Nos. 19-267 and 19-348

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL, PETITIONER

v.

AGNES MORRISSEY-BERRU

ST. JAMES SCHOOL, PETITIONER

v.

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

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Free Exercise and Establishment Clauses of the U.S. Constitution prevent civil courts from adjudicating employment-discrimination claims brought by former employees at religious schools who provided religious instruction.

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INTEREST OF THE UNITED STATES

The United States has substantial interests in preserving the free exercise of religion and ensuring that the federal government avoids a prohibited establishment of religion. The Equal Employment Opportunity Commission (EEOC) participated in the proceedings below in No. 19-348 as amicus curiae supporting respondent. The United States has also participated in

other cases concerning the First Amendment's ministerial exception, including *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012).

STATEMENT

Petitioners are two private Catholic primary schools. 19-267 Pet. App. 5a; 19-348 Pet. App. 4a. Respondents are (or represent) former employees of the schools who provided religious instruction. 19-267 Pet. App. 3a, 5a; 19-348 Pet. App. 5a. When respondents brought federal employment-discrimination claims against the schools, district courts dismissed the claims pursuant to the First Amendment's "ministerial exception," applying this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012). 19-267 Pet. App. 4a-9a; 19-348 Pet. App. 69a-74a. The court of appeals reversed. 19-267 Pet. App. 1a-3a; 19-348 Pet. App. 1a-39a.

1. Our Lady of Guadalupe School and St. James School are both private Catholic primary schools in California. 19-267 Pet. App. 5a; 19-348 Pet. App. 78a. Both schools are affiliated with Roman Catholic parishes. 19-267 Pet. App. 13a-14a; 19-348 Pet. App. 79a. And both are under the jurisdiction of the Roman Catholic Archdiocese of Los Angeles. 19-267 Pet. App. 5a; 19-348 Pet. App. 4a.

Agnes Morrissey-Berru was formerly employed by Our Lady, starting in 1998 as a substitute teacher, then as a full-time sixth-grade teacher and later as a fifth-grade teacher. 19-267 Pet. App. 5a. Kristen Biel was employed by St. James from 2013 to 2014, first as a

long-term substitute teacher and then as a full-time fifth-grade teacher. 19-348 Pet. App. 4a.[1]

Both schools publicly commit to providing an education that is based on Catholic religious formation. Our Lady describes its faculty and staff as "striving to create a spiritually enriched learning environment, grounded in Catholic social teachings, values and traditions." 19-267 Pet. App. 8a (citation omitted). Our Lady further states that its faculty and staff will "utilize [their] educational training, skills, talents, and model [their] faith so that students are taught the fundamentals of a spiritual life," in addition to "academic achievement" and other values. *Id.* at 43a. St. James states that its "mission" is "to develop and promote a Catholic School Faith Community within the philosophy of Catholic education as implemented at the School, and the doctrines, laws and norms of the Catholic Church." 19-348 Pet. App. 96a.

The schools' commitment to providing Catholic education is reflected in their teacher employment agreements, which both respondents signed. 19-267 Pet. App. 32a-42a; 19-348 Pet. App. 96a-105a. As relevant here, each respondent's employment agreement stated that teachers "shall" perform "[a]ll [their] duties and responsibilities * * * with [the] overriding commitment" to "develop and promote a Catholic School Faith Community within * * * the doctrines, laws and norms of the Roman Catholic Church." 19-267 Pet. App. 32a; see 19-348 Pet. App. 96a. The agreements required respondents to "acknowledge" that the schools "operate within the philosophy of Catholic education," and that teachers "are expected to model, teach, and promote

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[1] Kristen Biel passed away on June 7, 2019. 19-348 Br. in Opp. 1 n.1. Her husband Darryl Biel, as personal representative of her estate, was substituted as a party to this case. *Ibid.*

behavior in conformity to the teaching of the Roman Catholic Church." 19-348 Pet. App. 97a; see 19-267 Pet. App. 32a-33a. Teachers are also required to "participate in * * * School liturgical activities." 19-267 Pet. App. 33a; 19-348 Pet. App. 97a.

Respondents' work at the schools involved significant responsibility for providing religious instruction to students. Both respondents taught their students religion four or five days a week, in addition to secular subjects. 19-267 Pet. App. 90a; 19-348 Pet. App. 5a. In both respondents' classrooms, those lessons conveyed topics such as Catholic doctrine, Catholic sacraments, Catholic signs and symbols, Catholic prayers, the lives of Catholic saints, and Catholic interpretations of scripture. 19-267 Pet. App. 91a-94a; 19-348 Pet. App. 5a, 70a, 81a-83a. In addition, both respondents prepared their students to participate in Catholic prayer, worship, and sacraments, and respondents themselves routinely participated in those religious observances alongside their students. Morrissey-Berru taught students "how to go to [M]ass, the parts of the [M]ass, communion, prayer, and confession." 19-267 Pet. App. 81a. She also led her students in prayer every day, and helped plan the liturgy for one Mass per month. *Id.* at 83a. Biel prayed prayers such as the Lord's Prayer and the Hail Mary with her students every day, and she attended school Masses with her students twice a month at which she prayed along with them. 19-348 Pet. App. 93a-96a.

Respondents' continued employment at the schools depended on, among other things, the "nature and effectiveness of [their] performance" at modeling, teaching, and demonstrating commitment to the Catholic faith. 19-267 Pet. App. 55a (emphasis omitted); see

19-348 Pet. App. 97a. The schools evaluated respondents on whether they effectively "infused" Catholic values "through all subject areas" in their curriculum, and displayed Catholic "sacramental traditions" in the classroom. 19-267 Pet. App. 23a-24a; see 19-348 Pet. App. 82a-84a.

2. a. For the 2014-2015 school year, the principal of Our Lady moved Morrissey-Berru from a full-time teaching position to a part-time position, and the next year the school did not renew her contract. 19-267 Pet. App. 5a, 29a-31a. Our Lady contends that it made those decisions based on Morrissey-Berru's teaching performance, Pet. Br. 15, whereas Morrissey-Berru contends that the school discriminated against her based on age, 19-267 Pet. App. 4a.

Morrissey-Berru filed a charge of age discrimination with the EEOC, and she later sued Our Lady under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* See 19-267 Pet. App. 4a. The district court dismissed her suit as barred by the ministerial exception. *Id.* at 6a-9a. The court found it uncontested that Our Lady qualifies as a religious institution, *id.* at 7a, and the court further found that Morrissey-Berru was responsible for "integrating Catholic values and teachings into all of her lessons," as well as "[teaching] her students the tenets of the Catholic religion [and] how to pray," *id.* at 8a.

The court of appeals reversed. 19-267 Pet. App. 1a-3a. The court agreed with the district court that Morrissey-Berru "ha[d] significant religious responsibilities as a teacher at" Our Lady, but also concluded that she did not publicly hold herself out as a "religious leader or minister" and that she had less formal religious training than Cheryl Perich, the Evangelical

Lutheran school teacher at issue in *Hosanna-Tabor*. *Id.* at 2a-3a. The court therefore held that, "on balance," the ministerial exception did not apply to Morrissey-Berru's ADEA claim. *Id.* at 3a.

b. At the end of the 2013-2014 school year, Biel informed the principal of St. James that she had breast cancer and needed time off to undergo surgery and chemotherapy. 19-348 Pet. App. 6a. A few weeks later, the principal told Biel that her teaching contract would not be renewed, citing as reasons "that Biel's 'classroom management' was 'not strict' and that 'it was not fair . . . to have two teachers for the children during the school year.'" *Id.* at 6a-7a.

After filing a charge of discrimination based on disability with the EEOC, Biel sued St. James under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* See 19-348 Pet. App. 7a; Pet. Br. 20. As in Morrissey-Berru's case, the district court dismissed Biel's claim as barred by the ministerial exception. 19-348 Pet. App. 69a-74a. The court saw "no dispute" that St. James is a "religious institution," *id.* at 71a, and the court found that Biel "sought to carry out St. James's Catholic mission," including by incorporating "Catholic teachings into all of her lessons," *id.* at 73a.

A divided panel of the court of appeals reversed. 19-348 Pet. App. 1a-39a. The court stated that Biel resembled Cheryl Perich "[o]nly" insofar as they both taught religion as part of their job duties, *id.* at 12a, and the court declined to apply the ministerial exception where, in its view, "only one" of the considerations that this Court had found relevant in *Hosanna-Tabor* was present, *id.* at 15a. The court also concluded that Biel's responsibilities for religious instruction—which the

court described as "limited to teaching religion from a book required by the school and incorporating religious themes into her other lessons," as well as taking students to Mass where her "only" responsibility was to keep them "quiet and in their seats"—"do not amount to the kind of close guidance and involvement that Perich had in her students' spiritual lives." *Id.* at 13a.

Judge D. Michael Fisher (sitting by designation) dissented. 19-348 Pet. App. 17a-39a. He reasoned that "Biel's duties as the fifth grade teacher and religion teacher are strikingly similar" to Perich's duties in *Hosanna-Tabor*, *id.* at 32a, and he emphasized the importance of the role that Biel played in teaching the Catholic faith to the next generation, *id.* at 31a-34a. Judge Fisher rejected Biel's contention that she had "executed her duties in a secular manner," because that "directly conflicts" with her contractual agreement to infuse Catholic thought throughout her lessons and to "personally demonstrate her faith." *Id.* at 33a-34a.

The court of appeals denied St. James's petition for rehearing en banc over the dissent of nine judges. 19-348 Pet. App. 40a-67a. The dissent argued that the panel's decision had "embrace[d] the narrowest construction of the First Amendment's 'ministerial exception' and split[] from the consensus of" other courts of appeals which hold "that the employee's ministerial function should be the key focus." *Id.* at 42a.

SUMMARY OF ARGUMENT

A. The First Amendment was adopted against the backdrop of a history of governmental interference with religious groups, including interference in religious education. Since ratification, this Court has consistently interpreted the First Amendment to prohibit the

government from intruding on ecclesiastical decisions, including the appointment of religious functionaries.

B. Consistent with that national tradition of governmental non-interference with religion, this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), recognized that the First Amendment does not allow employment-discrimination lawsuits brought against religious organizations by employees who personify the organization's beliefs, shape its faith and mission, or minister to the faithful. The Court held that the ministerial exception is not limited to ordained clergy or congregation leaders, and can apply to persons who perform a mix of secular and religious functions.

The Court's decision in *Hosanna-Tabor*, and the purposes of the First Amendment's Religion Clauses, support applying the ministerial exception to any employee of a religious organization who performs an important religious function. In particular, the ministerial exception should apply to any employee who preaches a church's beliefs, teaches its faith, or carries out its religious mission, because the independence of virtually all religious groups depends on the government's avoiding interference in those religious matters. In close cases, facts that demonstrate a religious organization sincerely regards its employee as performing such important religious functions should be dispositive.

C. The record here leaves no doubt that both respondents performed important religious functions at the Catholic schools where they were formerly employed. Each teacher was hired to personify the Catholic Church's beliefs and transmit the Catholic faith to the next generation. Respondents were required to perform those ecclesiastical responsibilities by teaching

Catholic doctrines and lessons, as well as by modeling the Catholic faith and helping students learn to practice it.

D. Respondents and the Ninth Circuit offer no sound basis for declining to apply the ministerial exception in these cases. The court of appeals misread *Hosanna-Tabor* to require a four-factor test for applying the ministerial exception, instead of focusing primarily on the purposes of the First Amendment and the important religious functions that respondents performed. And the court's conclusion that respondents, as religious-school teachers, did not have meaningful involvement in students' spiritual lives disregards the facts that respondents were required to incorporate the Catholic faith throughout their lessons, as well as to model the Catholic faith and foster its growth in students.

Contrary to respondents' suggestion, the ministerial exception does not depend on whether a religious organization requires the employee to be a "member" of the "same" faith. Imposing that requirement as a precondition for the ministerial exception would defeat the First Amendment's purposes by not leaving religious organizations free to set the qualifications for those who advance their faiths and missions. A "members only" test would also disadvantage minority religious groups, and it would force courts to weigh in on religious questions that this Court has long interpreted the First Amendment to require them to avoid.

ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), this Court held that the First Amendment safeguards the right of a religious organization, free from interference by civil

authorities, to select those who will "personify its beliefs," "shape its * * * faith and mission," or "minister to the faithful." *Id.* at 188-189. The First Amendment accordingly does not allow employment-discrimination claims brought against religious organizations by employees who perform an "important religious function[]." *Id.* at 192; see *id.* at 188-189. Because respondents here, as former Catholic-school teachers, "performed an important role in transmitting [their Church's] faith to the next generation," *id.* at 192, the First Amendment precludes their employment-discrimination claims against their religious employers.

A. The First Amendment Prohibits Governmental Interference With Ecclesiastical Appointments

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. "Both Religion Clauses bar the government from interfering with" a church's appointment of persons performing ecclesiastical functions. *Hosanna-Tabor*, 565 U.S. at 181.

1. Before the Revolution, one "principal means of government control" over the established church had been laws conferring "the power to appoint prelates and clergy," prompting "continual conflicts between clergymen, royal governors, local gentry, towns, and congregants over the qualifications and discipline of ministers." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2132, 2137 (2003); see *Hosanna-Tabor*, 565 U.S. at 182-183.

During that period, some governmental attempts to control religion extended to religious education. A 1704 Maryland law, for example, "prohibited any Catholic

priest or lay person from keeping school, or taking upon himself the education of youth." 2 Thomas Hughes, *History of the Society of Jesus in North America: Colonial and Federal* 443-444 (1917). In 1771, the royal government's commission and instructions to William Tryon, the newly appointed Governor of New York, required all schoolmasters to obtain a license from the Bishop of London. 3 Charles Z. Lincoln, *The Constitutional History of New York* 485, 745 (1906). And a 1774 New York law ordered that "no vagrant Preacher, Moravian, or disguised Papist, shall Preach or Teach, Either in Public or Private," without first taking an oath and obtaining a license. Sanford H. Cobb, *The Rise of Religious Liberty in America* 358 (1902). Those colonial-era restrictions followed the tradition of the English common law, which took aim at Catholic religious education by holding that "[p]ersons professing the popish religion * * * may not keep or teach any school under pain of perpetual imprisonment," and by imposing civil penalties on "any person [who] sends another abroad to be educated in the popish religion, * * * or [who] contributes to their maintenance when there." 4 William Blackstone, *Commentaries on the Laws of England* 55-56 (8th ed. 1778).

Those experiences of religious strife and persecution cumulatively formed the "background" for the adoption of the First Amendment. *Hosanna-Tabor*, 565 U.S. at 183. "Familiar with life under the established Church of England, the founding generation" adopted the First Amendment's Religion Clauses, which together "ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices." *Id.* at 183-184. "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." *Ibid.*

2. Since ratification, the constitutional requirement of governmental non-interference in ecclesiastical appointments has not been limited to ordained clergy or congregation leaders—the sense in which the term "minister" is "commonly used by many Protestant denominations" but rarely used by Catholics, Jews, Muslims, or members of many other faiths. *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring); see *id.* at 190 (majority opinion). Instead, the American national tradition reflects a broader principle that the government must respect, in James Madison's words, "the essential distinction between civil and religious functions." *Id.* at 185 (citation omitted). Accordingly, when John Carroll, the first Catholic bishop in the United States, wrote to the Jefferson administration in 1806 to solicit its opinion on who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase, "then-Secretary of State Madison responded that the selection of church '*functionaries*' was an 'entirely ecclesiastical' matter left to the Church's own judgment." *Id.* at 184 (emphasis added; citation omitted).

This Court's precedents have likewise recognized a broad principle of governmental non-interference with the functioning of religious entities. The Court has held that the government, including the civil courts, must not supersede decisions of religious bodies on matters of church governance, religious qualification, property usage, religious discipline, or faith and doctrine. See *Hosanna-Tabor*, 565 U.S. at 185-187 (discussing *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872); *Kedroff* v.

Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); and *Serbian E. Orthodox Diocese for the U.S. & Canada* v. *Milivojevich*, 426 U.S. 696 (1976)); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). Other courts have similarly recognized the need to avoid resolving religious questions or intruding on religious matters. See Pet. Br. 29-33.

This Court has also recognized that the Constitution places limits on the government's authority to direct the affairs of religious schools. In *National Labor Relations Board* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court held that the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, did not apply to teachers employed by religiously affiliated high schools, 440 U.S. at 506-507, in part out of concern that applying the Act to those teachers would cause governmental "entanglement with the religious mission of the school," *id.* at 502.

B. The Ministerial Exception Extends To Any Employee Of A Religious Organization Who Performs An Important Religious Function

In *Hosanna-Tabor*, this Court built on the national tradition of religious liberty for religious functionaries and on its own First Amendment precedents requiring governmental non-interference with religion. 565 U.S. at 181-187. The Court recognized for the first time the existence of a "ministerial exception" to governmental regulation of alleged employment discrimination. *Id.* at 188. But the Court did not undertake to define the full reach of that exception, finding it "enough * * * to conclude, in this our first case involving the ministerial exception, that the exception cover[ed]" the religious-school teacher at issue there, "given all the circumstances of her employment." *Id.* at 190.

Since *Hosanna-Tabor*, the federal courts of appeals to consider the ministerial exception—though not the Ninth Circuit below—have routinely treated the employee's performance of a religious function as the most important consideration. See, *e.g.*, *Sterlinski* v. *Catholic Bishop of Chicago*, 934 F.3d 568, 572 (7th Cir. 2019) (applying exception to a parish organist because "organ playing serves a religious function in the life of" the Church); *Lee* v. *Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 122 n.7 (3d Cir. 2018) (applying exception to a former pastor's breach-of-contract claim and holding that "the ministerial exception 'applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions'") (citation omitted); *Fratello* v. *Archdiocese of New York*, 863 F.3d 190, 205 (2d Cir. 2017) (applying exception to a Catholic elementary school principal and holding that "courts should focus primarily on the functions performed by persons who work for religious bodies") (brackets, citation, and internal quotation marks omitted); *Cannata* v. *Catholic Diocese of Austin*, 700 F.3d 169, 180 (5th Cir. 2012) (applying exception to a parish music director because he "performed an important function" during worship services and thereby "played a role in furthering the mission of the church and conveying its message to its congregants").

That is the correct test. The ministerial exception applies to any employee of a religious organization who performs an "important religious function[ ]." *Hosanna-Tabor*, 565 U.S. at 192. And in close cases, facts demonstrating that a religious organization sincerely regards its employee as performing such a function should be dispositive. For instance, giving an employee a formal

title or otherwise holding her out as a religious leader, requiring religious training or qualifications, imposing religious conditions in an employment agreement, or evaluating the employee on religious grounds may show that the employee plays a religious role within the organization.

1. Hosanna-Tabor *recognized a ministerial exception grounded in the Religion Clauses' special solicitude for religious functionaries*

The Court in *Hosanna-Tabor*, in its first consideration of the matter, unanimously recognized that the First Amendment requires a ministerial exception to employment-discrimination claims brought against religious organizations. 565 U.S. at 188. The Court explained that "[t]he members of a religious group put their faith in the hands of their ministers," and a government-created cause of action that would punish a church for failing to retain an unwanted minister would infringe the First Amendment's "special solicitude to the rights of religious organizations" to "select [their] own ministers." *Id.* at 188-189. The Court also explained that "the ministerial exception is not limited to the head of a religious congregation." *Id.* at 190. Rather, the exception advances both Religion Clauses' purpose to protect a religious organization's right to choose for itself those who will "personify its beliefs," "shape its * * * faith and mission," or "minister to the faithful." *Id.* at 188-189.

The Court then applied the ministerial exception to the ADA claim of Cheryl Perich, who had been fired from her position as a "called" kindergarten teacher at an Evangelical Lutheran Church and School. *Hosanna-Tabor*, 565 U.S. at 177-179; see *id.* at 190-192. The Court specifically declined "to adopt a rigid formula for

deciding when an employee qualifies as a minister." *Id.* at 190. Instead, the Court identified several features of Perich's employment relationship that made it especially clear the ministerial exception applied to her case, without marking any of those facts as either necessary or sufficient. See *id.* at 190-194. First, Perich's Church "held [her] out as a minister, with a role distinct from that of most of its members," by giving her the title "'Minister'" and "periodically review[ing]" her work in ministry. *Id.* at 191 (citation omitted). Second, "the substance reflected in [Perich's] title" showed that she had received significant religious training and had undergone "a formal process of commissioning." *Id.* at 191-192. Third, "Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms." *Id.* at 191. And fourth, "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 192. The Court observed that Perich taught both religious and secular subjects in her kindergarten class, led students in prayer and devotional exercises, and attended a weekly school-wide chapel service that she led twice a year. *Ibid.* "As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation." *Ibid.*

2. The ministerial exception applies when an employee's job duties or other facts show that the employee performs an important religious function

The court of appeals below read *Hosanna-Tabor* to mean that the ministerial exception does not apply unless a religious organization's employee bears a close resemblance to Perich in multiple respects. See 19-348 Pet. App. 10a-15a; 19-267 Pet. App. 2a-3a. The court reasoned that to apply the ministerial exception based

on an employee's responsibility to teach and model her religious employer's faith, without more, would "render most of the analysis in *Hosanna-Tabor* irrelevant." 19-348 Pet. App. 15a. But that reading is not consistent with this Court's disavowal of any "rigid formula" for determining whether the ministerial exception applies, 565 U.S. at 190, or with the Court's decision to hold open "whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations" discussed in its opinion, *id.* at 193. The Court was clear that the considerations it found relevant in *Hosanna-Tabor* should not be viewed simply as elements to be counted up. See *id.* at 193-194. Nor is the court of appeals' reading consistent with the concurring Justices' decision to join the majority opinion even as they described proposals for further clarifying the ministerial exception's contours. See *id.* at 196-198 (Thomas, J., concurring); *id.* at 198-206 (Alito, J., concurring). Instead, as multiple courts of appeals have recognized, see p. 14, *supra*, the analysis that is most faithful to *Hosanna-Tabor* and the purposes of the First Amendment focuses on whether a religious organization's employee performs an important religious function, while giving weight in close cases to facts that show the organization sincerely views the employee as performing such a function.

a. The Court recognized in *Hosanna-Tabor* that one critical purpose of the First Amendment's Religion Clauses is to safeguard the ability of religious groups freely to practice their faith and pass it on to others. 565 U.S. at 188-189, 196. And the ability of a religious organization to exercise those freedoms necessarily depends on the corresponding freedom to select the

persons who carry out those ecclesiastical responsibilities. See *Kedroff*, 344 U.S. at 116. That understanding of the First Amendment is reflected in several aspects of this Court's *Hosanna-Tabor* opinion.

First, the Court's description of the purpose of the ministerial exception emphasized the importance to religious groups of independence in selecting persons to perform religious functions. The Court described the history of the First Amendment as reflecting the Framers' desire to preserve "the essential distinction between civil and religious functions." *Hosanna-Tabor*, 565 U.S. at 185 (citation omitted). The Court then explained that the fundamental "purpose" of the ministerial exception is "ensur[ing] that the authority to select and control those who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." *Id.* at 194-195 (quoting *Kedroff*, 344 U.S. at 119). And the Court reaffirmed that the ministerial exception ultimately serves to protect "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. All of those formulations principally concern the functions performed by a religious organization's employee.

In addition, the Court's determination that the ministerial exception applied to Perich described many of the relevant considerations in functional terms. The Court explained that Perich had been held out as having a distinctive "role" in her Church; she "was tasked with performing [her] office" according to religious standards; her position reflected "a significant degree" of "training" in religious instruction and ministry; she held herself out as performing a "religious service"; and her "job duties reflected" an "important role" in "conveying [her] Church's message and carrying out its mission."

Hosanna-Tabor, 565 U.S. at 191-192. Furthermore, in explaining why the Sixth Circuit had erred in not applying the ministerial exception to Perich, this Court cautioned against looking to an employee's title alone without considering whether "a recognized religious mission underlie[s] the description of the employee's position." *Id.* at 193. And the Court also urged lower courts not to consider the time an employee spends on secular and religious activities "in isolation, without regard to the nature of the religious functions performed." *Id.* at 194. Again, the Court emphasized functions over formalities.

b. To be sure, the Court in *Hosanna-Tabor* did not rest its decision on Perich's job duties alone. See 565 U.S. at 191-192. The Court also considered her title, the substance reflected in that title, and her self-identification with a form of religious service. *Ibid.* But those considerations did not erect barriers to applying the ministerial exception to an employee who clearly serves an important religious function; they merely made Perich's case an especially easy one. And importantly, those additional considerations were relevant to the ministerial exception because they revealed the Evangelical Lutheran Church's own understanding of Perich's religious responsibilities, which itself provided further evidence that Perich performed important religious functions. In *Hosanna-Tabor*, the way that the Church understood Perich's role was reflected most obviously in her title of "minister," which had been granted after a formal process of commissioning. *Id.* at 191. And the Court took account of the Church's view of Perich's religious functions in other ways as well, by considering how the Church "held Perich out," the fact that it gave her a "distinct" role in religious instruction, and that it

"periodically review[ed]" her performance of "'ministerial responsibilities.'" *Ibid.* (citation omitted).

The additional considerations that this Court described in *Hosanna-Tabor* may not have been necessary to the outcome of that case, where Perich's duties sufficiently established the important religious functions that she performed. See 565 U.S. at 193 ("express[ing] no view on" that question). But those considerations would be more relevant in other, close cases where an employee's duties do not obviously or indisputably relate to its employer's religious mission, and other features of the employment relationship shed light on the religious organization's understanding of the employee's role. Furthermore, by taking account of how a religious organization sincerely views its own employee, courts applying the ministerial exception can avoid entanglement with religious questions. See *Sterlinski*, 934 F.3d at 570 ("Only by subjecting religious doctrine to discovery and, if necessary, jury trial, could the judiciary reject a church's characterization of its own theology and internal organization."). And accepting a religious organization's sincere view of its employee can also help to prevent uncertainty about the legal test from distorting "the way an organization carrie[s] out what it underst[ands] to be its religious mission." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987).

c. Applying the ministerial exception using a function-focused analysis also accords with the views of the concurring Justices in *Hosanna-Tabor*—all of whom joined the majority opinion.

Justice Alito, joined by Justice Kagan, wrote separately to endorse applying the ministerial exception

with a principal "focus on the function performed by persons who work for religious bodies." *Hosanna-Tabor*, 565 U.S. at 198. The concurrence explained that, because "[t]he First Amendment protects the freedom of religious groups to engage in certain key religious activities, including * * * worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith," the ministerial exception requires leaving religious groups "free to choose the personnel who are essential to the performance of these functions." *Id.* at 199. The concurring Justices recognized that, although our Nation has innumerable religious beliefs, structures, and practices, "it is nonetheless possible to identify a general category of 'employees' whose functions are essential to the independence of practically all religious groups," and the First Amendment principle of "religious autonomy" requires applying the ministerial exception to employees who perform any of those functions. *Id.* at 200. 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." *Ibid.* The concurring Justices' view is consistent with applying the ministerial exception by looking to the duties that an employee performs, as confirmed by the manner in which her religious-organization employer regards those duties.

Justice Thomas also concurred in *Hosanna-Tabor* to emphasize that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister." 565 U.S. at 196. Justice Thomas explained that deference is necessary so that courts do

not supersede a religious organization's own judgment about who is a minister—a question that "is itself religious in nature"—as well as to avoid "disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Id.* at 197. By considering how a religious organization views its own employee's role, see pp. 19-20, *supra*, a proper application of the ministerial exception accounts for Justice Thomas's concerns that courts avoid intruding on religious questions or disproportionately burdening minority faiths.

C. The Ministerial Exception Bars Respondents' Employment-Discrimination Claims

Under an analysis properly focused on the functions performed by a religious organization's employee, the ministerial exception bars respondents' employment-discrimination claims. Both respondents performed important religious functions for a religious employer. By accepting the responsibility to convey the Catholic Church's teachings to the next generation, respondents played a vital role in "minister[ing] to the faithful," *Hosanna-Tabor*, 565 U.S. at 189, through a mission that the Catholic Church considers one of its oldest and most important. See *Catechism of the Catholic Church* 8 (2d ed. May 2016) (affirming that "[c]atechesis," *i.e.*, "education in the faith" of children and others, "is intimately bound up with the whole of the Church's life") (citations and emphasis omitted). And by agreeing to model the Catholic faith, respondents also "personif[ied]" the Catholic Church's "beliefs." *Hosanna-Tabor*, 565 U.S. at 188. Moreover, other features of respondents' employment confirm that the Church indeed viewed respondents as performing important religious functions.

1. Both respondents had as an essential part of their job duties the responsibility to serve "[a]s a source of religious instruction" who "performed an important role in transmitting the [Catholic] faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 192.

Both respondents agreed that, as part of their employment at religious schools, they were expected to teach and model the Catholic faith effectively throughout their work. Both signed agreements acknowledging that the mission of the schools is "to develop and promote a Catholic School Faith Community within the philosophy of Catholic education * * * and the doctrines, laws and norms of the Roman Catholic Church." 19-267 Pet. App. 32a; see 19-348 Pet. App. 96a. And both agreed to perform all their "duties and responsibilities" as teachers "with this overriding commitment." *Ibid.* To that end, both Our Lady and St. James expected their teachers' curricula to be "infused" with "Catholic values" in all subject areas, not just those formally devoted to religious topics. 19-267 Pet. App. 23a; 19-348 Pet. App. 82a-84a. The teachers also agreed to participate in their religious employers' "liturgical activities." 19-267 Pet. App. 21a, 33a; 19-348 Pet. App. 97a.

Respondents fulfilled the obligations in their contracts by, among other things, spending time most days instructing students on religion as a dedicated subject. Morrissey-Berru "was responsible for introducing her students to Catholicism and providing the groundwork for their religious doctrine." 19-267 Pet. App. 17a; see *id.* at 82a, 86a. The curriculum for Biel's religion course "was grounded upon the norms and doctrines of the Catholic Faith." 19-348 Pet. App. 83a. Both respondents used those lessons to teach their students about a host of religious topics, including Catholic doctrine,

Catholic prayers, Catholic sacraments, Catholic saints, the history of the Catholic Church, and Catholic interpretations of scripture. See 19-267 Pet. App. 17a-21a, 87a; 19-348 Pet. App. 70a, 83a.

In addition to formally teaching religion, respondents helped their students *practice* religion. Morrissey-Berru "led the class in daily prayer, including [the] Hail Mary[], as well as spontaneous prayer." 19-267 Pet. App. 21a, 86a-87a. Biel likewise prayed with her students every morning and every afternoon, including the Lord's Prayer and the Hail Mary. 19-348 Pet. App. 93a. Both respondents regularly attended worship services with their students. 19-267 Pet. App. 88a; 19-348 Pet. App. 94a. Every month, Biel took her students to Mass where she prayed with them. 19-348 Pet. App. 82a. Morrissey-Berru attended weekly Mass with her students, took them to receive the Sacrament of Reconciliation, and took them to religious services such as the Stations of the Cross. 19-267 Pet. App. 88a.

2. Because respondents so clearly performed religious functions in teaching and modeling the Catholic faith, as well as guiding their students in prayer and other religious rituals, the ministerial exception applies to them. But even if any doubt remained, other features of respondents' employment confirm that the Catholic Church viewed them as performing the important religious functions of "teach[ing] [its] faith, and carry[ing] out [its] mission." *Hosanna-Tabor*, 565 U.S. at 196.

Although respondents were not titled "ministers"—a term that Catholics typically use only sparingly, see *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring)—the schools did "h[o]ld [respondents] out" as having a "role distinct from that of most of [the Church's] mem-

bers" in religious education. *Id.* at 191 (majority opinion). And respondents "held [themselves] out" as "accepting" that role of "religious service, according to its terms," *ibid.*, which at these religious institutions required leadership and instruction in the Catholic faith. See 19-267 Pet. App. 82a; 19-348 Pet. App. 81a-84a, 96a-97a. Our Lady publicly described its faculty and staff as "striving to create a spiritually enriched learning environment" that is "grounded in Catholic social teachings, values and traditions," 19-267 Pet. App. 8a (citation omitted), and in which teachers like Morrissey-Berru "model [their] faith" in order to teach "the fundamentals of a spiritual life," *id.* at 43a. St. James similarly stated that teachers like Biel would "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church," including by applying "the values of Christian charity, temperance and tolerance" in all their interactions "on behalf of the School." 19-348 Pet. App. 97a.

In addition, the Catholic Church tied respondents' employment to important religious functions. Respondents' employment agreements conditioned their retention as employees on "demonstrat[ing] [an] ability to develop and maintain a Catholic School Faith Community." 19-348 Pet. App. 97a; see 19-267 Pet. App. 55a. Both teachers were "periodically review[ed]" by their employers, *Hosanna-Tabor*, 565 U.S. at 191, to assess their performance at teaching religion. See 19-267 Pet. App. 23a-24a; 19-348 Pet. App. 32a. And the schools evaluated teachers on whether they had "visible evidence" of the sacramental traditions of the Catholic Church in their classrooms. 19-267 Pet. App. 23a; see 19-348 Pet. App. 84a.

The schools also asked both respondents to participate in training to enhance the effectiveness of their religious instruction. Biel attended a one-day conference every year at the Los Angeles Religious Education Congress, part of which covered "ways to better incorporate God into lessons." 19-348 Pet. App. 70a. Morrissey-Berru took a course on "the history of the Catholic Church," 19-267 Pet. App. 84a, where she "learned about the Bible" among other topics, *id.* at 86a.

In all of those ways, the Catholic Church made clear that it viewed respondents as having an important ecclesiastical role in providing religious instruction, and respondents themselves understood and accepted that role.

D. The Counterarguments Advanced By The Court Of Appeals And Respondents Lack Merit

1. The Ninth Circuit's opinions below incorrectly declined to apply the ministerial exception to respondents. In reaching that conclusion, the court committed three main errors.

First, the Ninth Circuit reasoned that respondents' employment resembled that of Cheryl Perich at her Church "[o]nly" in that all three employees "taught religion in the classroom," and the court thought that resemblance insufficient to apply the ministerial exception. 19-348 Pet. App. 12a; see *id.* at 15a; 19-267 Pet. App. 2a-3a. As explained above, the Ninth Circuit was wrong as a factual matter to find that the similarities between respondents and Perich did not extend beyond their job duties. See pp. 24-26, *supra*. But even if the court had been correct that respondents resembled Perich only in the important religious functions that each performed, those functions—which included teaching religion and modeling religious beliefs, values, and

worship practices—were sufficient to apply the ministerial exception. See pp. 16-22, *supra*; see also *Hosanna-Tabor*, 565 U.S. at 196 (explaining the "importan[ce]" to religious groups of "choosing who will preach their beliefs, teach their faith, and carry out their mission"); accord *id.* at 199-200 (Alito, J., concurring) (explaining that "teaching and conveying the tenets of the faith to the next generation" is among those functions "essential to the independence of practically all religious groups").

Second, the Ninth Circuit refused to apply the ministerial exception to respondents because it concluded that they did not have "close guidance and involvement" in "students' spiritual lives." 19-348 Pet. App. 13a. Specifically, the Court stated that Biel's "role in Catholic religious education was limited to teaching religion from a book required by the school and incorporating religious themes into her other lessons," and her duties while attending school-wide Mass involved simply keeping her students "quiet and in their seats." *Ibid.* That reasoning is again unsupported by the record, and it gives insufficient weight to the importance of the role of religious-school teachers. As both religious employers here made clear in their employment agreements and elsewhere, they expected teachers to do much more than simply recite lessons from a book and keep students quiet during Mass: The teachers taught students to pray, and they were to model the Catholic faith in everything they did at school. The schools directed that Catholic values and thought would influence what the teachers taught, how they taught it, and how they practiced the faith alongside their students both in daily prayer and during the liturgy. See pp. 22-26, *supra*. The relevant legal point is that respondents taught and

encouraged the Catholic faith, not that they used a pre-arranged curriculum to do so (a practice that may well vary among religious groups).

By attempting to draw fine distinctions between respondents' religious functions and those of Perich in *Hosanna-Tabor*, see 19-348 Pet. App. 12a-13a, the Ninth Circuit impermissibly weighed in on matters of religious faith and doctrine. Civil courts are not equipped to decide whether it was formative to Catholic students' "spiritual lives" that their teachers "joined" them in daily prayer and Mass, as opposed to "orchestrat[ing]" prayers and religious services as Perich did. 19-348 Pet. App. 13a. Under the Ninth Circuit's approach to the ministerial exception, it would be necessary for courts to determine how important to a religious organization's faith were the doctrines that its employee taught, or the worship practices that its employee modeled. But those inquiries are just the sort of judicial second-guessing of religious judgments that this Court has insisted on avoiding. See *Hosanna-Tabor*, 565 U.S. at 185-187; see also *id.* at 205-206 (Alito, J., concurring); cf. *Sterlinski*, 934 F.3d at 570 ("If the Roman Catholic Church believes that organ music is vital to its religious services, and that to advance its faith it needs the ability to select organists, who are we judges to disagree?").

Third, the Ninth Circuit suggested that there is no need to apply the ministerial exception to teachers at religious schools, because a religious organization can successfully defend an employment-discrimination claim by proving that its decision to terminate or demote an employee was based on ineffective job performance—including ineffectiveness at teaching religious subjects—rather than discrimination on the basis of a prohibited characteristic. See 19-348 Pet.

App. 17a n.6.[2] But that suggestion gives insufficient weight to the Religion Clauses' "special solicitude" to the rights of religious groups, over and above the First Amendment's protections for other expressive associations. *Hosanna-Tabor*, 565 U.S. at 189. This Court has explained that "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason"; it is to ensure that the "church[] alone" maintains control over "who will minister to the faithful." *Id.* at 194-195.

Moreover, the manner in which employment-discrimination claims are litigated in the absence of the ministerial exception confirms the need for the exception in cases like these. As the Ninth Circuit stated below, if a religious school argues that it took an adverse employment action based on "a religious justification," the employee would be permitted to argue that the school's explanation was a pretext for discrimination, and a district court would "assess * * * whether the proffered justification was the actual motivation for the termination." 19-348 Pet. App. 17a n.6. But for a court to conduct that pretext inquiry, the "credibility" of the religious school's "asserted reason" for the adverse employment decision "could not be assessed without taking into account" the religious matters on which the employee's teaching performance was

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[2] In *Hosanna-Tabor*, this Court noted that the ADA contains defenses permitting religious employers to give preferential treatment in hiring to employees of that religion who perform religious activities, and permitting religious employers to require employees to conform to the employer's religious tenets. 565 U.S. at 180 n.1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, also has certain exceptions for religious employers. See 42 U.S.C. 2000e-1(a), 2000e-2(e).

allegedly deficient. *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., concurring). "In order to probe the *real reason*" for the school's action, judges and potentially juries would need testimony about what the Church believes, how it prays, and how well the teacher succeeded at imparting those religious tenets and practices to students. *Ibid.*; cf. *Lee*, 903 F.3d at 121 (former pastor brought suit for breach of contract after he was terminated for "failing to provide adequate spiritual leadership"). The First Amendment precludes courts from hearing claims that require resolving such religious questions. See *Catholic Bishop*, 440 U.S. at 502 (When a religious group attests to its "religious creeds," a court's "inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the [group's] religious mission" may itself "impinge on rights guaranteed by the Religion Clauses.").

2. Respondents, for their part, contend that the ministerial exception does not apply to their claims because their employers did not require them to be Catholic in order to hold their teaching positions. See 19-348 Resp. C.A. Br. 40 & n.10. If a church's employees are not "required to be members of the church in good standing" or to "share in [its] same sincerely held religious belief," respondents argue, then those employees necessarily cannot be responsible for personifying the church's beliefs or ministering to the faithful. *Id.* at 40 n.10. Respondents are incorrect. For several reasons, the ministerial exception cannot depend on whether a religious institution requires the employment position at issue to be occupied by a "member" of that religion.

First, as explained above, courts have no warrant to supersede a religious organization's assessment that its employee was ineffective at teaching its religious tenets

or modeling its religious values, pp. 28-30, *supra*—and a court's interference with that type of religious judgment is problematic regardless of whether the employee shares her employing organization's faith. Cf. *Gonzalez*, 280 U.S. at 16 ("Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.").

Second and relatedly, conditioning the ministerial exception on membership would constrain the exception in ways that are inconsistent with the First Amendment's purposes. In some faith traditions, membership may not extend beyond a single congregation. See, *e.g.*, Southern Baptist Convention, *Position Statements* (affirming "the autonomy of the local church" such that "[e]ach church is free to determine its own membership and to set its own course under the headship of Jesus"), http://www.sbc.net/aboutus/positionstatements.asp. If an autonomous Baptist congregation hires a pastor from a different congregation to serve in an interim role of preaching and leadership, the ministerial exception applies to that interim pastor because the congregation has "put their faith in [his] hands," *Hosanna-Tabor*, 565 U.S. at 188—even though the interim pastor might not be considered a "member" of the "same" church. The same principle should apply when a religious school decides what degree of religious association is sufficient to qualify a teacher to pass on its faith. If a particular religious group determines that it can effectively teach its beliefs through a teacher who is willing to model those beliefs for students even if she is not herself a member of the same faith, that religious judgment warrants respect. "Religious autonomy means that reli-

gious authorities must be free to determine who is qualified to serve in positions of substantial religious importance." *Id.* at 200 (Alito, J., concurring); see *id.* at 197 (Thomas, J., concurring).

Third, it will frequently be difficult for courts to determine who constitutes a "member * * * in good standing" of a particular church, or who shares that church's "same" religious belief, 19-348 Resp. C.A. Br. 40 & n.10, without becoming impermissibly entangled in matters of religious "faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff*, 344 U.S. at 116). If a Conservative Jewish day school is willing to employ an Orthodox Jew as a teacher, has the school required its teachers to share its "same" religious belief? Or if a Catholic school would hire a baptized Catholic as a teacher even though she does not regularly attend Sunday Mass, or would hire a teacher who attends Mass but does not regularly receive the Sacrament of Reconciliation, has the school required its employees to be Catholics "in good standing"? "[T]he mere adjudication of such questions would pose grave problems for religious autonomy." *Id.* at 205-206 (Alito, J., concurring).

Sometimes, the question of "membership" is disputed among religious believers. See, *e.g.*, *Watson*, 80 U.S. (13 Wall.) at 727 (declining to interfere in a dispute between factions of the Walnut Street Presbyterian Church in Louisville, Kentucky). Indeed, the parties to this case appear to dispute some of the facts surrounding whether Morrissey-Berru was required to be a Catholic in good standing in order to teach religion at Our Lady. Our Lady's employment agreement stated that "[i]f you are Roman Catholic you must be in good

standing with the Church," J.A. 91, and the school principal testified that "[t]he ideal candidate [for a teaching position] is an actively practicing Catholic" and that "to teach religion at the school, you need to be a Catholic," 19-267 Pet. App. 56a-57a. But the principal also testified that "[e]xceptions can be made," *id.* at 57a, and Morrissey-Berru herself testified that she is "not currently a practicing Catholic," 19-267 Resp. App. 2a. Those ambiguities confirm the deficiency of respondents' proposed test for the ministerial exception. If an employee and her church disagree about whether she is a member in good standing, there is no neutral way for a court to resolve the matter. Cf. *Kedroff*, 344 U.S. at 122 (Frankfurter, J., concurring) ("Legislatures have * * * no such power * * * to define religious obedience.").

Fourth and finally, respondents' test for the ministerial exception would seriously risk disadvantaging religious groups that are "outside of the 'mainstream,'" *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring), because minority religions are likely to have a harder time than Roman Catholics or Lutherans finding certified teachers who are also adherents to their faith.

3. The Ninth Circuit's and respondents' diminished conception of the ministerial exception would create a significant risk of governmental interference in religious practice—which this Court has sought to avoid since the Founding. Religiously affiliated schools would be forced to accept religious instructors they do not want (if plaintiffs availed themselves of a reinstatement remedy where available), or else to pay a penalty for terminating unwanted religious instructors, potentially in the form of frontpay, backpay, damages, and attorney's fees. See *Hosanna-Tabor*, 565 U.S. at 194. But "the Free Exercise Clause protects against 'indirect

coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2022 (2017) (citation omitted). The First Amendment does not permit the government to use private remedies to disturb religious organizations' choice of "who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196.

At bottom, respecting the Constitution's "essential distinction between civil and religious functions" requires applying the ministerial exception to religious-school teachers like respondents, who were hired by their Church to "personify its beliefs" and "minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 185, 188-189 (citation omitted). Religious schools "put their faith in the hands of" teachers like respondents to model it, teach it, and thereby pass it on to the next generation. *Id.* at 188. Just as the First Amendment precludes the government from directing what doctrines are taught in a religious school, the First Amendment leaves each religious denomination free to determine how those doctrines are taught, and by whom.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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