No. 19-267

IN THE

Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,

v.

AGNES MORRISSEY-BERRU,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF PROFESSORS DOUGLAS LAYCOCK, MICHAEL W. MCCONNELL, NATHAN S. CHAPMAN, ELIZABETH A. CLARK, ROBERT F. COCHRAN, JR., TERESA COLLETT, CARL H. ESBECK, RICHARD W. GARNETT, PAUL HORWITZ, JOHN D. INAZU, CHRISTOPHER C. LUND, MICHAEL P. MORELAND, MICHAEL PAULSEN, ROBERT J. PUSHAW, DAVID A. SKEEL, AND EUGENE VOLOKH IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are professors Douglas Laycock, of the University of Virginia School of Law; Michael W. McConnell, of Stanford Law School; Nathan S. Chapman, of the University of Georgia School of Law; Elizabeth A. Clark, of BYU Law; Robert F. Cochran, Jr., of Pepperdine University School of Law; Teresa Collett, of the University of St. Thomas School of Law; Carl H. Esbeck, of the University of Missouri School of Law; Richard W. Garnett, of Notre Dame Law School; Paul Horwitz, of the University of Alabama School of Law; John D. Inazu, of Washington University School of Law; Christopher C. Lund, of Wayne State University Law School; Michael P. Moreland, of Villanova University School of Law; Michael Paulsen, of the University of St. Thomas School of Law; Robert J. Pushaw, of Pepperdine University School of Law; David A. Skeel, of the University of Pennsylvania Law School; and Eugene Volokh, of UCLA School of Law. *Amici* are legal scholars whose research and scholarly interests focus on religious liberty. They also represent parties and/or *amici* in litigation regarding the Religion Clauses. In particular, Professor Laycock was lead counsel for petitioner in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). *Amici* are further described in the Appendix.[1]

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *amici*'s intent to file this brief as required by Rule 37. Counsel for petitioner and respondent consented to the filing.

STATEMENT

This *amicus* brief explains why this Court should grant certiorari on the question presented. In the decision below, the Ninth Circuit adopted an unduly narrow understanding of the ministerial exception, refusing to apply it to an employee who teaches religion at a Roman Catholic School. The court did so despite the undisputed evidence that: (1) Catholic education is fundamental to the religious mission of the Catholic Church; (2) the teacher played a role in this mission by teaching Catholic doctrine to her students every day of the school week; (3) she played a significant role in transmitting the Catholic faith to her students by planning the liturgy of the Mass they attended each month and praying with them every day—including uniquely Catholic prayers like the "Hail Mary"; and (4) she was required to incorporate the Catholic faith into every subject she taught and was evaluated on her ability to do so.

Nonetheless, the Ninth Circuit held that the ministerial exception did not apply to the teacher, Agnes Morrissey-Berru, because her position purportedly satisfied only one of the four factors from *Hosanna-Tabor*, 565 U.S. 171. As shown below, the Ninth Circuit's view effectively confines the ministerial exception to the specific facts of *Hosanna-Tabor*, and is shorn from the purpose of religious autonomy that the exception embodies.

SUMMARY OF ARGUMENT

In *Hosanna-Tabor*, this Court affirmed that the ministerial exception protects the autonomy of religious organizations to select those who perform significant religious functions, including religion teachers and others who help transmit the faith. Both history and precedent show that the First Amendment forbids the government from "interfer[ing] with the internal governance of the church." *Hosanna-Tabor*, 565 U.S. at 188. And to protect the right of religious autonomy, religious organizations must have the freedom to "control . . . the selection of those who will personify [their] beliefs" or "teach their faith." *Id.* at 188, 196. The ministerial exception embodies this principle by prohibiting the government from imposing sanctions on religious organizations for the hiring and firing of key religious personnel, including religion teachers.

In the decision below, the Ninth Circuit misconstrued the ministerial exception in two ways. First, it misread *Hosanna-Tabor* as adopting a set of mechanical requirements that must be satisfied in every case for the ministerial exception to apply. Second, it failed to recognize that the core purpose of protecting religious autonomy requires applying the exception to all employees who have significant religious responsibilities.

The Ninth Circuit's decision not only departs from this Court's precedent and the history underpinning the ministerial exception, but also conflicts with every other Circuit to address this issue. Unless this Court intervenes, the Ninth Circuit's rule will invite judicial intrusion into religious affairs and create confusion

regarding the autonomy of religious bodies to choose those who perform significant religious functions.

ARGUMENT

I. Religious Organizations Have Autonomy To Select Those With Significant Religious Responsibilities

As this Court held in *Hosanna-Tabor*, the ministerial exception protects the right of religious organizations to select those who will occupy positions of significant religious responsibility, including those who teach religion. This doctrine has deep roots in our constitutional tradition of religious autonomy. To govern themselves, religious bodies must have the freedom to appoint and remove key personnel who will shape their faith communities. First Amendment jurisprudence expresses this principle by precluding lawsuits that would invite courts to second-guess whether a church has a "valid" reason for hiring or firing a religion teacher.

A. The Ministerial Exception Is Firmly Grounded In The History Of Religious Autonomy

The principle that the government may not interfere with internal church affairs "has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines." Thomas C. Berg *et al.*, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 175 (2011). In particular, "[t]he freedom to select religious leaders was a landmark in the development of limited government in the West." *Id.* at 180.

The Western tradition of religious autonomy emerged out of Europe's long and bloody history of "conflict[s] over the government's intervention in [religious] decisionmaking." *Id.* at 179. From the investiture controversies of the eleventh and twelfth centuries between popes and monarchs, to the famous conflict between Henry II and Archbishop Thomas Becket, "each side in these disputes prevailed only in a limited area." *Id.* at 180. Over time, this resulted in a "'duality' of jurisdictions that 'profoundly influenced the development of Western constitutionalism'" as it "established a 'principle that royal jurisdiction was not unlimited'" and that "'it was not for the secular authority alone to decide where its boundaries should be fixed.'" *Id.* (citation omitted).

The perils of state involvement in religious governance were illustrated by seventeenth-century England, which was roiled by religious controversy. A leading source of religious strife involved clashes between Episcopal and Presbyterian views of "church polity"—the church's internal governance structure. Brief for International Mission Board of the Southern Baptist Convention et al. as Amici Curiae Supporting Petitioner at 27, *Hosanna-Tabor*, No. 10-553, 565 U.S. 171 (2011). "Episcopal polity, associated with the Roman Catholic and Anglican churches, called for placing ecclesiastical authority principally in bishops." *Id.* "In contrast, Presbyterian polity, inspired by the Reformation and associated with the Puritans and many Protestant churches, called for governance by assemblies of elders—*i.e.*, 'presbyters.'" *Id.* Favoring Episcopal polity, James I attempted to impose it on Presbyterian Scotland, which sparked opposition from Parliament. Felix Makower, *The*

Constitutional History and Constitution of the Church of England 71 (1895). The conflict came to a head in 1640, when Charles I dissolved Parliament and required all clergy to swear an oath upholding the church's episcopal structure. *Id.* at 75–76. The Scots then invaded England, Parliament executed the king's chief minister, and years of civil war ensued. *Id.* at 77–79; *see also* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1412 (2004).

The worst of England's religious struggles were resolved by the Act of Toleration in the wake of what the victors called the Glorious Revolution of 1688. *See* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 355 & n.59 (1984). Writing to justify and secure the fruits of that Revolution, John Locke penned his influential *A Letter Concerning Toleration*, advocating church-state separation as the only path toward peace. According to Locke, "it is utterly necessary that we draw a precise boundary-line between (1) the affairs of civil government and (2) the affairs of religion." John Locke, *Toleration* 3 (Jonathan Bennett ed. 2010) (1690), *available at* http://www.earlymoderntexts.com/assets/pdfs/locke1689b.pdf. Otherwise, there will be "no end to the controversies arising between those who have . . . a concern for men's souls and those who have . . . a care for the commonwealth." *Id.*

Locke insisted that religious institutions must be free to control their membership and internal affairs. A church is a "free society" of people "who voluntarily come together to worship God in a way that they think

is acceptable to Him and effective in saving their souls." *Id.* at 5. "[S]ince the members of this society . . . join[] it freely and without coercion, . . . it follows that the right of making its laws must belong to the society itself." *Id.* This right of self-governance includes the society's authority to select its members—and to disassociate with anyone who declines to follow the society's rules. *Id.* A church's power of excommunication—"the power to remove any of its members who break its rules"—is thus fundamental and immutable, as "the society would collapse" if its members could "break [its laws] with impunity." *Id.* at 7.

Ideas similar to Locke's found expression in the colonies. In *The Bloudy Tenet of Persecution for Cause of Conscience*, theologian Roger Williams made a two-part case for non-interference with religious affairs. "First, it was best for the state because conformity in religious matters was impossible due to its personal nature, and state attempts to compel conformity would lead only to repression and civil discord." Esbeck, *supra*, at 357–58. Second, it "was best for religion because it sealed the church from co-optation by the state and left it free to pursue its mission, however perceived." *Id.* at 358. These ideas spread throughout the colonies during the First Great Awakening of 1720–1750. *Id.* at 357. "The leaders of the movement insisted that the Church should be exalted as a spiritual and not a political institution." *Id.* at 358 (internal quotation marks omitted).

After the American states gained independence, the early Congress of the Confederation strongly endorsed the principle of non-interference in internal church governance. In the early 1780s, the French

minister to the United States petitioned Congress to approve a Catholic Bishop for America. Carl H. Esbeck, *Religion During the American Revolution and the Early Republic*, in 1 *Law and Religion, An Overview* 57, 72–73 (Silvio Ferrari & Rinaldo Cristofori, eds. 2013). In response, Congress passed a resolution directing Benjamin Franklin (then-ambassador to France) to notify the Vatican's representative at Versailles that "the subject of [this] application . . . being purely spiritual[] . . . is without the jurisdiction and powers of Congress." *Id.*

B. The Constitution Embraced The Historical View Of Religious Autonomy

The Lockean view of religious autonomy was part of the background political philosophy of American supporters of disestablishment. Indeed, "[m]ost members of the Founding Generation embraced John Locke's theory of religious toleration." Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1464 (2013).

"It was against this background that the First Amendment was adopted." *Hosanna-Tabor*, 565 U.S. at 183. "Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church." *Id.* "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government . . . would have no role in filling ecclesiastical offices." *Id.* at 184.

"This understanding of the Religion Clauses was reflected in two events involving James Madison, the leading architect of the religion clauses of the First

Amendment." *Id.* (internal quotation marks omitted). *First*, in the wake of the Louisiana Purchase, John Carroll—the first Roman Catholic Bishop in the United States—asked Secretary of State Madison for advice on who should be appointed to head the Catholic Church in New Orleans. Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J. L. & Pub. Pol'y 821, 830 (2012). Madison responded that the "selection of [religious] functionaries . . . is entirely ecclesiastical" and government should not be involved. Letter from James Madison to John Carroll (Nov. 20, 1806), in 20 *The Records of the American Catholic Historical Society of Philadelphia* 63, 63–64 (1909). "He declined even to express an opinion on whom Carroll should select." McConnell, *supra*, at 830.

Second, in 1811, Congress passed a bill incorporating the Protestant Episcopal Church in Alexandria, then part of the District of Columbia. *Hosanna-Tabor*, 565 U.S. at 184–85. President Madison vetoed the bill "on the ground that it 'exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates . . . the article of the Constitution of the United States, which declares, that 'Congress shall make no law respecting a religious establishment.'" *Id.* (quoting 22 Annals of Cong. 982–983 (1811)). Madison explained:

> "The bill enacts into, and establishes by law, sundry *rules and proceedings relative purely to the organization and polity of the church incorporated*, and comprehending even the election and removal of the Minister of the same; so that no change could be made

> therein by the particular society, or by the general church of which it is a member, and whose authority it recognises."

Id. at 185 (emphasis altered) (quoting 22 Annals of Cong. 983 (1811)). This episode demonstrates that the principle of non-interference extends beyond the appointment of clergy; it broadly forbids government from interfering in "'the organization and polity of the church.'" *Id.* (quoting 22 Annals of Cong. 983 (2011)).

Thomas Jefferson took the same view. In response to a letter from the Ursuline Nuns of New Orleans in 1804, Jefferson assured them that the Louisiana Purchase—and the transfer of control from Catholic France to the United States—would not undermine their legal rights. 1 Anson Phelps Stokes, *Church and State in the United States* 678 (1950). As Jefferson explained, "[t]he principles of the [C]onstitution . . . are a sure guaranty to you that [your property and rights] will be preserved to you sacred and inviolate, and that your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority.'" *Id.* Thus, "Jefferson also saw church-state separation as guaranteeing the autonomy, independence, and freedom of religious organizations—not just churches but religious schools as well," as his "statement affirming institutional autonomy encompasses the freedom of a religious school to select its own leaders." Berg, *supra*, at 182–83.

The "disestablishment" process in the states so confirms. Because the original Bill of Rights did not apply to state governments, roughly half the states maintained established religions after ratification of the First Amendment. McConnell, *supra*, at 829.

"Disestablishment occurred on a state-by-state basis through adoption of state constitutional amendments—Massachusetts being the last to dismantle its localized establishment in 1833." *Id.* Importantly, "each of the states that first maintained an establishment and later adopted a state constitutional amendment forbidding establishment of religion—South Carolina, New Hampshire, Connecticut, Maine, and Massachusetts—adopted at the same time an express provision that all 'religious societies' have the 'exclusive' right to choose their own ministers." *Id.* This history shows that a church's freedom to choose those with significant religious responsibilities was "part and parcel of disestablishment." *Id.*

In sum, history confirms "a constitutional order in which the institutions of religion—not 'faith,' 'religion,' or 'spirituality,' but the 'church'—are distinct from, other than, and meaningfully independent of, the institutions of government." Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 523 (2007). "Church autonomy inheres *in the church* as a body and involves more than rights of individual conscience." Paul Horwitz, *Essay: Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1058 (2013) (emphasis added). Religious freedom thus "involve[s] a structural as well as an individual component, one that recognizes the limits of the state and the separate existence of the church." *Id.* "[E]arly American leaders embraced the idea of a constitutionalized distinction between civil and religious authorities." Richard W. Garnett & John M. Robinson, Hosanna-Tabor*, Religious Freedom, and*

the Constitutional Structure, 2011–2012 CATO SUP. CT. REV. 307, 313. "And they saw that this distinction implied, and enabled, a zone of autonomy in which churches and religious schools could freely select and remove their ministers and teachers." *Id.*[2]

C. The Ministerial Exception Covers Employees With Significant Religious Responsibilities, Including Teachers

This Court has recognized the historical and constitutional basis for the right of religious autonomy. Under the First Amendment, religious bodies have "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." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

In *Hosanna-Tabor*, this Court confirmed forty years of lower-court precedent recognizing a ministerial exception that gives religious organizations autonomy to hire and fire key religious personnel, and protects them from liability in connection with those decisions. 565 U.S. at 186–90. The Court clarified that this exception arises from both the Establishment and the Free Exercise Clauses: "By imposing an unwanted minister, the

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[2] By contrast, religion in the former Soviet Union was thoroughly regulated by the state's Council for Religious Affairs, which selected ministers for various faiths. Successor entities exist in several former Soviet republics. *See, e.g.*, The State Committee of Azerbaijan Republic for the Work with Religious Associations, *available at* http://www.azerbaijan.az/portal/StatePower/Committee/committeeConcern_02_e.html.

state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Id.* at 188–89. And "[a]ccording the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.*

The ministerial exception recognizes that the Religion Clauses form "a two-way street, protecting the autonomy of organized religion and not just prohibiting governmental 'advancement' of religion." McConnell, *supra*, at 834. There are three components to the ministerial exception. *First*, the relational—"[o]rganizations founded on shared religious principles, simply to exist, must have freedom to choose those religious principles." Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 4 (2011). *Second*, conscience, which allows religious organizations to consider factors like sex or religion in internal religious decisions, such as some groups' religious practice of maintaining an all-male clergy. *Id.* at 5. *Third*, autonomy, which bars those with significant religious duties from bringing employment-based claims against their religious organizations. *Id.*

This Court has eschewed any "rigid formula for deciding when an employee qualifies as a minister," emphasizing that the ministerial exception "is not limited to the head of a religious congregation." *Hosanna-Tabor*, 565 U.S. at 190. Instead, this Court has favored a functional approach that ties the exception's scope to the purpose of religious autonomy, protecting "the interest of religious groups in choosing

who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196.

This understanding of the exception comports with the Lockean view undergirding the First Amendment that society must protect a "church's right to make its own religious laws and to expel members for nonconformance." Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 Harv. J. L. & Pub. Pol'y 839, 857 (2012). This right necessarily entails the freedom to appoint and remove individuals with significant religious responsibilities, including religion teachers. *Id.* After all, selecting those who will teach the faith to the next generation is even more vital to self-governance than controlling membership. *Id.*

For this reason, focusing narrowly on the label of the "ministerial" exception is a mistake. This Court should re-affirm that the exception "protects more than just 'ministers,'" *Rweyemamu v. Cote*, 520 F.3d 198, 206–07 (2d Cir. 2008), and that it applies to all those with significant religious responsibilities. That corresponds to the historical origins of this doctrine, the decision in *Hosanna-Tabor*, and the lower-court precedent that gave rise to the doctrine.

As Justices Alito and Kagan have explained, the exception must be broad enough to "protect[] the freedom of [each] religious group[] to engage in certain key religious activities . . . as well as the critical process of communicating the faith . . . in its own voice, both to its own members and to the outside world." *Hosanna-Tabor*, 565 U.S. at 199, 201 (Alito, J., concurring). Accordingly, the term "ministerial" is somewhat inapt because "most faiths do not employ the term 'minister,'" and "some eschew the concept of

formal ordination." *Id.* at 202 (Alito, J., concurring). For this reason, "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy." *Id.* at 198 (Alito, J. concurring). It is not. "Instead, courts should focus on the function performed by persons who work for religious bodies." *Id.* Thus, the exception "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, *or serves as a messenger or teacher of its faith*." *Id.* at 199 (emphasis added).

"When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters." *Id.* at 201 (Alito, J., concurring). "Both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers," which the religious organization must be free to judge for itself. *Id.* "For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very embodiment of its message and its voice to the faithful." *Id.* (internal quotation marks omitted). "A religious body's control over such 'employees' is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world." *Id.* Thus, selecting those who are qualified to teach the faith is an inherently religious decision. Laycock, *supra*, at 850–51.

The logical conclusion is that "[r]equiring a church to accept or retain an unwanted minister"—or an unwanted teacher of religion—would "interfere[] with the internal governance of the church" by "depriving the church of control over the selection of those who

will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188 (majority op.). In short, the ministerial exception "bars" employment-discrimination suits brought against religious groups by those who would "preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196.

A Catholic school teacher who imparts Catholic teachings to students falls well within the exception. For Catholics, "'[e]ducation has always been one of the most important missions of the Church.'" *Biel v. St. James Sch.*, 911 F.3d 603, 612 (9th Cir. 2018) (Fisher, J., dissenting) (quoting the School's "Code of Ethics for Professional Educators in Catholic Schools"). And this Court has recognized that "[t]he various characteristics of [parochial] schools make them a powerful vehicle for transmitting the Catholic faith to the next generation." *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (internal quotation marks omitted). Thus, teachers in Catholic schools play a "critical and unique role" in the Catholic religious mission. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501–04 (1979). This is particularly true for teachers who serve as a model of the faith by engaging in religious activities such as leading students in prayer and planning the liturgy for Mass. Thus, "[t]he Constitution leaves it to the collective conscience of [the Church] to determine for itself who is qualified to serve as a teacher or messenger of its faith." 565 U.S. at 202 (Alito, J., concurring).

II. The Ninth Circuit's Mechanical Application Of *Hosanna-Tabor* Undermines Religious Autonomy, In Conflict With This Court's And Other Circuits' Decisions

A. The Ninth Circuit's Formalistic Analysis Misinterprets *Hosanna-Tabor*

In *Hosanna-Tabor*, this Court made clear that the ministerial exception applied to the plaintiff in that case, Cheryl Perich, because she played "a role in conveying the Church's message and carrying out its mission." 565 U.S. at 192. The Court reached that conclusion based on four "considerations," which it summarized as "the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church." *Id*. But these four specific "considerations" were not exclusive or necessary elements, or universal and conjunctive prerequisites, to trigger the ministerial exception. They are what made *Hosanna-Tabor* an easy case. *See, e.g.*, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) ("[E]ven referring to them as 'factors' denotes the kind of formulaic inquiry that the Supreme Court has rejected."); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 202, 204–05 (2d Cir. 2017) ("*Hosanna-Tabor* instructs only as to what we *might* take into account as relevant . . . . [I]t neither limits the inquiry to those considerations nor requires their application in every case."); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) ("Any attempt to calcify the particular considerations that motivated the Court in *Hosanna-Tabor* into a 'rigid formula' would not be appropriate.").

The function of teaching religion to the next generation is essential to every religious organization. The position of commissioned minister is unusual, perhaps confined to a few Lutheran bodies. To require an analogous *title*, instead of an analogous *function*, is to discriminate between denominations.

Indeed, until now, the Courts of Appeals have uniformly understood *Hosanna-Tabor* to adopt a functional approach that covers all employees with significant religious responsibilities, including religion teachers. *See, e.g., Fratello*, 863 F.3d at 208-09 ("[T]he most important consideration in this case is whether, and to what extent, the plaintiff 'performed' 'important religious functions . . . for [her religious organization].'"); *Grussgott*, 882 F.3d at 661 ("[T]he importance of Grussgott's role as a 'teacher of [] faith' to the next generation outweighed other considerations."); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 122 n.7 (3d Cir. 2018) ("[T]he 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[.]" (internal quotation marks omitted)); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015) (taking a broad view of what constitutes a religious title and focusing predominantly on the employee's religious responsibilities).

State high courts have agreed. *See Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012) ("[T]he ministerial exception applies to the school's employment decision regardless whether a religious teacher is called a minister or holds any title of

clergy."); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 613 n.61 (Ky. 2014) (noting "the potential danger of hyper-focusing on the title").

In this case, by contrast, the Ninth Circuit confined *Hosanna-Tabor* to its facts. Citing *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), the court adopted a formalistic, check-the-boxes approach that views the plaintiff in *Hosanna-Tabor* as the model against whom all other teachers must be judged. *See, e.g.*, *Biel v. St. James Sch.*, 926 F.3d 1238, 1243 (9th Cir. 2019) (Nelson, J., dissenting from denial of rehearing en banc) ("The panel majority mistakes *Hosanna-Tabor* to create a resemblance-to-Perich test."); *Sterlinski v. Catholic Bishop of Chicago*, No. 18-2844, 2019 WL 3729495, at *2 (7th Cir. Aug. 8, 2019) ("[The Ninth Circuit's] approach . . . asks how much like Perich a given plaintiff is, rather than whether the employee served a religious function.").

The Ninth Circuit's wooden approach is contrary to *Hosanna-Tabor*, its historical antecedents, and its progeny. As *Hosanna-Tabor* suggests, the proper question is whether the church has given the employee responsibility to "preach [its] beliefs, teach [its] faith, and carry out [its] mission," 565 U.S. at 196. This Court addressed Perich's title, ordination, and religious training, not because they form the *sine qua non* of the ministerial exception, but because they were sufficient to show that, under the doctrine and practices *of the Lutheran Church – Missouri Synod*, the church chose Perich to "minister to the faithful." *Id.* at 189. For this Court's decision to apply as a guiding precedent across a variety of facts and faiths, the doctrine must cover all teachers at religious

schools who have significant religious responsibilities. Indeed, that is a core application of the doctrine.

The Ninth Circuit's contrary approach cannot be reconciled with "[o]ur country's religious landscape," which "includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status." *Id.* at 197 (Thomas, J., concurring). Such a formalistic analysis would deprive religious bodies of autonomy to structure their internal governance according to their own doctrine and practice. *Id.* at 188–89; *see also id.* at 198 (Alito, J., concurring).

B. The Ninth Circuit's Analysis Shows The Perils Of Narrowly Construing The Ministerial Exception

The Ninth Circuit's analysis shows how a constrained view of the ministerial exception results in improper judicial second-guessing on questions of internal religious governance. Most notably, the court attempted to minimize the significance of Morrissey-Berru's daily responsibility to teach Catholic doctrine to her students and to "incorporate Catholic values and teachings into her curriculum." Pet.App.3a. The court acknowledged that "Morrissey-Berru did have significant religious responsibilities as a teacher at the School . . . as evidenced by several of the employment agreements she signed." *Id.* These duties included leading her students in daily prayer, being "in charge of" planning the liturgy for monthly Mass, and directing and producing a performance by her students during the School's annual Easter celebration. *Id.* Moreover, as the district court explained, she "also taught her students the tenets of

the Catholic religion, how to pray, and instructed them on a host of other religious topics." Pet.App.8a. And to ensure that her religious instruction met the church's standards, she maintained "regular catechist certifications" under the supervision of the Archdiocese of Los Angeles. *Id*.

Thus, by any measure, Morrissey-Berru played a vital role in the School's religious mission of conveying the Catholic faith to the next generation. Nevertheless, the Ninth Circuit dismissed these religious responsibilities and held that she did not qualify for the ministerial exception for three reasons, each of which shows how a departure from the functional approach invites improper second-guessing of religious judgments. *See Cannata*, 700 F.3d at 179–80 (courts cannot "second-guess" a church's sincere religious judgments); *Lee*, 903 F.3d at 121 (second-guessing "would impermissibly entangle the court in religious governance").

First, the Ninth Circuit found that, unlike the teacher in *Hosanna-Tabor*, Morrissey-Berru's "formal title of 'Teacher' was secular." Pet.App.2a. But there is nothing inherently "secular" about the title of "teacher," especially when teaching religious matters. In *Hosanna-Tabor*, the title "minister" was relevant only because of what it meant to the church there. *See* 565 U.S. at 191. Because other faiths use different labels to refer to religiously significant employees—such as certified catechists at Catholic schools—"it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy." *Id.* at 198 (Alito, J. concurring). *See also, e.g.*, *Fratello*, 863 F.3d at 207 ("We cannot accept the notion that by doing no

more than changing the title of an employee, a religious-group employer can change its employee's rights under the federal employment-discrimination laws."); *Temple Emanuel*, 975 N.E.2d at 443.

Second, in an apparent attempt to assess the "substance" of Morrissey-Berru's position (*Hosanna-Tabor*, 565 U.S. at 192), the Ninth Circuit held that her religious "credential[s]" and "training" were inadequate because she had taken only a "single course on the history of the Catholic church." Pet.App.3a. But the Ninth Circuit downplayed the fact, noted by the district court, that she maintained "regular catechist certifications," Pet.App.8a. As the Archdiocese of Los Angeles explains, a certified catechist "is a person of faith who is called by the parish or school community to hand on the tradition and teaching of the Catholic Church to others," which "demands that the catechist understand church doctrine and demonstrate appropriate teaching skills." *See* http://www.la-archdiocese.org/org/ore/cf/Pages/The-Catechist.aspx. Indeed, the scope of Morrissey-Berru's religious responsibilities, which even the Ninth Circuit acknowledged as "significant," Pet.App.3a, illustrates that, in the eyes of the Catholic Church, she possessed training and knowledge suitable for instructing students on Catholic faith.

By deeming this certification inadequate, the Ninth Circuit's reasoning invites courts to second-guess the religious schools' judgment about what types of religious training are essential to the school's religious mission. This entangles courts in one of the very religious questions that the ministerial exception is designed to avoid—*i.e.*, what is the "proper" way to train and certify a religious teacher? *See Sterlinski*,

2019 WL 3729495, at *2 (The Ninth Circuit improperly "embraced" the "independent judicial resolution of ecclesiastical issues.").

Third, the Ninth Circuit emphasized that Morrissey-Berru did not "hold herself out to the public as a religious leader or minister." Pet.App.3a. But Catholic schools clearly do hold themselves out to the public as advancing the Catholic faith through their parochial-school teachers, and Morrissey-Berru explicitly agreed to advance the Catholic faith through her duties as a teacher. She signed an agreement stating that she understood that "the mission of the School [was] 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 Roman Catholic Church." (Pet.App.32a, 93a)

In any event, "the purpose of the ministerial exception is to allow religious employers the freedom to hire and fire those with the ability to shape the practice of their faith." *Grussgott*, 882 F.3d at 661. To maintain autonomy, churches must be free to decide who should be entrusted to teach the faith and how they should "hold themselves out" to the public. "Thus, it is the school's expectation—that [the teacher] would convey religious teachings to her students—that matters," regardless of whether the teacher holds herself out as a religious figure. *Id.*; *see also Temple Emanuel*, 975 N.E.2d at 443 (the ministerial exception covered a teacher at a Jewish school even though "she . . . did not hold herself out as a rabbi").

A proper understanding of *Hosanna-Tabor* and the historical antecedents it embodies makes this another clear case, and the importance of the issue

demands this Court's review. Morrissey-Berru had all the religious functions that Perich had in *Hosanna-Tabor*; the rest is merely differences in denominational practice and nomenclature. As a result of the Ninth Circuit's decision, "Catholic schools in th[at] circuit now have less control over employing [their] elementary school teachers of religion than in any other area of the country," and "thousands of Catholic schools in the West have less religious freedom than their Lutheran counterparts nationally." *Biel*, 926 F.3d at 1251 (Nelson, J., dissenting from denial of rehearing en banc). Our Lady of Guadalupe chose Morrissey-Berru as a teacher who would "preach [its] beliefs, teach [its] faith, and carry out [its] mission." 565 U.S. at 196. She accordingly falls within the ministerial exception, and the School cannot be punished for its decision to dismiss her. Any other result would infringe on the School's religious liberty by denying it the "free[dom] to choose those who will guide it on its way." *Id.*

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

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Respectfully submitted,

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APPENDIX

APPENDIX OF *AMICI CURIAE* [1]

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[1] Institutions are listed for affiliation purposes only. All signatories are participating in their individual capacity, not as representatives of their institutions.

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