

No. 19-348

---

---

IN THE  
**Supreme Court of the United States**

---

ST. JAMES SCHOOL,  
*Petitioner,*

v.

DARRYL BIEL,  
*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**

---

Todd R. Geremia  
JONES DAY  
250 Vesey Street  
New York, NY 10281

Victoria Dorfman  
*Counsel of Record*  
Anthony J. Dick  
Kaytlin L. Roholt  
JONES DAY  
51 Louisiana Avenue NW  
Washington, DC 20001  
(202) 879-3939  
vdorfman@jonesday.com

*Counsel for Amici Curiae*

---

---

## TABLE OF CONTENTS

|   | <b>Page</b> |
|---|-------------|
| TABLE OF AUTHORITIES.....   | iii         |
| INTEREST OF <i>AMICI CURIAE</i> .....   | 1           |
| STATEMENT .....   | 2           |
| SUMMARY OF ARGUMENT.....  | 3           |
| ARGUMENT .....  | 4           |
| I. Religious Organizations Have Autonomy<br>To Select Those With Significant Religious<br>Responsibilities.....   | 4           |
| A. The Ministerial Exception Is Firmly<br>Grounded In The History Of Religious<br>Autonomy .....  | 4           |
| B. The Constitution Embraced The<br>Historical View Of Religious<br>Autonomy .....  | 8           |
| C. The Ministerial Exception Covers<br>Employees With Significant Religious<br>Responsibilities, Including Teachers .....   | 12          |
| II. The Ninth Circuit’s Mechanical<br>Application Of <i>Hosanna-Tabor</i><br>Undermines Religious Autonomy, In<br>Conflict With This Court’s And Other<br>Circuits’ Decisions ..... | 16          |
| A. The Ninth Circuit’s Formalistic<br>Analysis Misinterprets<br><i>Hosanna-Tabor</i> .....  | 16          |

**TABLE OF CONTENTS**  
(continued)

|   | <b>Page</b> |
|---|-------------|
| B. The Ninth Circuit’s Analysis Shows<br>The Perils Of Narrowly Construing<br>The Ministerial Exception ..... | 20          |
| CONCLUSION .....  | 24          |
| APPENDIX OF <i>AMICI CURIAE</i> .....   | App. 1      |

## TABLE OF AUTHORITIES

|  | Page(s)       |
|--|---------------|
| <b>CASES</b>   |               |
| <i>Cannata v. Catholic Diocese of Austin</i> ,<br>700 F.3d 169 (5th Cir. 2012).....                            | 17, 21        |
| <i>Conlon v. InterVarsity Christian Fellowship</i> ,<br>777 F.3d 829 (6th Cir. 2015).....                      | 18            |
| <i>Fratello v. Archdiocese of N.Y.</i> ,<br>863 F.3d 190 (2d Cir. 2017) .....                                  | 17, 18, 21    |
| <i>Grussgott v. Milwaukee Jewish Day Sch.</i> ,<br>882 F.3d 655 (7th Cir. 2018).....                           | 17, 18, 22    |
| <i>Hosanna-Tabor Evangelical Lutheran<br/>Church and School v. EEOC</i> ,<br>565 U.S. 171 (2012).....          | <i>passim</i> |
| <i>Kedroff v. St. Nicholas Cathedral of<br/>Russian Orthodox Church in N. Am.</i> ,<br>344 U.S. 94 (1952)..... | 12            |
| <i>Kirby v. Lexington Theological Seminary</i> ,<br>426 S.W.3d 597 (Ky. 2014).....                             | 18            |
| <i>Lee v. Sixth Mount Zion Baptist Church<br/>of Pittsburgh</i> ,<br>903 F.3d 113 (3d Cir. 2018) .....         | 18, 21        |
| <i>Lemon v. Kurtzman</i> ,<br>403 U.S. 602 (1971).....   | 16            |
| <i>NLRB v. Catholic Bishop of Chicago</i> ,<br>440 U.S. 490 (1979).....  | 16            |
| <i>Rweyemamu v. Cote</i> ,<br>520 F.3d 198 (2d Cir. 2008) .....  | 14            |

**TABLE OF AUTHORITIES**  
(continued)

|  | <b>Page(s)</b> |
|--|----------------|
| <i>Sterlinski v. Catholic Bishop of Chicago</i> ,<br>No. 18-2844, 2019 WL 3729495<br>(7th Cir. Aug. 8, 2019) .....   | 19, 22         |
| <i>Temple Emanuel of Newton v. Mass.<br/>Comm’n Against Discrimination</i> ,<br>975 N.E.2d 433 (Mass. 2012).....   | 18, 21, 23     |
| <b>OTHER AUTHORITIES</b>   |                |
| Anson Phelps Stokes, <i>Church and State<br/>in the United States</i> (1950) .....   | 10             |
| Thomas C. Berg <i>et al.</i> , <i>Religious<br/>Freedom, Church-State Separation,<br/>and the Ministerial Exception</i> ,<br>106 NW. U. L. REV. 175 (2011) .....   | 4, 10          |
| Nathan S. Chapman, <i>Disentangling<br/>Conscience and Religion</i> ,<br>2013 U. Ill. L. Rev. 1457 (2013).....   | 8              |
| Carl H. Esbeck, <i>Dissent and<br/>Disestablishment: The Church-State<br/>Settlement in the Early American<br/>Republic</i> , 2004 BYU L. Rev. 1385 (2004) .....   | 6              |
| Carl H. Esbeck, <i>Establishment Clause<br/>Limits on Governmental Interference<br/>with Religious Organizations</i> ,<br>41 WASH. & LEE L. REV. 347 (1984).....   | 6, 7           |
| Carl H. Esbeck, <i>Religion During the<br/>American Revolution and the Early<br/>Republic</i> , in 1 <i>Law and Religion, An<br/>Overview</i> 57 (Silvio Ferrari &<br>Rinaldo Cristofori, eds. 2013) ..... | 8              |

**TABLE OF AUTHORITIES**  
(continued)

|   | <b>Page(s)</b> |
|---|----------------|
| Richard W. Garnett, <i>Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?</i> , 22 ST. JOHN'S J. LEGAL COMMENT. 515 (2007).....              | 11             |
| Richard W. Garnett & John M. Robinson, <i>Hosanna-Tabor, Religious Freedom, and the Constitutional Structure</i> , 2011-2012 CATO SUP. CT. REV. 307.....      | 11, 12         |
| Paul Horwitz, <i>Essay: Defending (Religious) Institutionalism</i> , 99 VA. L. REV. 1049 (2013).....  | 11             |
| Douglas Laycock, <i>Hosanna-Tabor and the Ministerial Exception</i> , 35 Harv. J. L. & Pub. Pol'y 839 (2012).....   | 14, 15         |
| Letter from James Madison to John Carroll (Nov. 20, 1806) in 20 <i>The Records of the American Catholic Historical Society of Philadelphia</i> 63 (1909)..... | 9              |
| John Locke, <i>A Letter Concerning Toleration</i> (Jonathan Bennett ed. 2010).....  | 6, 7           |
| Christopher C. Lund, <i>In Defense of the Ministerial Exception</i> , 90 N.C. L. REV. 1 (2011).....   | 13             |
| Felix Makower, <i>The Constitutional History and Constitution of the Church of England</i> 71 (1895).....   | 5, 6           |
| Michael W. McConnell, <i>Reflections on Hosanna-Tabor</i> , 35 Harv. J. L. & Pub. Pol'y 821 (2012).....   | 9, 10, 11, 13  |

**TABLE OF AUTHORITIES**  
(continued)

|   | <b>Page(s)</b> |
|---|----------------|
| Sup. Ct. R. 37.....   | 1              |
| State Committee of Azerbaijan Republic for<br>the Work with Religious Associations..... | 12             |

**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.<sup>1</sup>

---

<sup>1</sup> 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. *Amici* have filed a similar brief supporting another pending petition that presents the same issue. See Brief *Amici Curiae* of Professors, *Our Lady of Guadalupe Sch. v. Morrissey-Berru* (No. 19-267). *Amici* file this brief to emphasize the importance of the issue and to explain how the Ninth Circuit has repeatedly erred on it.

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 instructing her students in Catholic doctrine four days a week; and (3) she was required to incorporate Catholic teaching into all subjects and was evaluated on her ability to do so.

Nevertheless, the Ninth Circuit held that the ministerial exception did not apply to the teacher, Kristen Biel, because her position purportedly satisfied “only one of the four” factors from *Hosanna-Tabor*. Pet.App.12a. 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 Bloody 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.*<sup>2</sup>

### **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 state infringes the Free Exercise Clause, which

---

<sup>2</sup> 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](http://www.azerbaijan.az/portal/StatePower/Committee/committeeConcern_02_e.html).

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. 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. 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.” Pet.App.20a (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). 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). 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, adopting 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.,* Pet.App.50a (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 minimized the significance of Biel’s responsibility to teach Catholic doctrine to her students and to “incorporate[] religious themes and symbols into her overall classroom environment and curriculum.” Pet.App.12a. The court acknowledged that Biel’s contract required her to work “within [St. James’s] overriding commitment” to Church “doctrines, laws, and norms” and “teach[] and promote behavior in conformity to the teaching of the Roman Catholic Church.” Pet.App.5a. Consistent with this requirement, she taught her students “a standard religion curriculum” for “thirty minutes a day, four days a week, using a workbook on the Catholic faith prescribed by the school administration.” *Id.* She also “joined her students in twice-daily prayers” and “attended a school-wide monthly mass” with them. *Id.*

Thus, by any measure, Biel played a vital role in the School’s religious mission of conveying the Catholic faith to the next generation. She was the primary provider of religious instruction to each fifth grade student in her charge, and her regular instruction in Catholic doctrine and practices was almost certainly more than the students were receiving from their priests—and certainly more than they received at weekly Mass. 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*, there was “nothing religious reflected in Biel’s title” of “Grade 5 Teacher.” Pet.App.11a (internal quotation marks and citation omitted). But there is nothing inherently secular about the title of “teacher,” especially for those like Biel who teach 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, “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 Biel’s position (*Hosanna-Tabor*, 565 U.S. at 192), the Ninth Circuit held that her religious “credential[s]” and “training” were inadequate because her “only [religious] training” consisted of “a single half-day conference where topics ranged from

the incorporation of religious themes into lesson plans to techniques for teaching art classes.” Pet.App.4a-5a. But by deeming her religious training insufficient, 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 Biel did not “consider[] herself a minister or present[] herself as one to the community.” Pet.App.12a. But Catholic schools clearly do hold themselves out to the public as advancing the Catholic faith through their parochial-school teachers, and Biel explicitly agreed to “teach[] and promote behavior in conformity to the teaching of the Roman Catholic Church.” Pet.App.5a. She also held herself out to the public as a religious teacher by making that commitment at a school whose public mission statement provided that it would “facilitate the development of confident, competent, and caring Catholic-Christian citizens prepared to be responsible members of their church[,] local[,] and global communities.” *Id.*

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. Biel 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.” Pet.App.66a-67a (Nelson, J., dissenting from denial of rehearing en banc). St. James chose Biel 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**

The Court should grant the petition for certiorari.

OCTOBER 16, 2019

Respectfully submitted,

Victoria Dorfman

*Counsel of Record*

Anthony J. Dick

Kaytlin L. Roholt

JONES DAY

51 Louisiana Avenue NW

Washington, DC 20001

(202) 879-3939

[vdorfman@jonesday.com](mailto:vdorfman@jonesday.com)

Todd R. Geremia

JONES DAY

250 Vesey Street

New York, NY 10281

*Counsel for Amici Curiae*

---

**APPENDIX**

---

**APPENDIX OF *AMICI CURIAE***<sup>1</sup>

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law and Professor of Religious Studies at the University of Virginia. He is one of the nation's leading authorities on the law of religious liberty, having taught and written about the subject for four decades at the University of Chicago, the University of Texas, the University of Michigan, and now the University of Virginia. He has testified frequently before Congress and has argued many religious freedom cases in the courts, including the U.S. Supreme Court; he was lead counsel for petitioner in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). His many writings on religious liberty have been republished in a five-volume collection.

Michael W. McConnell is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow at the Hoover Institution. He has served as a Circuit Judge on the United States Court of Appeals for the Tenth Circuit and has held chaired professorships at the University of Chicago and the University of Utah.

---

<sup>1</sup> Institutions are listed for affiliation purposes only. All signatories are participating in their individual capacity, not as representatives of their institutions.



## App. 2

Nathan S. Chapman is a tenured associate professor of law at the University of Georgia School of Law and a McDonald Distinguished Fellow at the Center for the Study of Law and Religion at Emory University. He writes on law and religion, and his scholarship focuses on religious liberty and Christianity and the law. He is the author of several law review articles and book chapters on conscience, religion, and Christianity and the law.

Elizabeth A. Clark is Associate Director of the International Center for Law and Religion Studies at the J. Reuben Clark Law School at Brigham Young University. Professor Clark has spoken worldwide and written extensively on church-state issues and is the editor of several books on U.S. and comparative law and religion issues. She has testified before the U.S. Congress on religious freedom issues, taken part in drafting legal analyses of pending legislation affecting religious freedom in over a dozen countries, and has written *amicus* briefs on religious freedom issues for the U.S. Supreme Court.

Robert F. Cochran, Jr., is the Louis D. Brandeis Professor of Law and the founder of the Herbert and Elinor Nootbarr Institute on Law, Religion, and Ethics at Pepperdine University School of Law. He teaches courses and lectures internationally on the intersection of law and religion. He has also published extensively on law and religion, including notable works on church autonomy and the role of religion in shaping the law.

Teresa Collett is a professor at the University of St. Thomas School of Law. She has published numerous legal articles and is the co-editor of a collection of

### App. 3

essays exploring “catholic” and “Catholic” perspectives on American law. She is an elected member of the American Law Institute, and has testified before committees of the U.S. Senate and House of Representatives, as well as before legislative committees in several states. She served two terms on the Pontifical Council for the Family after being appointed by Pope Benedict XVI and then reappointed by Pope Francis.

Carl H. Esbeck is the R.B. Price Professor Emeritus of Law and the Isabelle Wade & Paul C. Lyda Professor Emeritus of Law at the University of Missouri School of Law. He has published widely in the area of religious liberty and church-state relations, and has taken the lead in recognizing that the modern Supreme Court has applied the Establishment Clause not as a right, but as a structural limit on the government’s authority in explicitly religious matters. Professor Esbeck previously directed the Center for Law & Religious Freedom, a nonprofit public interest law firm, and served as Senior Counsel to the Deputy Attorney General at the U.S. Department of Justice. He is co-editor of the just published *Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776 to 1833* (2019).

Richard W. Garnett is the Paul J. Schierl/Fort Howard Corporation Professor at Notre Dame Law School. He teaches and writes about the freedoms of speech, association, and religion, and constitutional law more generally. He is a leading authority on the role of religious believers and beliefs in politics and society. He has published widely on these matters, and is the author of dozens of law review articles and book chapters. He is the founding director of Notre

#### App. 4

Dame Law School's new Program on Church, State, and Society, an interdisciplinary project that focuses on the role of religious institutions, communities, and authorities in the social order.

Paul Horwitz is the Gordon Rosen Professor of Law at the University of Alabama School of Law. He teaches courses on law and religion and constitutional law. A leading figure in First Amendment scholarship, he is the author of dozens of articles and of two books, *The Agnostic Age: Law, Religion, and the Constitution*, and *First Amendment Institutions*. He has taught and visited at a number of law schools, including Harvard and Notre Dame. He has also written for many general-readership publications, such as the New York Times.

John D. Inazu is the Sally D. Danforth Distinguished Professor of Law & Religion and Professor of Political Science at Washington University School of Law. His scholarship focuses on the First Amendment freedoms of speech, assembly, and religion, and related questions of legal and political theory. He is the special editor of a volume on law and theology, and his articles have appeared in a number of law reviews and specialty journals.

Christopher C. Lund is Professor of Law at Wayne State University Law School. His scholarship focuses primarily on religious liberty, and he has written widely on notions of church autonomy and the internal structure and governance of religious organizations.

Michael P. Moreland is the University Professor of Law and Religion at Villanova University's Charles

App. 5

Widger School of Law and Director of the Eleanor H. McCullen Center for Law, Religion and Public Policy.

Michael Paulsen is Distinguished University Chair and Professor of Law at University of St. Thomas School of Law. He has written numerous articles in the field of religious liberty.

Robert J. Pushaw is the James Wilson Endowed Professor of Law at Pepperdine University School of Law and has taught at eight other law schools. He is a prolific constitutional law scholar. Many of his works explore the dangers of government interference with individual constitutional rights, including the institutional free exercise rights of parochial schools.

David A. Skeel is the S. Samuel Arsht Professor of Corporate Law at the University of Pennsylvania Law School. His research and teaching interests include religion and the law and Christian perspectives on the law. He is the author of a book and several articles on Christianity and law, including *True Paradox: How Christianity Makes Sense of Our Complex World* (2014), *The Paths of Christian Legal Scholarship* (2008), and *Christianity and the (Modest) Rule of Law* (2006).

Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law. He has written many law review articles on First Amendment law, as well as the casebooks *The First Amendment and Related Statutes* and *The Religion Clauses and Related Statutes*.