

## BENCH MEMOS

## LAW &amp; THE COURTS

# Supreme Court Should Grant Cert on *Morrissey-Berru v. Our Lady of Guadalupe School*

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In the coming weeks, the Supreme Court will consider whether to grant a **petition for certiorari** filed by the Becket Fund in *Morrissey-Berru v. Our Lady*

of *Guadalupe*, which concerns the proper scope of the “ministerial exception.” We filed an **amicus brief** supporting the petition on behalf of a group of distinguished religious-liberty scholars.

As the Supreme Court **recognized** in the *Hosanna-Tabor* decision in 2012, the ministerial exception protects the right of religious groups to “shape [their] own faith and mission through [their] appointments.” In order to exercise genuine autonomy under the Religion Clauses of the First Amendment, churches must be free to decide for themselves who will hold positions of significant religious responsibility. This means that a religious organization cannot be subject to legal penalties for hiring or firing such employees, even if the hiring or firing is alleged to be “discriminatory” or otherwise improper in the eyes of the civil authorities.

The protected category of religious employees includes, most obviously, the traditional role of “ministers” in the Protestant tradition. But as Justices Alito and Kagan have **pointed out**, it cannot be limited to “ministers,” because “most faiths do not employ the term ‘minister,’” and “some eschew the concept of formal ordination” altogether. For this reason, they explained, a proper respect for the autonomy of all religious faiths requires the government to refrain from interfering in the hiring or firing of 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.”

In *Our Lady of Guadalupe*, the Ninth Circuit refused to apply the ministerial exception to a teacher at a Catholic school who played a critical role in the Catholic Church’s mission of conveying the faith to the next generation. The case involves a fifth-grade teacher at Our Lady of Guadalupe School. Her duties required her to teach the tenets of Catholicism, lead her students in daily prayer, and plan the liturgy for the school’s monthly Mass. To ensure that she was qualified to serve as a religious teacher, the Archdiocese of Los Angeles required her to take a course to become a certified Catechist.

After the school declined to renew the teacher's contract due to her performance, she sued the school for age discrimination. A federal district court rejected her claim, holding that civil courts could not second-guess a Catholic school's judgment over who should serve as one of its religion teachers. That decision was consistent with a long line of cases holding that religious schools must retain full autonomy over such employment decisions.

On appeal, however, the Ninth Circuit reversed. Although the court acknowledged that the teacher had "significant religious responsibilities," it nonetheless held that the ministerial exception did not bar her claim, in part because her title of "Teacher" was secular, and she did not hold herself out to the public as a religious "minister." Rather than focus on the critical religious function the teacher played, the court dwelled on these formalistic factors to deny the school's right to control who will teach religion to its students. This decision not only defied Supreme Court precedent, but also created a circuit split with every other federal appellate circuit in the country that has considered the issue.

As our amicus brief **explains**, the Supreme Court should grant review to resolve the circuit split and correct the Ninth Circuit's aberrant ruling, which is shorn from the purpose of religious autonomy that the ministerial exception embodies. The ministerial exception is firmly grounded in the original understanding of both the Free Exercise and Establishment Clauses of the First Amendment. Those provisions were widely understood by the Founders to ensure that the government would not interfere in churches' selection of key religious personnel. This principle traces back to the Lockean view that private religious societies cannot survive and flourish unless they are free to set their own terms of association. "[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." A church's freedom of association — "the power to remove any of its members who break its rules" — is thus vital, as "the society would

collapse” if its members (much less its teachers) could “break [its laws] with impunity.” In the words of Thomas Jefferson, “[t]he principles of the [C]onstitution” provide “a sure guaranty” that a religious institution “will be permitted to govern itself according to its own voluntary rules without interference from the civil authority.” The Supreme Court’s decisions, including in *Hosanna-Tabor*, embody this constitutional tradition of religious autonomy, repeatedly reaffirming that to govern themselves, religious bodies must have the freedom to appoint and remove key personnel who will shape their faith communities.

Teachers of religion at parochial schools fall in the very heartland of this doctrine. If religious schools cannot decide for themselves who is qualified to teach the faith to the next generation, then their core mission of perpetuating their religious message will be critically compromised. And if civil courts attempt to adjudicate whether a religious school’s rationale for hiring or firing a religious teacher is “legitimate” or unlawfully “discriminatory,” they will inevitably entangle themselves in religious controversies—where secular authorities have no place.