

No. 19-267

IN THE
Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,

v.

AGNES DEIRDRE MORRISEY-BERRU *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF CHRISTIAN LEGAL
SOCIETY, AMERICAN ASSOCIATION OF
CHRISTIAN SCHOOLS, ASSOCIATION OF
CHRISTIAN SCHOOLS INTERNATIONAL,
LUTHERAN CHURCH – MISSOURI SYNOD,
NATIONAL ASSOCIATION OF EVANGELICALS,
AND QUEENS FEDERATION OF CHURCHES AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

THOMAS C. BERG
RELIGIOUS LIBERTY
APPELLATE CLINIC
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403
(651) 962-4918
tcborg@stthomas.edu

REED N. SMITH
Counsel of Record
KIMBERLEE WOOD COLBY
CENTER FOR LAW AND
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Rd., Ste 302
Springfield, VA 22151
(703) 894-1081
rsmith@clsnet.org

Counsel for Amici Curiae

September 30, 2019

QUESTION PRESENTED

Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	vi
INTEREST OF THE <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT.....	4
I. A Broad, Deferential Definition of “Minister” under the Ministerial Exception Ensures Religious Equality, Avoids Judicial Entanglement, and Reflects the Original Meaning of the Religion Clauses.	5
A. A Broad, Flexible Definition of “Minister” Ensures Equality Among Diverse Faiths.	5
B. Anything Less than a Broad, Deferential Definition of “Minister” Invites Courts to Engage in Ecclesiastical Decision-Making as to Who Will Lead a Religious Organization.....	7
C. Narrow Definitions of “Minister,” Especially Through Requirements of Ministerial Education or Credentials, Were a Chief Evil that Helped Spur Adoption of the First Amendment.	9

TABLE OF CONTENTS—Continued

	Page
II. An Employee’s Religious Function Should Be the Key Consideration in Defining Who Is a “Minister,” and Where Such Important Religious Function Exists, No Ministerial Credentials, Training, or Title Should Be Required.....	13
A. Religious Function Should Be the Key Consideration in a Ministerial Exception Analysis, Understood with Deference to an Organization’s Self-Understanding.	13
B. Teachers in Religious Schools Often Serve Important Religious Functions, as This Case Exemplifies.	14
C. When an Employee Has Important Religious Functions, There Should Be No Further Requirement that the Employee Have a Ministerial Credential, Training, or Title.	16
1. Requiring specific religious training, ordination, or credentials for a person to qualify as a minister would produce the same evils the Religion Clauses were meant to prevent.....	16
a. Ministerial training requirements harken back to unconstitutional government “credentialing” of ministers.	17

TABLE OF CONTENTS—Continued

	Page
b. Requiring ministerial training would discriminate against some religions.	17
c. Requiring ministerial training would authorize judicial second- guessing of religious decisions.	19
2. Reliance on an employee’s formal title for purposes of applying the ministerial exception will create the same evils.....	20
3. A requirement that an employee hold herself out as a minister cre- ates the same evils.	22
CONCLUSION	23
APPENDIX:	
Individual Statements of Interest.....	1a

TABLE OF AUTHORITIES

CASES	Page(s)
<i>American Legion v. American Humanist Ass’n</i> , 139 S. Ct. 2067 (2019).....	6
<i>Biel v. St. James School</i> , 911 F.3d 603 (9th Cir. 2018).....	2, 12, 20, 21, 22
<i>Corporation of Presiding Bishop v. Amos</i> , 483 U.S. 327 (1987).....	7, 8
<i>Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC</i> , 565 U.S. 171 (2012).....	<i>passim</i>
<i>Larson v. Valente</i> , 456 U.S. 228 (1982).....	5-6
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971).....	15
<i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979).....	15, 20-21
<i>Presbyterian Church v. Hull Church</i> , 393 U.S. 440 (1969).....	7
<i>Serbian Eastern Orthodox Diocese v. Milivojevich</i> , 426 U.S. 696 (1976).....	7, 8
<i>Sterlinski v. Catholic Bishop of Chicago</i> , 934 F.3d 568 (7th Cir. 2019).....	19
CONSTITUTION	
U.S. Const. amend. I	<i>passim</i>

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page(s)
Isaac Backus, “An Appeal to the Public for Religious Liberty” (1773), reprinted in <i>Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-89</i> (William G. McLoughlin ed. 1968)	11
Thomas C. Berg et al., <i>Religious Freedom, Church-State Separation, and the Ministerial Exception</i> , 106 Nw. L. Rev. Colloq. 175 (2011).....	11
Sanford H. Cobb, <i>The Rise of Religious Liberty in America: A History</i> (1968).....	11
Friends General Conference, <i>FAQs about Quakers</i> , https://www.fgcquaker.org/discover/faqs-about-quakers (last visited Sept. 26, 2019).....	18
Thomas S. Kidd & Barry Hankins, <i>Baptists in America: A History</i> (2015)	12
Letter from James Madison to George Washington (Nov. 20, 1789), in 5 <i>The Writings of James Madison</i> (1901).....	12
Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), in 1 <i>Letters and Other Writings of James Madison: 1769–1793</i> (1884)	11
Michael W. McConnell, <i>The Origins and Historical Understanding of Free Exercise of Religion</i> , 103 Harv. L. Rev. 1409 (1990).....	9, 11, 12

TABLE OF AUTHORITIES—Continued

	Page(s)
William G. McLoughlin, <i>New England Dissent 1630-1833: The Baptists and the Separation of Church and State</i> (1971).....	9, 10
Jacob C. Meyer, <i>Church and State in Massachusetts</i> (1930).....	10, 17

INTEREST OF THE *AMICI CURIAE*¹

Amici curiae are religious educational and civil liberties organizations who agree that the principles underlying the First Amendment’s ministerial exception are best served by applying the exception to all who act as ministers on behalf of their religious organization. All *amici* agree that requiring additional court-approved indicia of ministerial status, such as titles, training, or credentials, unconstitutionally invites judicial second-guessing of a religious organization’s understanding of who may fulfill ministerial functions and discriminates against those faiths who eschew such offices or requirements.

The specific interests of *amici* are detailed in the Appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012), this Court unanimously held that both the Free Exercise and Establishment Clauses “preclud[e] application of [non-discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers.” The Court applied the ministerial exception to dismiss a suit brought by a fourth-grade teacher at a Lutheran elementary school. The exception, the Court said, protects the “important ... interest of religious groups in choosing who will

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), *amici* gave all parties’ counsel of record timely notice of their intent to file this brief. All parties gave written consent to its filing.

preach their beliefs, teach their faith, and carry out their mission.” *Id.* at 196.

The current case, involving a fifth-grade teacher at a Catholic parish school, asks the Court to determine whether civil courts can apply narrow judicial definitions of “minister” to frustrate religious groups’ interest in who will “teach their faith.” Plaintiff Agnes Morrissey-Berru “committed to incorporate Catholic values and teachings into her curriculum” and also “led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School’s Easter celebration every year.” Pet. App. 3a. “Most prominently, she taught daily religion classes [presenting Catholic doctrine] every year of her employment.” Pet. 7 (citing App. 81a, 90a, 93a).

Yet the Ninth Circuit, although it acknowledged these “significant religious responsibilities,” *id.* at 3a, found she was not a minister. Relying on its previous decision in *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), the court concluded that “an employee’s duties alone are not dispositive under *Hosanna-Tabor*’s framework.” App. 3a. Rather, the court focused on the fact that other considerations referenced by this Court in *Hosanna-Tabor*, 585 U.S. at 191-92, were, in its view, absent: Morrissey-Berru’s “formal title of ‘Teacher’ was secular,” not religious; she “did not have any religious credential, training, or ministerial background”; and she “did not hold herself out to the public as a religious leader or minister.” App. 2a-3a. Under the court’s logic, an employee’s religious function is never enough for the ministerial exception to apply: one of these other features must be present.

As stated in the petition for certiorari, the Ninth Circuit’s approach squarely conflicts with other courts

that have emphasized an employee's religious functions in determining "minister" status. Pet. 14-27. This Court should grant review to ensure a consistent nationwide standard for the rights and duties of religious organizations. *Id.* at 27-30. *Amici* focus on another reason to grant review: The Ninth Circuit's approach conflicts with basic principles underlying the Religion Clauses and with the original understanding of the evils the clauses were meant to prevent.

I. A broad, deferential definition of "minister" for purposes of the ministerial exception is necessary for several reasons. It ensures equality among religions with diverse understandings of leadership and avoids second-guessing a religious organization's understanding of who should teach the faith. It also adheres to the original meaning of the Religion Clauses: narrow definitions of "minister," especially in the form of education or credentialing requirements, were among the violations of religious freedom the Clauses were meant to prevent.

II. Under these principles, an employee's "important religious functions" should be enough to qualify him or her as a "minister" under the ministerial exception. This criterion is flexible enough to protect the diverse views of different religious groups on who should perform their key religious functions. Religious-school teachers frequently perform important religious functions, and *Morrissey-Berru* did here. By contrast, requiring in addition some form of ministerial "credential," "training," or "title"—as the Ninth Circuit did here—produces the very evils the ministerial exception and the Religion Clauses are meant to prevent. It discriminates against groups that do not rely on such credentials or title for those who teach the faith, and it invites courts to second-guess those groups' deci-

sions about who they designate to “convey[] the tenets of the faith to the next generation.” *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

ARGUMENT

In *Hosanna-Tabor* the Court unanimously held not only that the ministerial exception is a constitutional mandate, but that Cheryl Perich, a fourth-grade teacher, was a “minister.” This Court declined to “adopt a rigid formula” or definitive test for “when an employee qualifies as a minister.” 565 U.S. at 190. But its unanimity suggests that Perich’s position fell well within the exception’s bounds, leaving ample room for other employees who “preach th[e] beliefs, teach th[e] faith, and carry out th[e] mission,” *id.* at 196, to qualify as well. In fact, three Justices concurred specifically to note that the ministerial exception should be applied broadly, not just to teachers similar to formally commissioned teachers in a Lutheran school. *Id.* at 198 (Alito, J., concurring); *id.* at 197 (Thomas, J., concurring).

The Ninth Circuit, however, assumed that the facts in *Hosanna-Tabor* set or approached the bounds of the ministerial exception. The panel distinguished teachers like Morrisey-Berru from those like Perich, primarily because the former lacked a formal religious title or “credential[s], training, or ministerial background.” App. 2a-3a.

This approach is fundamentally misguided. An employee’s “important religious functions” should be the dominant factor and should suffice to qualify the employee as a minister. Other considerations like title, training, and credentials should be secondary and should not exclude an employee from the category of “minister” when that employee performs important

religious functions.² This approach is necessary to preserve equality among diverse faiths, preclude judicial second-guessing of ecclesiastical determinations, and adhere to the original understanding of the First Amendment.

I. A Broad, Deferential Definition of “Minister” under the Ministerial Exception Ensures Religious Equality, Avoids Judicial Entanglement, and Reflects the Original Meaning of the Religion Clauses.

A broad, deferential definition of “minister” is necessary to fulfill the purpose of the ministerial exception: protecting “the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.” *Hosanna-Tabor*, 565 U.S. at 196; see *id.* at 199 (Alito, J., concurring) (“religious groups must be free to choose the personnel who are essential to,” among other things, “the critical process of communicating the faith”). Such a definition serves not only this core freedom, but two other basic Religion Clause principles: equality among religions and the prohibition on civil courts deciding questions of religious doctrine.

A. A Broad, Flexible Definition of “Minister” Ensures Equality Among Diverse Faiths.

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S.

² Although carrying out important or significant religious functions should be the dominant consideration and should suffice to make one a minister, the other factors mentioned in *Hosanna-Tabor* are of course not irrelevant. They may be added to an employee’s religious function to bolster a finding of minister status, as happened in *Hosanna-Tabor* itself. See 565 U.S. at 191-92.

228, 244 (1982). In the context of the ministerial exception, this requires substantial deference to a religious organization's own understanding of who qualifies as a minister.

Three concurring Justices in *Hosanna-Tabor* called for a broad definition of "minister" for precisely this reason: a narrow definition favors certain institutional arrangements over others. Indeed, the term "minister" itself has strong Protestant associations. *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). A flexible definition is crucial in the United States, a melting pot of religions. "Because virtually every religion in the world is represented in the population of the United States," broad application of the ministerial exception is necessary to protect minority religions. *Id.*; see also *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring) ("[T]he First Amendment demands" "sensitivity to and respect for this Nation's pluralism[.]"") Specifically, "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring)

In his concurrence, Justice Thomas added that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 196. He reasoned that our nation

includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status.... Judicial attempts to fashion a civil definition of "minister" through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the "mainstream" or unpalatable to some.

Id. (citing *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987)).

The bedrock principle of equality among religions is so fundamental to the First Amendment that it hardly bears repeating. But the Ninth Circuit’s approach threatens to undermine this principle in the context of employment suits by ministers. As discussed further in part II *infra*, the court’s approach threatens to disadvantage religious groups with employees who perform important religious functions but who do not fit a court’s concept of ministerial “credentials.”

B. Anything Less than a Broad, Deferential Definition of “Minister” Invites Courts to Engage in Ecclesiastical Decision-Making as to Who Will Lead a Religious Organization.

Courts must accept the decisions of ecclesiastical tribunals regarding their own rules and regulations for internal discipline and government. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-25 (1976). Judicial second-guessing of these ecclesiastical decisions impermissibly usurps the church’s internal governance. *Id.* at 708; see also *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969) (“First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.”).

Under these principles, “it is impermissible for the government to contradict a church’s determination of who can act as its ministers.” *Hosanna-Tabor*, 565 U.S. at 185. In *Hosanna-Tabor*, the Court specifically relied on *Milivojevich*, which had forbidden courts to second-guess a church’s decision to discipline and

defrock one of its bishops. *Milivojevich* held that the decision to fire or discipline a minister was a “quintessentially religious” controversy. *Id.* at 720.

But the right to choose ministers “would be hollow ... if secular courts could second-guess the organization’s sincere determination that a given employee is a ‘minister’ under the organization’s theological tenets.” *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Accordingly, a broad, flexible definition of “minister” is necessary to avoid resolving essentially religious controversies. “[C]ivil courts are in no position to second-guess [a religious organization’s] assessment” that an employee’s “religious function ... made it essential that she abide by [the employer’s] doctrine” and decision-making. *Id.* at 206 (Alito, J., concurring).

A judicial definition that second-guesses an organization’s understanding of who is a minister also creates a chilling effect. A religious group’s “uncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause [it] to conform its beliefs and practices regarding ‘ministers’ to the prevailing secular understanding.” *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring); see also *Amos*, 483 U.S. at 335 (“[I]t is a significant burden on a religious organization to require it ... to predict which of its activities a secular court will consider religious.”)

**C. Narrow Definitions of “Minister,”
Especially Through Requirements of
Ministerial Education or Credentials,
Were a Chief Evil that Helped Spur
Adoption of the First Amendment.**

A broad definition of “minister” is also required by the original meaning and historical background of the Religion Clauses. In *Hosanna-Tabor*, the Court noted that religious establishments involved government appointment and control of ministers: it was “against this background that the First Amendment was adopted.” 565 U.S. at 182-83; see also *id.* at 184.

In particular, colonial laws setting educational and other credentials for ministers were among the perceived evils that helped spur the First Amendment’s adoption. As such, the public would have understood government “credentialing” of ministers as violations of “free exercise of religion” and as aspects of an “establishment of religion.”

The Constitution’s religious freedom guarantees arose in significant part from disputes between established colonial churches and Pietist dissenters, including “New Light” Congregationalists in Connecticut and Baptists in Massachusetts and Virginia. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1437-43 (1990) (describing the “[pietistic] evangelical impetus toward religious freedom”).

For example, from 1740 to 1754, the “New Light” Congregationalists separated from the “Old Light” establishment, dissatisfied with its “formality [and] spiritual dullness.” 1 William G. McLoughlin, *New England Dissent 1630-1833: The Baptists and the Separation of Church and State* 351 (1971). The New

Lights spoke “to men’s hearts or souls, to their spiritual emotions, not to their understanding or minds.” *Id.* Naturally, this attitude reflected who they chose to teach their faith. The New Lights opposed the formally trained “legal preacher,” preferring a “layman who had experienced conversion” personally. *Id.* They loathed the “implication that since only an exceptionally intelligent and well-educated man could fathom the doctrinal mysteries of religion, the laws of nature, and the philosophy of science, salvation was only for the elite, the intelligentsia.” *Id.* at 352. They believed that “the learned clergy had lost touch with the spiritual needs of the common man and no longer really served as ministers of God to them.” *Id.*

New England colonial legislatures, which reflected the views of the “Old Lights,” responded by taking steps to restrict or disfavor informally trained ministers. *Id.* at 363. In 1742, Connecticut passed a law prohibiting “itinerants” from preaching without approval of an established parish. That same year, it also passed legislation “preventing any church or parish from choosing a minister who lacked a college degree.” *Id.*

Likewise, Massachusetts passed a law in 1760 preventing legal recognition of parish ministers unless they had “academy or college training, or had obtained testimonials from the majority of the ministers already settled in the county.” Jacob C. Meyer, *Church and State in Massachusetts* 51 (1930). The law disqualified uncredentialed ministers, primarily Baptists, from receiving funds that were collected by each town’s authorities for support of worship. *Id.* Isaac Backus, a leader among the colony’s Baptists, cited the law as an example of how the “blend[ing]” of “civil and ecclesiastical affairs ... depriv[ed] many of God’s people of that liberty of conscience which he has given them.”

Isaac Backus, “An Appeal to the Public for Religious Liberty” (1773), reprinted in *Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-89*, at 303, 316-17 (William G. McLoughlin ed. 1968). Backus argued that by requiring “each parish to settle a minister” but then disqualifying teachers who lacked the government’s preferred training, the law violated the principle that God “gives gifts unto men in a sovereign way as seems good unto him.” *Id.* at 317-18 (italics removed). See also Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* 202 (1968).

Virginia likewise narrowly defined the “ministers” who enjoyed autonomy, by dictating where ministers were permitted to preach and jailing the (mostly itinerant, non-establishment) unlicensed ministers. Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. L. Rev. Colloq. 175, 188 (2011). James Madison said, impassionedly, that these restrictions reflected a “diabolical, hell-conceived principle of persecution.” Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), in 1 *Letters and Other Writings of James Madison: 1769–1793*, at 12 (1884).

Disputes like these spurred the adoption of the First Amendment. Members of these dissenting religions feared a federal government capable of resurrecting such legal restrictions on their faiths. Madison owed his 1789 election to Congress to disgruntled Baptists who supported his candidacy in part to address their grievances with the established church in Virginia. McConnell, *supra*, at 1476–77 (attributing Madison’s “narrow” victory to Baptist support given after he promised “a constitutional provision for religious liberty”). Likewise, some New England dissenters feared the prospect of a powerful federal government

and pushed for greater protection under the new Constitution. John Leland, a Baptist minister in both Massachusetts and Virginia, opined that the original Constitution provided no “Constitutional defence” against religious oppression of the type Baptists had already suffered. Thomas S. Kidd & Barry Hankins, *Baptists in America: A History* 73 (2015).

Madison then made good on his promise to dissenters, introducing what became the Bill of Rights and taking a leading role in securing Congress’s approval. He later reported that a Baptist leader assured him the Bill of Rights “had entirely satisfied the disaffected of his sect.” McConnell, *supra*, at 1487 (quoting Letter from James Madison to George Washington (Nov. 20, 1789), in 5 *The Writings of James Madison* 429 (1901)).

In short, narrow definitions of “minister”—especially laws setting educational and other credentials for ministers—were among the key evils to which the Religion Clauses were a response. Like the founding-era laws, the Ninth Circuit requires that a minister must have some sort of “credential, training, or ministerial background.” App. 2a-3a; *Biel*, 911 F.3d at 608. Such requirement imposes civil authorities’ assumption—usually a majoritarian assumption—that certain training or formalities are inherent in the concept of a minister.

The founding-era laws used narrow definitions of “minister” to deny congregations the choice of the preacher or teacher they wished to call (Connecticut), or to deny ministers access to public funds that remained available for those with training the government deemed adequate (Massachusetts). Today the Ninth Circuit uses a narrow definition to deny religious organizations the protection of the ministerial exception, exposing them to employee lawsuits that threaten the

organization's ability to choose who will teach the faith. The evil is the same in each case: subjecting religious organizations to a legal burden or disability regarding their chosen leaders based on those leaders' lack of "credentials."

II. An Employee's Religious Function Should Be the Key Consideration in Defining Who Is a "Minister," and Where Such Important Religious Function Exists, No Ministerial Credentials, Training, or Title Should Be Required.

In light of the above principles, the definition of "minister" should focus on religious function. Where such function is present, courts should not further require a title, "credential, training, or ministerial background." App. 2a-3a.

A. Religious Function Should Be the Key Consideration in a Ministerial Exception Analysis, Understood with Deference to an Organization's Self-Understanding.

The ministerial 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." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). Such employees effectuate, among other things, "the critical process of communicating the faith." *Id.* In other words, an employee's important religious functions should suffice to make him or her a "minister"; other features should not be required.

An emphasis on important religious functions serves the core values of denominational equality and judicial abstention from religious controversies. A functional criterion is denominationally neutral because it is

flexible enough to accommodate the diverse ways that different religious organizations pursue their faith and mission. As Justice Alito has observed, a definition tied to roles of teaching, leadership, or liturgy “focuses on the objective functions that are important for the autonomy of *any religious group, regardless of its beliefs.*” *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring) (emphasis added). Some groups do not utilize formal ministerial titles, training, or other “credentials”—as discussed *infra* pp. 16-21—but all groups must carry out basic religious functions and rely on key personnel, i.e., ministers, to do so.

B. Teachers in Religious Schools Often Serve Important Religious Functions, as This Case Exemplifies.

The important religious functions that are the key to “minister” status include “teach[ing] th[e] faith.” *Hosanna-Tabor*, 565 U.S. at 196; *id.* at 200 (Alito, J., concurring) (ministers include those “entrusted with teaching and conveying the tenets of the faith to the next generation”). Teachers in religious schools frequently play that role. In *Hosanna-Tabor*, this Court noted that Perich was charged with “lead[ing] others toward Christian maturity” through her teaching and that she led her students in prayers, brought them to the school worship services, and occasionally planned the liturgy for worship. *Id.* at 192. As such, she was “a source of religious instruction” and “performed an important role in transmitting the Lutheran faith to the next generation.” *Id.*

In this case, the Ninth Circuit acknowledged that Morrissey-Berru had “significant religious responsibilities as a teacher” (App. 3a)—duties strikingly similar to those of Perich:

She committed to incorporate Catholic values and teachings into her curriculum, as evidenced by several of the employment agreements she signed, led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School's Easter celebration every year.

Id. The court did not question the importance of Morissey-Berru's religious functions. It simply held them insufficient because she lacked other features the court considered necessary.

This Court has recognized the role that religious-school teachers play in the mission of religious schools, including Catholic schools. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979), the Court emphasized the "critical and unique role of the teacher in fulfilling the mission of a church-operated school." See also *id.* (noting "the importance of the teacher's function in a church school"). *Id.* Those findings remain relevant today. Similarly, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court held that the Catholic schools were "a powerful vehicle for transmitting the Catholic faith to the next generation," and "an integral part of the religious mission of the Catholic Church" (*id.* at 615-16)—and that teachers were a "prime factor for the success or failure" of the school's mission. *Id.* at 618 (quoting schools' handbook).³

³ *Amici* disagree with other aspects of *Lemon*, including its denial of neutral assistance to religious schools among other private schools. But its finding that teachers play an important religious role in Catholic schools was and is correct.

C. When an Employee Has Important Religious Functions, There Should Be No Further Requirement that the Employee Have a Ministerial Credential, Training, or Title.

The Ninth Circuit acknowledged Morrissey-Berru’s “significant religious responsibilities” but nevertheless held that she was not a minister because she lacked other features considered by this Court in *Hosanna-Tabor*, in particular “any religious credential, training, or ministerial background” (“[a]side from taking a single course on the history of the Catholic church”). App. 2a-3a. Under the Ninth Circuit’s analysis, one’s religious functions are not enough to make one a minister if they are not accompanied by a “ministerial” title, training, ordination, or similar credential, regardless of how pervasive or essential those functions are.

1. Requiring specific religious training, ordination, or credentials for a person to qualify as a minister would produce the same evils the Religion Clauses were meant to prevent.

First, requiring some sort of minister-related “credential [or] training” will exclude faiths that do not use specific training or credentials to identify or prepare their ministers. It will thus create the evils identified in part I, including inequality among faiths and excessive government entanglement with, and second-guessing of, ecclesiastical determinations.

a. Ministerial training requirements harken back to unconstitutional government “credentialing” of ministers.

The Ninth Circuit’s objection that a teacher lacks “credentials, training, or ministerial background” recalls—with striking similarity—the colonial New England laws that disqualified ministers who lacked a college degree or “academy or college training.” See *supra* pp. 9-13 (quoting, among others, Meyer, *supra*, at 51). Like those laws, the Ninth Circuit’s approach imposes the civil authority’s assumption that certain training or other credentials are inherent in the concept of a minister. And like those laws, the Ninth Circuit’s approach means that organizations whose ministers lack such credentials suffer a legal burden: in this case, loss of the ministerial exception, and consequently, exposure to the threat of employment-related litigation by their ministers.

Legally enshrined credentialism in the founding era favored the authorities’ conception of a “minister” and disadvantaged religions with conflicting views. The Ninth Circuit’s approach adopts a similar limit as its primary justification for denying religious groups the protection of the ministerial exception. The Religion Clauses were meant to prevent just such government credentialism.

b. Requiring ministerial training would discriminate against some religions.

Requiring ministerial education, training, or other credentials as a criterion for “minister” status would invite discrimination against minority faiths, religions

with non-hierarchical polities, and faiths that use schools to sustain their beliefs.

The concurrences in *Hosanna-Tabor* explain how formal requirements discriminate against religions with structures that do not fit the formalities. As Justices Alito and Kagan noted, “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.” 565 U.S. at 198. Such criteria would disadvantage faiths that do “not employ the term ‘minister,’” that “eschew the concept of formal ordination,” or that (like Quakers, for example) “consider the ministry to consist of all or a very large percentage of their members.” *Id.* at 202.⁴

The Ninth Circuit’s approach also discriminates against religious groups that rely heavily on educators and schools to “transmi[t] the[ir] faith to the next generation” (*Hosanna-Tabor*, 565 U.S. at 192). But requiring the type of training that a secular court deems suitable for “ministers” is likely to disqualify school teachers, even those with important religious functions—as it did in this case.

Finally, a training requirement could also discriminate against small and minority religious groups. Such groups may lack the resources to provide formal training programs or lack sufficient candidates who have undergone such training. Teachers under these faiths may fail to qualify as ministers under the Ninth Circuit’s analysis, even when performing the same religious function as teachers of other faiths with more resources for training.

⁴ Friends General Conference, *FAQs about Quakers*, <https://www.fgcquaker.org/discover/faqs-about-quakers>.

These groups may be pressured to change their practices in order to avoid civil liability: they may have to spend additional resources on clergy-like training, rely more on ordained persons to teach the faith, or shift their religious teaching away from K-12 school classrooms. They will be pressured to “conform [their] beliefs and practices regarding ‘ministers’ to the prevailing secular understanding.” *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

c. Requiring ministerial training would authorize judicial second-guessing of religious decisions.

Requiring ministerial training would also invite courts to resolve questions of religious doctrine (see *supra* pp. 7-8). It would allow courts to “second-guess” a religious organization’s assessment that an employee’s “religious function ... made it essential that she abide by [the employer’s] doctrine” and decision-making. *Id.* at 206 (Alito, J., concurring); see also *id.* at 197 (Thomas, J., concurring).

In entrusting important religious functions to employees such as teachers, an organization typically prescribes the training it believes necessary or appropriate for those functions. Yet the Ninth Circuit’s approach holds that the employee cannot be a “minister” unless he receives training that the court deems sufficient. Under this approach, courts will necessarily have to decide in future cases just what sort and extent of training is enough to make one a “minister.” A more entangling inquiry could hardly be imagined. Thus, as the Seventh Circuit recently observed, the Ninth Circuit’s approach improperly embraces “independent judicial resolution of ecclesiastical issues.” *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568, 570 (7th Cir. 2019) (Easterbrook, J.)

(criticizing *Biel* for “essentially disregarding what Biel’s employer ... thought about its own organization and operations” and largely ignoring “whether the employee served a religious function.”).

2. Reliance on an employee’s formal title for purposes of applying the ministerial exception will create the same evils.

Under the Ninth Circuit’s approach, an employee can also be excluded from “minister” status because the court deems that her job title is not sufficiently “minister”-like. In this case, the panel asserted that “Morrissey-Berru’s formal title of ‘Teacher’ was secular.” App. 2a. In *Biel*, the panel majority said that the “teacher” title did not “conve[y] a religious—as opposed to secular—meaning.” *Biel*, 911 F.3d at 608 (quotation omitted, brackets adjusted). This analysis violates the Religion Clauses—through discrimination and improper judicial involvement in religious questions—in two distinct ways.

First, a requirement that the employer use certain terminology in job titles directly leads to these violations. The term “minister” itself can produce discrimination among religions: “the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists.” *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). Focusing on an employee’s formal title is also bound to create improper judicial second-guessing of a religious group’s self-understanding, as this case shows. Contrary to the Ninth Circuit’s assertion, there is nothing inherently “secular” about the title “teacher” (nor “Grade 5 Teacher”). Rather, as this Court has recognized, teachers quite commonly play a “critical and unique role ... in fulfilling the mission of a church-operated school.” *Catholic Bishop*,

440 U.S. at 501. In order to qualify for the ministerial exception, religious schools in the Ninth Circuit would be forced to rechristen their employees with titles more to the court's taste as to what is "religious."

Second, the Ninth Circuit's approach compounds its credentialing error by indicating that an employee's title should reflect not primarily her functions but, as much or more, her training and education. Judge Fisher argued, in her dissent in *Biel*, that the formal title "Grade 5 Teacher" should be interpreted in the light of the employer's "expression of [the teacher's] role in the school," which was the religious role of "a *distinctively Catholic* Grade 5 Teacher." 911 F.3d at 616 (Fisher, J., dissenting) (emphasis added). But the majority objected that this analysis "focused on [Biel's] duties at the school—as opposed to her *education, qualifications, and employment arrangement.*" *Id.* at 608 (emphasis added); see *id.* (arguing that Biel's title was non-ministerial because it did not suggest "that she had special expertise in Church doctrine, values, or pedagogy"). And in this case, following *Biel*, the panel said the question was whether the "teacher" title reflected "ministerial substance *and training.*" App 2a (emphasis added).

In other words, in the Ninth Circuit's approach, the criterion of "job title" does not focus on the functional roles associated with the title; it becomes another way to impose the criterion of acceptable training or credentials. And that criterion, as already discussed, invites the evils of denominational inequality and judicial entanglement. See *supra* pp. 16-20.

3. A requirement that an employee hold herself out as a minister creates the same evils.

Similar problems arise from the criterion of whether the employer or employee “held [the employee] out as a minister.” App. 2a-3a. As with its consideration of title, the Ninth Circuit considered this criterion in relation to the employee’s training, not just to the more important question of his or her function. See *Biel*, 911 F.3d at 608 (concluding that the school did not “hold Biel out as a minister by suggesting to its community that she had special expertise in Church doctrine, values, or pedagogy”). In other words, the Ninth Circuit misapplied the “holding out” factor and thereby tied it to an improper requirement of specific training and credentials.

Moreover, to rely on the employee’s unilateral action of “holding out” invites the court to resolve ecclesiastical disputes in a civil court. In every ministerial-exception case where the definition of “minister” is at issue, the plaintiff claims a different understanding of the term from the organization’s understanding and invites the civil court to impose his or her claimed religious understanding on the organization. In other words, the plaintiff asks the court to engage in the second-guessing—the involvement in ecclesiastical questions—that this Court has said is improper.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

THOMAS C. BERG
RELIGIOUS LIBERTY
APPELLATE CLINIC
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403
(651) 962-4918
tcborg@stthomas.edu

REED N. SMITH
Counsel of Record
KIMBERLEE WOOD COLBY
CENTER FOR LAW AND
RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Rd., Ste 302
Springfield, VA 22151
(703) 894-1081
rsmith@clsnet.org

Counsel for Amici Curiae

September 30, 2019

APPENDIX

APPENDIX**Individual Statements of Interest**

The **Christian Legal Society** is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 law schools. Since 1975, its Center for Law and Religious Freedom has worked to protect religious freedom.

The **American Association of Christian Schools** (“AACCS”) serves Christian schools and their students through a network of thirty-eight state affiliate organizations and two international organizations. The AACCS represents more than 750 schools nationally.

The **Association of Christian Schools International** (“ACSI”) is a nonprofit association providing support services to 24,000 Christian schools that educate 5.5 million children in over 100 countries. ACSI serves 2500 Christian pre-schools, elementary, and secondary schools and 90 post-secondary institutions in the United States.

The **Lutheran Church—Missouri Synod** (“the Synod”) is an international Lutheran denomination with more than 6,000 member congregations and 2 million baptized members throughout the United States. In addition to numerous Synodwide related entities, it has two seminaries, nine universities, the largest Protestant parochial school system in America, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations throughout the country.

The **National Association of Evangelicals** (“NAE”) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denomina-

2a

tions, as well as numerous evangelical associations, missions, social service providers, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, their religious ministries, and separately organized evangelical associations.

The **Queens Federation of Churches** is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry.