Nos. 19-267 & 19-348

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL, *Petitioner,*

v.

AGNES MORRISSEY-BERRU, *Respondent.*

ST. JAMES SCHOOL, *Petitioner,*

v.

DARRYL BIEL, *Respondent.*

On Writs of Certiorari to the United States Courts of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* INDEPENDENT WOMEN'S LAW CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Independent Women's Law Center is a project of the Independent Women's Forum, a nonprofit, nonpartisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues.[1] Independent Women's Law Center is committed to expanding educational opportunity, individual liberty, and access to the marketplace of ideas. Independent Women's Law Center respectfully submits this brief out of concern that an excessively narrow and formalistic interpretation of the ministerial exception will permit government to interfere with the ability of parents to raise their children with a religious education and will impair the ability of many women to work as religious educators, a position that is often attractive because of its contribution to a faith-based education and because of its flexibility.

Counsel for all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Because the First Amendment guarantees the "freedom of a religious organization to select its ministers," this Court unanimously recognized that the employment discrimination laws do not apply to "the relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran*

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no one other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Church & School v. *E.E.O.C.*, 565 U.S. 171, 188 (2012). This "ministerial exception * * * protects a religious group's right" under the Free Exercise Clause "to shape its own faith and mission through its appointments" and vindicates the Establishment Clause by preventing the entanglement of government and religion. *Id.* at 189, 190.

The scope of the ministerial exception should not be confined to the facts in *Hosanna-Tabor*. Rather, in recognizing the ministerial exception, this Court specifically declined to adopt "a rigid formula" to define the exception's scope. Instead, the Court enumerated four relevant "considerations": (1) "the formal title" conferred on the employee by the religious organization; (2) "the substance reflected in that title," including the "degree of religious training"; (3) the employee's "use of that title"; and (4) "the important religious functions * * * performed" by the employee. *Hosanna-Tabor*, 565 U.S. at 191-92.

Although the majority "express[ed] no view on whether" the performance of important religious functions could bring an employee within the "ministerial exception in the absence of the other considerations" *id.* at 193, the doctrinal basis for the exception indicates that the employee's "religious functions" are paramount in the analysis. Thus, Justice Alito's concurring opinion (joined by Justice Kagan) explained that, properly conceived, the ministerial exception should apply to any employee "who [is] entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* at 200.

This Court should confirm the primacy of religious function in determining the exception's scope. The Court has repeatedly recognized "the critical and unique role of the teacher in fulfilling the mission of a

church-operated school." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). That role reflects what teachers do and the mission they serve, rather than their academic qualifications or formal title. See *ibid.* The ministerial exception protects the ability of religious organizations to choose who will instruct others in the teachings of a faith. Contrary to the decisions below, a leadership role in a religious community is not necessary for the exception to apply. *Hosanna-Tabor* itself involved an elementary school teacher who taught kindergarten through most of her time at the school in question. *See* 565 U.S. at 178. Leadership is only one way that an employee may pass on a faith.

The other "considerations" discussed in *Hosanna-Tabor* should be treated as factors that may strengthen or rebut a showing of religious function in marginal cases. But subordinating the employee's religious function to characteristics that were discussed in *Hosanna-Tabor* largely by coincidence would vitiate the exception for the variety of denominations that structure and staff religious education differently from the Evangelical Lutheran institution at issue in that case. In particular, differences in title and formal credentials hinge on circumstances that may be specific to each denomination, if not each community. A rigid four-factor test—and especially a seemingly *per se* rule that an employee's religious function alone cannot suffice to qualify under the ministerial exception—is inconsistent with *Hosanna-Tabor* and with the doctrinal underpinnings of the exception itself.

The adoption of the very "rigid formula" this Court declined to impose in *Hosanna-Tabor* would have significant and harmful practical consequences. Federal and state courts would decide the level of training and

other credentials needed for a particular teacher of religion to qualify for the protection of the ministerial exception. A formulaic approach also entangles civil courts in religious disputes by forcing judges to decide for themselves whether a particular teacher's title and credentials pass muster under the ministerial exception. As a practical matter, secular courts would set employment standards for religious instructors. And by effectively confining the ministerial exception to the facts of *Hosanna-Tabor*, this formulaic approach would discriminate against religious groups whose teachers do not mirror the characteristics of the Lutheran teacher in that case.

That would have substantial adverse effects on women who either (1) seek to engage in employment as instructors in religious schools or (2) seek to ensure that their children receive education from the religious denomination and in the educational environment of their choice. Religious instruction would become less reliable and less available as the sclerotic effects of regulation limit the ability of religious institutions to hire instructors of their choice and to fire those who do not live up to institutional religious or performance standards. Fewer teachers would be available and they would have to be paid more, limiting the supply of religious instruction. And women who wished to serve their communities—and obtain or supplement an income—by becoming religious instructors would be burdened by the more onerous credentialing requirements that religious schools would have to adopt to qualify their instructors for the ministerial exception. That would present a tough dilemma for denominations that lack their own seminaries or other institutions of higher religious education.

The Court correctly described the ministerial exception as applying broadly to employees who "preach [the] beliefs, teach [the] faith, and carry out [the] mission" of the religious group that employs them. *Hosanna-Tabor*, 565 U.S. at 196. In deciding this case, the Court should make those religious functions the presumptive gauge of the exception's application.

ARGUMENT

A. The Religion Clauses Guarantee All Denominations The Right To Select Those Who Will Educate Adherents And Their Children In The Tenets Of Their Faith.

In various contexts, the Court has recognized the essential role that religious schools play in propagating the faith. The Court has observed that "[r]eligious authority necessarily pervades" a religious "school system," *Lemon* v. *Kurtzman*, 403 U.S. 602, 617 (1971), and that religious schools form "an integral part of the religious mission" of the sponsoring denomination. *Id.* at 616. Religious schools are "a powerful vehicle for transmitting * * * faith to the next generation," all the more so in light of the "impressionable age of the pupils, in primary schools particularly." *Ibid.*; see also *id.* at 629 (Douglas, J., concurring) ("the raison d'être of parochial schools is the propagation of a religious faith"). Indeed, this Court has recognized that even teachers of secular subjects play a "critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Catholic Bishop of Chicago*, 440 U.S. at 501. "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." *Ibid.*

In particular, this Court has observed that the First Amendment's Religion Clauses "protect[] a religious group's right to shape its own faith and mission through its appointments" and safeguard religious groups' autonomy "in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 188 (emphasis added). The Court reached this conclusion based on earlier decisions holding that civil courts should stay out of intradenominational disputes over church property when resolution would require determining which faction was the true representative of a church or faith. Even without reference to the First Amendment, the Court long ago held that "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine * * * is unquestioned." *Watson* v. *Jones*, 13 Wall. 679, 727, 728-29 (1872)). More recent decisions have recognized that civil courts lack capacity to determine the proper governance of religious institutions or which of two factions more closely conforms to religious doctrine. See, *e.g.*, *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952); *Serbian Eastern Orthodox Diocese for United States and Canada* v. *Milivojevich*, 426 U.S. 696, 708 (1976).

B. The Ministerial Exception Provides A Critical Buffer Between Government And Faith-Based Institutions.

The mass of government regulations that operate on the employment relationship present a significant impediment to the ability of faith-based institutions to choose their instructors and preserve institutional health and integrity. The employment relationship is heavily regulated: in addition to wage-and-hour and

safety regulations that apply to all employees, antidiscrimination laws relating to one or more personal characteristics cover a substantial majority of the workforce—if not all of it, given the vitality of so-called "reverse discrimination" lawsuits. Given this pervasive regulation, any adverse employment decision is at least theoretically subject to challenge as discrimination against one or more characteristics protected by federal or state law. And if the employee in question has accused anyone at his or her employer of some kind of discriminatory animus in the past, an adverse action is even more easily painted as retaliation for those protected complaints.

These multifarious employment regulations multiply the risk of litigation or government enforcement, especially in the context of religious education where the institution's criteria of quality and conduct are likely to be specific to each denomination, outwardly subjective when viewed by a nonbeliever, and far afield from the more objective criteria generally used in the secular employment context. In addition, religiously affiliated, nonprofit educational institutions generally operate on thin budgets to ensure the broadest possible access to the faithful. Relatively small increases in expense, either directly or to counteract increased litigation risk, can have profound impacts on an institution's ability to perform its mission.

C. The Ministerial Exception Rests Primarily On The Religious Function Of The Employee.

The doctrinal roots of the ministerial exception make clear that the exception can and should apply based on religious function alone. Other characteris-

tics may affect the application of the exception in marginal or questionable cases, but religious function is the only essential component.

The concurring opinion of Justices Alito and Kagan in *Hosanna-Tabor* correctly identified the core of the ministerial exception in light of its grounding in the Religion Clauses. Properly understood, the ministerial exception encompasses any employee who "serves as a messenger or teacher of [a denomination's] faith," 565 U.S. at 199, and "who [is] entrusted with teaching and conveying the tenets of the faith to the next generation," *id.* at 200. The unfettered ability to select instructional personnel is critical to this mission. "When it comes to the expression and inculcation of the faith, there can be no doubt that the messenger matters." *Id.* at 201. In short, the ministerial exception is not limited to employees in leadership roles or with objective credentials, but includes ordinary lay teachers who are employed to propagate the faith.

Ministerial title and qualifications can be of probative value in certain contexts. A teacher may fall outside the exception if she lacks the title and qualifications customarily conferred on religious instructors by her employer. But an employer who eschews those distinctions does not thereby lose the benefit of the ministerial exception for its instructional staff. The importance of teachers for the religious institutions that employ them rests in the work that they do and the mission they serve. While formal title and academic qualifications may often be required, they are of secondary significance to a teacher's ability to inculcate the values and teachings of a particular religion.

The decisions below refuse to apply the ministerial exception unless, in addition to religious function, at least one of the other three characteristics in *Hosanna-Tabor* is present. The express rationale for this elevation of formula over function is that, in order to qualify under the ministerial exception, the employee must "serve a leadership role in the faith," a role inferred when an employee meets at least one of the other characteristics enumerated in *Hosanna-Tabor*. St. J. Pet. App. 16a.

Yet this Court could not have stated more clearly that a leadership role is not necessary for the ministerial exception to apply. In explaining the exception, the Court noted that it applied not only to "those who serve in positions of leadership," but also to "those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and"—as most relevant here—"those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 200. Viewed in that light, the three characteristics beyond religious function discussed in that case are not universally applicable factors necessary to measure the degree of leadership in the abstract, but rather considerations that coincidentally arose in the Evangelical Lutheran context in *Hosanna-Tabor*. In that context, the employee's title was significant; in others, it may have little significance.

D. Adopting A "Rigid Formula" For The Ministerial Exception Would Have Severe Harmful Consequences.

1. *A Formulaic Approach Disfavors Religious Groups Whose Organization And Practices Differ From The Evangelical Lutheran Tradition.*

Treating the four considerations in *Hosanna-Tabor* as a factor-counting exercise inflates the significance of formalities, such as the teacher's job title and credentials—which vary widely among religious groups—while minimizing the significance of teachers' universal function in propagating the faith and advancing the mission of the religious employer.

As Justice Thomas warned, "Our country's religious landscape includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J. concurring). In some traditions, many adults are ordained but most rarely lead prayers. In others, few or none are formally ordained, yet many lead prayers or teach religious doctrine or practice. See generally *Hosanna-Tabor*, 565 U.S. at 202 & nn.3-4 (Alito, J., concurring). And approaches to religious education vary widely in the criteria used to qualify an instructor, such as formal training, observed experience, or demonstrated erudition.

For example, Catholic religious schools, which were originally founded and operated by religious orders, now rely predominantly on lay teachers, who are entrusted with "[t]he integral formation of the human person." The Sacred Congregation for Catholic Education, *Lay Catholics in Schools: Witnesses to*

Faith, #17, 1982 (*quoted in* No. 19-267, National Catholic Educational Ass'n Amicus Br. (Cert.) 1). This entails "reveal[ing] the Christian message not only by word but also by every gesture of their behaviour." The Sacred Congregation for Catholic Education, *The Catholic School,* #43, 1977 (*quoted in* No. 19-267, National Catholic Educational Ass'n Amicus Br. (Cert.) 3).

Jewish religious schools, similarly, do not rely on teachers who are ordained or commissioned like the one in *Hosanna-Tabor*. See, *e.g.*, *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 659 (7th Cir.), cert. denied, 139 S. Ct. 456 (2018) (concluding that an elementary school teacher at a Jewish Day School qualified under the ministerial exception due to the importance of her role as a "teacher of the faith," notwithstanding her "lay title" and absence of university-level formal training). See also No. 19-267, Stephen Wise Temple Amicus Br. (Cert.) 13 (noting that "most Jewish-school teachers" do not hold a ministerial title, yet they "are a synagogue's primary conduit for transmitting Jewish faith to the next generation").

And many faiths have no clear or consistent "concept of ordination" at all. See *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). These include a wide variety of religions and denominations within religions. The formulaic approach impermissibly favors religions that have a formal ordination process and ministerial structure over those that do not. That result violates "[t]he clearest command of the Establishment Clause": "that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, (1982).

2. *A Formulaic Approach Mires Civil Courts In Matters of Religious Doctrine And Practice.*

The ministerial exception "protect[s] a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs" and "guarantees religious bodies 'independence from secular control or manipulation.'" *Hosanna-Tabor*, 565 U.S. at 199-200 (Alito, J., concurring) (quoting *Kedroff*, 344 U.S. at 116). But a formulaic approach can give dispositive weight to a secular judge's assessment of whether a religious instructor's title has sufficient *gravitas* or her training was sufficiently rigorous. As noted above, the term "minister" appears almost entirely within Protestant denominations, while the concept of formal ordination carrying specific titles varies widely in usage and significance within and outside the Judeo-Christian tradition.

This threat of interference has manifested in several decisions, including those below. In *St. James*, the Ninth Circuit reached its own conclusion about the significance of the teacher's various religious responsibilities. The court's reduction of religion to a subject that is taught in class, rather than a way of life that is informed by religious doctrine, reflects a failure to appreciate the vital role that religious-school teachers play in modeling the faith, particularly to young children.

Equally stark is the decision of the California Court of Appeal in *Su* v. *Stephen Wise Temple*, a wage-and-hour action brought by the California Labor Commissioner on behalf of teachers at the Temple's preschool. 32 Cal. App. 5th 1159, review denied, cert. dismissed, 140 S. Ct. 341 (2019). The court refused to apply the ministerial exception even though the teachers

"are responsible for implementing the school's Judaic curriculum by teaching Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services," and accordingly "have a role in transmitting Jewish religion and practice to the next generation." *Id.* at 1168. Unless the teachers shared at least one additional characteristic with the teacher in *Hosanna-Tabor*—unless they held some sort of formal title or leadership position—the court would not apply the exception.

In viewing *Hosanna-Tabor* to require an analysis of the "degree of religious training," the *Stephen Wise Temple* court impermissibly second-guessed the qualifications the synagogue required of its preschool teachers. 565 U.S. at 191. The state court faulted the preschool for failing to require formal religious training analogous to the eight university-level courses required by the school in *Hosanna-Tabor*. See 32 Cal. App. 5th at 1168. That the teachers of toddlers were "not require[d] to have any formal Jewish education or training" did not diminish their ministerial role toward their young charges.

Cases in the same vein also presume to decide whether an employee performs a ministerial function based on the amount of time spent in explicitly and exclusively religious activity. And they second guess the significance of the form of instruction used, which necessarily entails entangling the courts in matters of religious doctrine. For example, one of the decisions below commented that the teacher taught religion from a "standard religious curriculum," used a "workbook on the Catholic faith prescribed by the school administration," and did so "for about thirty minutes a day, four days a week." St. J. Pet. App. 5a; see *id.* at

13a. In contrast, this Court held that the application of the ministerial exception cannot "be resolved by a stopwatch * * * without regard to the nature of the religious functions performed." *Hosanna-Tabor*, 565 U.S. at 193-94.

At faith-based schools, "religion" is not a dry academic subject to be "taught" exclusively during "religion classes." Rather, it is way of life that is modeled throughout the day, with religion classes used to provide specific instruction in doctrine, scripture, practices, and traditions. As Justice Alito explained:

> A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. 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."

Hosanna-Tabor, 565 U.S. at 201 (Alito, J., concurring) (quoting *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006)).

The formulaic approach to the ministerial exception applied below would impermissibly restrict religious self-governance and literally constrain a denomination's ability to determine how it will perpetuate itself.

3. *A formulaic approach will harm teachers seeking to participate in religious education and parents seeking to secure a religious education for their children.*

As Justice Thomas warned, a formalistic approach to the ministerial exception "may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding" in order to reduce exposure to legal liability. *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). This danger is especially acute in the case of smaller religious groups that lack the resources to spend on litigation or to invest in seminaries.

For example, one natural response to the Ninth Circuit's rigid test might be for religious schools to add unnecessary certification or educational requirements in order to mimic those in *Hosanna-Tabor*. This would have predictable collateral consequences for both religious schools and their teachers. Current or prospective teachers would be faced with the additional burden of formal training—training that might be entirely unnecessary to the religious aspect of their positions. Both part-time and full-time instructor positions are especially attractive to women with child care responsibilities (especially if their children attend the school where they teach). But increased credentialing and training requirements would dissuade parents with busy family lives from entering or remaining in the field of religious-school instruction. And schools would likely face higher costs to pay for these more credentialed teachers, even though the additional training did not increase their qualifications for the job at hand.

The increased expense—either of government interference or the prophylactic measures necessary to

fend it off—inevitably would threaten the survival of many religious schools, including part-time schools, which often operate on the economic edge.

Increasing tuition likely would deprive some adherents of access to religious instruction for their children. But this Court has long recognized the important right of parents "to direct the upbringing and education of children under their control." *Pierce* v. *Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925); *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997) (holding that "the 'liberty' specially protected by the Due Process Clause includes the right[] … to direct the education and upbringing of one's children"); *Meyer* v. *Nebraska*, 262 U.S. 390, 399-401 (1923) (Due Process Clause includes the right of parents "to control the education" of their children). Indeed, in *Pierce*, this Court specifically upheld the right of parents to send children to religiously affiliated schools. 268 U.S. at 534-35. As this Court recognized, parents have a "high duty" to prepare their children "for additional obligations." *Id.* at 535. As part of this duty, parents may well choose to send their children to religious schools—counting on those schools to not only teach their children to read and write but also for its teachers to model and instruct their children in a faithful life.

CONCLUSION

The judgments should be reversed.

Respectfully submitted.

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