

Nos. 19-267 & 19-348

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IN THE  
*Supreme Court of the United States*

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OUR LADY OF GUADALUPE SCHOOL,  
*Petitioner,*

v.

AGNES MORRISSEY-BERRU,  
*Respondent.*

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ST. JAMES SCHOOL,  
*Petitioner,*

v.

DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE  
ESTATE OF KRISTEN BIEL,  
*Respondent.*

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

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**BRIEF OF *AMICUS CURIAE*  
NATIONAL CATHOLIC EDUCATIONAL  
ASSOCIATION IN SUPPORT OF PETITIONERS**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The National Catholic Educational Association (NCEA) is the oldest and largest professional organization of Catholic educators in the United States. Founded at the turn of the last century, NCEA represents 150,000 Catholic teachers who serve nearly two million students across the country. The organization supports the Church's teaching mission through professional development, faith formation, and advocacy. NCEA serves as a national voice for Catholic school communities.

Education is central to the ministry of the Roman Catholic Church, arising from the call of Jesus Christ to "make disciples of all nations, . . . teaching them to obey everything that I have commanded you." *Matthew* 28:19-20 (New Revised Standard Version Catholic Edition). Consequently, a rich and indispensable theological basis animates the Catholic school mission. And because Catholic schools depend on classroom teachers to carry out this mission, NCEA promotes the broad freedom of these schools in choosing who to entrust with the important religious functions that make it all possible. Absent that freedom, the very identity and survival of American Catholic schools—and the vital ministry they have provided for centuries—is in peril.

Dedicated to the teachings of the Catholic Church's Second Vatican Council, NCEA likewise

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<sup>1</sup> Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made a monetary contribution to this brief. The parties have provided written or blanket consent to the filing of this brief.

stands by the right of all faiths to religious liberty as a matter of human dignity. As Vatican II proclaimed, all religious groups have “the right not to be hindered, either by legal measures or by administrative action on the part of the government, in the selection, training, appointment, and transferral of their own ministers.” Pope Paul VI, *Dignitatis Humanae* ¶ 4 (1965). The Church cherishes for others the same organizational autonomy it seeks for itself.

NCEA therefore urges this Court to confirm the sufficiency of religious function in applying the ministerial exception. This approach recognizes the inextricable relationship between a religious entity and those charged with realizing its mission, in honor of the profound constitutional principles at stake.

### **SUMMARY OF ARGUMENT**

This case presents a constitutional question that will determine the religious autonomy of thousands of Catholic schools in the United States: Can a Catholic school teacher’s important religious functions—that is, teaching the Church’s faith and carrying out its mission—alone render her a “minister” of that faith?

In light of Church teaching, the answer to that central question is an unequivocal “yes.” After all, the Church’s educational initiatives go to the very heart of its mission—aiming, above all else, to impart the faith to the next generation. The Catholic approach to education is irreducibly theological: Catholic schools strive for the “complete formation of the human person” and view Jesus Christ as the ultimate objective of each student’s search for meaning. And the Church today entrusts this ministry to lay educators

like Respondents, whom parents nationwide depend upon for their children's faith formation.

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, this Court made clear that while a teacher's title, training, and use of title may indicate ministerial status, such formalities are not necessary for the exception to apply; rather, they are mere considerations in a flexible analysis. 565 U.S. 171, 190-92 (2012). As members of this Court stressed in concurrence, this holistic approach best comports with constitutional norms of religious autonomy and equality. *See generally id.* at 198-206 (Alito, J., joined by Kagan, J., concurring). *Hosanna-Tabor*, these members added, also left undisturbed a decades-long consensus among lower courts that treats religious function as the lodestar of the ministerial exception.

Contrary to this guidance, as well as the approach of courts across the country and a dissent by nine colleagues from denial of en banc review, the Ninth Circuit panel decisions applied a narrow and rigid interpretation of the ministerial exception. For though the two panels readily acknowledged the important religious responsibilities of Catholic school teachers, they declared such teachers cannot be ministers absent a religious title, training, or use of title like that of Cheryl Perich, the teacher in *Hosanna-Tabor*.

This "resemblance-to-Perich" test imposes a definition of minister that is foreign to the Catholic Church's own understanding of its theologically driven approach to education. *Biel v. St. James Sch.*, 926 F.3d 1238, 1243 (9th Cir. 2019) (Nelson, J., dissenting from denial of rehearing en banc). More broadly, it contradicts both the constitutional principles and mechanics of the ministerial exception. Imposing this

sort of orthodoxy test for ministerial status violates church autonomy by interfering with religious organizations' authority to employ ministers according to their criteria, not the state's. And, in the process, rejecting ministerial status for those with important religious functions will also result in secular courts becoming enmeshed in religious matters when judging the merits of the underlying employment dispute.

Although the present cases involve Catholic schools, their implications extend further. The narrow approach urged by the Ninth Circuit would also exclude minority-faith communities from the religious liberty afforded others. These communities would be penalized for approaches to ministry different from the Lutheran Church-Missouri Synod in *Hosanna-Tabor* or, worse yet, be coerced to conform. A function-centered application, instead, honors principles of church autonomy, denominational equality, and respect for religious diversity. It must prevail.

## ARGUMENT

### I. Catholic School Teachers Are Central to the Church's Ministry.

#### A. Catholic theology animates and guides the Church's school teaching.

The Roman Catholic Church founded schools in response to the call of Jesus Christ to "make disciples of all nations, . . . teaching them to obey everything that I have commanded you." *Matthew* 28:19-20 (New Revised Standard Version Catholic Edition); *Code of Canon Law* ¶ 794 § 1 (1983) ("The duty and right of educating belongs in a special way to the Church, to which has been divinely entrusted the mission . . .").

In fulfilling this sacred mission, the Church acts as both “Mother and Teacher,” tasked with announcing Christ’s message and helping all people live a Christian life. *Catechism of the Catholic Church* ¶¶ 2030-32 (2d ed. 2000); *see also Code of Canon Law, supra*, ¶¶ 794-96. Catholic educational initiatives—which date back to the second century—are therefore “born from the heart of the church.” Pope John Paul II, *Ex Corde Ecclesiae* ¶ 1 (1990). They derive from and serve Christ Himself as “Teacher and Lord.” *Id.*; *John* 13:13.

Driven by this divine call, the Church’s approach to education is distinctive and irreducibly theological. Catholic education strives for the “complete formation of the human person.” *Code of Canon Law, supra*, ¶ 795. The concept of “integral formation” aims to teach knowledge and professional skills, while also inculcating the doctrine, moral precepts, and social values of the Church. Sacred Congregation for Catholic Educ., *Lay Catholics in Schools: Witnesses to Faith* ¶ 17 (1982).

This all-encompassing approach arises from a central Catholic belief: God creates every person in His “image and likeness,” with inherent dignity and an eternal destiny. *Catechism of the Catholic Church, supra*, ¶ 1700; *see also Genesis* 1:26-27. As Pope Benedict XVI emphasized, “in order to educate, it is necessary to know the nature of the human person.” Pope Benedict XVI, *Caritas in Veritate* ¶ 61 (2009). Because their students are not only physical and intellectual, but also spiritual, moral, and social, Catholic teachers must attend to all these needs. In short, Catholic education prepares its pupils for what they must be and do “here below,” so as to “attain the

sublime end” for which God made them. Pope Pius XI, *Divini Illius Magistri* ¶ 7 (1929).

Just as the human person is multi-faceted, so is knowledge. The Catholic approach does not segregate faith and reason. Rather, the two engage in constant and dynamic dialogue as the “witness to the unity of all truth.” Pope John Paul II, *Ex Corde Ecclesiae*, *supra*, ¶ 17; *see also* Sacred Congregation for Catholic Educ., *The Religious Dimension of Education* ¶ 34 (1988) (“The Catholic school . . . is based on an educational philosophy in which faith, culture and life are brought into harmony.”). From the Catholic perspective, faith seeks understanding. And intellectual inquiry necessarily leads to ultimate questions, to which faith responds. The Church encourages students in this dialogue, in the hope of “the discovery of Truth itself”: namely, Jesus Christ. Sacred Congregation for Catholic Educ., *The Catholic School* ¶ 41 (1977); *see also* *John* 14:6 (“I am the way, and the truth, and the life.”).

Finally, in a Catholic school, teachers are the conduits of the faith. The Church views the Catholic school mission as depending “almost entirely” on teachers, who support Catholic parents by providing formal religious education to their children. Pope Paul VI, *Gravissimum Educationis* ¶ 8 (1965). In fact, many American bishops require Catholic parents to enroll their children in either Catholic school or a separate “Sunday school” program. *See, e.g.*, U.S. Conference of Catholic Bishops, *National Directory for Catechesis* 204 (2005); Pope Paul VI, *Gravissimum Educationis*, *supra*, ¶ 8 (noting parents’ “duty” to entrust their children “to Catholic schools wherever and whenever it is possible”). Catholic parents, and the Church more

broadly, rely on Catholic school teachers to impart the faith to the next generation. See Sacred Congregation for Catholic Educ., *supra*, *The Catholic School* ¶ 43.<sup>2</sup>

Properly understood, therefore, every aspect of Catholic education bears religious significance and teachers are at the head of the class, both literally and theologically. For the Church’s mission informs “the whole organization of the school, and its teachers, the syllabus, and textbooks.” Pope Pius XI, *Divini Illius Magistri*, *supra*, ¶ 80; see also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (“[W]e have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school.”). Or, as Pope John Paul II articulated in an address to NCEA, “Catholic education is above all a question of communicating Christ, of helping form Christ” in students’ lives. Pope John Paul II, Message to the National Catholic Educational Association (Apr. 16, 1979).

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<sup>2</sup> This emphasis on school-based faith education could be compared with the education a child might otherwise receive in church. Pope Francis, for example, has recently urged priests to keep homilies—the priest’s sermon during the Holy Mass—to ten minutes. John L. Allen, *Pope Gets Practical on Homilies*, *Crux* (Feb. 7, 2018), <https://bit.ly/31fx5xi>. A recent national study of homilies found they last only fourteen minutes on average. *The Digital Pulpit: A Nationwide Analysis of Online Sermons*, Pew Res. Ctr. (Dec. 16, 2019), <https://pewrsr.ch/2u52KoL>. Therefore, children who attend Catholic schools receive the bulk of their religious education there. See, e.g., Appellant’s Excerpts of Record at 36, *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018) (No. 17-55180) (noting Ms. Biel was required to devote 200 minutes per week to the subject of religion); Appellant’s Excerpts of Record at 67, *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, No. 17-56624, 2019 WL 1952853 (9th Cir. Apr. 30, 2019) (stating Ms. Morrissey-Berru taught religion classes on a daily basis).

**B. Catholic schools in the United States have advanced the Church's mission for over four centuries.**

Given the missionary nature of Catholic education, the long history of Catholic schools in the United States comes as no surprise. Formal Catholic education in North America dates back to the early seventeenth century, when Franciscan friars opened a school in Saint Augustine, Florida. Betty Ann McNeil, *Historical Perspectives on Elizabeth Seton and Education*, 9 J. Cath. Educ. 284, 285 (2006). Soon thereafter, Jesuits started teaching in New York and Montreal, where their pupils included Saint Kateri Tekakwitha. *Id.* Meanwhile, the Ursuline Sisters came from France to Louisiana to educate girls and young women across “all religious, social, and economic strata,” ensuring disadvantaged pupils could attend for free. Richard M. Jacobs, *U.S. Catholic Schools and the Religious Who Served in Them* (pt. 1), 1 J. Cath. Educ. 364, 370 (1998) [hereinafter Jacobs Pt. 1].

In the 1800s, Elizabeth Ann Seton—a widow and Catholic convert who would become the first American Saint—founded the Sisters of Charity of Saint Joseph's, a religious order dedicated to teaching. McNeil, *supra*, at 285-86. The Sisters opened schools nationwide “on the enduring values of respect and equality,” shunning contemporary prejudices and welcoming students from diverse backgrounds. *Id.* at 298-99. Among these schools was Saint Joseph's Academy, the country's first free all-girls school staffed by religious women. *Id.* Notably, the Sisters carried on the Catholic school mission by forming both “minds and hearts” and addressing the “intellectual,

spiritual, [and] moral” needs of their students. *Id.* at 300. Mother Seton was a “pioneer of Catholic education,” once described by the Archbishop of Baltimore as having “[done] more for the Church in America than all of us bishops together.” *Id.* at 287.

The Church’s commitment to primary education in the United States intensified in the mid-nineteenth century, when European immigration greatly increased America’s Catholic population. See Julie Byrne, *Roman Catholics and Immigration in Nineteenth-Century America*, Nat’l Human. Ctr. (Nov. 2000), <https://bit.ly/2RGXINV>. At the same time, the expansion of the American Catholic Church “corresponded to the rise of the fledgling public, or ‘common,’ school system.” Margaret F. Brinig & Nicole Stelle Garnett, *Lost Classroom, Lost Community* 11 (2014). Although Catholics initially welcomed these efforts, they soon saw a problem. *Id.* at 11-12.

Despite its growth, the Catholic population was still vastly outnumbered by the Protestant majority, which shaped the curriculum in public schools. See Byrne, *supra*; John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299-300 (2001). As a result, public school instruction was often in tension with Church teaching—for example, by using Bible translations that diverged on key points of theological significance. Jeffries & Ryan, *supra*, at 300-05.

After unsuccessful attempts at compromise, the U.S. Catholic Bishops urged “the establishment of parish free schools,” both to “educate the laity in the faith and to combat the prevalence of secularism in the country.” McNeil, *supra*, at 286-87; see also Brinig & Garnett, *supra*, at 13-15. In response, individual

parishes opened parochial schools with financial support from the working-class, immigrant Catholic population. Brinig & Garnett, *supra*, at 18-19. These schools were a necessary ministry, not a source of monetary gain; in fact, they still depend on donations. See NCEA, *United States Catholic Elementary and Secondary Schools 2019-2020: The Annual Statistical Report on Schools, Enrollment and Staffing* 18 (2020) [hereinafter *NCEA Report*] (finding that tuition and fees cover on average only sixty-five percent of an elementary school's operating expenses, with the difference largely made up by subsidies directly from the local church and/or fundraising). In sum, American Catholics sought greater independence as a faith community, especially in the education of their children. And what followed became the largest private school system in the world. See Brinig & Garnett, *supra*, at 17.

This background and history illustrate a core point: Catholic education is “an integral part of the religious mission of the Catholic Church.” *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). And for more than four centuries, the Church in this country has entrusted classroom educators with teaching and imparting its ancient yet ever-new faith consistent with that theological vision of education.

### **C. Lay educators lead the teaching ministry of Catholic schools.**

Although popular discussion of Catholic education tends to focus on religious orders, lay educators have long been central to the Church's teaching ministry. Even in the eighteenth century, some Catholic schools relied primarily on lay teachers. Jacobs Pt. 1, *supra*, at 367-68. Lay educators increased in the mid-1950s,

and their numbers grew even more after the Second Vatican Council in the 1960s. Richard M. Jacobs, *U.S. Catholic Schools and the Religious Who Served in Them* (pt. 3), 2 *J. Cath. Educ.* 159, 160-61 (1998) [hereinafter Jacobs Pt. 3]. Today, the laity—that is, members of the Church not vowed to religious orders or ordained to the clergy—lead the Catholic school mission, comprising over ninety-seven percent of full-time professional staff. See *NCEA Report, supra*, at 23.

Many factors drove this shift to lay teachers outnumbering professed sisters, brothers, and priests in Catholic schools. The Second Vatican Council, for example, preached the universal call to holiness and the vocation of the laity, encouraging greater lay participation in Church ministry. Pope Paul VI, *Lumen Gentium* ¶¶ 30-42 (1964). Vatican II also called for the renewal of religious life, such that members of religious orders who had started teaching only to fill a need returned to their original ministries. See Pope Paul VI, *Perfectae Caritatis* ¶¶ 2, 8 (1965); Jacobs Pt. 3, *supra*, at 161. The twentieth century further saw a decline in formal commitments to the priesthood or religious orders. Sacred Congregation for Catholic Educ., *Lay Catholics in Schools, supra*, ¶ 3.

Throughout this shift, however, the theological purpose of the Catholic school ministry has remained a constant—even if that ministry is commended to those without the trappings of a formal title, seminary training, or ordination. As the Vatican’s chief body on Catholic education notes, “[t]he most basic reason for this new [teaching] role for Catholic laity, a role which the Church regards as positive and enriching, is theological.” *Id.* ¶ 2. The Church has repeatedly stressed that the growth of lay teachers does not

change the theological nature of a Catholic teacher's responsibilities. *See, e.g., id.* ¶ 24 ("Lay teachers must be profoundly convinced that they share in the sanctifying, and therefore educational, mission of the Church.").

**D. St. James and Our Lady of Guadalupe illustrate the indispensable role of lay educators in the Catholic school mission.**

The Petitioner schools illustrate the Catholic Church's education ministry as wholly animated and directed by the faith. Our Lady of Guadalupe aims to provide "a quality Catholic education for [its] students" and "a spiritual learning environment, grounded in Catholic teachings, values, and traditions." Appellant's Excerpts of Record at 973, *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, No. 17-56624, 2019 WL 1952853 (9th Cir. Apr. 30, 2019) [hereinafter *Morrissey-Berru* ER]. St. James, too, strives to develop a "Catholic school faith community" consistent with "the doctrines, laws, and norms of the Catholic Church." Appellant's Excerpts of Record at 9-10, *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018) (No. 17-55180) [hereinafter *Biel* ER].

As the sole teachers for their students, Ms. Biel and Ms. Morrissey-Berru bore full responsibility for the Church's ministry to the fifth graders in their care. *See Biel*, 911 F.3d 603, 605 (9th Cir. 2018); *Morrissey-Berru* ER at 472, 736. Their duties included extensive religious education on Catholic doctrines like the Sacraments, transubstantiation, the Incarnation, and the Passion of Christ. *See Biel* ER at 36-37; *Morrissey-Berru* ER at 942. They also taught their students to recite professions of faith that summarize core

Catholic beliefs. *Biel* ER at 24, 549; *Morrissey-Berru* ER at 942.

On top of teaching the faith, Ms. Biel and Ms. Morrissey-Berru prayed with their students—often saying the Hail Mary, a Catholic prayer that makes profound theological claims about Mary as the “Mother of God.” See *Biel* ER at 223; *Morrissey-Berru* ER at 71. They also participated in the Holy Mass, which Catholics, unlike many Christian traditions, consider the “source and summit of the Christian life.” *Catechism of the Catholic Church, supra*, ¶ 1324 (quoting Pope Paul VI, *Lumen Gentium* ¶ 11 (1964)); see *Biel*, 911 F.3d at 605-06; *Morrissey-Berru* ER at 943. Moreover, the teachers agreed by contract to incorporate, model, and promote Catholic values in and out of the classroom. *Biel* ER at 2; *Morrissey-Berru* ER at 941.

Like Catholic schools across the country, Our Lady of Guadalupe and St. James were originally staffed by religious orders: The Carmelite Sisters and the Sisters of the Order of St. Joseph of Carondelet, respectively. See *Morrissey-Berru* ER at 608; *History of the School, St. James Catholic Sch.*, <https://bit.ly/31qW9kL> (last visited Feb. 4, 2020). But the lay teachers who succeeded these Sisters carry out the same educational ministry. Filling the shoes of those who came before, Ms. Biel and Ms. Morrissey-Berru were the only ones in their classrooms entrusted with conveying the Catholic faith to the next generation. If not them, who?

## II. A Function-Centered Test for Ministerial Status Honors Constitutional Principles Vital to American Catholic Education.

### A. Religious autonomy and equality demand an inclusive approach that does not premise ministerial status on formalistic factors.

As this Court recognized in *Hosanna-Tabor*, the First Amendment protects the right of churches to choose who will “preach their beliefs, teach their faith, and carry out their mission.” 565 U.S. at 196. This “ministerial exception” is rooted in core constitutional principles of religious autonomy, church-state separation, and equality. *See id.* at 185-89. In light of these several and overlapping constitutional norms, an inclusive application of the exception is necessary to protect the religious ministries entrusted to the ordained and laypeople alike—including in the Roman Catholic Church.

The ministerial exception “ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church’s alone.” *Id.* at 194-95 (internal quotation marks and citation omitted); *see also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (emphasizing churches’ “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”). Inhibiting a church’s freedom to decide who will teach and embody its faith threatens its very “lifeblood,” and imposes an intrusive, government-proscribed alternative. *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). Moreover, the

constitutional imperative of respecting all faiths likewise counsels against a rigid approach to the ministerial exception. *See Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring) (urging the availability of the ministerial exception to any faith “regardless of its beliefs”); *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

Given these concerns, any formulaic narrowing of the ministerial exception must be rejected, particularly where it implicates the criteria a religious group uses to decide who will “personify its beliefs” in teaching the faith. *Hosanna-Tabor*, 565 U.S. at 188; *see also id.* at 202 (Alito, J., concurring) (“The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith.”). For although some faiths might insist on the type of training, title, and use of title valued by the Lutheran Church-Missouri Synod in *Hosanna-Tabor*, others might want to echo the Catholic Church’s theologically driven embrace of lay educators. *See Biel*, 926 F.3d at 1247 (Nelson, J., dissenting from denial of rehearing en banc) (rejecting a rigid test because “title, training, and how an employee holds herself out differ widely depending on [the] tradition”). Indeed, it is constitutionally improper for the government to prefer one group’s vision over the other. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (describing the rejection of a religious orthodoxy test as a “fixed star in our constitutional constellation”).

To be sure, in applying the ministerial exception in *Hosanna-Tabor*, the Court described four

“considerations” informing its conclusion that the exception at least covered Ms. Perich. 565 U.S. at 190-92. But the Court also made clear these considerations were not a “rigid formula,” relying instead on “all the circumstances of [Ms. Perich’s] employment.” *Id.* at 190. The word “considerations” itself is illustrative of this pivotal distinction—the Court could have said “factors,” “elements,” or “prongs,” but it did not. Rather, it emphasized that more formalistic concepts “cannot be considered in isolation.” *Id.* at 194.

Following this lead, lower courts have rightly stressed that *Hosanna-Tabor* “neither limits the inquiry to [its four] considerations nor requires their application in every case.” *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 205 (2d Cir. 2017); *see also Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658 (7th Cir. 2018) (“We read the Supreme Court’s decision to impose, in essence, a totality-of-the-circumstances test.”); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) (describing *Hosanna-Tabor* as supporting “an all-things-considered approach”). As these courts have indicated, this flexible approach appropriately honors religious institutions’ right to use their own criteria in selecting those who will teach and personify their faith.

**B. Given the stakes, the ministerial exception requires an approach where important religious function suffices.**

In rejecting a rigid formula in favor of a case-by-case analysis, the Court in *Hosanna-Tabor* allowed for the possibility raised here that religious function alone can suffice to show ministerial status. *See* 565 U.S. at 193 (“We express no view on whether someone with Perich’s duties would be covered by the ministerial

exception in the absence of the other considerations we have discussed.”). And for fear that the Court’s four “considerations” might be misinterpreted to exclude faiths dissimilar to the Lutheran Church-Missouri Synod—including Catholicism—members of the Court went on to clarify that, at a minimum, the “functional consensus” among lower courts was undisturbed and should continue. *Id.* at 203-04 (Alito, J., concurring) (cautioning that *Hosanna-Tabor* “should not be read to upset” pre-existing consensus among federal circuit courts that the ministerial exception is function-centered); *see also id.* at 197 (Thomas, J., concurring) (rejecting the “multifactor analysis” altogether).

Accordingly, courts applying the ministerial exception after *Hosanna-Tabor* have maintained this understanding that religious function is central to the inquiry. For example, the Seventh Circuit held that a Hebrew teacher at a Jewish day school was a minister despite lacking two of *Hosanna-Tabor*’s four “considerations,” reasoning that “formalistic factors are greatly outweighed by . . . duties and functions.” *Grussgott*, 882 F.3d at 661; *see also Fratello*, 863 F.3d at 207 (explaining that the “substance of the employees’ responsibilities in their positions is far more important” than any formal title). Similarly, the Supreme Judicial Court of Massachusetts concluded a teacher at a synagogue-based school was a minister despite lacking three of the four “considerations” because she served the important religious function of “teach[ing] Jewish children about Jewish learning, language, history, traditions, and prayer.” *Temple Emanuel of Newton v. Mass. Comm’n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012). These decisions illustrate how an employee’s important religious functions can merit application of

the ministerial exception regardless of any other considerations.

Indeed, for numerous reasons—grounded in the constitutional principles underlying the ministerial exception and reflected in the particulars of Catholic education—the primary focus when applying the exception should be “on the function performed by persons who work for religious bodies.” *Id.* at 198 (Alito, J., concurring); *see also Biel*, 926 F.3d at 1251 (Nelson, J., dissenting from denial of rehearing en banc) (concluding “court[s] should look to the function performed by employees of religious bodies” because “[d]oing so would honor the foundational protections of the First Amendment”).

In particular, this approach responds to a core problem the ministerial exception is meant to cure: secular courts determining matters of religious faith and doctrine. In almost any employment dispute, an inescapable question for the court is whether the employee performed her job well. But answering this question when that job already includes important religious functions would require a court to unconstitutionally make “extensive inquiry . . . into religious law and polity.” *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976); *see also* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 51-57 (2011) (describing this “inquiry problem” underlying the ministerial exception). Thus, as this Court articulated in an analogous context, “[i]t is not only the conclusions that may be reached by the [adjudicator] which may impinge on rights guaranteed by the Religion Clauses,

but also the very process of inquiry leading to findings and conclusions.” *Catholic Bishop*, 440 U.S. at 502.

Thus, a function-centered approach is particularly crucial for Catholic lay educators who often lack formal titles and training yet still perform religious functions central to the Church’s mission of integral formation. *See Biel*, 926 F.3d at 1245 (Nelson, J., dissenting from denial of rehearing en banc) (arguing religious function is “particularly significant to religious groups” like the Catholic Church, “whose beliefs and practices may render the other three considerations less relevant, or not relevant at all”). Ms. Biel, for example, was tasked with “model[ing], teach[ing], and promot[ing] behavior in conformity to the teaching of the Roman Catholic Church,” and she was explicitly evaluated on her ability to do so. *See Biel*, 911 F.3d at 605-06. If called on to assess whether her termination was valid, the court would inevitably consider whether she performed these religious job responsibilities well. This, in turn, would require a secular judge and jury to decide what it means to “promote behavior in conformity [to Catholic teachings],” or even what those teachings are. *Biel* ER at 941; *see also Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., concurring). Allowing courts to make such determinations would sanction government intrusion into a domain reserved exclusively for religious institutions, corroding the church’s authority to interpret its own doctrine.

Accordingly, application of the ministerial exception must focus on whether an employee engages in important religious functions; otherwise, examining her job performance will impermissibly require a secular court to make religious determinations. To the

extent additional “considerations” like ecclesiastical title, formal training, or use of title matter, it is chiefly as evidence of function. Put another way, while these indicators might bolster a claim that an employee is a minister, they do not constitute a “legal floor” for the exception—either collectively or in isolation. *Biel*, 926 F.3d at 1244 (Nelson, J., dissenting from denial of rehearing en banc). Rather, “important religious functions” alone must suffice to show ministerial status so that courts do not subvert religious institutions’ understanding of their own faith and ministry. *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring).

**C. The Ninth Circuit ignored the important religious functions of lay Catholic teachers to the detriment of the Church and those it serves.**

In *Biel* and *Morrissey-Berru*, the Ninth Circuit concluded Catholic school teachers who taught and modeled the faith to their students could never be ministers without religious titles, training, or use of those titles. *See Biel*, 911 F.3d at 605; *Morrissey-Berru*, 2019 WL 1952853, at \*1. Rather, the court interpreted *Hosanna-Tabor* to require two (or even more) of its four “considerations”—disallowing the ministerial exception based on religious functions alone, no matter how important those functions are. *See Biel*, 911 F.3d at 609. Because, in the view of the panel majorities, both teachers had secular titles, lacked religious credentials and training akin to Ms. Perich, and did not hold themselves out to the public as religious leaders, they could not be ministers. *See id.*; *Morrissey-Berru*, 2019 WL 1952853, at \*1.

Strikingly, the Ninth Circuit acknowledged that Ms. Morrissey-Berru had “significant religious responsibilities”—as she herself had testified. *Morrissey-Berru*, 2019 WL 1952853, at \*1; see *Morrissey-Berru* ER at 941-44. Specifically, she “incorporate[d] Catholic values and teachings into her curriculum, . . . 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.” *Morrissey-Berru*, 2019 WL 1952853, at \*1. Ms. Biel, too, served important religious functions: teaching Catholic doctrine to her students for 200 minutes per week, incorporating religious themes into her lessons, and joining her students in daily prayer and monthly Masses. See *Biel* ER at 36, 163, 223, 227. Yet, the Ninth Circuit believed *Hosanna-Tabor*’s four “considerations” meant neither teacher was a minister despite being “entrusted with teaching and conveying the tenets of the faith to the next generation.” *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

This interpretation not only misreads *Hosanna-Tabor*, it also undermines the ministerial exception’s animating purposes. In essence, the Ninth Circuit applied a “resemblance-to-Perich” test, requiring practices in Catholic schools to mirror the Evangelical Lutheran school in *Hosanna-Tabor*. *Biel*, 926 F.3d at 1243 (Nelson, J., dissenting from denial of rehearing en banc). This raises both autonomy problems and equality concerns, where religious institutions whose practices are not encapsulated by this orthodox approach will feel pressure to change their beliefs in order to claim the ministerial exception on an equal basis with other faiths. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*,

483 U.S. 327, 336 (1987) (“[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious . . . . Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.”); *see also Biel*, 926 F.3d at 1245 (Nelson, J., dissenting from denial of rehearing en banc) (“[R]equiring a religious group to adopt a formal title or hold out its ministers in a specific way is the very encroachment into religious autonomy the Free Exercise Clause prohibits . . .”).

The Ninth Circuit’s focus on formal titles and ordination also trivializes how the distinct Catholic mission of integral formation permeates the role of lay teachers. If Ms. Biel and Ms. Morrissey-Berru had been “Sisters Biel and Morrissey-Berru,” they would no doubt have been considered ministers. And although the Church has emphasized that the growth of lay educators does not change the responsibilities of a Catholic school teacher, the court’s one-size-fits-all approach ignored this theological reality. In so doing, the court wrought what the ministerial exception is designed to prohibit: second-guessing a church’s understanding of its own faith and governing structure, “depriving the church of control over the selection of those who . . . personify its beliefs.” *Hosanna-Tabor*, 565 U.S. at 188; *see also Biel*, 926 F.3d at 1247 (Nelson, J., dissenting from denial of rehearing en banc) (cautioning that “ignoring [the customs of Catholic education] risks the very Establishment Clause violation the ministerial exception was intended to prevent”).

### III. A Formalistic Approach Also Hurts Minority Faiths.

If even the Catholic Church—with its well-established structure and teaching—cannot claim the ministerial exception for those who teach its faith, the outlook for minority faiths with lesser-known beliefs and practices is similarly grim, if not worse. Insisting on factual equivalency with *Hosanna-Tabor* will no doubt disproportionately harm faith communities whose structures differ even more from the Lutheran Church-Missouri Synod.

As the Second Vatican Council proclaimed, all religious communities have “the right not to be hindered” by the government “in the selection, training, appointment, and transferral of their own ministers.” Pope Paul VI, *Dignitatis Humanae, supra*, ¶ 4. The Catholic Church urges civic leaders to defend rights like these with “an effective constitutional guarantee”—particularly in pluralistic societies where people of “different cultures and religions are being brought together.” *Id.* ¶ 15. Fortunately, the First Amendment vigorously forbids differential treatment among religions in general. *Larson*, 456 U.S. at 244. But an overly narrow approach to the ministerial exception jeopardizes such equality and threatens the rich diversity of faith traditions in the United States.

Fixating on a formal religious title risks this harm because religious communities take diverse approaches to who receives a title and what a title, if given, means. The term “minister” is itself almost exclusively Protestant and is “rarely if ever used [to refer to leaders] by Catholics, Jews, Muslims, Hindus, or Buddhists.” *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

In fact, many communities of faith forgo formal titles altogether. Sunni Islam does not recognize a “class or profession of ordained clergy” and “every Muslim can perform the religious rites.” Theodore M. Ludwig, *Ordination*, in *Encyclopedia of Religion* 6858 (Lindsay Jones ed., 2d ed. 2005). Baptists, Quakers, and Jehovah’s Witnesses celebrate the “priesthood of all believers” and reject religious hierarchy. R. Stanton Norman, *The Baptist Way: Distinctives of a Baptist Church* 94-96 (2005); see also Ben Pink Dandelion, *The Quakers: A Very Short Introduction* 2 (2008); The Watchtower, *Who Are God’s Ministers Today?* 15-16 (2000) (ebook). Sikh communities, too, eschew clergy. See *Engaging Sikh Leaders*, USC Ctr. for Religion & Civic Culture (Apr. 13, 2016), <https://bit.ly/36IwqW0>. And in Buddhist temples and Dharma centers, lay people have assumed greater responsibility in recent years. Karma Lekshe Tsomo, *Buddhist Women and Religious Leadership*, in *Religious Leadership: A Reference Handbook* 302, 303-04 (Sharon Henderson Callahan ed., 2013). Each of these communities structures its spiritual leadership as it sees fit, according to deeply held theological commitments and individual traditions.

Similarly, a title’s “substance” varies greatly depending on the religious community. Courts have interpreted this *Hosanna-Tabor* consideration to encompass credentials, training, or special expertise in the faith. See, e.g., *Biel*, 911 F.3d at 608. But these formalities are disproportionately absent in less established, under-resourced, or historically marginalized communities. For instance, predominantly African-American churches in low-income areas have struggled at times to employ full-time ministers, much less individuals with the costly

academic credentials and well-established certifications present in *Hosanna-Tabor*. See Gunnar Myrdal, *The Black Church in America* 257, 259 (Hart M. Nelsen et al. eds., 1971) (explaining that limited resources make it difficult to justify expensive training, and the average preacher may not have much more religious education than his congregation).

As another example, Hinduism is still growing in the United States, despite being one of the oldest extant world religions. Amanda Lucia, *Hinduism in America*, in *Oxford Research Encyclopedia of Religion* 671, 673 (2017). Traditionally, Hindu leaders train in mathas (monasteries)—studying Sanskrit, learning to perform worship ceremonies, and memorizing liturgical texts. Deepak Sarma, *The Asian Religious Context: Focus on Hinduism*, in *Religious Leadership: A Reference Handbook*, *supra*, at 74, 76. But since mathas take significant resources to operate, North America contains very few, and those that do exist are all run by one particular denomination. *Id.* Thus, in many American Hindu communities, “novice ‘lay’ experts” take on leadership roles. *Id.* While these ministers may lack theological training at accredited institutions, they no less function as the leaders, communicators, and consolers of their faithful.

Finally, a religious community’s view on what constitutes “holding out” either oneself or an employee as a minister could diverge substantially from a secular court’s expectations. As just one example, certain Protestant denominations believe in absolute separation of church and state, such that their ministers have historically refrained from taking a tax exemption. James E. Wood, *Churches and Tax Exemption*, 11 *J. Church & St.* 197, 197-98 (1969). But

the Ninth Circuit contended it cut against ministerial status that Ms. Biel “claimed no benefits available only to ministers”—in contrast to Ms. Perich, who claimed a special housing allowance. *Biel*, 911 F.3d at 609. Ironically, under such a rigid approach, these denominations’ insistence on separation of church and state would actually invite the very governmental interference they fear.

Religious communities, as “a requirement of the social nature both of man and of religion itself,” rightfully claim the freedom to “govern themselves according to their own norms.” Pope Paul VI, *Dignitatis Humanae, supra*, ¶ 4. All such communities should therefore have the right to select their ministers, not just faith traditions that conform to a particular understanding of religion.

In particular, a formalistic test for the ministerial exception would deny minority faiths equal treatment and pressure them to change their practices and beliefs simply to exercise their constitutional rights. Courts should instead continue to take a function-centered approach that respects faith communities’ unique structural and theological decisions.

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**CONCLUSION**

The Ninth Circuit's approach to the ministerial exception would threaten the Catholic Church's educational mission, the constitutional principles underlying the exception, and the equal standing of minority faiths. For these reasons, NCEA urges this Court to reverse.

Respectfully submitted,

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February 10, 2020