Nos. 19-267 & 19-348

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL, PETITIONER

v.

AGNES MORRISSEY-BERRU

ST. JAMES SCHOOL, PETITIONER

v.

DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KRISTEN BIEL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF VIRGINIA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, ILLINOIS, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

States have a powerful interest in protecting their residents from "the harmful effects of discrimination." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 609 (1982). They likewise have a powerful interest in protecting the religious freedom that is guaranteed in state constitutions as well as the United States Constitution. And—regardless of how the federal government chooses to draw the line in its own statutes and policies—States have a strong interest in preserving the ability to strike their own balance between employers' claims to religious autonomy and employees' right to be free from invidious discrimination. Because the constitutional doctrine the Court is considering here will define the boundaries of that balance for States as well as the federal government, amici States have a substantial interest in this case.

SUMMARY OF ARGUMENT

1. Modern anti-discrimination laws have evolved to create important and robust protections for American workers. As in other areas, States led the way in seeking to dismantle discriminatory employment practices, efforts that were later joined by the federal government and have been continually expanded by both the federal government and the States themselves.

State and federal anti-discrimination laws have helped American workplaces cast off the segregation of the Jim Crow era and become more diverse than at any other time in our Nation's history. But those gains should not be taken for granted. Rather, maintaining

and continuing progress towards eradicating discrimination in the workplace requires sustained investment and consistent enforcement of the full panoply of anti-discrimination protections, both state and federal.

2. In its only previous decision addressing the ministerial exception, this Court recognized the "undoubtedly important" societal interest "in the enforcement of employment discrimination statutes." *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171, 196 (2012). Although the Court concluded that the First Amendment required those laws to yield in certain circumstances, the Court closely tailored the exception's scope to its intended ends: ensuring that religious organizations remain free to select their ministers without government intrusion. The Court specifically declined to adopt "a rigid formula for deciding *when* an employee qualifies as a minister," *id.* at 190 (emphasis added), instead highlighting four considerations that weighed in favor of finding that the exception applied to the plaintiff in the case before it. *Id.* at 191–92.

In concluding that respondents do not rank as "ministers" (and thus may continue to seek protection under generally applicable laws), the court of appeals faithfully applied the totality-of-the-circumstances approach set forth in *Hosanna-Tabor*. And—contrary to the claims of petitioners and the federal government—the Religion Clauses do not mandate a different result. By focusing solely on the duties a plaintiff performs without considering her role in the broader organization, a functions-only test is ill-suited to determining

whether an organization's treatment of a *particular* employee should be immune from legal scrutiny. In contrast, the flexible standard articulated in *Hosanna-Tabor* enables courts to determine whether the organization has imparted to an employee the status and responsibility befitting a minister.

The additional arguments raised by petitioners and the federal government are equally unpersuasive. The court below correctly found that three of the four considerations deemed significant in *Hosanna-Tabor* are entirely absent in these cases and that the presence of the fourth consideration (less significant here than in *Hosanna-Tabor*) does not warrant application of the ministerial exception. And the federal government's suggestion that the court of appeals impermissibly intruded on an ecclesiastical judgment by engaging in the same sort of analysis conducted in *Hosanna-Tabor* is without merit and serves only to reveal the flaws in the proposed functions-only test.

3. The stakes of these cases are high. Although often described as an "exception" to various federal civil rights statutes, the doctrine that petitioners would have this Court expand is ultimately a constitutional one. Unlike the typical case where this Court considers the reach of an employment discrimination statute (or its exceptions), Congress will be unable to respond if it determines that the Court has struck the wrong balance between autonomy for religious employers and protection for employees like respondents. And—just as important—a State that concludes that

this Court has reached the wrong result will be powerless to choose a different course for its own citizens.

The sweeping rule sought by petitioners and the federal government is also deeply unsound. It would erase the careful distinctions this Court drew in *Hosanna-Tabor* and undermine the progress made possible by years of rigorous enforcement of workplace anti-discrimination laws. In the immediate term, adoption of the functions-only test could deprive more than 100,000 lay Catholic school teachers of the protections other workers enjoy. In the longer term, its application could result in the non-enforcement of employment laws against religious institutions altogether, corroding anti-discrimination norms built over a generation.

The importance of the interests protected by the ministerial exception is undisputed (and indisputable). But the First Amendment does not require the transformation petitioners and the federal government advocate, and this Court should not mandate it.

ARGUMENT

I. Federal and state civil rights laws provide important protections for employees

Multiple interlocking statutory schemes at the federal and state levels protect employees from workplace discrimination. Today's protections were developed over several decades and have contributed to substantial gains in employment for women, members of racial and ethnic minority groups, older Americans, and people with disabilities. But these gains did not just happen, and maintaining and continuing them

requires substantial investment and consistent appreciation for the statutes' broad remedial purposes.

A. Laws prohibiting employment discrimination have developed into a robust legal regime

1. Legal protections against employment discrimination in the United States trace back to the early 1940s. When the country was preparing to enter World War II, American employment practices "revealed a most embarrassing contradiction" to the nation's role as a champion of democracy.[1] Among other glaring disparities, the median wage of African-American males was 41% that of white males.[2] Under pressure to avoid protests that might disrupt the war effort, President Roosevelt issued Executive Order No. 8802, which prohibited "discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin."[3]

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[1] James E. Jones, Jr., *The Development of Modern Equal Employment Opportunity and Affirmative Action Law: A Brief Chronological Overview*, 20 Howard L. J. 74, 75 (1977) (Jones).

[2] Jenny Bourne, *A Stone of Hope: The Civil Rights Act of 1964 and Its Impact on the Economic Status of Black Americans*, 74 La. L. Rev. 1195, 1200 (2014) (Bourne).

[3] Executive Order No. 8802, *Reaffirming Policy Of Full Participation In The Defense Program By All Persons, Regardless Of Race, Creed, Color, Or National Origin, And Directing Certain Action In Furtherance Of Said Policy* (June 25, 1941); Equal Employment Opportunity Comm'n, EEOC 35th Anniversary: Milestones, The Early Years, *available at* https://www.eeoc.gov/eeoc/history/35th/milestones/early.html.

2. As in other areas, States were early leaders in the fight against employment discrimination. The first legally enforceable prohibition on job discrimination ever proposed in a legislature was introduced in Michigan in 1943. See S.B. 226, 62d Leg., Reg. Sess. (Mich. 1943). In 1945, New York and New Jersey became the first States to pass employment discrimination laws.[4] By the end of 1949, eight States had enacted laws barring discrimination by employers, a number that had grown to two dozen by 1964. See Pauli Murray, *State's Laws on Race and Color* 9 (1950); Jones 77; Engstrom 1074.

3. Despite these early efforts, overt workplace discrimination remained prevalent in the early 1960s. Employers continued to use explicit racial job classifications and often refused to hire African-American workers altogether.[5] And even though most Americans experienced a decade of robust wage growth from the 1950s to 1960s, median income for African-American males in the south was no higher in 1963 than it had been ten years earlier.[6]

4. This persistent inequality, along with the events of 1963 and 1964, led to the adoption of landmark federal anti-discrimination legislation. Part of an

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[4] David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 Stan. L. Rev. 1071, 1073, 1079 & n.29 (2011) (Engstrom).

[5] Gavin Wright, *The Regional Economic Impact of the Civil Rights Act of 1964*, 95 B.U. L. Rev. 759, 764 (2015) (Wright).

[6] *Id.* at 769.

omnibus civil rights bill, Title VII was debated throughout the tumultuous summer and fall of 1963 and reported out of the House Judiciary Committee just two days before President Kennedy was assassinated.[7] The bill ultimately became law on July 2, 1964, seven months after President Johnson urged Congress "to eliminate from this Nation every trace of discrimination and oppression that is based upon race or color."[8]

Amendments in the intervening decades have expanded Title VII's reach and strengthened its enforcement mechanisms, while specifically acknowledging the separate enforcement authority States maintain. The statute makes it unlawful for employers with 15 or more employees to "discriminate" based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a); see 42 U.S.C. § 2000e(b) (defining "employer"). In addition to prohibiting first-order discrimination, Title VII makes it unlawful to retaliate against employees who complain about discrimination and authorizes the Equal Employment Opportunity Commission (EEOC) to enforce the statute through a variety of means. 42 U.S.C. §§ 2000e-3(a), 2000e-4. The statute also specifically preserves state and local authority to adopt stronger anti-discrimination protections. See

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[7] Equal Employment Opportunity Comm'n, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* 9–11, 2001 (1964).

[8] President Lyndon Johnson, "Address Before a Joint Session of the Congress" (Nov. 27, 1963); see U.S. Senate, The Civil Rights Act of 1964, *available at* https://www.senate.gov/artandhistory/history/civil_rights/civil_rights.htm.

42 U.S.C. § 2000e-7 (stating that "[n]othing in this [subchapter] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any . . . law of any State or political subdivision of a State").

Congress has enacted additional statutory protections for workers, including the two statutes directly at issue here. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employers with 20 employees or more from "fail[ing] or refus[ing] to hire or to discharge any individual . . . because of . . . age." 29 U.S.C. § 623(a); see 29 U.S.C. § 630(b) (defining "employer"). And the American With Disabilities Act of 1990 (ADA) bars employers with 15 employees or more from "discriminat[ing] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a); see 42 U.S.C. § 12111(5)(A) (defining "employer").

5. Critically, these laws unambiguously cover religious employers. Title VII and the ADA both permit "religious corporations [and] educational institutions" to give preference to co-religionists, 42 U.S.C. § 12113(d)(1); 42 U.S.C. § 2000e-1(a), and to "require that all applicants and employees conform to the religious tenets of such organization[s]," 42 U.S.C. § 12113(d)(2). See also 42 U.S.C. § 2000e-2(e). But neither statute authorizes religious institutions to discriminate against employees based on any other protected ground, even if such discrimination is consistent with (or mandated by) religious tenets. And the ADEA does not contain any carve-out for religious employers at all. See 29 U.S.C. § 621, et seq.

The history of these statutes shows that this limited accommodation to religious employers was intentional. In 1972, Congress considered amending Title VII to exempt "any religious corporation, association or society" from the statute's prohibitions on employment discrimination. 118 Cong. Rec. 1981. That amendment was rejected. *Id.* at 1995. And when it passed the ADA, Congress made clear its intent to apply the new law to religious employers in the same manner as Title VII. As the House report explains, under the ADA, a religious organization can "refuse to hire [a person with a disability]" "[i]f [that] person is not [a co-religionist]." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 76–77 (1990). But "if two [co-religionists] apply for a job, one with a disability and [one] without a disability, the organization cannot discriminate against the applicant with the disability because of that person's disability." *Id.* at 76.

6. States have adopted their own anti-discrimination provisions and work closely with federal agencies to enforce both federal and state laws.

Nearly every State has enacted statutes banning employment discrimination on the basis of race, color, sex, and age, and the vast majority have separately prohibited discrimination on the basis of disability.[9]

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[9] See National Conference of State Legislatures, *State Employment-Related Discrimination Statutes* (July 2015), *available at* https://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf.

Numerous States have also enacted anti-discrimination statutes protecting LGBT workers.[10] As the federal Department of Labor has noted, "some of these state laws"—including those related to protection against disability-based discrimination—are "more stringent than federal laws."[11]

State officials also play an important role in enforcing federal and state anti-discrimination statutes. "[T]o give States and localities an opportunity to combat discrimination free from premature federal intervention," *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 110–11 (1988), federal law grants States the option of having an exclusive 60-day period in which they investigate alleged violations. 42 U.S.C. § 2000e-5(c). Many States have entered into a worksharing agreement with EEOC, under which "a complainant ordinarily need not file separately with federal and state agencies" but instead "may file her charge with one agency, and that agency will then relay the charge to the other." *Fort Bend City* v. *Davis*, 139 S. Ct. 1843, 1846 (2019). Even in those circumstances, States typically retain the ability to conduct their own investigations and exercise initial jurisdiction in cases where they have expressed an interest. See *Commercial Office Prods.*, 486 U.S. at 112, 118. And current EEOC regulations specifically reflect an intent to "encourage the maximum degree of effectiveness in the State and

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[10] See Illinois Amicus Br. at 14–15 & nn.43–44, *Bostock* v. *Clayton County*, No. 17-1618 (U.S. July 3, 2019) (citing examples).

[11] United States Department of Labor, *Laws & Regulations*, *available at* https://www.dol.gov/general/topic/disability/laws.

local agencies." 29 C.F.R. § 1601.13(a)(3)(i); see also *id.* (EEOC pledging to "provide such assistance to State and local agencies as is permitted by law and as is practicable").

B. State and federal anti-discrimination efforts have made significant progress in protecting employees and advancing equality

1. Almost immediately "after passage of the Civil Rights Act [of 1964]," "[t]he economic status of African Americans began to improve at an accelerated pace especially in the South." Wright 766. Real wages among employed black male heads of households "increased sharply" during the 1960s, both in absolute terms and relative to the wages of white men living in the same area. Bourne 1195–96. The percentage of African-American male managers also increased, going from 2.1% in 1964 to 3.5% in 1972. Bourne 1213. Empirical research suggests that these gains were connected to Title VII.[12]

The benefits of civil rights laws have continued to compound over time. From 1966 to 2013, employment participation rates increased for African Americans, Hispanics, Asian Americans, and white women—trends that have continued at pace in recent years.[13] In

[12] According to this research, "black employment gains were greater at large employers covered by Title VII relative to others," and "these gains were extended to newly covered employers when the Act was amended in 1972." Wright 766.

[13] See Equal Employment Opportunity Comm'n, *American Experiences Versus American Expectations* (July 2015); see also

2019, 19.8% of adults ages 65 and older were employed, continuing a steady increase over the past several decades.[14] During the first few years after the ADA was enacted, employment rates grew for individuals who reported limitations on functional or daily activities as well.[15]

2. Today's workforce is as diverse as it has ever been, due in large part to the statutory protections codified in federal and state law. But maintaining these gains requires sustained investment and consistent enforcement of workplace protections.

Each year, the EEOC investigates more than 70,000 complaints of discrimination.[16] In 2019 alone, administrative resolutions resulted in monetary recoveries of $116.1 million for the ADA, $75.7 million for

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Jeanna Smialek, *Minority Women Are Winning the Jobs Race in a Record Economic Expansion*, N.Y. Times (July 1, 2019).

[14] See Drew DeSilver, 10 Facts About American Workers, Pew Research Center (Aug. 29, 2019); see also Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, Monthly Labor Review at 15, 23 (May 2002); Committee for Economic Development of The Conference Board, *Growing the American Workforce* (Oct. 30, 2019), *available at* https://www.pewresearch.org/fact-tank/2019/08/29/facts-about-american-workers/.

[15] Douglas Kruse and Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 (1) Industrial Relations 31, 61 (2003).

[16] Equal Employment Opportunity Comm'n, Charge Statistics, FY 1997 Through FY 2019, *available at* https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

the ADEA, and $244.7 million for Title VII.[17] Where a matter cannot be resolved administratively, EEOC may utilize its authority to sue an employer in federal court. Since 2010, the EEOC has filed almost 2,000 suits to enforce federal anti-discrimination laws.[18]

The States also invest resources in enforcing anti-discrimination laws. For example, in 2018, the Division of Human Rights and Fair Housing in the Office of the Virginia Attorney General received 258 discrimination complaints and completed 56 investigations of alleged discrimination.[19] In 2019, New Jersey's Division on Civil Rights received 521 complaints of discrimination or bias-based harassment and completed and closed 598 investigations.

3. This Court has also played an important role in ensuring that workplace anti-discrimination laws have the broad remedial effects their drafters intended.

In *Gomez-Perez* v. *Potter*, 553 U.S. 474 (2007), for example, the Court held that the federal-sector provision of the ADEA prohibits retaliation for filing an age-discrimination complaint, notwithstanding the

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[17] See Equal Employment Opportunity Comm'n, Enforcement and Litigation Statistics, *available at* https://www.eeoc.gov/eeoc/statistics/enforcement/.

[18] Equal Employment Opportunity Comm'n, EEOC Litigation Statistics, FY 1997 Through FY 2019, *available at* https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

[19] Commonwealth of Virginia Office of the Att'y Gen., *Annual Report of the Attorney General to the Governor of Virginia: 2018* 36 (May 1, 2019).

absence of an express reference to retaliation in the statutory provision. In *West* v. *Gibson*, 527 U.S. 212 (1999), the Court recognized EEOC's authority to award compensatory damages against federal agencies in Title VII claims, even though the statutory section in question did not "explicitly refer" to that form of relief. *Id.* at 217. And in *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), this Court unanimously construed Title VII's anti-retaliation provision as protecting *former* employees, concluding that reading was most consistent with "a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms." *Id.* at 346.[20]

In addition to these decisions, which have enabled plaintiffs to vindicate their rights to the full extent the law allows, this Court has recognized the critical role States play in enforcing anti-discrimination provisions. In *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), for example, the Court rejected a religious school's effort to enjoin an administrative action brought by the Ohio Civil

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[20] See also *McKennon* v. *Nashville Banner Pub. Co*., 513 U.S. 352, 358 (1995) (employee not precluded from recovering under ADEA where misconduct is discovered after discriminatory discharge where barring relief would undercut ADEA objectives of "eliminat[ing] discrimination in the workplace"); *General Tel. Co. of the Nw.* v. *Equal Employment Opportunity Comm'n*, 446 U.S. 318, 333–34 (1980) (interpreting Title VII provision to allow EEOC to seek classwide relief without complying with Rule 23); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 761 (1979) (interpreting ADEA provision "consistent with the [statute's] remedial purposes" not to require a claimant to commence state remedies within time limits specified by state law).

Rights Commission alleging that the school had engaged in gender-based discrimination and retaliation when it terminated a pregnant teacher. Recognizing Ohio's significant interest in "the elimination of prohibited sex discrimination" and the "comity and federalism" concerns implicated by the case, the Court determined that the administrative action should proceed over the school's objection. *Id.* at 628. "Even religious schools," the Court reasoned, "cannot claim to be wholly free from some state regulation." *Id*.

II. Application of the ADA and ADEA's anti-discrimination provisions to these cases does not violate the First Amendment

These cases involve a constitutionally based defense, not a statutory one. See *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171, 176 (2012) (framing question as "whether the Establishment and Free Exercise Clauses . . . bar [a particular] action"). But that fact warrants more caution—not less—in deciding how broadly the ministerial exception should sweep. When it comes to matters of statutory interpretation, Congress may always enact a new law if it disagrees with this Court's interpretation of the old one. In contrast, when this Court announces a constitutional rule, "only this Court or a constitutional amendment can alter" it. *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2177 (2019).[21]

[21] Congress has not hesitated to abrogate this Court's statutory decisions in the employment discrimination context. In 1991, Congress amended Title VII and 42 U.S.C. § 1981 in "response to a series of decisions of this Court." *Landgraf* v. *USI Film Prods.*,

Such considerations are especially prevalent here. Despite being rendered in cases about two specific federal statutes (the ADA and the ADEA), the Court's decision will *also* establish binding restrictions on proceedings conducted under state anti-discrimination laws. For that reason, and because the ministerial exception serves to completely deny employees their day in court, an overly broad interpretation threatens to severely undermine workplace protections at both the federal and state level.

A. *Hosanna-Tabor* recognized a limited exception to workplace anti-discrimination laws grounded in the First Amendment

This Court's decision in *Hosanna-Tabor* is fully consistent with the principle that constitutionally based exceptions to employment discrimination statutes should be carefully tailored. They must be expansive enough to accommodate the fundamental interest at stake (here the First Amendment's requirement that religious organizations remain free to select their own ministers) but narrow enough to ensure that workplace anti-discrimination laws have their intended remedial effect.

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511 U.S. 244, 250 (1994). And in 2009, Congress abrogated this Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), amending Title VII to make clear that the 180-day statute of limitations for filing an equal-pay lawsuit begins anew with each paycheck infected with discrimination. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, Jan. 29, 2009, 123 Stat. 5.

1. In *Hosanna-Tabor*, the Court emphasized that society's interest "in the enforcement of employment discrimination statutes is undoubtedly important." 565 U.S. at 196. "But so too," the Court observed, "is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* And "[w]hen a minister who has been fired sues her church alleging that her termination was discriminatory," the Court explained, "the First Amendment has struck the balance for us." *Id.*

2. The Court's framing of the issues refutes any suggestion that it was contemplating a rule that would wholly exempt religious organizations from the reach of civil rights laws, contra Congress's intent.

To be sure, the Court made clear that the "ministerial exception is not limited to the head of a religious congregation." 565 U.S. at 190. But the Court's entire discussion was built on the premise that the ministerial exception applies only to *some* employees and that the goal of the analysis prescribed is to identify which employees those are. The Court described the question for decision as what the First Amendment requires "[1] when the employer is a religious group *and* [2] the employee is one of the group's ministers." *Id.* at 176–77 (emphasis added). And, throughout its opinion, the Court used a variety of terms that illustrate what it meant by "ministers," including those in whom "[t]he members of a religious group put their faith," those who "personify [the organization's] beliefs," and those who "guide it on its way." *Id.* at 188, 196. Because of their unique role, the Court explained, "[r]equiring a

church to accept or retain" this particular category of employees "intrudes upon more than a mere employment decision": it also "interferes with the internal governance of the church." *Id.* at 188.

3. The fact that the ministerial exception shields religious employers from suits by only a carefully drawn sub-category of employees is confirmed by the Court's discussion of why the exception covered plaintiff Cheryl Perich.

First, the Court emphasized that "Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members." 565 U.S. at 191. She accepted the role of "called teacher"—a change from her previous title, "lay teacher." *Id.* at 177. When the organization "extended [Perich] a call," it also issued her a "diploma of vocation, according her the title 'Minister of Religion, Commissioned.' " *Id*. at 191. And "[i]n a supplement to the diploma, the congregation undertook to periodically review Perich's 'skills of ministry' and 'ministerial responsibilities,' and to provide for her 'continuing education as a professional person in the ministry of the Gospel.' " *Id.*

Second, the Court observed that Perich's title "reflected a significant degree of religious training followed by a formal process of commissioning." 565 U.S. at 191. "To be eligible to become a commissioned minister," the Court noted, "Perich had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher." *Id.* "She also had to obtain the endorsement of her local Synod district" and "pass an oral

examination by a faculty committee" at a religious college. *Id.* Altogether, that process took six years. *Id*.

Third, the Court noted that Perich "held herself out as a minister of the Church by accepting the formal call to religious service . . . [and] in other ways as well," such as by claiming a tax exemption available only to employees earning compensation "in the exercise of the ministry." 565 U.S. at 191.

Fourth, the Court recognized that Perich's "job duties reflected a role in conveying the Church's message and carrying out its mission." 565 U.S. at 192. Perich was "expressly charged" with "lead[ing] others" in their faith and did so in numerous ways. *Id.* She "taught her students religion four days a week, and led them in prayer three times a day." *Id.* About twice a year, Perich led the school-wide chapel service by "choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible." *Id.* In one year of her tenure, Perich also "led" her students "in a brief devotional exercise each morning." *Id.*

Much of this careful analysis would have been superfluous if petitioners and the federal government were correct that all that really matters is an employer's assertion that the functions the employee performs are religious in nature. But the Court was clear that it based its conclusion that Perich fell within the ministerial exception on "*all* the circumstances of her employment." 565 U.S. at 190 (emphasis added). Indeed, the Court took pains to explain that, although the title of commissioned minister did "not automatically ensure coverage, the fact that an employee has

been ordained or commissioned . . . is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's position." *Id.* at 193. Conversely, the Court declined to indicate whether someone with the same duties as Perich "would be covered by the ministerial exception in the absence of the other considerations . . . discussed." *Id.*

B. The court of appeals correctly applied *Hosanna-Tabor* in respondents' cases

The decisions below are consistent with both the letter and spirit of *Hosanna-Tabor*.

1. In both decisions under review, the court of appeals correctly concluded that three of the four considerations highlighted in *Hosanna-Tabor* are not present here and the fourth is insufficient to bring respondents within the bounds of the ministerial exception.

- Unlike Perich, neither Biel nor Morrisey-Berru was held out as a minister by her respective employer. To the contrary, both bore the secular title "teacher." 19-267 Pet. App. 32a–42a; 19-348 Pet. App. 96a–105a.
- Unlike Perich, neither Biel's nor Morrisey-Berru's secular titles reflected a formal commission or substantial religious training. As the court of appeals pointed out, Biel's "training consisted of only a half-day conference whose religious substance was limited," 19-348 Pet. App. 11a, and Morrisey-Berru's post-appointment religious education consisted of

only one course in the history of the Catholic Church, 19-267 Pet. App. 2a–3a, 85a.

- Unlike Perich, neither respondent held herself out as a minister "by suggesting . . . that she had special expertise in Church doctrine, values, or pedagogy beyond that of any practicing Catholic." 19-348 Pet. App. 11a.

That leaves only the final *Hosanna-Tabor* consideration—the functions performed by the employee. As the court of appeals explained, "an employee's duties alone" cannot be "dispositive under *Hosanna-Tabor's* framework," 19-267 Pet. App. 3a, because otherwise "most of [this Court's] analysis . . . would be irrelevant dicta," 19-348 Pet. App. 12a.

In any event, the court of appeals also properly recognized that there were material differences between the functions performed by Perich and respondents. Unlike Perich, Biel's and Morrisey-Berru's responsibility for conveying religious doctrine was limited to basic lessons derived from a pre-selected workbook. JA 79–80; see also 19-348 Pet. App. 12a. And critically, although Biel and Morrisey-Berru participated in their students' prayer-related activities, neither teacher performed religious sacraments or played a leadership role in religious celebrations. See, *e.g.*, 19-267 Pet. App. 82a–89a; JA 93–94, 258–59. Unlike Perich, who "crafted and led religious services for the school, Biel's responsibilities at St. James's monthly Mass were only 'to accompany her students,' and '[t]o make sure the kids were quiet and in their seats.'" 19-348 Pet. App. 13a. Morrisey-Berru's responsibilities

were similarly limited. See, *e.g.*, JA 78a–79a; Resp. Br. 13, 46.

2. As noted previously, *Hosanna-Tabor* specifically declined to address "whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations we have discussed." 565 U.S. at 193. For that reason, it is plain that the court of appeals did not violate *Hosanna-Tabor*'s instruction or example by looking to considerations other than job functions. The only question, then, is whether this Court should go substantially beyond *Hosanna-Tabor* and hold that the Religion Clauses foreclose respondents' employment discrimination claims based *solely* on the particular religious tasks they performed. The answer is no.

a. As this Court explained in *Hosanna-Tabor*, the ministerial exception is the product of a balance between two "undoubtedly important" interests: society's interest "in the enforcement of employment discrimination statutes" and religious groups' interest in choosing who will "carry out their mission." 565 U.S. at 196. Here, as in most areas, the primary responsibility for striking the appropriate balance rests with Congress and the legislatures of the several States. Only when the requirement to keep an unwanted employee "intrudes upon more than a mere employment decision" does the First Amendment override those choices and "str[ike] the balance for us." *Id.* at 188, 196.

b. A test that looks to a variety of considerations—some formal and others functional—best serves the constitutional balance this Court identified.

Examining concrete and easily discernable distinguishers like title and religious education or expertise helps separate those employees who have achieved a position of stewardship in a religious congregation from those who might, as a matter of function, spread its tenets but who do not "minister to the faithful," "personify [the organization's] beliefs" or "guide it on its way." 565 U.S. at 188, 196. That form of analysis is hardly novel. To the contrary, job title and experience level are among the most familiar means for determining an employee's responsibility within an organization—whether religious or not.

By contrast, a test that looks exclusively to an employee's job functions will often fail to illuminate how the employee fits within the organization's greater structure. For that reason, a functions-only test is ill-suited to determine who *among* a religious organization's employees qualifies as a minister and whose treatment will thus escape scrutiny under state and federal employment discrimination laws. As with (very) roughly analogous questions about who is an "officer," "partner," or "manager," the answer to that question necessarily turns in part on an individual member's relative status and level of responsibility within the group.

To be sure, an emphasis on title and training may be misplaced when considering religious organizations with less-familiar structures—including those that lack any observable hierarchy. But *Hosanna-Tabor* has already accounted for those challenges by eschewing

a "rigid formula" in favor of a totality-of-the-circumstances approach that permits assessment of a multitude of factors, including function. 565 U.S. at 190. The flexibility to afford different weights to the various considerations—including, for example, by placing greater emphasis on function where title is an inapt marker—is precisely why the *Hosanna-Tabor* approach is effective and why it should not be abandoned.

3. Petitioners and the federal government rely heavily on one of the concurring opinions in the case in support of their plea for a functions-only test. That reliance is misplaced.

As the concurring Justices explained, they "join[ed] the Court's opinion" but wrote separately to "clarify [their] understanding of the significance of formal ordination and designation as a 'minister' in determining whether an 'employee' of a religious group falls within the so-called 'ministerial' exception." 565 U.S. at 198 (Alito, J., joined by Kagan, J., concurring). Noting that "[t]he term 'minister' " and "the concept of ordination" are not shared by all religions, the concurring Justices explained that "it would be a mistake" to view either of those concepts as "central to the important issue of religious autonomy." *Id.* The concurring opinion is thus best understood as admonishing lower courts against an undue reliance on titles or the existence of specific procedures for conferring them, particularly for religious groups that do not employ a distinctive hierarchy. As indicated by the fact that both concurring

Justices joined the Court's opinion, the totality-of-the-circumstances approach the Court endorsed affords sufficient flexibility to do just that.

Petitioners and the federal government repeatedly reference the concurring Justices' statement that the ministerial exception covers employees "who are entrusted with teaching and conveying the tenets of the faith to the next generation." See *Hosanna-Tabor*, 565 U.S. at 200; see also U.S. Br. 21, 27 (quoting this language); Pet. Br. 26, 38, 43 (same). But that statement must be understood in the context of the concurring Justices' express approval of lower court decisions in the decades leading up to *Hosanna-Tabor*. See 565 U.S. at 202–03 (Alito, J., concurring). And those decisions had universally *rejected* the view that lay faculty at religious schools are covered by the ministerial exception.[22] Accordingly, even if that concurring opinion could be read to suggest that an employee's duties alone may bring her within the purview of the ministerial exception, it cannot be understood to support the result petitioners and the federal government urge here—that lay teachers who perform any religious

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[22] See, *e.g.*, *Geary* v. *Visitation of Blessed Virgin Mary Parish School*, 7 F.3d 324, 331 (3d Cir. 1993) (rejecting position that First Amendment barred adjudication of teacher's ADEA claim despite school's assertion that "[t]he unique and important role of the elementary school teacher in the Catholic education system mandates [a] commitment to the philosophy and principles of the Catholic Church"); *DeMarco* v. *Holy Cross High School*, 4 F.3d 166, 171–73 (2d Cir. 1993) (lay teacher may pursue ADEA claim); *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1393–99 (4th Cir. 1990) (lay teachers covered by Fair Labor Standards Act).

functions are *automatically* among those to whom the exception applies.

C. The additional challenges petitioners and the federal government raise against the court of appeals' decisions are without merit

1. Despite their first-line argument that Biel and Morrisey-Berru's job functions are alone sufficient to bring them within the ministerial exception, petitioners and the federal government also attempt to show that the other *Hosanna-Tabor* considerations weigh in the schools' favor. They do not.

a. Petitioners insist that, by combining the title "teacher" and the name of the school (St. James Catholic School), the position of lay teacher takes on "religious significance" such that respondents should be regarded as having "religious titles." Pet. Br. 50–51. Petitioners also emphasize that respondents' appointments as teachers were approved by the parish priest and that they underwent some training in church doctrine and history. *Id.*[23] The federal government echoes petitioners' focus on post-appointment education, citing Biel's attendance at a half-day conference on religious education and Morrisey-Berru's participation in a course on church history. U.S. Br. 26. It also references the schools' employment agreements as evidence that petitioners "held out" respondents as " 'having a

[23] As respondents explain (at 40–41), petitioners' assertion that Morrisey-Berru bore the additional title "Catechist" misstates the record.

role distinct from that of most of [the Church's] members'" and insists that, by signing the agreements, respondents "held [themselves] out as 'accepting' that role." *Id.* at 24–25 (quoting *Hosanna-Tabor*, 565 U.S. at 191).[24]

b. These arguments stretch this Court's reasoning past its breaking point. As described above, *Hosanna-Tabor* explained that Perich was "extended . . . a call" before taking on her role as a "called teacher," a position distinct from her prior position as a lay teacher. 565 U.S. at 191, 194. Perich was issued a "diploma of vocation" and accorded the title "Minister of Religion, Commissioned." *Id.* at 191. Reading respondents' title of "teacher" in quick succession with

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[24] The federal government's position on these factual matters in this Court stands in stark contrast to its position in the court of appeals. In 2017—when the case was pending in the court of appeals—the federal government filed an amicus brief supporting Biel (a fact acknowledged only with an oblique reference in the "Interests of the United States" section of its brief in this Court). In that brief, the federal government argued—contrary to its position here—that (1) "[u]nlike in *Hosanna-Tabor*, [Biel's] . . . job carried the secular title of 'Teacher' "; (2) "Biel never held herself out to be a minister"; and (3) "Biel, unlike Perich, had no special religious training, before or after St. James hired her to teach fifth grade." Equal Employment Opportunity Comm'n Amicus Br. at 18–19, *Biel* v. *St. James School*, No. 17-55180 (9th Cir. Sept. 27, 2017). At oral argument, moreover, the federal government told the court of appeals that Biel "was a teacher" and that "the substance behind the title shows that all of her training and experience was as a teacher and she had no . . . religious doctrinal training." Oral Arg. at 17:55–18:03, *Biel* v. *St. James School*, No. 17-55180 (9th Cir. July 11, 2018). The federal government neither acknowledges nor explains its abrupt turnaround on the facts of Biel's case.

the name of their religious employers hardly yields a comparable status.

But the factual differences do not end there. Far beyond having her hiring approved by the parish priest, Perich could only obtain her commission through "election by the congregation, which recognized God's call to her to teach." *Hosanna-Tabor*, 565 U.S. at 191. Perich's education—which consisted of eight college-level classes as well as other requirements—was also a far cry from the single course and half-day conference attended by Morrisey-Berru and Biel, respectively.

Nor does the fact that respondents signed employment agreements recognizing their responsibility to model and impart Catholic values prove that they "held themselves out" as "'having a role distinct from that of most of [the Church's] members.'" U.S. Br. at 25–26 (quoting *Hosanna-Tabor*, 565 U.S. at 191). Again, the comparison to *Hosanna-Tabor* is instructive. There, the Court found that Perich "held herself out" as a minister based on the fact that she accepted the "formal" call to teach, she stated that "God is leading me to serve in the teaching ministry," and she signed official forms designating herself as a minister. 565 U.S. at 191–92.

2. a. Petitioners and the federal government also challenge the distinctions the court of appeals drew between the religious functions respondents performed and Perich's role as described in *Hosanna-Tabor*. See Pet. Br. 45–47; U.S. Br. 27–28. For the reasons explained above and in respondents' brief (at

45–47), the court of appeals' reading of the record was correct. Respondents' basic and largely administrative involvement with their students' spiritual education was qualitatively different from Perich's. See 19-348 Pet. App. 13a; see also JA 86a–89a (describing Morrisey-Berru's role). And as respondents observe, their commitment "to serve as role models and incorporate religious values into [their] work should not transform them into ministers" because a "requirement to bear witness to the faith or to set a good example is not the same was being required to '*minister* to the faithful.'" Resp. Br. 47 (quoting *Hosanna-Tabor*, 565 U.S. at 189).

b. Immediately after criticizing the court below for not accepting that respondents had "'close guidance and involvement' in 'students' spiritual lives'"—in other words, for not seeing the record as it does now, see note 24, *supra*—the federal government faults the court of appeals for engaging in such an inquiry at all. U.S. Br. 27 (quoting 19-348 Pet. App. 13a). In so doing, the federal government argues, "the Ninth Circuit impermissibly weighed in on matters of religious faith and doctrine" because "[c]ivil courts are not equipped to decide whether it was formative to Catholic students' 'spiritual lives' that their teachers 'joined' them in daily prayer and Mass, as opposed to 'orchestrat[ing]' prayers and religious services as Perich did." U.S. Br. 28 (quoting 19-348 Pet. App. 13a). There are several problems with that argument.

i. For one thing, the federal government ignores the fact that this Court engaged in that very sort of analysis in *Hosanna-Tabor*. By highlighting Perich's

numerous religious functions in support of its conclusion that her "job duties reflected a role in conveying the Church's message and carrying out its mission," the Court signaled that the *absence* of those duties—including leading school-wide chapel services and students' daily devotional exercise—might yield a different conclusion. 565 U.S. at 192. In comparing and contrasting respondents' role to Perich's, the court of appeals did no more than apply the approach this Court articulated in *Hosanna-Tabor* to the cases before it. That sort of analysis, conducted by courts every day, in no way constitutes "judicial second-guessing of religious judgments." U.S. Br. 28. Indeed, it is *required* by a rule that exempts some of a religious organization's employees—but not others—from generally applicable laws.

ii. But the problems with the federal government's argument do not end there. Given that the federal government now advocates a test that focuses *exclusively* on the duties performed by an employee, its criticism of the court of appeals' efforts to determine whether respondents "performed an '*important* religious function'" appears self-defeating. See U.S. Br. 14 (quoting *Hosanna-Tabor*, 565 U.S. at 192) (emphasis added).

But that is only because the federal government does not actually intend for courts to engage in that analysis. For, in explaining how it would have this Court resolve the challenges it sees with its own preferred test, the federal government argues that courts must simply accept a religiously affiliated employer's

own views about what constitutes important religious functions, see U.S. Br. 8, 20, 28—and, in so doing, allow employers to decide for themselves whether their decisions regarding a particular employee are immune from judicial scrutiny. Nothing in this Court's opinion in *Hosanna-Tabor* requires (or warrants) ceding responsibility for determining which employees fall within the ministerial exception to the organization seeking to avoid scrutiny for alleged discrimination.

3. In its final critique, the federal government faults the court of appeals for "suggest[ing] that there is no need to apply the ministerial exception to teachers at religious schools, because a religious organization can successfully defend an employment discrimination claim by proving that its decision to terminate . . . an employee was based on ineffective job performance . . . rather than discrimination." U.S. Br. 28. That "suggestion," the federal government urges, gives insufficient weight to the Religion Clauses and would entangle courts in ecclesiastical questions. *Id.*

That argument is a straw man. The court below in no way based its conclusion that Biel was not covered by the ministerial exception on its confidence that religious organizations could otherwise avoid liability under civil rights statutes. Rather, the court of appeals (in a single footnote) simply made two indisputably correct points: (1) St. James was free to argue on remand that it did not violate the ADA; and (2) "*had* St. James asserted a religious justification for terminating Biel," the conclusion that Biel is not subject to the ministerial exception would not "command[] or permit[]

the district court to assess the religious validity of that explanation." 19-348 Pet. App. 17a. n.6 (emphasis added).

The federal government latches on to this innocuous footnote to argue for a broader (indeed, boundless) ministerial exception for reasons that have no relevance to these cases. As the federal government knows, neither of these cases *actually involves* a proffered religious justification for termination. To the contrary, the school's stated rationale for terminating Biel—that "it was not fair . . . to have two teachers for the children during the school year" given her need to be absent to receive cancer treatment, 19-348 Pet. App. 6a-7a—comes perilously close to *admitting* unlawful disability discrimination. That is precisely the problem with an exception that sweeps too broadly: It forecloses claims alleging discrimination even where the religious organization makes no assertion that firing the employee is religiously required or even in any way advances the fulfillment of its religious mission.

Short of rewriting civil rights laws to exclude religious employers entirely, it is inevitable that courts will sometimes need to determine whether an asserted religious basis for termination or demotion is pretextual. But that has been true for decades, both before and after this Court's decision in *Hosanna-Tabor*. The fact that courts will continue to conduct the same analysis they have done for years—which is designed to afford religious organizations *additional* constitutional protection—is no reason to expand the ministerial exception beyond logical bounds.

III. The approach advocated by petitioners and the federal government would undermine workplace anti-discrimination protections

The stakes of this case are substantial. As petitioners explain, the religious functions respondents performed are shared by lay teachers across Catholic schools. See Pet. Br. 46–47 (explaining the consistent approach the Church takes to parochial education across parishes). At a minimum, then, adopting petitioners' and the federal government's preferred approach would likely deprive more than 100,000 lay teachers employed by Catholic elementary and secondary schools of the anti-discrimination protections enshrined in federal and state laws. See Oral Arg. at 25:15–30, No. 17-55180 (9th Cir. July 11, 2018) (federal government lawyer stating that applying the ministerial exception to Biel means that "there are thousands of Catholic teachers who would have lost their rights that they would have rightly assumed . . . they would have").[25]

But that is just the beginning. As respondents explain (at 32–35), there are countless other employees of religiously affiliated institutions—from janitors and receptionists to nurses and coaches—who might be

[25] See National Catholic Educ. Ass'n, *Catholic School Data*, *available at* https://www.ncea.org/ncea/proclaim/catholic_school_data/catholic_school_data.aspx (explaining that there are 152,730 full-time equivalent professional staff at Catholic elementary and secondary education institutions today, and 97.2% are non-religious).

covered under the functions-only test. And given the federal government's inclination to accede to a religious organization's "sincere view" of its employee's function (U.S. Br. 20), coupled with certain organizations' concerted efforts to ensure that the exception covers as many employees as possible (see Resp. Br. 36–37), the potential for expansion is limitless. What is more, if the ministerial exception is applied to other statutory protections—as the federal government now contends it should be—that expanded understanding will apply outside the employment discrimination context as well.[26]

The effects of broadening the ministerial exception would reverberate far beyond the cases in which it is found to apply. As described previously, maintaining the progress that has been made in the years since federal and state civil rights laws were passed requires consistent enforcement. See Part I, *supra*. That effort, in turn, requires resource investment. With ever-present budgetary constraints, enforcement agencies are forced to make hard choices about their enforcement priorities.

Because the function-only test turns on case-specific, difficult-to-quantify facts that likely cannot be assessed at the outset of an investigation, agencies

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[26] As respondents note, the Department of Labor has recently taken the position that the ministerial exception applies to the Fair Labor Standards Act such that employees falling within the exception cannot vindicate their wage-and-hour rights or other labor protections. See Resp. Br. 38 (citing Opinion Letter, FLSA, 2018-29).

may elect to forgo enforcement of civil rights laws against religiously affiliated organizations altogether for fear of wasting valuable time and resources on cases that will never yield recovery. Likewise, private plaintiffs unsure whether their claims are foreclosed by the ministerial exception will be less inclined to invest the resources necessary to try to vindicate their rights administratively or through judicial action.[27]

Creating a virtual non-enforcement zone around religious organizations threatens to corrode workplace anti-discrimination protections. As this Court has explained, "Congress designed the remedial measures in [civil rights] statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." *McKennon*, 513 U.S. at 358 (quotation marks omitted). With no risk of litigation or administrative enforcement, religiously affiliated employers may not be spurred to "self-examine," allowing historical

[27] This uncertainty would also be problematic when a prospective employee is deciding whether to accept an offer from a religiously affiliated organization. As respondents point out (at 22), many professionals, including school and hospital staff, frequently choose between public institutions, private institutions, and religious institutions. Whether or not one will be protected by generally applicable worker safety and workplace anti-discrimination laws may be an important consideration when an employee is deciding where to work. Equally problematic, an employee working in a sector where religious employers are particularly prevalent might not have the option of choosing a private or public-sector employer, leaving her wholly outside the reach of laws designed to protect her rights.

discrimination to persist and/or new discriminatory practices to take hold. For that reason as well, the functions-only test urged by petitioners and the federal government underserves the "undoubtedly important" societal interest in "the enforcement of employment discrimination statutes." *Hosanna-Tabor*, 565 U.S. at 196.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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