

Nos. 19-267 & 19-348

IN THE
Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,

v.

AGNES MORRISSEY-BERRU,
Respondent.

ST. JAMES SCHOOL,
Petitioner,

v.

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

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

**BRIEF OF *AMICUS CURIAE* UNITED STATES
CONFERENCE OF CATHOLIC BISHOPS
SUPPORTING PETITIONERS**

ANTHONY R. PICARELLO, JR.	AARON M. STREETT
JEFFREY HUNTER MOON	<i>Counsel of Record</i>
MICHAEL F. MOSES	RICHARD A. HUSSEINI
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS	BRENTON H. COOPER
3211 Fourth Street, NE	BAKER BOTTS L.L.P.
Washington, D.C. 20017	910 Louisiana St.
(202) 541-3000	Houston, Texas 77002
	(713) 229-1234
	aaron.streett@bakerbotts.com

*Counsel for Amicus Curiae United States
Conference of Catholic Bishops*

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INTEREST OF *AMICUS CURIAE*¹

Amicus United States Conference of Catholic Bishops (USCCB) is an assembly of the hierarchy of the United

¹ Petitioners' counsel of record and respondents' counsel of record consented to the filing of this brief. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

States and the U.S. Virgin Islands who jointly exercise certain pastoral functions on behalf of the Christian faithful of the United States. The purpose of the Conference is to promote the greater good which the Church offers humankind, especially through forms and programs of the apostolate fittingly adapted to the circumstances of time and place. This purpose is drawn from the universal law of the Church and applies to the episcopal conferences which are established all over the world for the same purpose.

The bishops themselves constitute the membership of the Conference. The Conference is organized as a corporation in the District of Columbia. Its purposes under civil law are: “To unify, coordinate, encourage, promote and carry on Catholic activities in the United States; to organize and conduct religious, charitable and social welfare work at home and abroad; to aid in education; to care for immigrants; and generally to enter into and promote by education, publication and direction the objects of its being.”

The Conference advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation’s life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. The Conference’s interest in religious freedom and the rights of faith-based organizations and their adherents often motivates its participation as *amicus* in this Court. The Conference submits this brief because the court of appeals’ decision contravenes this Court’s decision in *Hosanna-Tabor* and reflects a misunderstanding of the practical realities of Catholic education and numerous other ministries of the Church.

SUMMARY OF ARGUMENT

The ministerial exception is grounded in both the Free Exercise Clause and the Establishment Clause. By focusing myopically on training and titles to determine which employees qualify as “ministers,” the court of appeals’ judgment abridges the Catholic Church’s rights—and those of many other religious groups—under both Religion Clauses.

The Ninth Circuit’s approach violates the Free Exercise Clause by effectively penalizing the Catholic Church for exercising its fundamental theological belief in active lay participation in the mission of the Church. As part of its broader doctrine of Church unity, Catholic teaching emphasizes that the laity is to be “co-responsible” for the life and mission of the Church. Carrying out this tenet, many professional Catholic laypeople execute the Church’s mission to feed the hungry, help the homeless, and educate the next generation. These laypeople, by definition, often lack the formal titles and training that the Ninth Circuit views as essential to the definition of “minister.” By requiring formal credentials, the Ninth Circuit’s test imposes liability on the Catholic Church for exercising its theological belief in lay participation. It also improperly pressures the Church to change its internal organization to avoid liability, contrary to Church teaching.

The court of appeals’ rationale equally transgresses the Establishment Clause. By rigidly comparing Catholic school teachers to Cheryl Perich, the Lutheran teacher at issue in *Hosanna-Tabor*, the Ninth Circuit essentially adopts the Lutheran hierarchy as a one-size-fits-all blueprint to which all religious groups seeking First Amendment shelter must conform. This rubric violates the Establishment Clause’s denominational-neutrality principle because it disadvantages the Catholic

Church and other religions that have structures different from the Lutheran hierarchy. The Court should reverse.

ARGUMENT

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I. While these two clauses “often exert conflicting pressures,” *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005), the ministerial exception harmonizes them: “Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181 (2012) (emphasis added). Thus, the Constitution’s twin prohibitions on “governmentally established religion” and “governmental interference with religion,” *Walz v. Tax Comm’n of City of N.Y.*, 397 U.S. 664, 669 (1970), take center stage in the consolidated cases now before the Court.

The Catholic Church is just one example of the many religious faiths threatened by the court of appeals’ approach. But it is an illustrative one. *Amicus* submits that the judgments below should be reversed because the Ninth Circuit’s holding violates both the Free Exercise Clause and the Establishment Clause. First, the Ninth Circuit’s view of the ministerial exception—which requires a “minister” to have a formal title or extensive training—violates the Free Exercise Clause by discouraging the Catholic Church from exercising its belief in the laity’s active participation in the Church’s mission. Second, the Ninth Circuit’s framework violates the Establishment Clause by disfavoring religious groups, like the Catholic Church, whose structures do not closely mirror the Lutheran hierarchy that the Court analyzed in *Hosanna-Tabor*.

I. THE NINTH CIRCUIT'S APPLICATION OF *HOSANNA-TABOR* VIOLATES THE FREE EXERCISE CLAUSE

In its landmark, unanimous decision, this Court expressly acknowledged what had long been implicitly understood: “By imposing an unwanted minister, the state infringes the Free Exercise Clause.” *Hosanna-Tabor*, 565 U.S. at 188. State control over ministerial hiring and firing not only interferes with a church’s general “right to shape its own faith and mission through its appointments.” *Ibid.* It also interferes with a church’s specific theological beliefs about which of its members ought to carry out which religious functions. That is because “[t]he question whether an employee is a minister is *itself* religious in nature, and the answer will vary widely.” *Id.* at 197 (Thomas, J., concurring) (emphasis added). It is thus unsurprising that “[d]ifferent religions will have different views on exactly what qualifies as an important religious position,” *id.* at 200 (Alito, J., concurring), not to mention different views on the titles and training for various ministerial roles within the religious body.

Many Christian denominations feature well-developed systems of ecclesiology—robust theological doctrines governing the church’s relationship to the world and the proper hierarchy within the church. See 4 *Encyclopedia of Religion* 480–485 (1st ed. 1987) (cataloguing various Christian denominations’ general approaches to ecclesiological questions). These beliefs are just as central and just as sincerely held—and, consequently, just as worthy of free-exercise protection—as more widely known beliefs about salvation, the human condition, or the nature of God. See *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring) (“[P]opular familiarity with a religious doctrine cannot be the determinative factor” for free-exercise analysis.).

The Catholic Church is no exception. As part of its broader doctrine of Church unity, Catholic teaching emphasizes the importance of the laity in advancing the Church's mission. Faithful lay leaders, by definition, often lack the official titles and formal training that the Ninth Circuit viewed as essential to the definition of "minister." The court of appeals' application of *Hosanna-Tabor* thus threatens to penalize the Catholic Church—and groups with similar doctrines regarding the laity—for delegating Church functions according to this important belief. And the court of appeals' approach correspondingly pressures the Church to organize its hierarchy under the dictates of legal liability rather than its belief structure. The Free Exercise Clause requires more.

A. The laity's active participation in carrying out the Church's mission is a core element of Catholic doctrine

The shared work of ordained and laity in the Catholic Church, by which some of the latter also exercise functions of ministry, is rooted in a profound theology of unity. From the Church's earliest days, St. Paul implored its members to "striv[e] to preserve the unity of the spirit through the bond of peace," for there is "one body and one Spirit, * * * [o]ne Lord, one faith, one baptism; [and] one God and Father of all." *Ephesians* 4:3–6;² see also *Galatians* 3:26–28 ("For through faith you are all children of God in Christ Jesus. * * * There is neither Jew nor Greek, there is neither slave nor free person, there is not male and female; for you are all one in Christ Jesus."). The Church teaches that through Christ's work of salvation, *all* of "[t]he baptized, by regeneration and the anointing of the Holy Spirit, are

² All citations to the Bible are to the New American Bible, Revised Edition.

consecrated as a spiritual house and a holy priesthood[.]” Second Vatican Council, *Dogmatic Constitution on the Church (Lumen Gentium)* ¶ 10 (Nov. 21, 1964) (citing *1 Peter* 2:5).³ In the Cross, the Church believes, Christ has “broken down the wall of distinction between peoples, races and cultures: all are united in Christ.” Pope Benedict XVI, *Address of His Holiness Benedict XVI at the Opening of the Pastoral Convention of the Diocese of Rome on the Theme: “Church Membership and Pastoral Co-Responsibility”* (May 26, 2009).⁴ Importantly, the early Church manifested this unity not only in word, but also in deed, as “[a]ll who believed were together and had all things in common; they would sell their property and possessions and divide them among all according to each one’s need.” *Acts* 2:44–45.

One dimension of this fundamental doctrine of Church unity is the unity between clergy and laity. This “foundational belief” was “announced with urgency by the Second Vatican Council” in the 1960s. U.S. Conference of Catholic Bishops, *Co-Workers in the Vineyard of the Lord* 7 (2005).⁵ Though “they differ from one another in essence and not only in degree, the common priesthood of the faithful and the ministerial or hierarchical priesthood are nonetheless interrelated: each of them in its own special way is a participant in the one priesthood of Christ.” *Lumen Gentium* ¶ 10; see also Second Vatican Council, *Decree on the Apostolate of the Laity (Apostolicam Actuositatem)* ¶ 2 (Nov. 18, 1965) (“[T]he laity likewise share in the priestly, prophetic, and

³ https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html

⁴ http://www.vatican.va/content/benedict-xvi/en/speeches/2009/may/documents/hf_ben-xvi_spe_20090526_convegno-diocesi-rm.html

⁵ <http://www.usccb.org/upload/co-workers-vineyard-lay-ecclesial-ministry-2005.pdf>

royal office of Christ[.]”⁶ The unitary “People of God,” according to Catholic doctrine, refers to “all” Catholics, “from the Pope to the most recently baptized Child.” *Address of His Holiness Benedict XVI*. The Church consists of “one body,” with each of its “many parts”—laity and clergy alike—filling essential roles in advancing the Church’s mission. *1 Corinthians* 12:20. As St. Paul explains, “[t]he eye cannot say to the hand, ‘I do not need you,’ nor again the head to the feet, ‘I do not need you.’” *Id.* at 12:21.

For this reason, the Church has emphasized that the laity must not be viewed as mere “collaborators” with the clergy, but “as people who are really ‘co-responsible’ for the Church’s being and acting.” Pope Benedict XVI, *Message of His Holiness Pope Benedict XVI on the Occasion of the Sixth Ordinary Assembly of the International Forum of Catholic Action* (Aug. 10, 2012).⁷ The Church exhorts the laity to “share the pastoral decisions of the dioceses and parishes, * * * creating * * * communion with priests for a lively ministerial and missionary community.” *Ibid.* The Church likewise instructs the clergy to give “every opportunity” to the laity, “according to their abilities and the needs of the times,” so that the laity “may zealously participate in the saving work of the Church.” *Lumen Gentium* ¶ 33.

Countless Catholic laypeople comprise the front lines of the Church’s outreach efforts, “bring[ing] hope to the problematic, difficult and dark situations which people today often encounter in their journey through life.” *Message of His Holiness Pope Benedict XVI*. Catholic

⁶ http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651118_apostolicam-actuositatem_en.html

⁷ http://www.vatican.va/content/benedict-xvi/en/messages/pont-messages/2012/documents/hf_ben-xvi_mes_20120810_fiac.html

prison ministries, for example, rely on laypeople—“both volunteer and professional”—who are “indispensable” to the Church’s efforts in advancing restorative justice and upholding the dignity of every human person. U.S. Conference of Catholic Bishops, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (Nov. 15, 2000).⁸ Lay groups like the Knights of Columbus and their professional, non-ordained staff serve needy families and deliver disaster relief, all in the name of advancing the Gospel and embodying Christ’s command to “love your neighbor as yourself.” *Matthew* 22:39. Laypeople work full-time at crisis pregnancy centers and food banks. And they assist refugees and counsel the grieving.

The Church simply could not execute its mission without these lay servant-leaders. See *Apostolicam Actuositatem* ¶ 1 (“The apostolate of the laity derives from their Christian vocation and the Church can never be without it.”). There are 68.7 million Catholics in the United States, not to mention the millions more reached by Catholic ministries. *Frequently Requested Church Statistics*, CENTER FOR APPLIED RESEARCH IN THE APOSTOLATE.⁹ But there are only 36,580 diocesan and religious-order priests. *Ibid.* Active lay participation exponentially magnifies the Church’s ability to minister to Americans of all faiths and no faith. And with Pope Francis’s recently expressed concerns over the numerical decline of the Church’s priests and nuns, the laity have become all the more essential. See Pope Francis, *Address of His Holiness Pope Francis to Participants in the Plenary Assembly of the Congregation for Institutes*

⁸ <http://www.usccb.org/issues-and-action/human-life-and-dignity/criminal-justice-restorative-justice/crime-and-criminal-justice.cfm>

⁹ <http://cara.georgetown.edu/frequently-requested-church-statistics>

of Consecrated Life and Societies of Apostolic Life (Jan. 28, 2017).¹⁰

The Church likewise relies on professional laypeople for many internal functions. The performance of non-ordained musicians, for example, is “integral to the mass and many other activities.” *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 569 (7th Cir. 2019) (citing U.S. Conference of Catholic Bishops, *Sing to the Lord: Music in Divine Worship* (Nov. 14, 2007)). And the Church appoints non-ordained canonists to “perform the vital function of instructing those who will in turn interpret, implement and teach the law governing the Roman Catholic Church and the administration of its sacraments.” *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464 (D.C. Cir. 1996).

To see the faithful Catholic laity at work, the Court need look no further than the petitioners. Catholic schools promote the “spirit of Catholicism,” which should “permeate the entire curriculum.” Archbishop J. Michael Miller, *The Holy See’s Teaching on Catholic Schools* 42 (2006). This goes beyond the school’s role in “religious instruction, catechesis, and pastoral activities.” *Id.* at 43–44. Because a Catholic school holistically prepares students “for a fully human life at the service of others and for the life of the world to come,” all of its instruction “must be authentically Catholic in content and methodology across the entire program of studies.” *Id.* at 44. Clergy and courts alike recognize the centrality of lay teachers to carrying out this religious mission. See Cardinal William Baum, *Lay Catholics in Schools: Witnesses to Faith* (Oct. 15, 1982) (“For it is the lay teachers * * * who will substantially determine whether

¹⁰ http://www.vatican.va/content/francesco/en/speeches/2017/january/documents/papa-francesco_20170128_plenaria-civcsva.html

or not a school realizes its aims and accomplishes its objectives.”)¹¹ Indeed, Catholic teachers play a critical role in advancing the Catholic faith “regardless of whether the teachers provide instruction in religious or secular subjects.” *Duquesne Univ. of the Holy Spirit v. NLRB*, ___ F.3d ___, No. 18-1063, 2020 WL 425053, at *7 (D.C. Cir. Jan. 28, 2020) (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979)). As the cases now before the Court demonstrate, these Catholic school teachers will often lack the titles and formal religious training that their Lutheran counterparts might have. See *Hosanna-Tabor*, 565 U.S. at 177. But the Church indisputably understands them to be carrying out an essential aspect of the Church’s mission, consistent with the doctrines of the laity and Church unity. Put succinctly, the Church views them as “ministers” essential to the Church’s theology, ministry, and hierarchy.

B. The Ninth Circuit’s approach effectively penalizes the Catholic Church for exercising its theological belief in active lay participation

The decisions below require a religious employee to have some level of “credentials, training, or ministerial background” for the ministerial exception to apply. *Biel v. St. James Sch.*, 911 F.3d 603, 608 (9th Cir. 2018). That approach would hinder the Church’s ability to exercise its sincere theological belief in the importance of lay ministry. In *Biel*, for example, the court of appeals acknowledged the significant religious functions that Kristen Biel performed as a Catholic school teacher. Four days a week, Biel taught her students lessons on the Catholic faith. *Id.* at 609. As the school required, she incorporated religious themes into her classroom

¹¹ http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_19821015_lay-catholics_en.html

environment and the class curriculum. *Ibid.* And she joined her students daily in student-led prayer. *Id.* at 605. Nevertheless, the Ninth Circuit discounted these religious responsibilities because Biel lacked the formal markers typically associated with ordination. Biel's school did not "hold [her] out as a minister, with a role distinct from that of most of its members." *Id.* at 607. She did not have sufficient "credentials, training, or ministerial background." *Id.* at 608. And nothing in the record indicated that she "considered herself a minister or presented herself as one to the community." *Id.* at 609.

Morrissey-Berru is similar. The court of appeals acknowledged that Agnes Deirdre Morrissey-Berru "did have significant religious responsibilities as a teacher at the School." *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460, 461 (9th Cir. 2019). She committed to incorporating Catholic teaching into her curriculum, led her students daily in prayer, planned the liturgy for a monthly Mass, and organized the school's annual Easter celebration. *Ibid.* Yet despite this active lay leadership in the Church's mission, the court of appeals did not consider Morrissey-Berru a "minister" because she was not akin to an ordained member of the priesthood. Her "formal title of 'Teacher' was secular." *Ibid.* Except for "a single course on the history of the Catholic Church, she did not have any religious credentials, training, or ministerial background." *Ibid.* And she did not "hold herself out to the public as a religious leader or minister." *Ibid.*

By reading *Hosanna-Tabor* to require titles, training, and ministerial background, the Ninth Circuit's approach doubly threatens the Church's ability to exercise its belief in active lay participation. First, it inflicts a direct injury. A Catholic entity is vulnerable to liability when it parts ways with a lay employee who exercises religious

functions, while it would have been protected if only it had relied on ordained ministers. In effect, the court of appeals' approach punishes the Church for delegating important religious functions to a layperson. See *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 207 (2d Cir. 2017) (explaining that relying excessively on titles and credentials “penalize[s] religious groups for allowing laypersons to participate in their ministries”). But this delegation of religious functions to the laity is a core Catholic belief, part and parcel of the doctrine of Church unity. The Ninth Circuit’s rationale thus “effectively penalizes” the Catholic Church’s “free exercise of [its] constitutional liberties.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020 (2017) (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)).

Second, the Ninth Circuit’s framework indirectly coerces the Church to alter its religious belief and practice. Conditioning the ministerial exception’s availability on formal markers of religious leadership improperly pressures the Church, and other groups with similar beliefs, to limit reliance on the laity. First Amendment doctrines, however, should not influence a church to “conform its beliefs and practices regarding ‘ministers’ to the prevailing secular understanding.” *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) (“[U]ncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding ‘ministers’ to the prevailing secular understanding.”); see also *Corp. of Presiding Bishops 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.”); *Fratello*, 863 F.3d at 207 (explaining that a form-over-function approach to the

ministerial exception incentivizes religious organizations to bar laity from substantial roles).

Even requiring something less than ordination—such as formal religious training, credentials, or titles—would deter laypeople from participating and force the Church to alter its beliefs and practices. At bottom, the court of appeals’ approach improperly pressures the Church to either cease assigning important religious functions to its lay members or to expand its concept of ordination, a topic on which the Church has equally well-developed and sincerely held beliefs. See, e.g., *Catechism of the Catholic Church* §§ 1536–1600 (1993);¹² see also *infra* at Part II.B. The Church should not have to choose between these violations of conscience. See *Hosanna-Tabor*, 565 U.S. at 196 (protecting the right of “religious groups [to choose] who will preach their beliefs, teach their faith, and carry out their mission”).

This is not to say that every employee of the Catholic Church or a Catholic organization is a “minister.” See Pet. Br. 41–44. *Hosanna-Tabor* rightly eschewed a “rigid formula for deciding when an employee qualifies as a minister.” 565 U.S. at 190. The correct legal rule depends on far more than the formal markers of religious leadership invoked by the court of appeals. It must also be sensitive to the diversity of theological beliefs about *how* religious leaders are assigned and avoid penalizing deeply rooted ecclesiological practices.

II. THE NINTH CIRCUIT’S APPLICATION OF *HOSANNA-TABOR* VIOLATES THE ESTABLISHMENT CLAUSE’S PRINCIPLE OF DENOMINATIONAL NEUTRALITY

The court of appeals’ approach also creates Establishment Clause problems. The Establishment Clause’s “clearest command” is that “one religious

¹² https://www.vatican.va/archive/ENG0015/_P4R.HTM

denomination cannot be officially preferred over another.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). By requiring that “ministers” possess something akin to the formal commissioning of the Lutheran teacher in *Hosanna-Tabor*, the Ninth Circuit favors religious groups with a hierarchy similar to that of the Lutherans.

A. The Ninth Circuit’s framework favors religious groups with Lutheran-style hierarchies

The Establishment Clause’s denominational-neutrality principle teaches that the government “may not * * * aid, foster, or promote one religion or religious theory against another.” *Epperson v. Ark.*, 393 U.S. 97, 104 (1968). This principle has persisted as a cornerstone of our national identity since before the Constitution’s ratification. Thomas Jefferson, for example, declared in the 1785 Virginia Act Establishing Religious Freedom that in this country, “opinion[s] in matters of religion * * * shall in no wise diminish, enlarge, or affect [our] civil capacities.” Thomas Jefferson, *Virginia Act for Establishing Religious Freedom* (Oct. 31, 1785), in 5 *The Founders’ Constitution* 85 (P. Kurland & R. Lerner eds. 1987).

“The Establishment Clause’s core principle of denominational neutrality,” *Dunn v. Ray*, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting), forbids more than naked preferences for one religion over another. It also prohibits governmental policies that privilege one type of denominational practice or structure. For this reason, the Court invalidated a Minnesota law imposing reporting requirements on religious groups that received more than fifty percent of their funds from nonmember donations. *Larson*, 456 U.S. at 231–232. The Court explained that the statute violated the Establishment Clause because it disadvantaged churches that, “as a matter of policy, may favor public solicitation over

general reliance on financial support from members.” *Id.* at 248 n.2.

The court of appeals’ application of the ministerial exception likewise violates this bedrock principle. By rigidly comparing the titles and formal training of the Catholic school teachers here to the credentials of the Lutheran school teacher in *Hosanna-Tabor*, the Ninth Circuit effectively adopts Lutheran ecclesiology as a one-size-fits-all blueprint to which all religious groups must conform in order to enjoy First Amendment protection. The opinion in *St. James*, for example, invokes Cheryl Perich, the Lutheran school teacher from *Hosanna-Tabor*, no less than twenty-five times. 911 F.3d at 607–609. The court of appeals held that Kristen Biel was not a “minister” because her job description did not closely correspond to Perich’s, who operated under a different denomination with a different ecclesiology and different hierarchy. Perich was a “Minister of Religion, Commissioned,” but Biel was called a “Grade 5 Teacher.” *Id.* at 608; see also *Morrissey-Berru*, 769 F. App’x at 461 (making the same comparison). Perich considered herself “a minister,” but Biel considered herself a teacher. *St. James*, 911 F.3d at 609. Perich’s position required college-level courses in theology. But Biel’s position had no such requirement, and Biel had no such training. *Id.* at 607–608. Perich’s employment was terminable only by a supermajority vote, while Biel’s was at will. *Id.* at 608.

Under the court of appeals’ rationale, the nomenclature, training, and structure adopted by the governing church—rather than the substance of the teachers’ religious role—dictate the outcome. It treats a Lutheran-style hierarchy—and the ecclesiology on which it rests—as essential to the legal definition of “minister” for First Amendment purposes. The Ninth Circuit’s approach thereby discriminates against denominations or

other religions that rely on laity or informally designated ministers to lead critical religious efforts.

B. The Catholic Church exemplifies numerous religious groups who face discriminatory treatment under the Ninth Circuit’s approach

The Catholic Church is just one example of the many religious groups at risk of unequal treatment under the Ninth Circuit’s ministerial-exception test. The Catholic Church’s hierarchy and terminology are quite different from the Lutherans’. As Justices Alito and Kagan have explained, the term “minister” is used differently across Christian denominations. Though many Protestant churches use the term to denote clergy members, it is not frequently used in this sense by “*Catholics, Jews, Muslims, Hindus, or Buddhists.*” *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring) (emphasis added). Indeed, Protestants pioneered the use of “minister” for referring to the clergy. Before the Reformation, the term was used primarily in phrases such as “minister of the church” or “minister of the gospel.” See 9 Oxford English Dictionary 818 (2d ed. 1989) (def. 4(b)). Thus, the unadorned term “minister” carried a secular meaning—as one who “act[s] under the authority of another”—and the rest of the phrase supplied the religious context. *Ibid.* (def 2(a)). After the Reformation, Calvinists began injecting religious meaning into the word itself, believing that “the terms *priest* and *clergyman* * * * impl[ie]d erroneous views of the nature of the sacred office.” *Ibid.* (def 4(b)).

Though Catholics have since adopted some use of the standalone “minister,”¹³ significant disagreement persists between the Church and different denominations about

¹³ The Catholic Church has many youth ministers and extraordinary ministers of Holy Communion.

the “nature of the sacred office.” *Ibid.* Indeed, the structure of the clergy starkly illustrates the mismatch between the Catholic hierarchy and the Lutheran hierarchy used as a touchstone by the court of appeals. The Catholic Church views the devotion of oneself to the priesthood as a sacrament, the Sacrament of Holy Orders, and priesthood is reserved to those who have received this sacrament. *Catechism of the Catholic Church* §§ 1536–1600. Unlike in most Protestant churches, Catholic ordination symbolizes apostolic succession tracing back to Christ Himself. Consequently, it goes beyond “simple delegation * * * by the community,” for it confers a “sacred power” that “can come only from Christ himself.” *Id.* §§ 1537–1538; see also 9 *New Catholic Encyclopedia* 653 (2d ed. 2002) (“To say [that ordained ministers are mere delegates of the community] would be to deny the unique source of power in Christ.”). Catholic ordination differs not only in essence, but also in the obligations it imposes. The Catholic Church, for example, calls upon its ordained to remain celibate “for the sake of the kingdom of heaven,” whereas most Protestant churches do not. *Catechism of the Catholic Church* § 1579.

Because Protestants and Catholics differ significantly in their ecclesiology at the highest levels of their hierarchy, the Ninth Circuit’s Lutheran-centric approach will likely treat the Catholic Church less favorably. Catholics reserve ordination for narrower purposes and impose greater obligations than many Protestant churches. By the same token, the Catholic Church rarely confers titles denoting quasi-ordination, like Perich’s formal “commissioning,” which Protestants might assign more widely. *Hosanna-Tabor*, 565 U.S. at 191. Rather, Catholics often reserve teaching and other important ministry roles to the laity, who lack similar titles and credentials, in keeping with the doctrines outlined above.

As a result, there are many Catholic ministry employees who are identical in function to their Protestant counterparts but who lack the titles, credentials, and formal training that the Protestants possess. The Ninth Circuit’s approach protects Protestants’ right to make employment decisions regarding their ministerial employees but denies Catholics autonomy over their similarly situated lay ministers.

This disparate treatment is intolerable under the Establishment Clause. Some religious groups recognize the concept of ordination broadly, some recognize it “only as to certain offices,” and some do not recognize it at all. *Biel v. St. James Sch.*, 926 F.3d 1238, 1246 (9th Cir. 2019) (Nelson, J., dissenting from the denial of rehearing en banc) (citing *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring)). Formal titles and training might therefore be relevant to determining ministerial status for Lutherans, a tradition in which such markers strongly correlate to religious leadership. *Ibid.* But the Catholic Church has “repeatedly emphasized that the growth of lay Catholic teachers—those who are succeeding [to] roles previously held by religious orders, sisters, brothers, and clergy—does *not* change a Catholic teacher’s responsibilities.” *Ibid.* (quoting Brief of Nat’l Catholic Educ. Ass’n as Amicus Curiae in Support of Rehearing and Rehearing En Banc 14). It is therefore unsurprising and constitutionally immaterial that “Biel’s title * * * differed from Perich’s title, as a Lutheran school teacher.” *Ibid.*

The Ninth Circuit’s erroneous attempt to assess Catholic teachers through the lens of a different ecclesiological tradition treats the Catholic Church unequally because of its religious beliefs. The Court should reverse and establish that the Constitution requires a neutral approach when courts evaluate ministerial status under *Hosanna-Tabor*.

CONCLUSION

The judgments of the court below should be reversed.

Respectfully submitted.

ANTHONY R. PICARELLO, JR.	AARON M. STREETT
JEFFREY HUNTER MOON	<i>Counsel of Record</i>
MICHAEL F. MOSES	RICHARD A. HUSSEINI
UNITED STATES	BRENTON H. COOPER
CONFERENCE OF CATHOLIC	BAKER BOTTS L.L.P.
BISHOPS	910 Louisiana St.
3211 Fourth Street, NE	Houston, Texas 77002
Washington, D.C. 20017	(713) 229-1234
(202) 541-3000	aaron.streett@bakerbotts.com

*Counsel for Amicus Curiae United States
Conference of Catholic Bishops*

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