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.
DANIEL 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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have frequently appeared before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) or for amicus, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. 171 (2012). The proper resolution of this case is a matter of utmost concern to the ACLJ because of its dedication to religious freedom.

SUMMARY OF THE ARGUMENT

The animating principle of the ministerial exception is preservation of religious autonomy. In every other context where institutional autonomy has been an important consideration, this Court has consistently accorded a significant degree of deference to the institution's decisions. The Court has been particularly reluctant to second-guess an institution's management of its internal affairs when the institution's autonomy is grounded in a specific

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* Counsel of record for Petitioners filed with the Court a blanket consent to the filing of amicus briefs. Counsel of record for Respondents consented to the filing of this amicus brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its respective counsel made a monetary contribution to the preparation or submission of this brief.

constitutional provision, or when the internal operation of the institution lies beyond judicial ken.

Because religious autonomy is anchored in the Religion Clauses, as well as in the right to expressive association, and because the internal operation of religious schools (like public schools) lies outside judicial ken, deference to religious schools in ministerial exception cases is especially appropriate. Indeed, denial of deference in ministerial exception cases would single out religious organizations for discriminatory treatment and drain the religious autonomy principle of the vigor it deserves under the First Amendment.

ARGUMENT

I. The Religious Autonomy Principle Requires the Judiciary to Defer to Religious Organizations' Determinations about Which Employees Serve as "Ministers."

Religious autonomy is, at a minimum, "a principle of deference." Christopher C. Lund, *In Defense of The Ministerial Exception*, 90 N.C.L. Rev. 1, 16 (2011). Grounded as it is in the First Amendment, religious autonomy safeguards "a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 173 (2012). Religious autonomy is the "flagship" religious liberty issue and the "litmus test" of the Nation's "commitment to genuine spiritual freedom." Gerard

V. Bradley, *Forum Juridicum: Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 La. L. Rev. 1057, 1061 (1987).

Accordingly, this Court's religious autonomy decisions recognize a "spirit of freedom for religious organizations, an independence from secular control or manipulation--in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)); *see also Watson v. Jones*, 80 U.S. 679, 726–27 (1872) (discussing the control and judgment of religious organizations over their members).

It is doubtless for that reason that this Court rejected a "rigid formula for deciding when an employee qualifies as a minister." *Hosanna-Tabor*, 565 U.S. at 190. Rigid formulas on the one hand, and amorphous standards like the Ninth Circuit's "totality of the circumstances" test, *Biel v. St. James Sch.*, 911 F.3d 603, 614 (9th Cir. 2018), raise the risk that secular authorities will second-guess religious groups' choices about "who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196; *see also id.* at 197 (Thomas, J., concurring) ("A religious organization's right to choose its ministers would be hollow, however, if secular courts could second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets."); *see also id.* at 198 (Alito, J., Kagan, J., concurring) ("It would be a mistake if the

term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one.").

As this Court has acknowledged, religious schools assume a major role in teaching religious faith and values to the next generation. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979) ("[T]he *raison d'etre* of parochial schools is the propagation of a religious faith.") (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring)). And it is the teachers who fulfill "the critical and unique role" of both teaching and modeling the faith to the schools' students. *NLRB*, 440 U.S. at 501. Teachers at many religious educational institutions are expected to integrate their faith with any subject they teach, whether theology, math, or physical education. *See, e.g.*, *Wolman v. Walter*, 433 U.S. 229, 253–54 (1977); *Meek v. Pittenger*, 421 U.S. 349, 370–71 (1975). "Religious authority necessarily pervades the [religious] school system." *NLRB*, 440 U.S. at 501. Accordingly, attempts to categorize teacher functions as secular or religious raise the risk of encroachment upon the "former autonomous position of [religious school] management." *Id.* at 503 (citation omitted).

The Ninth Circuit's decisions in the instant cases illustrate the damage to religious autonomy that results from judicial second-guessing of religious schools' good faith determinations that a teacher plays an instrumental role in teaching and exemplifying the schools' religious values. As the Seventh Circuit pointed out, the Ninth Circuit in *Biel* made its own "independent assessment, essentially disregarding what [the school thought] . . . about its

own organization and operations." *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019). Rejecting the schools' assessments of Catholic theology and their internal organizations, the Ninth Circuit ran roughshod over the schools' religious autonomy as well as their First Amendment associational rights.

An important safeguard against such encroachment on religious school autonomy is judicial deference to the religious school's assessment of which employees perform religious functions and qualify as ministers:

> The question whether an employee is a minister is itself religious in nature, and the answer will vary widely. Judicial attempts to fashion a civil definition of "minister" through a bright-line test or multifactor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the "Mainstream" or unpalatable to some.

Hosanna-Tabor, 565 U.S. at 197 (Thomas, J., concurring); *see also NLRB*, 440 U.S. at 495 (holding that the NLRB's attempt to distinguish "completely religious" schools from "merely religious" schools is unworkable because it implicates "very sensitive questions of faith and tradition").

In every other context where respect for institutional autonomy has been an important consideration, this Court has granted some degree of deference to the institution's decisions. Given the

inextricable link between religious institutional autonomy and religious liberty, judicial deference is doubly warranted in ministerial exception cases.

II. This Court Has Held in Many Other Contexts that Judicial Deference Is an Essential Means of Safeguarding Institutional Autonomy.

Judicial deference is a rule of thumb in many other contexts where institutional autonomy is an important constitutionally-grounded principle.

A. Judicial Deference in Other First Amendment Cases

In First Amendment cases involving academic freedom and expressive association, the Court has afforded substantial deference to the institution's management of its internal operations. Because academic freedom is "a special concern of the First Amendment," *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), the Court has required deference to the academy's "autonomous decision-making." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 & n.12 (1985) (noting the Court's "reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom"); s*ee also Grutter v. Bollinger*, 539 U.S. 306, 328–30 (2003) (citing the Court's "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits"); *Regents of Univ. of Cal. v. Bakke*,

438 U.S. 265, 312 (1978) (plurality) (stating that academic freedom means that educational institutions may choose "who may teach, what may be taught, how it shall be taught, and who may be admitted to study").

This deference has extended to lower public school decisions as well. Because public schools are essential to "the preparation of individuals for participation as citizens," and are vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system," *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979), federal courts "should not ordinarily intervene in the resolution of conflicts which arise in the daily operation of school systems." *Bd. of Educ. v. Pico*, 457 U.S. 853, 861 (1982) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969)).

Where the First Amendment right to expressive association is at stake, this Court has held it appropriate to "give deference to an association's assertions regarding the nature of its expression," as well as its "view of what would impair its expression." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000); *see also Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 123–24 (1981).

B. Judicial Deference in Cases Where Institutional Autonomy Derives from Other Constitutional Principles

The Court has held that institutional autonomy requires judicial deference to the institution's decisions when necessary to uphold other

constitutional principles, such as separation of powers and federalism. A few examples suffice:

- Deference to Executive Branch—*Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982) (recognizing "the President's constitutional responsibilities and status as factors counseling judicial deference and restraint"); *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 385 (2004) (noting that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated").

- Deference to Congress—*Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010) (noting that on matters of national security, Congress's "superior capacity for weighing competing interests means that 'we must be particularly careful not to substitute our judgment of what is desirable for that of Congress'") (citation omitted).

- Deference to State courts—The federal abstention doctrines derive from "deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996); *see also Theard v. United States*, 354 U.S. 278, 281 (1957) (holding

that a state's autonomous control over the practice of law requires general deference by federal courts to state courts concerning methods by which to regulate the state bar).

C. Other Cases Holding that Judicial Deference Is Appropriate

Even in cases where institutional autonomy is not necessarily grounded in constitutional principles, the Court has required deference to the institution's internal operation decisions where management of the institution lies beyond judicial ken.

- Deference to the Military—The Court has accorded substantial deference to the military's decision-making autonomy when the propriety of duty assignments is questioned. *E.g.*, *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953) (holding that the special nature of military life has supported the military establishment's broad power to deal with its own personnel); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (noting that judicial review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society).

- Deference to Correctional Institutions—Deference to prison officials is warranted because prison security decisions are

> "peculiarly within the province and professional expertise of corrections officials." *Pell v. Procunier*, 417 U.S. 817, 827 (1974). Constitutional challenges by inmates should therefore be reviewed under a deferential standard of review. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

It follows from the foregoing precedents that judicial deference should be at its zenith in ministerial exception cases. Unlike academic freedom, religious autonomy is anchored in two separate guarantees of the First Amendment – the Free Exercise Clause and the Establishment Clause, which both give "special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189.

Additionally, the First Amendment right to expressive association requires judicial deference to religious organization personnel decisions. *See Dale*, 530 U.S. at 653. Because religious organizations are quintessentially "dedicated to the collective expression and propagation of shared religious ideals," deference should apply "with special force." *Hosanna-Tabor*, 565 U.S. at 200–01 (Alito, J., Kagan, J., concurring); *see also Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) (noting that the constitutional interest in freedom of association may be "reinforced by Free Exercise Clause concerns").

Finally, judicial deference to religious school personnel decisions is supported in this Court's cases granting deference to an educational institution's operation of its own internal affairs. Management of

religious schools—as is true with public schools—is beyond judicial ken. Judicial second-guessing of religious school determinations about which teachers teach and model the faith is a direct assault on the institution's autonomous decision-making. *See NLRB*, 440 U.S. at 503.

In light of this Court's other deference cases, there can be no principled basis for denying substantial deference to a religious school's good faith determination about which of its teachers possess the character and conduct to be credible messengers of its religious beliefs. Withholding such deference would effectively impose unique disabilities on religious organizations. Amicus accordingly urges this Court to hold that the religious autonomy principle mandates robust judicial deference to a religious organization's determination about which employees qualify as ministers.

CONCLUSION

Amicus respectfully requests this Court to reverse the Ninth Circuit.

Respectfully submitted,

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