Nos. 19-267 and 19-348

In The Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,
v.
AGNES MORRISEY-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 THE RUTHERFORD INSTITUTE, *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888

Nathan A. Adams, IV
HOLLAND & KNIGHT LLP
315 S. Calhoun Street
Suite 600
Tallahassee, FL 32301
(850)425-5640

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond VA 23219 (800) 847-0477

QUESTION PRESENTED

Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Treatises

INTEREST OF *AMICUS CURIAE*[1]

Since its founding over 35 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking out about religion, or defending the rights of individuals against illegal search and seizure, The Rutherford Institute offers assistance—and hope—to thousands.

The Institute has repeatedly demonstrated its commitment to defending freedom of religion, along with our nation's other vital freedoms. To that end, The Institute actively participates in cases addressing the First Amendment's guarantee of religious freedom. The Institute served as *amicus curiae* in prior religious freedom cases before this

---

[1] Counsel of record to the parties in this case have consented to the filing of this brief. No counsel to any party authored this brief in whole or in part, nor has any party or counsel to a party made a monetary contribution funding the preparation of this brief.

Court, including *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), *Cutter v. Wilkinson*, 544 U.S. 709 (2005), and *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987).

Each year, The Institute receives numerous complaints involving misinterpretation of the First Amendment's free exercise and establishment clauses. The extent of misunderstanding regarding the proper scope of the First Amendment's religion clauses, and the number of potential lawsuits resulting from this misunderstanding, is alarming.

The Institute presents this brief in the hope that it will assist the Court in bringing clarity to the law. By returning to the fundamental First Amendment principles that animate and justify the ministerial exception, the Court can clarify a standard that is more protective of the important freedoms at stake, flexible rather than rigid and formulaic, easier for the lower courts to apply without unwarranted interference with the internal affairs of religious organizations, and more predictable and principled in its outcomes.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is now well-established that the Constitutional imperative to protect the "wall of separation" between church and state, *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947), requires a strong ministerial exception, barring most employment-related lawsuits between religious organizations and those of their employees who play an important role

in the religious mission of the organization, regardless of whether those employees are formally ordained as "ministers." Indeed, in the first circuit court decision to adopt it, the Fifth Circuit recognized that the church autonomy doctrine from which the ministerial exception doctrine springs is vital to protect what this Court has called "'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.'" *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)) (refusing to consider a Title VII discrimination suit brought by a minister against her church because "[t]he relationship between an organized church and its ministers is its lifeblood…. Matters touching this relationship must necessarily be of prime ecclesiastical concern.").

The First Amendment preserves civil liberties against religious interference and religious liberty from invasion by civil authority. As such, this Court recognized from the start in *Watson v. Jones*, 80 U.S. 679 (1871), that the church autonomy doctrine from which the ministerial exception doctrine springs is jurisdictional, not an affirmative defense. Civil courts lack the competence to decide who should speak what ecclesiastical message from the pulpit. This is within the exclusive jurisdiction of the church. It is not that the church's ministerial hiring decisions may be unlawful but for the doctrine, but that those hiring decisions are outside the reach of civil courts altogether. Although reaffirming *Watson* in every

other respect, this court in *Hosanna-Tabor* erroneously departed from it without acknowledgment. The Court should return to the whole of *Watson* and recant treatment of the doctrine as an affirmative defense to avoid undermining the doctrine's rationale and purpose.

Finally, to avoid creating the problems of entanglement that the church autonomy doctrine was designed to avoid, courts must defer to religious organizations' own assessments of the religious significance of their employees' duties. In order to safeguard religious liberty while avoiding the risks of entanglement, the Court should adopt a standard similar to that articulated in Seventh Circuit cases, which declines to second-guess religious institutions' own views of the religious importance of their employees' functions, but instead employs "a presumption that clerical personnel" are within the ministerial exception, rebuttable by proof that "the church is a fake," or the minister's title is a sham, or her function is "entirely rather than incidentally commercial." *Schleicher v. Salvation Army,* 518 F.3d 472, 477-78 (7th Cir. 2008). There is no doubt that the Petitioners would have prevailed under this standard. More generally, and more importantly, under such a standard, religious institutions would enjoy greater freedom and autonomy in matters of faith, courts would be less at risk of entanglement in religious issues, and judicial decisions in this area would be clearer, more consistent and more predictable.

Protecting the "wall of separation" between church and State requires vigilance against even

well-intentioned incursions by courts and government bureaucrats (perhaps especially against such). As this Court has warned, "the breach … that is today a trickling stream may all too soon become a raging torrent…." *School Dist. of Abington, Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963).

ARGUMENT

I. THE PRINCIPLES ADOPTED IN THE COURT'S PRIOR RELIGION CASES DICTATE RECOGNITION OF A ROBUST MINISTERIAL EXCEPTION.

With the decision in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), this Court formally recognized the ministerial exception, ruling (as had lower courts for decades) that the exception is built on the foundation of this Court's prior seminal religion cases. *Id.* at 185-88. See, *e.g., McClure v. Salvation Army*, 460 F.2d 553, 559-60 (5th Cir. 1972) (discussing the Court's key religion decisions, in adopting the ministerial exception). In the instant case, the Court is asked to determine whether the lower courts erred in refusing to apply the exception in employment discrimination lawsuits brought by two religious school teachers. In making that decision, the Court will also provide guidance to lower courts in resolving similar disputes that affect the fundamental freedoms enshrined in the First Amendment's religion clauses. As the Petitioners' merits brief makes clear, the Ninth Circuit in these cases lost sight of the fundamental principles established in this Court's cases, applying the ministerial exception in a mechanical fashion that

fails to protect core First Amendment values. In resolving these cases and in providing lower courts with guidance in applying the ministerial exception, this Court should return to those fundamental principles embodied in the free exercise and establishment clauses it has long recognized.

The Court began to recognize the "wall of separation" between church and state erected by the First Amendment in *Watson v. Jones*, 80 U.S. 679 (1871), a contest between two factions for control of church property in Kentucky resulting from a schism over the slavery question. One of the factions had been recognized by the highest ecclesiastical body of the Presbyterian Church as the "regular and lawful" governing body of the church. *Id.* at 694. Rejecting the contrary view of the English courts known as "Lord Eldon's Rule," the Court held that civil courts have no authority to question such an ecclesiastical ruling. *Id.* at 728-29.

Here was a signal achievement of the American Revolution, acknowledged by this Court, to distinguish the sphere of the state from the sphere of the church to prevent one from dominating the other. In the words of this Court, "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference" and "secured religious liberty from the invasion of the civil authority." *Id.* at 730. The constitutional framers endeavored to chart a course away from Europe's religious wars and persecution that led America's first European settlors here. No less than in any prior century, ours is riven by moral and religious turmoil, dividing churches, churches

from other churches, and churchgoers from nones. The fundamental question who may preach from the pulpit, inculcate the faith, and represent the church is as divisive as ever. It must not be decided by the state if the American experiment is to persist.

Although *Watson* was decided prior to judicial recognition of the Fourteenth Amendment's incorporation of the First Amendment to restrain state action, the opinion "radiates … 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" *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). See also *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969) (although decided before the application of the First Amendment to the States, *Watson* was "informed by First Amendment considerations").

The *Watson* Court grounded its decision on three fundamental liberties contained in the First Amendment: the right to free exercise of religion, the prohibition on government establishment of religion, and freedom of association. Each one presses toward the religious freedom that James Madison, Jr. thought Americans reserved in accordance with their allegiance to God before and as a condition of entering civil society. Europeans assumed rights emanate from the state, so the sovereign could grant or, more often, deny religious liberty. The state was

the final arbiter of religious doctrine and heresy under Lord Eldon's Rule, but not so in America:

> In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine … is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all of the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. *It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject*

> *only to such appeals as the organism itself provides for.*

Watson, 80 U.S. at 728-29 (emphasis added). In sweeping language that remains relevant today, the Court declared that a "rule of action" protecting the autonomy of religious organizations to decide religious questions is necessary to protect "that full, entire and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles." *Id.* at 727-28.

Based on *Watson*, the Court has repeatedly instructed that courts cannot dictate to religious institutions the selection or removal of ministers. This Court relied on *Watson* fifty years later in holding that the courts could not second-guess a decision of the Archbishop of Manila refusing to appoint the petitioner to a chaplaincy for lack of qualification under Canon Law. *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929). Noting that the appointment was "a canonical act," the Court ruled that "it is the function of the church authorities," and not a civil court, "to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* at 16.

In *Kedroff*, the principles espoused in *Watson* and *Gonzalez* were explicitly recognized to be mandated by the Constitution. The Court there invalidated a New York statute, passed in the wake of the Russian Revolution, that purported to transfer control over Russian Orthodox churches in this country from the patriarch of Moscow to authorities selected by the North American churches. Although the case involved competing rights to control a

particular cathedral, the Court understood that what really was at stake was "the power to exercise religious authority," "a claim which cannot be determined without intervention by the State in a religious conflict." 344 U.S. at 121 (Frankfurter, J., concurring). The Court concluded that the New York law violated the Constitution because it "prohibit[ed] the free exercise of religion," which requires that religious institutions have the "power to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine." 344 U.S. at 116, 120. Included within this sphere of autonomy is "[f]reedom to select the clergy." *Id.*

Nearly twenty-five years after *Kedroff*, the Court relied on that decision in ruling that civil courts have no authority to entertain a suit seeking to force a church to reinstate a defrocked bishop. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The Court recognized that the "fallacy fatal to the judgment" of the state court was that it had "impermissibly substitute[d] its own inquiry into church polity and resolutions," when religious disputes are matters "for ecclesiastical and not civil tribunals." 426 U.S. at 708-09. The Court declared that "questions of church discipline and the composition of the church hierarchy are at the core of the ecclesiastical concern," and "not the proper subject of civil court inquiry." *Id.* at 717, 713. Significantly, the Court recognized that the First Amendment would be violated not merely by a court's reversal of a church's decision, but even by the intrusion of a "detailed review of the evidence," such as "evaluat[ing] conflicting testimony concerning

internal church procedures." *Id.* at 718. Any other rule would sanction judicial "intrusion into a religious thicket." *Id.* at 719.

The Court returned to this "entanglement" theme in the context of religious schools in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). In that case, the Court declined to interpret the National Labor Relations Act to give the National Labor Relations Board authority to force church-operated schools to engage in collective bargaining with their teachers because allowing such an "intrusion" "could run afoul of the Religion Clauses" of the First Amendment. *Id.* at 499. Recognizing both that "'religious authority necessarily pervades the [parochial] school system,'" (citing *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)), and "the critical and unique role of the teacher in fulfilling the mission of a church-operated school," *id.* at 501, the Court concluded that "[w]e see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." *Id.* at 504. Anticipating that schools would defend labor charges by responding that "their challenged actions were mandated by their religious creeds," and that courts would then be drawn into an examination of religious doctrine (the "detailed review of the evidence" and "evaluation of conflicting testimony concerning internal church procedures" prohibited by *Milivojevich*), the Court understood that "[i]t is not only the conclusions reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502.

As this historical review shows, for more than a century, the Court has protected religious freedom by prohibiting the courts from second-guessing a church's decision to appoint or remove a minister, or a church's interpretations on matters of religious faith and doctrine, including the manner in which the church passes on the faith to the next generation through church-operated schools.

II. THE MINISTERIAL EXCEPTION DOCTRINE IS JURISDICTIONAL, RATHER THAN AN AFFIRMATIVE DEFENSE.

Hosanna-Tabor was the first time that the Court had ever addressed the import of the First Amendment's religion clauses to the selection of ministers. In finding that religious organizations have a right to select their ministers, this Court first reaffirmed the principles set forth in *Watson* and *Kedroff* that in order to freely exercise their religions, churches must have plenary authority to govern themselves. *Hosanna-Tabor*, 565 U.S. at 185-86.

Relying on these authorities, the *Hosanna-Tabor* ruling found a ministerial exception is required by the First Amendment, reasoning as follows:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the

> selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 188-89. This Court also recognized that "government interference with an internal church decision that affects the faith and mission of the church itself" presented special concerns. *Id.* at 190.

In all of these respects, this Court recognized the ministerial exception doctrine expounded in *Watson* and its progeny as a structural restraint upon government. So it was surprising when this Court, went on to refer in a footnote to the ministerial exception doctrine as an affirmative defense. *Id.* at 195 n.4. This Court did not acknowledge the departure from *Watson* when it reasoned:

> [I]t is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character, a matter over which the civil courts exercise no jurisdiction, in a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church

> to the standard of morals required of them, becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted, and, in a sense often used in the courts, **all of those may be said to be questions of jurisdiction**.

Watson, 80 U.S. at 733 (emphasis added).

In *Blue Hull*, this Court reiterated this point and explained that *Watson* concerned in the first instance "the American concept of the relationship between church and state" and that it was "wholly inconsistent" with that concept "to permit civil courts to determine ecclesiastical questions"; rather, "the logic of" the First Amendment's "language leaves the civil courts no role in determining ecclesiastical questions in the process of resolving property disputes." 393 U.S. at 445-47.

In *Milivojevich*, this Court rejected a bishop's resistance to his removal from office in reliance on the *Watson* holding concerning jurisdiction: this is "a strictly and purely ecclesiastical matter … over which the civil courts exercise no jurisdiction." 426 U.S. at 713-14 (citing *Watson*, 80 U.S. at 733-34). The Court observed that in deciding that a church acted "arbitrarily" by failing to follow its own rules, the Illinois Supreme Court "must inherently" have inquired "into the procedures that canon or

ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question." *Id.* at 713. Yet this Court in *Milivojevich* determined: "[T]his is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." *Id.* at 713. If an affirmative defense, the ministerial exception doctrine would allow extensive inquiry into ecclesiastical matters before the church would have any chance to dismiss the lawsuit contrary to *Milivojevich*.

The First Amendment also took center stage as a jurisdictional bar in *Jones v. Wolf*, 443 U.S. 595, 602 (1979). According to this Court, the "[First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Id.* In this respect, *Jones* was faithful to James Madison's "favorite principle" undergirding the Constitution: "the immunity of Religion from civil jurisdiction." THE WRITINGS OF JAMES MADISON 98, 100 (Gaillard Hunt ed., 1910). He knew churches are not mere creatures of the law deriving their existence from the state. Churches preexisted the state by millennia, are transnational, and are likely to continue to exist after the state dissolves as evidenced most recently in East Europe.

Treating the ministerial exception doctrine as an affirmative defense, rather than jurisdictional bar undermines its rationale and purpose of avoiding entanglement between church and state. An affirmative defense is only a set of facts other than those alleged by the plaintiff which, if proven by the defendant, defeats or mitigates the legal consequences of the defendant's otherwise unlawful conduct. Under this lens, a church hiring exclusively males as priests is unlawful but potentially excusable, whereas under the *Watson* lens, the state is not competent to judge the lawfulness of the church ministerial hiring decision in accordance with its ecclesiastical convictions. Who are the leaders of the church is for the church to decide, not the state.

Notwithstanding this, the courts of appeal split in a manner betraying their fundamental misunderstanding of the ministerial exception doctrine. *See Hosanna-Tabor*, 565 U.S. at 195 n.4. In *Petruska v. Gannon Univ.*,462 F.3d 294, 302 (3d Cir. 2006), the court wrongly ruled *ipso facto* that the ministerial exception doctrine does not concern, as does Fed. R. Civ. Pro. 12(b)(1), the "very power to hear the case." In *Watson*, this Court ruled this is exactly what the doctrine concerns. The Court in *Watson* could easily have treated the doctrine as an affirmative defense but did not.

In *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F. 3d 940 (9th Cir. 1999), the court determined that "[a]ny non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits under Rule 12(b)(6)." Although it is true

that nothing in Article III limits the federal court's power to decide an age discrimination case involving a minister against a church, *Watson* teaches that the structural restraint on civil courts preventing them from hearing the case is grounded in the establishment clause. 80 U.S. at 730. This is why state courts have also generally treated the ministerial exception doctrine as a jurisdictional bar. See, e.g., *Music v. United Methodist Church*, 864 S.W.2d 286 (Ky. 1993); *Parish of the Advent v. Diocese*, 688 N.E. 2d 923 (Mass. 1997).

In *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002), the court claimed the ministerial exception doctrine "is similar to a government official's defense of qualified immunity, which is frequently asserted in a motion to dismiss under Rule 12(b)(6) or Rule 56." To the contrary, there is no analogy between, on the one hand, a legal doctrine protecting government from religious interference and religious liberty from government and, on the other hand, a doctrine that shields government officials from being sued for discretionary actions performed within their official capacity unless their actions violate clearly established constitutional rights.

These decisions are misguided and led this Court down the wrong path in *Hosanna-Tabor*, in contrast to *Tomic v. Catholic Diocese of Peoria*, 442 F. 3d 1036, 1037 (7th Cir. 2006), where Judge Posner, in reliance upon *Milivojevich*, *Blue Hull*, *Jones*, and other cases, wrote, "Federal courts are secular agencies. They therefore do not exercise jurisdiction over the internal affairs of religious organizations."

When defendants facially challenge subject matter jurisdiction under Rule 12(b)(1), plaintiffs have the burden of establishing subject matter jurisdiction. *See, e.g., Marcus v. Kansas Dep't of Revenue*, 170 F. 3d 1305, 1308 (10th Cir. 1999); *Richmond Fredericksburg & Potomic R. Co. v. United States*, 945 F.2d 765 (4th Cir.1991), *cert. denied*, 503 U.S. 984 (1992). This accords with the constitutional presumption that the state is not over the church in ecclesiastical matters, including, most importantly, who may work for, associate with and represent the church and what the church teaches. In contrast, the presumption of Fed. R. Civ. P. 12(b)(6) in favor of the validity of a plaintiff's allegations or of Fed. R. Civ. P. 56 that controverted facts require trial means the state will be entitled to sit in judgment on the church in most circumstances.

As an affirmative defense, the ministerial exception doctrine cannot protect the church from the very types of entangling discovery under the coercive subpoena power of the state that this Court determined must be avoided. Through discovery, those opposed to the agenda of the church can use the state to compel the church, at a minimum, to endure great cost and to divert the church from its mission before the case may be dismissed, notwithstanding that the doctrine is designed to protect against the "very process of inquiry leading to findings and conclusions," not just the conclusions themselves. *NLRB*, 440 U.S. at 502. The threat of entanglement was itself a primary reason the court adopted the doctrine:

> [I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization ef every religious denomination may, and must be examined into with minuteness and care, for they would become in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court.

Watson, 80 U.S. at 733; see also *Milivojevich*, 426 U.S. at 709 (judicial intervention in matters of ecclesiastical cognizance creates a "substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs").

This Court has the opportunity to restore the jurisprudential footing of the ministerial exception doctrine and, thus, the constitutional separation between church and state that protects religious liberty without eliminating discovery rights for plaintiffs. When a defendant facially challenges the court's subject matter jurisdiction, the court may consider evidence extraneous to the complaint such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction to hear the action. *See, e.g., Boyle v. Governor's Veterans Outreach & Assistance Ctr.*, 925 F. 2d 71, 74 (3d Cir. 1991); 2A JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE, ¶ 12-07 (2-1), at

12-49 to 12-50 (2d ed. 1995). This discovery is properly in service of determining whether the dispute at hand is ecclesiastical in nature and, thus, one that civil authority must not invade.

III. THE NINTH CIRCUIT'S MECHANICAL APPLICATION OF THE MINISTERIAL EXCEPTION ESTABLISHED IN *HOSANNA-TABOR* FAILS TO PROTECT CORE FIRST AMENDMENT FREEDOMS.

In finding that religious organizations such as schools have a right to select their ministers and that a religious school teacher is within the ministerial exception, this Court pointed in *Hosanna-Tabor* to certain facts related to her employment by the church and school, but specifically disclaimed that any "rigid test" was being established. *Id.* Yet, as the Petitioners point out in their brief, the Ninth Circuit adopted just such an inflexible test—one that is ripe for "manipulation" of religious institutions. Br. for Pets. at 24 (citing *Kedroff*, 344 U.S. at 116).

Additionally, the decisions below give no indication that the courts accorded any deference to the determination of the religious employer, in order to fully preserve and protect the separation of church and state and free exercise principles that are the foundation of the ministerial exception. As Justice Thomas wrote in his concurrence in *Hosanna-Tabor*, "the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister." 565 U.S. at 196 (Thomas, J., concurring). He went on to explain that

> [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. Our country's religious landscape includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status. 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 multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the "mainstream" or unpalatable to some. Moreover, uncertainty 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. . . . These are certainly dangers that the First Amendment was designed to guard against.

Id. at 197.

The deference Justice Thomas called for and which was missing from the lower courts' analysis in these cases should inform the decision here. The First Amendment foundations of the ministerial exception, including "independence from secular control or manipulation," *Kedroff*, 344 U.S. at 116, and that matters of religion are reserved "for ecclesiastical and not civil tribunals," *Milivojevich*, 426 U.S. at 708-09, should require special circumstances before a court second-guesses a religious institution's decision of "who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. In order to assure the constitution's twin goals of protecting church autonomy and preventing government establishment of religion, courts must avoid at all costs "evaluat[ing] conflicting testimony concerning internal church procedures," *Milivojevich*, 426 U.S. at 718, because that kind of intrusive inquiry itself impinges upon the rights protected by the Religion Clauses. *NLRB*, 440 U.S. at 502.

According deference to a religious organization's decision of who will communicate its faith and lead adherents serves the ultimate purpose of the ministerial exception: to "ensure[] that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,' *Kedroff*, 344 U.S., at 119,—is the church's alone." *Hosanna-Tabor*, 565 U.S. at 195. Due respect for the determination made by religious organizations is necessary for the following reasons:

First, courts are not competent to distinguish "religious" tasks from "secular" tasks, and they

engage in impermissible entanglement when they attempt to do so. This problem is compounded because the inquiry has both quantitative and qualitative elements. Some tasks may take little time but may be considered of great religious importance by a particular church, and vice-versa. See *Clapper v. Chesapeake Conference of Seventh-day Adventists*, No. 97-2648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998) (per curiam) (explaining that the quantity of time an employee spends on religious matters must be considered alongside "the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology"). Judges are not equipped to assess the qualitative aspect of a minister's duties. *Cf. Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (criticizing balancing tests that require courts to compare items that are "incommensurate," such as whether a "particular line is longer than a particular rock is heavy"). It is only too understandable, then, that courts will give greater weight to the quantitative analysis because that is within their grasp, but this is precisely what this Court ruled they must not do.

Second, the difficulty of applying a "primary duties" or similar test leads to significant uncertainty for churches as they cannot know which of their employees will be covered by the ministerial exception, and which will not be. As this Court has explained, such uncertainty can itself be a free exercise clause violation:

> Nonetheless, it 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. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987). See also *Hosanna-Tabor*, 565 U.S. at 711 (Thomas, J., concurring). This uncertainty may lead to churches to be overprotective and assign tasks such as preaching and proselytizing to only one or two employees whom the courts will accept as "ministers," while prohibiting those employees from engaging in tasks (such as service to parishioner's material needs) that a court might consider "secular," regardless of the importance of those tasks to the church's spiritual mission. When a church is forced to designate "ministers" based on litigation posture rather than spiritual needs, it has changed its core activities and its spiritual message to accommodate or protect against government pressures or expectations. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972) (warning against "contemporary society['s] exert[ion of] a hydraulic insistence on conformity to majoritarian standards" on religious entities).

Even under the kind of functional analysis the Petitioners urge in the instant case (Br. for Pets. at

36), religious organizations will face uncertainty and manipulation of their staffing decisions without some assurance that their determinations of who will personify their beliefs will be accorded some deference. In a pre-*Hosanna-Tabor* decision, a panel of the Ninth Circuit found use of a "primary duties" test "problematic" because the intrusive judicial analysis "could create the very government entanglement into the church-minister relationship that the ministerial exception seeks to prevent," while "the underlying premise of the primary duties test—that a minister must 'primarily' perform religious duties—is suspect" because "secular duties are often important to a ministry." *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 598 F.3d 668, 675 (9th Cir. 2010), *reh'g en banc granted,* 617 F.3d 1101 (9th Cir. 2010) and *vacated in part, adopted in part*, 627 F.3d 1288 (9th Cir. 2010).[2] See also *Clapper,* 1998 WL 904528, at *7 (explaining that the quantity of time an employee spends on religious matters must be considered alongside "the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology"). Moreover, the critical issue is not the tasks the employee performs but the meaning or religious significance with which the church endows those tasks under its own doctrine or

---

[2] On rehearing, the Ninth Circuit sitting *en banc* vacated Part IV-C of the original panel's opinion solely because "Rosa is a minister under any reasonable interpretation of the exception," and, therefore, "we need not and do not adopt a general test." 627 F.3d at 1290.

creed. See *Schleicher*, 518 F.3d 472, 477-78 (7th Cir. 2008) (thrift shops in the Salvation Army "have a religious function": "The sale of goods in a thrift shop is a commercial activity, on which the customers pay sales tax. But the selling has a spiritual dimension, and so, likewise, has the supervision of the thrift shops by ministers.").

Consider the hypothetical example of a homeless shelter operated by a local parish and staffed by lay Christian employees.[3] Assume that the shelter's operations are indistinguishable from a non-religious social service center: serving meals, providing a warm place to sleep for the night, and offering job training and placement assistance. The employees do not engage in direct proselytizing. The employees need not even be of the same creed as the sponsoring parish. The church, however, considers the homeless shelter to be an attempt to fulfill a sacred duty to minister to the poor and fulfill a corporal work of mercy. See *Catechism of the Catholic Church* ¶ 1033 (Doubleday Religion, 2d ed. 1992)("Our Lord warns us that we shall be separated from him if we fail to meet the serious needs of the poor and the little ones who are his brethren."); *Deuteronomy* 15:11 ("There will always be poor people in the land. Therefore I command you to be openhanded toward your brothers and toward the poor and needy in your land."). The hiring of

---

[3] See Carl Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 7 (1998).

compassionate Christian persons to "minister" quietly and conscientiously to the poor is therefore of critical importance to the parish as the "embodiment of [the church's] message." *Petruska,* 462 F.3d at 306. The church carefully selects these employees based, in part, on their acceptance of this mission. If these employees brought an employment claim against the church, a court focused on function might ignore the church's perspective on the employees' role because similar social services are provided in a similar manner by secular entities. Federal courts should not disregard--indeed, they should defer to--the theological understanding of the church regarding its mission in the world and the role its ministers play in that mission. *See Tomic*, 442 F.3d at 1040 (explaining how easily a court may be drawn into having to rule on a theological question); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) ("[C]hurches must be free "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989) ("Because of the difficulties inherent in separating the message from the messenger, a religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents."); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 804 (4th Cir. 2000) (ministerial exception applied to musician who was the "primary human vessel through whom the church chose to spread its message in song"); *Van Osdol v. Vogt*, 908 P.2d 1122,

1126 (Colo. 1996) ("The choice of a minister is a unique distillation of a belief system. Regulating that choice comes perilously close to regulating belief.").

IV. THE COURT SHOULD ACCORD DEFERENCE TO A RELIGIOUS ORGANIZATION'S DESIGNATION TO FULLY PROTECT THE IMPORTANT LIBERTIES AT STAKE.

Instead of the rigid approach employed in the decisions below, on a Rule 12(b)(1) motion this Court should adopt a standard that defers to the church's determination of whether and how an employee is important to the spiritual mission of the church, in the form of a rebuttable presumption. This kind of deferential test has significant advantages. First, it saves courts from having to decide religious questions because the rebuttable presumption would dictate that the church's articulation of the employee's role and spiritual significance would generally control. This would avoid many difficult cases because the court would need a clear showing that the church or the title of "minister" was fake in order to overcome the presumption. Close cases governed by the presumption would increase predictability.

Federal courts give deference in expressive association cases to the decisions of a group over its message. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) ("[W]e must also give deference to an association's view of what would impair its expression."). A church's selection of religious leaders to carry out its mission and transmit the faith to the next generation is at the intersection of the freedoms of religion and association, and is protected

by both, as the Court recognized a century ago in *Watson*, 80 U.S. at 728-29, and reaffirmed in *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) ("[I]t is easy to envision a case in which a challenge on freedom of association grounds would * * * be reinforced by Free Exercise Clause concerns."). See also *Amos*, 483 U.S. at 342 (Brennan, J., concurring) ("Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.").

A deferential test does not mean abdication. Opposing parties may overcome the presumption by showing that a church's status or the title it bestowed are shams, *Schleicher,* 518 F.3d at 478, or insincere. *Hosanna-Tabor*, 565 U.S. at 198 (Thomas, J., concurring) The church also has its institutional integrity to maintain and is accountable to its congregants and employees to operate in a forthright manner. See also *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018) ("This does not mean that we can never question a religious organization's designation of what constitutes religious activity, but we defer to the organization in situations like this one, where there is no sign of subterfuge.").

As a deferential standard, the Seventh Circuit's test in *Schleicher v. Salvation Army* is more protective of religious freedom, more predictable, and easier for courts to apply with less risk of entanglement than is the primary duties test. *Id.* at 478. In *Schleicher*, Judge Posner adopted "a

presumption that clerical personnel" are covered by the ministerial exception that could be rebutted by proof that the employee's function is "*entirely* rather than incidentally commercial." (emphasis added). *Id.* at 478. Such a rebuttable presumption minimizes the risk of entanglement while allowing cases to go forward where the employee has *no* religious function, so that the ministerial exception will not be subject to abuse. Returning to the homeless shelter hypothetical, *see supra* p. 26, the deferential test would lead to a different result. The test would give deference to the church's careful choice of ministerial employees and its understanding of the shelter's vital spiritual role. The employees could attempt to rebut the claims with evidence that the church or role description was fake.

Similarly, the Ninth's Circuit's now vacated[4] test in *Alcazar* is also more protective of religious freedom while minimizing the risk of entanglement. The original panel's test extended the ministerial exception where the employee was selected for the position "based largely on religious criteria" and "perform[s] *some* religious duties." *Alcazar,* 598 F.3d at 676 (emphasis added).

Both these tests are superior to the method employed below in the instant cases because they take courts out of the constitutionally impermissible business of supplanting the judgment of religious leaders as to which of a ministerial employee's duties

---

[4] See note 2, supra.

are most important and whether those so-called "primary" duties serve the faith. The Seventh Circuit's test is preferable because its presumption is more protective of religious freedom and avoids more elegantly the twin problems of the primary duties test.

CONCLUSION

In the end, the best protection for religious liberty is to vindicate the separation between church and state that the ministerial exception doctrine vindicates by recognizing separate spheres of competence: a civil jurisdiction independent from the church and an ecclesiastical jurisdiction independent from the state in relation to religious matters. By its nature, the ministerial exception doctrine is jurisdictional, not an affirmative defense. To assess the applicability of the doctrine in reaction to a Rule 12(b)(1) motion, no test can answer every question with fidelity to the First Amendment if that test is applied in a rigid and insensitive manner. The nature of the dispute must always be considered; regardless of the employee's duties. A religious organization may have a religious basis for the termination of employment that is protected by the First Amendment. Whatever test they employ, the lower courts should be instructed to tread with caution and to consider carefully whether adjudicating the issues raised by the particular dispute will entangle the court in matters of faith. The Court can come closer to the ideal with a more sensitive, flexible and principled test.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888

Nathan A. Adams, IV
HOLLAND & KNIGHT LLP
315 S. Calhoun St.
Suite 600
Tallahassee, FL 32301
(850) 425-5640

Counsel for Amicus Curiae The Rutherford Institute

February 10, 2020