No. 24-7246
Rehearing En Banc Granted June 18, 2026
En Banc Argument Scheduled for the Week of September 28, 2026

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNION GOSPEL MISSION OF YAKIMA WASHINGTON,

Plaintiff-Appellee,
v.

NICK BROWN, in his official capacity as Attorney General of Washington State; ANDRETA ARMSTRONG, in her official capacity as Executive Director of the Washington State Human Rights Commission; DEBORAH COOK, in her official capacity as Commissioner of the Washington State Human Rights Commission; GUADALUPE GAMBOA, in her official capacity as Commissioner of the Washington State Human Rights Commission; JEFF SBAIH, in his official capacity as Commissioner of the Washington State Human Rights Commission; HAN TRAN, in his official capacity as Commissioner of the Washington State Human Rights Commission,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Washington, No. 1:23-cv-03027-MKD
The Honorable Mary K. Dimke, District Judge

EN BANC BRIEF OF PROFESSOR LAEL WEINBERGER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[1]

Lael Weinberger is an assistant professor of law at George Mason University Antonin Scalia Law School. He has an interest in the sound development of church autonomy law and has published extensive scholarship on this subject. *See, e.g.*, Lael Weinberger, *The Origins of Church Autonomy*, VA. L. REV. (forthcoming 2027), bit.ly/4fxjnMQ; Lael Weinberger & Branton Nestor, *Church Autonomy and Interlocutory Appeals*, NOTRE DAME L. REV. (forthcoming), bit.ly/44KDx0S; Lael Weinberger, *Is Church Autonomy Jurisdictional?*, 54 LOY. U. CHI. L.J. 471 (2023); Lael Weinberger, *The Limits of Church Autonomy*, 98 NOTRE DAME L. REV. 1253 (2023); Robert Joseph Renaud & Lael Daniel Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 N. KY. L. REV. 67 (2008).

Many judges have relied on Professor Weinberger's scholarship when confronting the types of issues raised here. *See, e.g.*, *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 258 (2025) (Thomas, J., concurring) (citing *Spheres of Sovereignty*); *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 157 F.4th 627, 648 (5th Cir. 2025) (citing *The Limits of Church*

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus* and his counsel contributed money intended to fund its preparation or submission. Counsel of record for all parties received timely notice of *amicus*'s intent to file this brief. A motion for leave to file accompanies this brief.

Autonomy); *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 811 (9th Cir. 2025) (en banc) (Bumatay, J., concurring) (citing *Is Church Autonomy Jurisdictional?*); *O'Connell v. U.S. Conf. of Cath. Bishops*, No. 23-7173, 2025 WL 3082728, at *2 n.5 (D.C. Cir. Nov. 4, 2025) (Walker, J., concurring in the denial of rehearing en banc) (citing *Is Church Autonomy Jurisdictional?*); *id.* at *7, *11, *12 (Rao, J., dissenting from the denial of rehearing en banc) (citing *The Limits of Church Autonomy*, *Spheres of Sovereignty*, and *The Origins of Church Autonomy*); *Garrick v. Moody Bible Inst.*, 95 F.4th 1104, 1123-24 (7th Cir. 2024) (Brennan, J., dissenting) (citing *Is Church Autonomy Jurisdictional?*). Indeed, Professor Weinberger's scholarship has been cited by the Court in this very appeal. *See Union Gospel Mission of Yakima Wash. v. Brown*, 162 F.4th 1190, 1205 (9th Cir. 2026) (citing *The Limits of Church Autonomy*), *reh'g en banc granted, opinion vacated*, 2026 WL 1758172 (9th Cir. June 18, 2026). Professor Weinberger therefore submits this brief to facilitate the en banc Court's proper resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel opinion applied the First Amendment's church autonomy doctrine to a religious institution's employment decision. But no party claimed that the employee was a "minister." They therefore made no arguments that the "ministerial exception" applied. And the panel did not purport to apply the ministerial exception. Instead, it applied general principles of "church autonomy."

Critics of that decision have argued that its approach overprotects religious institutions. On one side, the State condemns the panel's religious-motivation requirement as containing "no limiting principle at all." Pet. for Reh'g En Banc at 18. Professor Esbeck condemns the same requirement from the opposite direction.[2] He acknowledges that where church autonomy applies, it is "a powerful cause of action or defense." Carl H. Esbeck, *Church Autonomy and the Co-Religionist Hiring Practice at Issue in* Union Gospel Mission of Yakima v. Brown, 102 NOTRE DAME L. REV. REFLECTION (forthcoming 2026) (manuscript at 4), bit.ly/4bEeYX2. He agrees that the Mission's ministerial employees are categorically protected; he does

[2] Professor Esbeck argues that the case should be decided on free exercise grounds—not church autonomy—or, failing that, remanded so the district court can consider in the first instance Union Gospel Mission's claims of forced speech and freedom of association. *See* Carl H. Esbeck, *Church Autonomy and the Co-Religionist Hiring Practice at Issue in* Union Gospel Mission of Yakima v. Brown, 102 NOTRE DAME L. REV. REFLECTION (forthcoming 2026), bit.ly/4bEeYX2. This Brief argues that the panel's decision was correct based on church autonomy, while recognizing that these alternative bases also suffice to support the panel's judgment.

not question the sincerity of the Mission's co-religionist practice; he counts the burdens the panel catalogued as "compelling reasons" for a ministry's fears; and he would affirm the preliminary injunction—though on free exercise grounds. *Id.* But because the panel "felt it necessary to limit its finding of church autonomy to instances when the co-religious hiring was religiously motivated," the appropriate doctrine, he reasons, cannot be church autonomy at all. *Id.* at 8. In his view, the church autonomy doctrine has nothing to say about non-minister employees of a religious institution.

This Brief presents the counterpoint to Professor Esbeck's unnecessarily narrow view of how church autonomy applies to the employment relationship. The ministerial exception has become well established—but neither doctrine, text, nor history suggests that it is the *only* church autonomy principle relevant to employment matters for religious organizations. To narrow the analysis in that way is to reify the ministerial exception beyond what the Constitution, or the doctrine's history, can bear. The religious-basis requirement is the boundary of church autonomy—drawn where the Religion Clauses draw it, policed through sincerity review that courts perform every day.

The panel properly applied the church autonomy doctrine, and this Court should affirm the preliminary injunction.

ARGUMENT

I. The Church Autonomy Doctrine Is Broader than the Ministerial Exception

The "ministerial exception" is a particular application of a broader rule. This broader rule is known as the "church autonomy doctrine." And the Court should avoid conflating the two.

A. The Church Autonomy Doctrine Derives from Both of the First Amendment's Religion Clauses

The church autonomy doctrine derives from the First Amendment's Religion Clauses. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 747-48 (2020). And the reference to "church autonomy" points to the doctrine's main practical application: to protect the internal affairs of religious institutions from interference, allowing them to decide for themselves matters of "faith and doctrine" and of "church government." *Id.* at 746 (quotation marks omitted). Government decisions about how a religious body manages these internal affairs would interfere with the free exercise of religion, and government involvement in making decisions for a religious body would amount to government establishment of religion as well.

Of course, church autonomy is not limited to those religious institutions that call themselves "churches." It applies equally to synagogues, mosques, and other houses of worship, and it has been applied to religious schools and ministries of various kinds as well, outside the limitations that might be associated with talking purely about a house of worship. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185-87 (2012).

At the same time, church autonomy does not protect anything and everything that happens within the setting of a religious institution. For instance, it does not provide cover for criminal activity. *See* Weinberger, *The Limits of Church Autonomy*, *supra*, at 1316.

But what it does protect is the self-governance of religious institutions—the "internal management decisions that are essential to the institution's central mission," of which ministerial selection is "a component." *Our Lady of Guadalupe*, 591 U.S. at 746; *see also Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1096 (2022) (Alito, J., statement respecting the denial of certiorari) (explaining that the Court's "precedents suggest that the guarantee of church autonomy is not so narrowly confined" to "employment decisions regarding formal ministers"); *McRaney*, 157 F.4th at 636 (noting that the doctrine "prohibits far more" than interference with worship or ministerial selection, protecting religious polity issues "such as membership, matters of discipline and good standing"); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655-58 (10th Cir. 2002) ("The Court has made clear that the constitutional protection extends beyond the selection of clergy to other internal church matters."); *Korte v. Sebelius*, 735 F.3d 654, 678 n.16

(7th Cir. 2013) ("The religious-employer exemptions in Title VII and the ADA are legislative applications of the church-autonomy doctrine.").

The historical origins of church autonomy in American law go back to the Founding. *See* Weinberger, *The Origins of Church Autonomy*, *supra*. The doctrine was then elucidated by the courts throughout the nineteenth century. Many of the early cases involved disputes arising from church property after a church split. *See, e.g.*, *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 685-86 (1872). Many others arose out of defamation proceedings—cases alleging that false, defamatory statements were made in the course of a church discipline proceeding. *See, e.g.*, *Jarvis v. Hatheway*, 3 Johns. 180, 183 (N.Y. Sup. Ct. 1808) (slander action between church members over discipline charges fails absent malice); *York v. Pease*, 68 Mass. (2 Gray) 282, 283-84 (1854) (words spoken "in good faith" in a church proceeding are privileged); *Landis v. Campbell*, 79 Mo. 433, 437-39 (1883) (ecclesiastical decisions "made in good faith" are "conclusive upon civil tribunals").

American courts encountering these cases recognized that they should not be in the business of taking sides in churches' doctrinal disputes or disagreements. *See* *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253, 259 (1842) ("The judicial eye . . . cannot penetrate the veil of the Church."); *German Reformed Church v. Commonwealth ex rel. Seibert*, 3 Pa. 282, 291 (1846) ("The decisions of ecclesiastical courts, like every other judicial tribunal, are final," and "[a]ny other than those courts must be incompetent judges of matters of faith, discipline and doctrine"). From this emerged the recognition that the self-definition, self-identity, religious doctrine, and self-governance of religious bodies were best managed by the religious body itself. These were matters of ecclesiastical government, not of civil government. And they were protected by the First Amendment. *See Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 712 (1976).

The "ministerial exception" is a logical application of these principles to a context largely unknown to early America. Employment nondiscrimination law is a mid-twentieth century development. *See, e.g.*, Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66. And when plaintiffs began suing churches for hiring and firing decisions, courts recognized that scrutinizing such decisions could lead to courts second-guessing matters fraught with religious criteria and religious significance. Employment decisions involving ministers, in particular, implicated "the internal governance of the church," and a court sitting in judgment over a church's decision in this regard would be "depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. This became known as the "ministerial exception."

To be clear, this exception merely applied the broader constitutional principle of church autonomy to a specific factual scenario. As the Court emphasized in *Our Lady of Guadalupe*, the "constitutional foundation" for the Court's development of the ministerial exception "was the general principle of church autonomy," not a special constitutional principle for clergy. *Our Lady of Guadalupe*, 591 U.S. at 747. The "prior decisions on which [the Court] primarily relied drew on this broad principle, and none was exclusively concerned with the selection or supervision of clergy." *Id.* They instead "involved a dispute about the control of church property," *id.* (citing *Watson*, 80 U.S. 679), and disputes at the intersection of church property and the "appointment and authority of bishops," *id.* at 748 (citing *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952), and *Milivojevich*, 426 U.S. 696).

B. The Ministerial Exception Is Derived from Broader Principles of Church Autonomy and Serves to Insulate Religious Institutions' Decisions About Their Leaders, Teachers, and Messengers from State Interference

What makes the ministerial exception distinctive is that, once it's shown that a religious institution's employment decision involves a minister, the judicial inquiry ends. According to the Supreme Court, a religious body can make decisions about its selection of ministers, protected by the First Amendment, without even the necessity of showing that the reason for the particular employment decision was itself religious. In *Hosanna-Tabor*, the plaintiff had threatened to file an Americans with Disabilities Act lawsuit, was fired, and then sued for retaliation. *See* 565 U.S. at 179-80. The church said that its religious reason for firing the plaintiff was that the plaintiff had failed to follow church guidance on resolving disputes within the faith community. *Id.* at 180. The plaintiff argued that the church's purported religious reason was mere pretext. *Id.* at 194. The Supreme Court said that didn't matter, because the ministerial exception's "purpose" is not to "safeguard a church's decision to fire a minister" only "when it is made for a religious reason." *Id.* at 194. "The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." *Id.* at 194-95 (quoting *Kedroff*, 344 U.S. at 119) (internal citation omitted).

Professor Esbeck is correct to note that one of the most distinctive aspects of the ministerial exception is this protection for decisions about the employment of ministers—without the necessity of showing "a religious reason" for the decision. But this should not be generalized into assuming that the same kind of blanket protection must be granted to an employment decision of a church in order for that employment decision to be considered part of the church autonomy doctrine.

One way of understanding the flaw in Professor Esbeck's analysis is to view it as a syllogism that works more or less as follows: Church autonomy protecting employment decisions does not inquire about the reasons for the employment decision. The panel decision inquired about the reasons for the employment decision. Ergo, the analysis of the employment decision in *Union Gospel* ought not to rely upon church autonomy. The first premise of this syllogism, however, is mistaken. Only those decisions regarding *ministers* are free from having to address the reasons.

Applying the religious-reason inquiry outside the ministerial context is no embarrassment to the doctrine—no "tell" that something other than church autonomy is at work. *Cf.* Esbeck, *supra*, at 8. Nor does it amount to mere interest-balancing. Rather, the religious-reason inquiry is the basic question that identifies a decision *as church government* in the first place. That is how the courts of appeals have long administered church autonomy beyond the ministerial exception: "Before the church autonomy doctrine is implicated, a threshold inquiry is whether the alleged misconduct is 'rooted in religious belief.'" *Bryce*, 289 F.3d at 657 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). A doctrine is not disqualified from the Religion Clauses because it asks, at the threshold, whether religion is actually in the case. Professor Esbeck errs in suggesting the contrary.

The best way to understand what's going on with the ministerial exception cases is simply that selecting a minister is a fundamental matter of church governance. A religious organization's selection of someone to "lead[] [it], conduct[] worship services or important religious ceremonies or rituals," or to "serve[] as a messenger or teacher of its faith," *Our Lady of Guadalupe*, 591 U.S. at 751 (quotation marks omitted), is so intimately bound up with decisions about pastoral care, theological perspective, message, character, and the like, that such a decision is *always* going to have religious significance, *see Hosanna-Tabor*, 565 U.S. at 188. Put simply, the ministerial exception presumes that selecting a minister is religiously motivated. So, once a religious institution shows that the employment-law matter involves a minister, the inquiry into the religious body's reasons stops.

This makes sense when dealing with leadership, teaching, and messaging roles. Naturally, then, courts have paid close attention to the characterization of ministers. *Hosanna-Tabor* declined to "adopt a rigid formula for deciding when an employee qualifies as a minister." *Hosanna-Tabor*, 565 U.S. at 190. But in *Our Lady of Guadalupe*, the Court (building on *Hosanna-Tabor*) highlighted "four relevant circumstances" that characterized the ministerial role: (1) the title given to the position, (2) the degree of training and formal commissioning, (3) the decision by the religious body to hold out the individual (to the public or to the IRS) as a minister with a formal religious call to service, and (4) job duties that involved "a role in conveying the Church's message and carrying out its mission." *Our Lady of Guadalupe*, 591 U.S. at 750 (quoting *Hosanna-Tabor*, 565 U.S. at 192). "What matters, at bottom, is what an employee does." *Id.* at 753. A religious teacher counts as a minister, the Court explained, because the function was "at the very core" of—and was "central" to—the mission of the religious institution. *Id.* at 754, 756.

* * *

In sum, the ministerial exception bakes in a presumption that selecting a minister is inherently religiously motivated. So, there is no need for a religious institution to show that it had a religious reason for an employment decision regarding a minister. Once the employee is shown to be a minister, the inquiry ends.

But it does not follow from this that the church autonomy doctrine speaks to employment law *only* when the employee is a minister. Nor does it follow that, if the church autonomy doctrine were applied to an employment-related decision involving someone other than a minister, it would be necessary or appropriate to relieve a religious institution from having to articulate its reason for action. To determine if other employment decisions by religious institutions could ever fall within the scope of church autonomy, it is necessary to zoom out from the ministerial exception to that broader doctrine.

II. Applying Church Autonomy to Employment Situations Outside the Ministerial Exception Makes Sense

There's no reason to think that the ministerial exception exhausts the relevance of the church autonomy doctrine for employment-law matters. After all, the ministerial exception falls underneath the umbrella of church autonomy. And so for a role that is *not* characterized as that of a "minister" within a religious institution, the scope of church autonomy—not of the ministerial exception in particular—is what matters. When viewed through that proper lens, the basic principles of church autonomy protect a religious employer's religiously motivated employment decisions for any member of the religious employer's staff.

A. The Prima Facie Case for Covering an Employment Situation Within the Scope of Church Autonomy

To start, church autonomy principles protect religious conduct, not anything done within a church. Thus, the church autonomy doctrine can be applied if the conduct at issue is religious. *See* Weinberger, *The Limits of Church Autonomy*, *supra*, at 1307-08. In the ministerial exception setting, as argued above, this religious character is presumed from the nature of the ministerial role. But a presumption is available only where the issue is so religious on its face that it's unnecessary to go further. The situation with leaders, teachers, and messengers is one such setting justifying the ministerial exception. In many routine settings, however, there is no presumption; the religious character must be shown.

Here, there's no doubt that the Union Gospel Mission acted based on its religious beliefs. The Mission has religious beliefs about sexual ethics. It has religious beliefs about the way it wishes its Mission staff to model Christian life and ethics according to the Mission's understanding. And that is the reason for the employment decision at issue in this case. As a result, the conduct at issue is religious in a straightforward way.

It also implicates church governance—that internal self-rule that religious organizations must be free to pursue. Matters of membership in the religious organization are characteristically religious. And courts cannot second-guess those decisions. Instead, *Watson* puts "the conformity of the members of the church to the standard of morals required of them" beyond civil jurisdiction. 80 U.S. at 733. The membership-and-discipline cases have applied that rule to ordinary members, without regard to office or employment, for a century and a half. *See Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40 (1872) (explaining that courts "cannot decide who ought to be members of the church"); *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 878-83 (9th Cir. 1987) (similar); *Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528, 537-41 (Minn. 2016) (similar); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342-43 (1987) (Brennan, J., concurring) (explaining, in the context of employment, that "if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities").

In short, the "guarantee of church autonomy" is not "narrowly confined" to "employment decisions regarding formal ministers." *Seattle's Union Gospel Mission*, 142 S. Ct. at 1096 (Alito, J., statement respecting denial of certiorari). The doctrine protects a wide array of religious organizations from being forced to hire "personnel who do not share their religious views." *Id.*

The question in this case is therefore not whether to annex some new domain to church autonomy. It is whether the already-recognized membership domain of the doctrine reaches this particular religious community, whose members participate through employment. That inquiry does not turn on whether the employee is a minister or the particular form that the religious institution takes. *See Cath. Charities Bureau*, 605 U.S. at 248-49. It turns on whether the employment decision is (1) religiously based, regarding (2) an employee who has joined with a religious institution. If both those criteria are met, then the decision is protected by the church autonomy doctrine.

Professor Esbeck argues that "[t]hings are different when a religious employer restricts hiring to those who are members of the sponsoring denomination or church," because there "each job applicant meeting the qualification can be objectively known." Esbeck, *supra*, at 7 n.34. But that is precisely the case here too. Union Gospel informs applicants of its co-religionist policy before and during the hiring process; every employee must sign and agree to its statement of faith upon any offer of employment; and the State has never questioned the sincerity of the practice. *See* 162 F.4th at 1197-98, 1209. A covenant community's signed confession is every bit as "objectively known" as a denomination's membership rolls. To constitutionalize a distinction between the two would prefer religious communities organized along denominational lines over independent ministries—

precisely the sorting among "inherently religious choices" (including whether to "serve only co-religionists") that the Supreme Court has unanimously condemned. *Cath. Charities Bureau*, 605 U.S. at 250.

Professor Esbeck's deeper structural objection is that because "the meaning of co-religionist varies with each particular employer[,] the zone of autonomy will also vary." Esbeck, *supra*, at 7. In his view, this creates an unconstitutional preference for some religions, since the scope of church autonomy "has to embrace the same protected zone of subject matters across all religions." *Id.* But Professor Esbeck's objection mistakes the level at which uniformity operates. The legal rule here is uniform for every faith: a religious organization's religiously based decision about who participates in its religious community is protected upon a showing that the decision is rooted in sincere religious belief.

That the rule's application varies with each faith's self-understanding is not a defect; it is how every recognized domain of church autonomy works. The concept of a "minister" is administered functionally, tradition by tradition, under no "rigid formula." *Hosanna-Tabor*, 565 U.S. at 190. And membership itself is defined by each religious body's own criteria, which civil courts may not second-guess. *See Milivojevich*, 426 U.S. at 713-14. The variance Professor Esbeck fears implicates differences in religious content, but the rule of decision remains the same for every religious community.

Nor would that rule expand the church autonomy doctrine beyond its historical limits. On the contrary, membership is a well-recognized area for the operation of church autonomy principles. *See* Weinberger, *The Origins of Church Autonomy*, *supra*, at 15; Weinberger, *The Limits of Church Autonomy*, *supra*, at 1311-12; *see also* Branton J. Nestor, *Judicial Power and Church Autonomy*, 100 NOTRE DAME L. REV. 1899, 1905, 1918-20, 1922 (2025). And there is no question that the criteria applied here for membership and belonging are religious.

Indeed, this case is an easy one for applying the church autonomy doctrine, because the twin safeguards of ex ante disclosure and consent are in place. *See* Weinberger, *The Limits of Church Autonomy*, *supra*, at 1313-15. Those who join the work of Union Gospel are informed ex ante of the religious character of the organization and its requirement that those who participate as employees live out Union Gospel's understanding of Christian ethics and lifestyle. 162 F.4th at 1198. They then "unite themselves" to this "voluntary religious association[]"—and thereby "consent" to its resolution of ecclesiastical matters. *Watson*, 80 U.S. at 728-29. One could imagine other situations where an employer hires someone and later springs on them a surprise assertion that the organization is religious and that the position has religious character; this kind of situation has grave risks of abuse. *See* Weinberger, *The Limits of Church Autonomy*, *supra*, at 1313. But that is not what happened here. This case falls squarely within the church autonomy doctrine.

B. Providing a Church Autonomy Avenue for Dealing with the Non-Ministerial Employment Situation Is Superior to Putting All the Pressure on the Ministerial Exception

Were this Court to limit the church autonomy doctrine's application to employment decisions for "ministers," it would also create serious practical issues. Most notably, it would risk putting certain religious groups at a disadvantage based on their organizational choices. Those religious institutions that seek to provide meaningful religious roles for lay participants will get less protection than religious institutions that have employees teach or proclaim the faith in traditional ways. Consider some examples:

1. Church A has a pastor who coordinates care for bereaved families. Church B has a lay bereavement coordinator who does the same. Both are large churches and employ their respective bereavement coordinators. Both would say that ministering to the grieving at a time of loss is religiously significant. But Church B will face much greater legal uncertainty as to whether it can use religious reasons for making employment decisions around the role of its bereavement coordinator.

2. Religious Charity A employs an addiction-recovery coordinator who has a degree in theology and teaches classes on spirituality. Religious Charity B employs an addiction-recovery coordinator who does not engage in teaching but is nonetheless expected to be available to pray with those going through the program. Charity B will face much greater legal uncertainty as to whether it can employ

religious reasons for making employment decisions around the addiction-recovery coordinator role.

3. Synagogue A and Synagogue B each have an employee on staff performing the role of a social ministries worker, coordinating the relationship with the synagogue and local charity operations (donations to food pantries and the like). But in Synagogue A, that worker also teaches religious education classes. In Synagogue B, the worker does not. In both cases the synagogues view the role as a religious function of the congregation in reaching out to the community. But Synagogue B would face greater uncertainty as to whether it could successfully assert the ministerial exception for its employee.

In each of these hypotheticals, option A presents a reasonable case for applying the ministerial exception. Option B would be a stretch, at best.

These pressures are not hypothetical. Where the ministerial exception is the only door, everything rides on fitting into this category, and the case reports show the ministerial classification bearing ever more weight: a customer-service representative, *McMahon v. World Vision, Inc.*, 147 F.4th 959 (9th Cir. 2025); a work-practice apprentice, *Behrend v. S.F. Zen Ctr., Inc.*, 108 F.4th 765 (9th Cir. 2024); a substitute drama teacher, *Billard v. Charlotte Cath. High Sch.*, 101 F.4th 316 (4th Cir. 2024); a lay principal, *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017); a Hebrew teacher, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018); an organist, *Sterlinski v. Cath. Bishop of Chi.*, 934 F.3d 568 (7th Cir. 2019); guidance counselors, *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931 (7th Cir. 2022); *Fitzgerald v. Roncalli High Sch., Inc.*, 73 F.4th 529 (7th Cir. 2023). All these positions were held to be "ministers."

Even the panel's scholarly critic reads the definition as "very generous"—generous enough, in his view, that "all or nearly all" of the Mission's employees might have qualified. Esbeck, *supra*, at 6 n.30. And that amplifies the possibilities for pretextual discrimination. Because ministerial decisions are immune even from pretext review, *see Hosanna-Tabor*, 565 U.S. at 194, every expansion of the label means less judicial scrutiny of religious employers, not more.

The label fails in the other direction as well. Where it cannot stretch, sincere religious judgments go unprotected altogether. For instance, one court denied the ministerial exception to a Christian university that dismissed a professor under its standard of "conformity with Biblical Christianity." *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1138, 1140, 1143-44 (D. Or. 2017). And in the Seattle mission's own case, its religious hiring for a legal-aid clinic was left to turn on "whether staff attorneys can qualify as ministers." *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060, 1070 (Wash. 2021), *cert. denied*, 142 S. Ct. 1094 (2022).

A regime that makes everything depend on the ministerial label overprotects on one side and underprotects on the other. The panel's rule asks the right question instead: not what the employee is called, but whether the decision rests on sincere religious belief.[3]

Running everything through the ministerial exception would create other practical problems. It will, for example, create pressure for religious institutions to try to define ministerial roles broadly, or to assign roles that are not reflective of the actual competence of the individual. If Synagogue B wants to have ministerial exception protections for its decisions regarding the social ministry coordinator, it could assign more teaching or liturgical functions to that role, or it could require more formal religious training or even ordination. But all of that is not necessary for the role; it might be simply an effort to meet the legal standards of "minister." *See* Recent Case, *Palmer v. Liberty University*, 137 HARV. L. REV. 1765, 1772 (2024) (warning that "crafty, or bad faith, religious entities can capitalize on this institutional deference by ordaining employees as quasi-ministerial").

And once an employee is deemed a "minister," that will establish the presumption of religious significance that relieves the religious institution from having to explain the reasons for its decision. *See Hosanna-Tabor*, 565 U.S. at 194. The presumption, as argued above, makes sense when dealing with significant

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[3] None of this necessarily means that the existing caselaw around the ministerial classification is wrong in its holdings. It is to suggest, however, that the existing focus on the classification of a position as a "minister" is risky, bearing more weight than the doctrine was designed to handle.

roles—individuals that have leadership roles or some similar important role at inculcating the faith. But the further one gets from this core instance of the ministerial exception, the less the presumption makes sense, and the more it makes sense to conduct the inquiry that is done for the rest of church autonomy—looking for whether the conduct challenged (here, the employment decision) is religious.

Funneling all employment issues through the ministerial exception would also risk religious rights turning on the contingencies of legislative drafting. In cases involving non-"ministers," the constitutional protection for a religious community's self-composition would run only as far as legislatures leave gaps in "neutral, generally applicable" laws—here, a matter within Washington's unilateral control. *Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990). But the Supreme Court has already explained why church autonomy does not hang on this framework. *Smith* "involved government regulation of only outward physical acts," whereas church autonomy concerns "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. The government cannot "lend its power to one or the other side in controversies over religious authority or dogma." *Smith*, 494 U.S. at 877; *see Hosanna-Tabor*, 565 U.S. at 190. The First Amendment forbids that outright, regardless of whether the exercise of state power comes from a neutral-and-generally-applicable rule.

The stakes are concrete in this very appeal. The State's supplemental authority holds that the Washington Law Against Discrimination is "both neutral and generally applicable." *Olympus Spa v. Armstrong*, 169 F.4th 817, 852 (9th Cir. 2026). *Olympus Spa* was a public-accommodations case; it had no occasion to consider the WLAD's employment provisions and their express exemptions, and this brief takes no position on that question. But this Court cannot underestimate the stakes of taking the wrong analytical approach.

If the ministerial exception is coextensive with church autonomy, then everything will hinge on the particulars of state drafting: the presence or absence of exemptions, the breadth of a statute's sweep, the comparators a court will accept. Under a proper understanding of church autonomy, cases will turn on an antecedent issue: whether the decision is an exercise of internal religious governance. Adopting the correct analytical approach is therefore the difference between providing the full sweep of religious protection that survives *Smith* and merely a subset of protection that kicks in only when a law is either not neutral or not generally applicable.

* * *

What this Brief has urged is a kind of two-tier approach to employment decisions by religious bodies. Ministers receive special treatment under the ministerial exception precedents. For ministers, the religious significance of the selection decision may simply be presumed. But there is not an automatic answer as to whether other employment decisions within a religious body are protected by church autonomy. For other positions within a religious body, the organization must identify the religious reason for the employment decision in making the case for church autonomy protection. In those situations, it becomes necessary to examine the religious character of the decision at issue. That approach preserves a categorical sphere for ministerial selection, while still recognizing that religious organizations may possess constitutionally protected interests in employment decisions involving other personnel. This is the best way to make sense of existing doctrine, without creating a new and unprecedented exclusion of a category of religious employment decisions. It is also good policy. It protects religious exercise in an inclusive way, without privileging particular modes of organizing religious entities over others.

Indeed, in this Circuit the two tiers are already present in the caselaw. Where the employee is a minister, "a religious organization need not provide any religious justification" for its decision. *Markel v. Union of Orthodox Jewish Congregations of Am.*, 124 F.4th 796, 808 (9th Cir. 2024). Where the employee is not, protection has turned on the religious character of the decision—and has been withheld where no religious reason appears. *See Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) (suit proceeded where the defendants did "not offer a religious justification" for the alleged conduct); *Puri v. Khalsa*, 844 F.3d 1152, 1164-67 (9th Cir. 2017) (same); *accord Bryce*, 289 F.3d at 657-58.

The panel's rule fits that architecture. The State's rule would excise its second tier—leaving religious community-composition decisions wholly unprotected unless a court can be persuaded to call the employee a "minister." That is contrary to the First Amendment and centuries of historical practice and precedent.

CONCLUSION

The Court should affirm the preliminary injunction on church autonomy grounds that track the panel's decision.

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s): 24-7246

I am the attorney or self-represented party.

This brief contains 5,935 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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I hereby certify that on July 23, 2026, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Court's ACMS electronic filing system. All participants in the case are registered ACMS users, and service will be accomplished by the ACMS system.

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