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February 14, 2020

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary

United States Senate
Washington, DC 20510

Dear Chairman Graham and Ranking Member Feinstein:

I have reviewed the questionnaire submitted to the Senate Judiciary Committee on February 13, 2019 in connection with my nomination to be a district judge on the Central District of California. Incorporating the additional information listed below, I certify that the information contained in those documents is, to the best of my knowledge, true and accurate.

Question 6:

In 2019, I concluded my service as Director of the Pepperdine Law School Ninth Circuit Appellate Advocacy Clinic.

In 2019, I concluded my service as a Board Member and Vice President of the Public Participation Project.

Question 8:

I was named a California Super Lawyer in 2020 and a Best Lawyers in America in 2019 and 2020.

Question 9:

I did not renew my memberships for 2020 in the Association of Business Trial Lawyers and the Association of Southern California Defense Counsel.

My term as a member and Vice-Chair of the Los Angeles County Bar Association's State Appellate Judicial Evaluation Committee concluded in 2019.

Question 11(a):

In 2019, I concluded my service as a Board Member and Vice President of the Public Participation Project.

Question 12(d):

June 6, 2019: Speaker, Harvard-Westlake School Career Day, Studio City, California. I took students to watch judicial proceedings and generally discussed with them the many possibilities afforded by a legal career. I have no notes, transcript, or recording. The address for Harvard-Westlake School is 3700 Coldwater Canyon Avenue, Studio City, California 91604.

June 10, 2019: Host and Speaker, Summer Associate Program—Appellate Practice, Burbank, California. I took my firm's summer associates to watch oral argument at the Ninth Circuit. After the oral argument, I spoke to my firm's summer associates and other externs working at the court about the practice of appellate law. I have no notes, transcript, or recording. The address of Horvitz & Levy LLP is 3601 West Olive Avenue, Eight Floor, Burbank, California 91505.

October 11, 2019: Judge, Final Round of Pepperdine Law School Moot Court Competition. I have no notes, transcript, or recording. The address of Pepperdine Law School is 24255 Pacific Coast Highway, Malibu, California 90263.

October 18, 2019: Presenter, "The Appellate Process: Oral Argument," Horvitz & Levy LLP. Notes supplied.

October 29, 2019: Guest Lecture, Constitutional Law Seminar at Pepperdine Law School. Notes supplied.

November 19, 2019: Judge, Loyola Law School Moot Court, Los Angeles, California. I have no notes, transcript, or recording. The address of Loyola Law School is 919 Albany Street, Los Angeles, California 90015.

February 1, 2020: Moderator, "Hot Topics in First Amendment Law," California Academy of Appellate Lawyers. Notes supplied.

Question 16(e):

I served as supporting counsel on the following petition for writ of certiorari:

Stephen Wise Temple v. Julie Su, No. 19-371 (Sept. 17, 2019). Copy supplied.

I served as supporting counsel on the following amicus briefs supporting petitions for writ of certiorari:

Brief of Amicus Curiae Stephen Wise Temple in support of Petitioner Our Lady of Guadalupe School, *Our Lady of Guadalupe School v. Morrissey-Beru*, No. 19-267. Copy Supplied.

Brief of Amicus Curiae Stephen Wise Temple in support of Petitioner St. James School, *St. James School v. Biel*, No. 19-348. Copy Supplied.

I served as supporting counsel in the following amicus brief in a merits case:

Brief of Amici Curiae Stephen Wise Temple and Milwaukee Jewish Day School in support of Petitioners St. James School, *St. James School v. Biel*, No. 19-348; and Our Lady of Guadalupe School, *Our Lady of Guadalupe School v. Morrissey-Beru*, No. 19-267. Copy supplied.

Question 19:

In 2019, I concluded my service as Director of the Pepperdine Law School Ninth Circuit Appellate Advocacy Clinic.

Question 25:

The Ninth Circuit affirmed the district courts in *Ellis v. Johnson* and *Alguard v. U.S. Department of Agriculture*. In *Hoffman v. Lassen* County, the Ninth Circuit vacated the grant of summary judgment and remanded for further proceedings.

After appointment by the Ninth Circuit as pro bono counsel, my clinic filed the appellant's opening brief in *Riley v. Kernan*, No. 17-56298. Mr. Riley is a prisoner who had filed a pro se lawsuit raising a number of civil rights claims.

I also worked on two other pro bono appeals outside of my Pepperdine Clinic:

In *In the Matter of Stephen Liebb*, Cal. Supreme Court Case No. 17-R-05126, I represent numerous law professors who specialize in criminal justice reform as amici curiae supporting Mr. Liebb's reinstatement as an attorney upon the conclusion of his prison sentence and probation period.

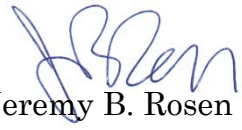
In *Shia v. Shia*, Cal. Court of Appeal Case No. B290859, I represent Ms. Shia who is challenging the trial court's order in her marital dissolution proceedings refusing to take into account the history of abuse by Mr. Shia against Ms. Shia and their minor child in determining the appropriate amount of spousal support to award.

Finally, I am supervising one of our new lawyers who is working with Public Counsel's adoption project to prepare the necessary paperwork to finalize adoptions.

# # #

I am also forwarding an updated net worth statement and financial disclosure report. I thank the Committee for its consideration of my nomination.

Very truly yours,



Jeremy B. Rosen

Oral Argument Hdl MCLE

A. Overhyped
- In Cal COA rarely has impact.
  But see JAT in Christoff w/ Leg'c pushing SOL issue to local panel how willing.
- In Cal Supreme Court → can make diff in 4/3 to split
- In 9th Cir, can make diff if panel is split.
- Clients always put way too much attention to it. But it is part of the game, so need to play along.

B. When to waive
- 9th Cir make decision for you
- In Cal COA, almost always risk to client to waive, but sometimes client response appeal should consider it.

C. Beyond appeals, can be OA on writ petition, including supplemental writ in connection with related appeal.

Also can include notes held over to panel → if RJN, must be dismissed, eh.

Sometimes feel letter not helpful. Sometimes letter is vague. Sometimes it stays narrow [illegible]

D) Purpose of OA

1. Identifying + addressing Court's concerns as either expressed in the [illegible] or in prior questions or in focus letter.
2. Try to focus on key points that would secure result you are seeking.
3. It is a time to discuss point being issues (i.e. new authority that you should have sent in via LRR or 23)).
4. Should not just repeat Briefs or raise new issues.
5. Not your job to rehab your client → but sometimes there are reasons to phrase things a certain way.

Scott's experience with his horrible client who tried to get Pl deported through ICE. Legal issue was whether [illegible] a FEMA [illegible] [illegible] were [illegible] in [illegible]. Not his job to defend morality of client.

6. Be aware of his [illegible]

E. Length of OA
GrCirs 10-30 minutes + they tell you.

CA → in some dist, up to 30 minutes, but
in others they set it at 15.

You can get OA now → some
in GrCir, register for your OA notice
If you want to avoid certain days.

F. Different types of tests
1. Fill Blank open in Run
2. short answer in 2/8 2/1 & others
3. oral thinking.

G. Some time for results.
2-5 minutes.
Form of Rebuttal: rehabilitate by point
Or trying to take down something
OPP OR something

H. Post-workout Grades:
Can be reported by court. Can also be had
by you to correct something made
at OA.

I. War stories

- Dealing with nasty judge → Judge Cle[illegible] Unan; Judge Johnson in Cent[illegible] out sipp appeal. Need to stay calm + answer quest.

  Judge Epstein → snapped at me for telling me Judge Marcella [illegible].

- Dealing with hard question on losing issue → Peter [illegible], might be[illegible] should agree to disagree on that and move on to point X.

- Dealing with question you don't know answer to → say you don't know + can file letter in a day.

- Be polite + opposing counsel → brownie points in courtesy.

J. OA prep

1. Review briefs → check key cases + recent cit.
2. Read [illegible].
3. Update research to see if new auth.
4. Pick key issues to focus on.
5. Prepare outline + notable notes/outline.
6. Moots (with + w/o client.)

Pepperdine Cons Law Clinic

I. How to get to S. Ct. pet
- Admin fight
- oppo to SJ
- COA/sup ct

II. OPEN 1A cases
- Property cases (Ē/ Church)
- Pastor fight: Crew to object to ea
(Hundreds v. students ballot)

III. State cons claims
- Free speech clause → applies to shopping ctr
- ~~Due process~~/EP → cons rt to education.

IV. Prisoner cases
5A/8A cases: Byrd → make shows.

Cindy Cohn: Executive Director
Electronic Frontier Foundation.
She previously served as GC
and Legal Director. Forbes
called her one of America's
Top 50 Women in Tech.
NLJ said she was one of
Top 100 most influential lawyers.
Many ORs awards.
Graduate of Michigan Law &
Undergrad at Iowa and
London School of Economics.
She has 11 people from the
10 years.

J. Kruger

Kelli Sager: Leading lawyer representing TV & radio broadcasters, cable companies, motion picture producers, newspapers & magazines, authors, Internet companies & web publishers. She practices media & entertainment law & has argued high profile cases before the Cal Supreme Court, Ninth Circuit & many others. She represents the media for access to high profile trials including OJ Simpson, Phil Spector, Robert Blake, Anthony Pellicano & many others. She graduated Univ of Utah Law School and West Georgia & USC undergrad. (over)

J. Kruger

Name Typ two lawyers by DJ,
on Media + Entertainment Lawyer
of Year by Law 360.
Number of hours +
amount.

Eugene Volokh:

Gary Schwartz Distinguished Professor of Law at UCLA. Teaches 1A law and runs a 1A amicus clinic. Clerk for Justice O'Connor on USSCt and Judge Kozinski on 9th Circuit. UCLA Law & undergrad. Author of books on 1A & Legal writing as well as over 90 law reviews. His law reviews have been cited in 8 USSCt opinions, hundreds of other court decisions and by several thousand scholarly articles. Previously worked for 12 years as a computer programmer

J. Kruger

Questions

Cindy: CDA, section 230 seems to be coming under attack in legislation. What have you seen in recent court decisions? Do you fear a legislative change? What do you say to those who say Internet companies should not get special privileges?

Ask what platform comes → Airbnb → does it make it it is an Internet company or brick + mortar service?

Kelli: It seems that in "[illegible]" cases, you can have the accurate sue the accuser (Janet Dubin v. Cosby) or the accused sue the accuser (Cle or Brett Kavanaugh). How should we view this stuff [illegible] & that [illegible] actually matter in these cases?

J. Kruger

Eugene: Please discuss what you have found with Ballistic
false dummy orders.
What can be done to stop this?
How has this impacted the availability of information?

Cindy: Please discuss the DHS proposed rule on collecting info from social media?
Is this a problem when people uses do this?
What are the 1A issues implicated?

Kelli: Justice Thomas in a concurring opinion denying cert in a defamation suit against Bill Cosby suggested that NYT v. Sullivan was not properly decided?
ASLD How do you respond to his argument?

J. Kruger

Is this squarely with any Kruger?

Jodi Kruger

No.

In the
Supreme Court of the United States

STEPHEN S. WISE TEMPLE,

Petitioner,

v.

JULIE SU, as Labor Commissioner, etc.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

September 17, 2019

QUESTION PRESENTED

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), this Court agreeing with every court of appeals and disagreeing with the EEOC first recognized the existence of a "ministerial exception" in the First Amendment. The Court held that a teacher at a Lutheran school qualified as a minister because of multiple factors, including that she transmitted the faith to the next generation. The Court warned against treating those multiple reinforcing factors as necessary, however, and Justices Alito and Kagan concurred to endorse the "functional approach" that was dominant in the lower courts before *Hosanna-Tabor*.

In this case, a California appellate court squarely rejected that functional approach and held that, under *Hosanna-Tabor*, teachers at a Jewish preschool do not qualify for the ministerial exception even though they "undeniably play an important role in Temple life" by "transmitting Jewish religion and practice to the next generation." That holding allows a state agency to proceed with an intrusive six-year-old employment suit against the Temple seeking hundreds of thousands of dollars in backpay and penalties, exacerbates an acknowledged split involving eight other federal and state courts, and unduly narrows the ministerial exception by misreading *Hosanna-Tabor*.

The question presented is:

Whether courts should apply a functional approach to the ministerial exception that does not punish religious institutions for employing non-adherents to transmit religious precepts to the next generation.

CORPORATE DISCLOSURE STATEMENT

Petitioner Stephen Wise Temple is a non-profit organization that has no parent corporation or stockholders.

STATEMENT OF RELATED PROCEEDINGS

Superior Court of California (Los Angeles County):

Su v. Stephen S. Wise Temple, No. BC520278 (Mar. 30, 2016)

Court of Appeal of California (Second Appellate District, Division Three):

Su v. Stephen S. Wise Temple, No. B275426 (Mar. 8, 2019), petition for reh'g denied, Apr. 2, 2019

Supreme Court of California:

Su v. Stephen S. Wise Temple, No. S255293 (June 19, 2019)

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PETITION FOR WRIT OF CERTIORARI

This case presents an important question of constitutional law that has split the lower courts and affects religious groups nationwide. Starting some 50 years ago, the lower courts recognized that the First Amendment's Religion Clauses bar the application of certain laws to claims concerning the employment relationship between a religious organization and its ministers. As those courts held, first principles under the First Amendment confirm that religious groups not the government should decide who will minister to the faithful. In refining this "ministerial exception" over the course of many decades, courts widely agreed that whether an employee qualifies as a minister turns not on formal title or ordination status, but on job function.

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), this Court recognized the ministerial exception for the first time. Multiple factors supported the application of the exception there, as the employee at issue not only performed a religious function, but had a religious title, received religious training, and considered herself a minister. But the Court warned against treating all those considerations as necessary; instead, having recognized the exception for the first time, the Court left defining its contours for another day. In a concurring opinion, however, Justices Alito and Kagan clarified that the Court's decision should not be read as upsetting the longstanding "functional approach" that prevailed in the lower courts, and that courts should continue to focus on job duties in ministerial-exception cases moving forward. The question

presented here is whether courts should do just that, or should instead treat some ministers differently based on the demands different religions have for those who teach religion.

Petitioner is a Jewish temple in Los Angeles that runs an on-site preschool. It is undisputed that the preschool fulfills a religious obligation for the Temple, and it is likewise undisputed that the preschool's teachers play an important role in accomplishing the Temple's religious objectives, including helping to transmit Judaism to future generations. Nonetheless, six years ago, California's Labor Commissioner filed suit against the Temple, asserting the right to regulate its employment relationships with its preschool teachers and alleging violations of state wage-and-hour laws vis-à-vis those teachers. The Temple moved for summary judgment, contending that the ministerial exception bars respondent's claims, and the trial court agreed. As the trial court concluded, dozens of undisputed facts confirm that the preschool teachers perform many religious functions, thereby rendering them ministers.

In a divided decision, the court below reversed. The majority conceded that the Temple's preschool teachers play an important role in Temple life and implement a curriculum with a substantial religious component. But the majority nevertheless held that they are not ministers covered by the ministerial exception. In its view, *Hosanna-Tabor* rejected the idea that employees of religious institutions may qualify as ministers based on the performance of an important religious function. Instead, the majority held, ministers must share some other characteristic

in common with the Lutheran school teacher in *Hosanna-Tabor*. The majority found it particularly problematic that the Temple does not require its teachers to be Jewish even though Judaism itself imposes no such religious test. The California Supreme Court denied review, thus allowing the state to seek hundreds of thousands of dollars in backpay and penalties.

The decision below deepens a split of authority on a critical issue, as the court below expressly rejected the functional approach employed by five courts of appeals and two state high courts, and just as expressly aligned itself with the minority view of the Ninth Circuit rejecting that approach. The decision below is also dangerously wrong, as it limits the ministerial exception to religions that conform to a pre-existing stereotype of what religions should demand from their ministers. Indeed, in considering whether the Temple's preschool teachers are ministers, the court below performed precisely the analysis that *Hosanna-Tabor* instructed courts *not* to perform. While *Hosanna-Tabor* expressly disclaimed any intent to establish a rigid formula for deciding when employees qualify as ministers, the court below nonetheless formulaically walked through the four considerations *Hosanna-Tabor* emphasized, and faulted the Temple for assigning the duty of teaching Judaism to teachers who failed to more closely conform to the Lutheran school teacher in that case.

That approach is fundamentally misguided. There is no question that Judaism is not Lutheranism, but that is no reason to limit the ministerial exception to the latter. Nothing in *Hosanna-Tabor* endorses

such discrimination between religions, and the Religion Clauses positively prohibit it. The correct view, and the view demanded by principles of religious neutrality, is the functional approach endorsed by Justices Alito and Kagan in their concurrence.

This issue has squarely and intractably divided the lower courts, and this case presents an excellent vehicle to resolve that division of authority. The parties have stipulated to most of the relevant facts, and there is no dispute that the teachers function as conduits for teaching the faith. And like *Hosanna-Tabor*, this case involves a direct action by a government enforcement agency. That puts front and center foundational First Amendment concerns about government officials examining the functioning of religious entities and making ill-informed judgments about whether religious teachers are sufficiently religious. Moreover, the government agents here are seeking hundreds of thousands of dollars in backpay and penalties, thus making palpable the coercion to conform to the state's view of what makes a religion teacher sufficiently religious. In short, when it comes to the core concerns of the Religion Clauses, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). And given the well-developed division among the lower courts and the erroneous and discriminatory approach embraced by the decision below and the Ninth Circuit, the time has come for this Court to embrace the functional test for the ministerial exception.

OPINIONS BELOW

The California Court of Appeal's opinion is reported at 244 Cal. Rptr. 3d 546 and reproduced at

App.3-30. The trial court's final summary judgment ruling is not reported but is reproduced at App.38-41. The trial court's tentative summary judgment ruling, which the final summary judgment ruling incorporated, is available at 2016 WL 11588476 and reproduced at App.31-37.

JURISDICTION

The California Court of Appeal issued its opinion on March 8, 2019, and the California Supreme Court denied review on June 19, 2019. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

STATEMENT OF THE CASE

A. Legal Background

The First Amendment commands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Religion Clauses thus "require[] government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). Consistent with these principles, this Court long ago recognized that the government has no business meddling in ecclesiastical disputes or deciding matters of religious dogma. *See, e.g.*, *Watson v. Jones*, 80 U.S. 679, 727 (1871). As the Court explained, the First Amendment accords religious organizations the "power to decide for themselves, free from state

interference, matters of church government as well as those of faith and doctrine" including the "[f]reedom to select the clergy." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952); *see also, e.g.*, *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 720, 724-25 (1976).

In the 1970s, after Congress started to enact antidiscrimination and other employment laws, *see, e.g.*, 42 U.S.C. §2000e *et seq.*, the courts of appeals relying in part on the teachings of these cases recognized the existence of a "ministerial exception" in the Religion Clauses of the First Amendment that bars certain claims concerning the employment relationship between a religious institution and its ministerial employees. *See, e.g.*, *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). In the decades thereafter, as the lower courts refined the ministerial exception, they widely agreed that the exception covered not merely ordained ministers, but any employee of a religious organization who performs a religious function. *See, e.g.*, *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) ("The 'ministerial exception' … does not depend upon ordination but upon the function of the position.").[1] Accordingly, "[a]s a general rule,"

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[1] *See also, e.g.*, *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291-92 (9th Cir. 2010) (en banc); *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003); *Starkman v. Evans*, 198 F.3d 173, 175 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F. 3d 455, 461 (D.C. Cir. 1996); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1204-05 (Conn.

courts applied the ministerial exception when an employee's "'duties consist[ed] of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.'" *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007).

In 2012, this Court directly addressed the ministerial exception for the first time in *Hosanna-Tabor*. *See* 565 U.S. at 188. *Hosanna-Tabor* involved a teacher named Cheryl Perich, who had been employed as a teacher at an elementary school in Michigan that was a member of the Lutheran Church-Missouri Synod. *See id.* at 177-78. That particular denomination classified teachers as either "lay" or "called" teachers. *See id.* at 177. While Perich began her employment as the former, after undertaking significant religious training specific to the denomination, she became a "called" teacher. *See id.* at 178, 191. In addition to teaching "math, language arts, social studies, science, gym, art, and music," Perich "also taught a religion class four days a week, led the students in prayer and devotional exercises each day, [] attended a weekly school-wide chapel service[,] [and] … led the chapel service herself about twice a year." *Id.* at 178. Perich later became ill, and after the school terminated her employment, the EEOC (with Perich as intervenor) filed suit against

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2011); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dept. of Workforce Dev.*, 768 N.W.2d 868, 881 (Wisc. 2009); *Pardue v. Ctr. City Consortium Sch. of Archdiocese of Wash., Inc.*, 875 A.2d 669, 675 (D.C. 2005); *Archdiocese of Wash. v. Moersen*, 925 A.2d 659, 668 (Md. 2007); *Alicea v. New Brunswick Theological Seminary*, 608 A.2d 218, 222 (N.J. 1992).

the school, alleging violations of the Americans with Disabilities Act (ADA). *See id.* at 178-79.

In its unanimous opinion, this Court started by agreeing with the lower courts that there is indeed a ministerial exception grounded in the First Amendment "that precludes application of [certain employment] legislation to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 188. As the Court explained, "[r]equiring 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," as it "depriv[es] the church of control over the selection of those who will personify its beliefs." *Id.* Such interference, the Court held, violates both Religion Clauses: "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." *Id.* at 188. And "[a]ccording 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.

After recognizing the ministerial exception, the Court held that Perich qualified as a minister. In doing so, the Court declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. Instead, "in [its] first case involving the ministerial exception," the Court found it sufficient to conclude that the particular circumstances of Perich's employment plainly demonstrated that she was a minister. *Id.* The Court

offered four "considerations" pertinent to that conclusion: (1) "the formal title" *i.e.*, "Minister of Religion, Commissioned" "given Perich by the Church" after becoming a "called" teacher; (2) "the substance reflected in that title," such as that Perich took "eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher" to earn her title; (3) "her own use of that title" *e.g.*, that Perich "accept[ed] the formal call" and identified herself as a minister on tax forms; and (4) "the important religious functions she performed for the Church." *Id.* at 191-92.

With respect to the final consideration, the Court noted that "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission":

> Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and about twice a year she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning.

Id. at 192. In short, the Court explained, "[a]s a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation." *Id.* The Court noted that it "express[ed] no view on whether someone with Perich's duties would be covered by the ministerial

exception in the absence of the other [three] considerations," *id.* at 193, for "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise," *id.* at 196.

Three Justices concurred in the Court's opinion. Justice Thomas wrote separately to explain that, in his view, courts must "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* (Thomas, J., concurring). Justice Alito, joined by Justice Kagan, also wrote separately to "clarify" that, notwithstanding the four considerations discussed in Court's opinion, "courts should focus on the function performed by persons who work for religious bodies" in determining whether they qualify as ministers. *Id.* at 198 (Alito, J., concurring). As Justice Alito explained, that approach best avoids potential discrimination among religions, for many religions (such as Judaism) do not refer to their ministers as "ministers" or emphasize formal ordination status. *Id.*

Justice Alito further explained that certain functions are so "essential to the independence of practically all religious groups" that any employee who performs them necessarily qualifies as a minister *viz.*, "those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* at 200. Justice Alito also highlighted that, over many decades, the lower courts had reached a "consensus" that they should apply a

functional approach in ministerial-exception cases, and he cautioned that the Court's opinion "should not be read to upset this consensus." *Id.* at 203.

B. Factual and Procedural Background

1. Petitioner Stephen Wise Temple is a Reform Jewish synagogue in Los Angeles "whose mission is to promote the Jewish faith and serve and strengthen the Jewish community." App.4. The Temple fulfills that mission, *inter alia*, through its Early Childhood Center (ECC), an on-site preschool for children aged five and under. App.4; AA871[2]; *see also* App.5 ("The ECC is part of the Temple's religious and educational mission, and it fulfills a religious obligation of the Temple."). "The ECC exists to instill and foster a positive sense of Jewish identity and to develop in children favorable attitudes towards the values and practices of Judaism." App.5. In short, at the ECC, "Jewish Life is what it is all about." AA872.

The ECC employs approximately 40 teachers. App.4. Unlike some other religions, "Judaism does not require ordination for an individual to teach Judaism," and "[n]on-Jews may teach Jewish doctrine." AA887-88. Accordingly, while some ECC teachers are Jewish, others are not. App.5. All ECC teachers, however, "play an important role in the religious objectives of the Temple," including by "help[ing] to transmit Judaism and Jewish identity to future generations." AA887. That much is clear from the first requirement

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[2] "AA" refers to the Appellant's Appendix filed with the California Court of Appeal. All facts in this petition pertaining to the Temple and the ECC—whether referenced in one of the lower-court opinions or elsewhere in the record—are undisputed.

listed in the "Teacher Job Description" for an ECC teacher: the "[d]evelopment and implementation of Judaic and secular curriculum." AA873; *see also* AA873-74 ("The introduction to Jewish life, religious rituals rituals and worship, and Judaic observances are part of the ECC's teachers' curriculum for preschoolers.").

In furtherance of its religious curriculum, "the ECC provides teachers with Judaic reading materials … to use for their classroom activities." AA874. Religious activities occur on a daily basis. For example, ECC teachers instruct their students in saying "*ha-motzi* (grace before meals) before meals and snacks." App.5; AA882. If "there are problems between children or other disputes," ECC teachers stress "*menschlicheit*" *i.e.*, "Jewish religious standards for what is right and wrong." AA882. Moreover, ECC teachers introduce their students "to Jewish values such as *kehillah* (community), *hoda'ah* (gratitude) and *shalom* (peace and wholeness)." App.5.

ECC teachers engage in other religious practices too. Each week, for example, ECC teachers participate with their children in *Shabbat* services, the "most important ritual observance in Judaism." AA881; App.5. "In doing so, they are acting as conduits to the fulfilment of *mitzvot* (religious commandments." AA881. And throughout the school year, ECC teachers participate in "the celebration of Jewish holidays," App.5, including "*Pesah* (Passover), *Shavuot*, *Rosh Hashanah*, *Yom Kippur*, *Sukkot*, *Shemini Atzeret/Simchat Torah*, *Tu B'Shevat*, *Hanukkah*, and *Purim*," AA875. For each holiday,

ECC teachers lead their students in religious rituals unique to that holiday. *See* AA876-77, 879-80, 884. In addition, "[a]ll ECC teachers … teach religious concepts, music, singing, and dance." App.5.

To be sure, ECC teachers also engage in activities common to any preschool *e.g.*, "indoor and outdoor play"; "promot[ing] reading readiness, writing readiness, and math readiness"; developing "social skills"; and "assist[ing] with toileting, meals, and snacks." App.4. But those "secular" activities notwithstanding, App.4, it is undisputed that "ECC teachers are expected to further the Temple's mission and implement the ECC's Judaic curriculum," AA874.

2. In January 2013, California's Labor Commissioner (respondent) served a subpoena on the Temple in connection with allegations that the Temple failed to comply with state wage-and-hour laws with respect to ECC teachers. AA808. The Temple complied with the subpoena, producing six boxes of materials, but maintained that the ministerial exception precluded the application of those state employment laws to its ECC teachers. AA808. Respondent disagreed, deeming it "[e]specially significant … that these teachers are hired without decisive regard as to whether they are adherents to the Temple's faith." AA808. Respondent further questioned whether Judaism even qualifies as a religion: "Some would consider Jews to be a nationality. A person could be considered an atheist and still be considered Jewish." AA840.

In September 2013, respondent commenced this action, alleging that the Temple violated state wage-and-hour laws by failing to provide its teachers

adequate rest breaks, meal breaks, and overtime pay. App.6. The complaint sought more than $400,000 in "meal period premiums," more than $400,000 in "rest period premiums," more than $76,000 in "civil penalties," an unspecified amount for "overtime pay," an unspecified amount for "statutory penalties," "attorney's fees," "prejudgment interest," "costs of suit," and injunctive relief. AA21-22.

The Temple moved for summary judgment, again asserting that respondent's claims are barred by the ministerial exception. App.6-7. The trial court agreed. App.7. The court first concluded that the ministerial exception applies to wage-and-hour claims, as such claims "implicate the relationship between the religious institution and its clergy." App.34-35. The court next concluded that ECC teachers are ministers covered by the exception. App.36-37. In doing so, the court explained that, under *Hosanna-Tabor*, the ministerial exception extends beyond those who are "head[s] of a religious congregation," and it cited pre-*Hosanna-Tabor* precedent for the proposition that preschool teachers at a religious school may qualify as ministers based on their job "duties." App.35. Based on dozens of undisputed facts regarding the religious job duties of ECC teachers, the court concluded that no "reasonable trier of fact could … conclude that ECC teachers do not serve a ministerial function." App.37; *see also* App.38-39. "Although ECC teachers teach secular subjects," the court explained, "they also teach religion, spread the faith, and serve to further the purposes of the Temple." App.37. The court accordingly found the ministerial exception applicable.

C. The Decision Below

1. A divided three-judge panel of the California Court of Appeal reversed. App.4. While a two-judge majority assumed that the claims at issue would be barred by the ministerial exception if it applied, it concluded that ECC teachers are not ministers, thereby precluding the application of the ministerial exception. *See* App.14-15. The majority based that conclusion on its view that ECC teachers do not share enough of the considerations that this Court identified with respect to the Lutheran school teacher in *Hosanna-Tabor*.

The majority first found it highly relevant that, "[u]nlike Perich," "ECC teachers are not given religious titles, and they are not ordained or otherwise recognized as spiritual leaders." App.14. The majority also emphasized repeatedly that ECC "teachers are not required to adhere to the Temple's religious philosophy, to be Temple members, or, indeed, even to be Jewish." App.14; *see also* App.5 (same); App.16 ("many of the Temple's teachers are not members of the Temple's religious community or adherents to its faith"); App.17 ("many of the Temple's teachers are not practicing Jews"); App.4 ("its teachers are not required … to adhere to the Temple's theology"). The majority also found it important that, "in contrast to Perich," ECC teachers do not undergo "any formal Jewish education or training." App.14. And the majority highlighted that, "again in contrast to Perich," ECC teachers do not "h[o]ld themselves out as ministers." App.15.

The majority conceded that ECC teachers and Perich had one seemingly critical similarity: "They

both taught religion in the classroom." App.15. ECC teachers, the majority acknowledged, "have a role in transmitting Jewish religion and practice to the next generation" *e.g.*, "implementing the school's Judaic curriculum by teaching Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services." App.15. Relying on a recent Ninth Circuit decision that found religious job duties insufficient to warrant the application of the ministerial exception, however, the majority declined to "read *Hosanna-Tabor* to suggest that the ministerial exception applies based on this factor alone." App.15-16 (citing *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018)). Accordingly, while the majority agreed that "ECC teachers undeniably play an important role in Temple life," it concluded that an important religious role is not enough to render the ministerial exception applicable. In so holding, the majority acknowledged that it was departing from the decisions of multiple other courts. *See* App.16-18.

One judge concurred only in the judgment on a ground "not considered by the majority opinion." App.20 (Edmon, J., concurring). In that judge's view, the ministerial exception simply did not apply to the wage-and-hour claims asserted by respondent. App.29; *see also* App.18 n.2 (majority noting that, "[g]iven our holding, it is unnecessary to decide whether the ministerial exception applies to California's wage-and-hour laws").

2. The Temple petitioned the Court of Appeal for rehearing, which the court denied. *See* App.2. The Temple then sought review before the California

Supreme Court, which that court denied as well. *See* App.1. Following the California Supreme Court's denial of review, the Court of Appeal recalled and stayed its mandate to allow the Temple to file this petition.

REASONS FOR GRANTING THE PETITION

This Court explained in *Hosanna-Tabor* that the "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" is "undoubtedly important." 565 U.S. at 196. That interest remains vitally important today, yet that interest is threatened by an open conflict in the lower courts. The decision below exacerbates that conflict, expressly embracing the minority approach by holding that a person who teaches religion to the next generation nonetheless is not a minister if the requirements for serving in that role do not conform to the model of certain organized religions. That conclusion is as wrong as it sounds, and nothing in the First Amendment or *Hosanna-Tabor* supports it.

Six federal court of appeals and two state high courts have weighed in on how to decide who is covered by the ministerial exception since this Court issued *Hosanna-Tabor*. The Second, Third, Fifth, Sixth, and Seventh Circuits, as well as the courts of last resort in Massachusetts and Kentucky, have all adopted a functional approach, agreeing that courts should focus on an employee's job duties in deciding whether an employee qualifies as a minister. Indeed, some of those courts have applied the ministerial exception in factual contexts materially identical to this case. *See, e.g.*, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 656-62 (7th Cir. 2018); *Temple Emanuel of*

Newton v. Massachusetts Commission Against Discrimination, 975 N.E.2d 433 (Mass. 2012). By contrast, the Ninth Circuit has twice recently rejected that functional approach and concluded that the performance of a religious function is not enough to qualify someone as a minister. The court below expressly aligned itself with the Ninth Circuit, while acknowledging that doing so puts it on the short end of a circuit split. That split in authority is thus deep and acknowledged and here to stay absent this Court's review.

The decision below not only exacerbates that split, but exemplifies the problems with rejecting the functional approach. It is undisputed that the Temple's preschool teachers play an important role in furthering the Temple's religious mission by transmitting Jewish religion and practice to the next generation. The notion that those teachers are *not* ministers and that the Temple does not have the freedom to appoint, dismiss, or take other employment-related actions with respect to them without state interference is not just wrong, but dangerously so, as any requirement that employees must conform to some other religion's conception of a minister would raise profound First Amendment problems. This case proves the point. Unlike the denomination at issue in *Hosanna-Tabor*, the Temple does not refer to any of its teachers as "ministers" or have any comparable requirement that its teachers undergo particular religious training. And the court below refused to recognize them as ministers for precisely those reasons. The court below thus has effectively decreed that only ministers who resemble Lutheran ministers will be recognized as bona fide

ministers, no matter whether that view is consistent with the Temple's own religious beliefs. The Establishment Clause and Free Exercise Clause were designed to guard against just such a result.

This case is an excellent vehicle to resolve the entrenched split in authority. This case, like *Hosanna-Tabor*, features an enforcement action by the government. That puts front and center the core concerns of the Religion Clauses, which are supposed to prevent government officials from making judgments about the nature of ministers and whether Judaism fully qualifies as a religion. Moreover, the government seeks not only to intrude on religious matters, but to impose hundreds of thousands of dollars in backpay and penalties on a religious institution because it does not conform to the government's view of what qualifies as sufficiently religious. The issues here are critically important. The decision below, like the Ninth Circuit, takes an exception designed to avoid entanglement and Religion Clause difficulties and interprets it in a manner that commits the cardinal sin of discriminating amongst religions. This Court should put an end to that intolerable state of affairs and embrace a functional approach to the ministerial exception that preserves both neutrality among and autonomy for all religions.

I. The Lower Courts Are Divided Over Whether To Employ A Functional Approach In Applying The Ministerial Exception.

The basic question in this case is whether courts should focus on the *function* performed by an employee of a religious institution in assessing whether that

employee qualifies as a "minister" within the meaning of the First Amendment's ministerial exception *i.e.*, the consensus approach before *Hosanna-Tabor*. *See* 565 U.S. at 203 (Alito, J. concurring). In addition to the court below, six courts of appeals and two state high courts have weighed in on that question since *Hosanna-Tabor*. With the exception of the court below and the Ninth Circuit, every court has embraced the functional approach, and the most recent decisions in this area have acknowledged the divide between the two camps. This recognized split of authority on an exceptionally important question of First Amendment law clearly warrants this Court's review.

A. Five Courts of Appeals and Two State High Courts Have Adhered to the Functional Approach After *Hosanna-Tabor*.

The first court to address the continuing validity of the functional approach after *Hosanna-Tabor* was the Massachusetts Supreme Judicial Court. In *Temple Emanuel of Newton v. Massachusetts Commission Against Discrimination*, the court considered whether the ministerial exception barred the application of state antidiscrimination laws to a Jewish temple's decision not to rehire a teacher in its Sunday and after-school religious school. *See* 75 N.E.2d at 434-35.

In answering that question, the court recounted the "various factors" identified in *Hosanna-Tabor* and acknowledged that some were absent in the case before it: The teacher "was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi," and the record was "silent as to the extent of her religious

training." *Id.* at 443. But it was undisputed that the teacher "taught religious subjects at a school that functioned solely as a religious school, whose mission was to reach Jewish children about Jewish learning, language, history, traditions, and prayer." *Id.* And the court found those religious job duties sufficient to render the ministerial exception applicable, emphasizing that the exception applies "regardless whether a religious teacher is called a minister or holds any title of clergy." *Id.*

The Fifth Circuit reached a similar conclusion in *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012). There, the court considered the application of the ministerial exception to a church music director. *See id.* at 170-71. In doing so, the court found it irrelevant that not all of the considerations present in *Hosanna-Tabor* were present, as "[a]pplication of the exception … does not depend on a finding that [the employee] satisfies the same considerations that motivated th[is] Court to find that Perich was a minister." *Id.* at 177. Instead, the court found it "enough to note that there is no genuine dispute that [the employee] played an integral role in the celebration of Mass and that by playing the piano during services, [the employee] furthered the mission of the church and helped convey its message to the congregants." *Id.*

The Kentucky Supreme Court reached the same conclusion in *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014), a case involving a professor at a theological seminary. While the court explained that the considerations discussed in *Hosanna-Tabor* offered a "suitable foundation" for

analysis, it found that "more discussion of the actual acts or functions conducted by the employee would be prudent." *Id.* at 613. Applying that functional approach, the court concluded that the professor qualified as a minister: "Kirby is not ordained, of course, but that is not dispositive. Given Kirby's extensive involvement in the Seminary's mission, religious ceremonies, and the subject matter of Kirby's teaching, it is clear that Kirby is a ministerial employee." *Id.* at 611.

Still other courts have followed suit. In *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015), the Sixth Circuit focused on job duties in considering the applicability of the ministerial exception to a "spiritual director" who "provid[ed] counsel and prayer" as part of an "evangelical campus mission." *See id.* at 831-32. The court concluded that the employee qualified as a minister, even though there was no evidence that she held herself out as a minister or received any rigorous religious training. *See id.* at 835. Instead, the fact that she performed "important religious functions" for her religious organization (and that her formal title included the word "spiritual") sufficed to bar her employment claims. *See id.*

The Second Circuit also endorsed the functional approach in *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017), which addressed whether a former principal at a Catholic school qualified as a minister. *See id.* at 192. The court explained that *Hosanna-Tabor* instructed courts to "assess a broad array of relevant 'considerations,'" *id.*, but "neither limits the inquiry to those considerations nor requires

their application in every case," *id.* at 205. As such, the court concluded that it "'should focus' primarily 'on the function[s] performed by persons who work for religious bodies." *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring)). Applying that functional approach, the court concluded that the principal qualified as a minister. "Although her formal title 'lay principal' does not connote a religious role, the record makes clear that she served many religious functions to advance the School's Roman Catholic mission." *Id.* at 206.

The Third and Seventh Circuits have reached materially identical conclusions. In *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018), the Third Circuit concluded that "the ministerial exception 'applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions.'" *Id.* at 122 n.7. And just this past month, in *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568 (7th Cir. 2019), the Seventh Circuit concluded that an organist at a Catholic church qualified as a minister because "organ playing serves a religious function." *Id.* at 572. The court rejected the employee's suggestion that it could "second-guess[]" the "Roman Catholic Church['s] belie[f] that organ music is vital to its religious services, and that to advance its faith it needs the ability to select organists." *Id.* at 570.

In applying that functional approach, the Seventh Circuit relied on its prior decision in *Grussgott*, which addressed the applicability of the ministerial exception to a former Hebrew teacher. *See* 882 F.3d

at 656. There, the Seventh Circuit explained that "the same four considerations" addressed in *Hosanna-Tabor* "need not be present in every case involving the exception." *Id.* at 658. And in concluding that the teacher qualified as a minister, the court found it particularly relevant that "the school expected its Hebrew teachers to integrate religious teachings into their lessons" and that the teacher indeed "performed 'important religious functions' for the school" *e.g.*, teaching students about "Jewish holidays, prayer, and the weekly Torah readings" and "practice[ing] the religion alongside her students by praying with them and performing certain rituals." *Id.* at 659-60. In short, the Seventh Circuit explained, "it is fair to say that … the importance of [the plaintiff's] role as a 'teacher of [ ] faith' to the next generation outweighed other considerations." *Id.* at 661. No fewer than six other courts of appeals and state high courts would agree.

B. The Ninth Circuit and the Court Below Have Rejected the Functional Approach After *Hosanna-Tabor*.

In stark contrast to these decisions, the Ninth Circuit and the California courts in this case have squarely refused to apply the functional approach in the wake of *Hosanna-Tabor*.

In *Biel v. St. James School*, the Ninth Circuit considered whether the ministerial exception covered a teacher at a Catholic school within the Archdiocese of Los Angeles. *See* 911 F.3d at 605. The teacher taught her students all subjects, including a religion class "thirty minutes a day, four days a week, using a workbook on the Catholic faith prescribed by the

school administration." *Id.* Despite these unequivocally religious job duties, a 2-1 majority concluded that the ministerial exception did not apply, reasoning that the teacher did not sufficiently resemble the Lutheran school teacher in *Hosanna-Tabor*. In particular, the court emphasized that the teacher "ha[d] none of Perich's credentials, training, or ministerial background"; that "there is nothing religious 'reflected' in [her] title"; and that she did not "consider[] herself a minister." *Id.* at 608-09. The majority acknowledged that Perich and the Catholic teacher did have one thing "in common: they both taught religion in the classroom." *Id.* at 609. But the majority did not "read *Hosanna-Tabor* to indicate that the ministerial exception applies based on this shared characteristic alone." *Id.*

Judge Fisher of the Third Circuit, sitting by designation, wrote a blistering dissent. As he explained, just like Perich, the teacher before them was "'entrusted with teaching and conveying the tenets of the faith to the next generation.'" *Id.* at 622 (Fisher, J., dissenting) (quoting *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J, concurring)). In his view, "[t]hose responsibilities render[ed] her the 'type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees.'" *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J, concurring)).

Biel is not an isolated phenomenon in the Ninth Circuit. The court doubled down on its rejection of the functional approach in *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App'x 460 (9th Cir. 2019), *pet. for cert. filed*, No. 19-267 (U.S. Aug. 28, 2019),

another case involving a Catholic school teacher. There too, the court conceded that the teacher "ha[d] significant religious responsibilities": "She committed to incorporate Catholic values and teachings into her curriculum, as evidenced by several of the employment agreements she signed, led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School's Easter celebration every year." *Id.* at 461. Relying on *Biel*, however, the court concluded that "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework," and thus refused to apply the ministerial exception. *Id.*

The court below has now exacerbated this division of authority, as it has expressly departed from the majority approach, App.15 and instead aligned itself with the Ninth Circuit, App.16 ("our conclusion is consistent with the Ninth Circuit's recent decision in *Biel*"). Other courts, too, have acknowledged the growing divide. For example, in *Sterlinski*, the Seventh Circuit noted that it has "adopted a different approach" to ministerial-exception cases than the Ninth Circuit, and that it "disagreed" with the Ninth Circuit's conclusion in *Biel* that courts may engage in "judicial resolution of ecclesiastical issues" consistent with the Constitution. 934 F.3d at 570-71.

There is no prospect that this conflict will resolve itself. In this very case, the California Supreme Court signaled that it has no intention of correcting any departure from the "functional approach" consensus, *see* App.1, and the en banc Ninth Circuit (over the dissent of nine judges) has just recently done the

same, *see Biel v. St. James Sch.*, 926 F.3d 1238 (9th Cir. 2019). The net effect of this discord is that religious institutions in California and other states throughout the Ninth Circuit must live with the reality that civil courts may second-guess their judgments about who may minister the faith, while religious organizations in other states and in other circuits retain their traditional First Amendment "[f]reedom to select the clergy." *Kedroff*, 344 U.S. at 116. The need for this Court's intervention is clear.

II. The Decision Below Is Profoundly Wrong.

This Court's review is critical not just because of the conflict in the lower courts, but also because the decision below is egregiously and dangerously wrong. ECC teachers are undoubtedly ministers covered by the ministerial exception based on the undisputedly important religious functions that they perform. The court below reached a contrary conclusion largely because of its elementary misreading of *Hosanna-Tabor*, which predictably resulted in elementary violations of the First Amendment.

A. The Ministerial Exception Covers Teachers Entrusted With Teaching and Conveying Judaism to the Next Generation at a Jewish Preschool.

The First Amendment's Religion Clauses prohibit the government from effecting an "establishment of religion" and impeding "the free exercise thereof." U.S. Const. amend. I. As this Court's unanimous opinion in *Hosanna-Tabor* explained, the first of those Clauses bars the government from "determin[ing] which individuals will minister to the faithful," and the second "protects a religious group's right to shape

its own faith and mission through its appointments." 565 U.S. at 188-89. The notion that persons assigned the duty of teaching the faith to the next generation are *not* ministers, and that the government may therefore interfere in the employment relationship between a religious organization and such persons, raises obvious problems under both Clauses.

First, empowering the government to determine who will fill religious-teaching positions plainly violates the Establishment Clause, which the Framers intended to "ensure[] that the new Federal Government unlike the English Crown would have no role in filling ecclesiastical offices." *Id.* at 184. Second, and relatedly, denying religious groups the freedom to determine for themselves who is best suited to convey their own views violates the Free Exercise Clause, which "prevents [the government] from interfering with the freedom of religious groups to select their own [ministers]." *Id.*

Justices Alito and Kagan recognized as much in their concurring opinion in *Hosanna-Tabor*. As they explained, although "[d]ifferent religions will have different views on exactly what qualifies as an important religious [function], … it is nonetheless possible to identify a general category of 'employees' whose functions" are so important that they necessarily qualify as ministers. *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). That category assuredly includes "those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.*; *see also NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979) (noting "the critical and unique role of the teacher in fulfilling the

mission" of religious schools). Justices Alito and Kagan are not alone in that assessment; numerous courts have reached the same conclusion, including in the context of Jewish schools. *See, e.g.*, *Temple Emanuel*, 975 N.E.2d at 442-43. Simply put, a functional approach to the ministerial exception confirms that persons who perform the function of teaching the faith to others are ministers.

That constitutionally compelled and common-sense proposition should have made this an easy case. The parties here may disagree about much, but they do agree on some points 53 of them, to be precise. *See* App.36; AA871-90. Those 53 undisputed facts reveal that "[t]he ECC is part of the Temple's religious and educational mission and fulfills a religious obligation of the Temple." AA871-72. And as both the trial and appellate courts acknowledged, "ECC teachers undeniably play an important role" in furthering that mission by "transmitting Jewish religion and practice to the next generation." App.8, 15, 18; *see also* App.41 ("The undisputed evidence shows that the ECC teachers perform[] many religious function[s]."). Specifically, ECC teachers implement a "religious curriculum" that "includes the celebration of Jewish holidays, weekly Shabbat observance, recitation of the *ha-motzi* (grace before meals) before meals and snacks, and an introduction to Jewish values such as *kehillah* (community), *hoda'ah* (gratitude) and *shalom* (peace and wholeness)." App.5. They also "participate in weekly Shabbat services and teach religious concepts, music, singing, and dance." App.5. Although ECC teachers also engage in "secular" activities with infants and toddlers, such as "toileting," App.4, that does not

diminish the religious functions they perform, *see Hosanna-Tabor*, 565 U.S. at 193-94; *id.* at 204 (Alito, J, concurring).

To be sure, the fact that teachers of faith, such as the ECC teachers in this case, qualify as ministers based on their religious job duties is not to say the other considerations addressed in *Hosanna-Tabor* are categorically irrelevant. Those factors may very well provide evidence that bears on one's ministerial status, just as they did in *Hosanna-Tabor*. But whether such evidence exists or not, the practical reality is that the ministerial exception "appl[ies] to any 'employee' [of a religious organization] who … serves as a … teacher of its faith." *Id.* at 199 (Alito, J. concurring). The reason why is simple. As Judge Wilkinson explained in the first case to discuss the "ministerial exception" *in haec verba*, "perpetuation of a church's existence may depend upon those whom it selects to … teach its message … both to its own membership and to the world at large." *Rayburn*, 772 F.2d at 1168. It simply cannot be correct that the government may control those selections.

B. The Court Below Misinterpreted *Hosanna-Tabor* and Violated Basic First Amendment Principles.

The court below arrived at the conclusion that a religious function is insufficient to warrant application of the ministerial exception primarily because of its mistaken reading of *Hosanna-Tabor*. According to the majority below, *Hosanna-Tabor* forecloses the argument that employees of a religious institution who are responsible for religious instruction may qualify as ministers based on that

consideration alone. *See* App.15 ("Although the ECC's teachers are responsible for some religious instruction, we do not read *Hosanna-Tabor* to suggest that the ministerial exception applies based on this factor alone."). Instead, in its view, employees must have some other factor "in common" with the Lutheran school teacher in *Hosanna-Tabor*. App.14-15. But *Hosanna-Tabor* says no such thing. In fact, the Court explicitly rejected the idea that it was "adopt[ing] a rigid formula for deciding when an employee qualifies as a minister," and made clear that its analysis applied to Perich and no one else. *Hosanna-Tabor*, 565 U.S. at 190; *accord Grussgott*, 882 F.3d at 658; *Fratello*, 863 F.3d at 204-05; *Cannata*, 700 F.3d at 176-77.

This Court's reluctance to embrace any set formula is understandable given the serious First Amendment problems a one-size-fits-all approach would present. For example, as Justices Alito and Kagan explained, many religious groups *e.g.*, "Catholics, Jews, Muslims, Hindus, or Buddhists" do not refer to their clergy as "ministers." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). Other groups have no concept of ordination *i.e.*, the process that bestows a formal title meaning that employees of those religious institutions will not use titles one way or another. *See id.* To declare by judicial fiat that all ministers (no matter the religion) must share a title-related characteristic in common with ordained ministers of the Lutheran Church-Missouri Synod thus would violate "[t]he clearest command of the Establishment Clause," namely, "that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982);

see also Hosanna-Tabor, 565 U.S. at 197 (Thomas, J., concurring) ("[U]ncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding.").

The court below committed just that fatal error and then some. In concluding that ECC teachers are not ministers, the majority placed special emphasis on the fact "many of the Temple's teachers are not practicing Jews," App.17 a point it revisited over and over, *see* App.4, 5, 16, 17. That echoes the concern offered by respondent throughout this litigation, including when it first subpoenaed the Temple over six years ago and suggested that Judaism may not even be a faith. *See* AA840; AA808 (respondent finding it "[e]specially significant … that these teachers are hired without decisive regard as to whether they are adherents to the Temple's faith"). But whether non-practicing-Jews are capable of adequately teaching the Temple's faith is not a judgment for the California Labor Commissioner (or the California Court of Appeal) to make especially considering that it is undisputed that "Judaism does not preclude a non-Jew from teaching the Jewish religion or Jewish holidays," and that "[n]on-Jews may teach Jewish doctrine." AA887.

After all, "[r]eligious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring); *see also, e.g.*, *Gonzalez v. Roman Catholic Archbishop of Manila,* 280 U.S. 1, 16 (1929)

("it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them"); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1263 (10th Cir. 2008) (McConnell, J.) ("It is not for the state to decide what Catholic or evangelical, or Jewish 'policy' is on educational issues." (alterations omitted)). Religious organizations do not lose that freedom simply because they conclude that their faith may be taught by non-adherents. The ministerial exception exists "precisely to avoid such judicial entanglement in, and second-guessing of, religious matters." *Sterlinski*, 934 F.3d at 570.

It is little surprise, then, that the majority mustered barely any authority to support its contrary conclusion. The court relied primarily on the Ninth Circuit's decision in *Biel* and a district court decision from the Northern District of Indiana *Herx v. Diocese of Ft. Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014). *See* App.17 ("The present case is analogous to *Biel* and *Herx*."). But *Biel* offers no cover, as it embraced the very same misreading of *Hosanna-Tabor*. *See* pp.24-25, *supra*. And *Herx* is even farther afield, as it involved a teacher who taught "junior high language arts" and performed no religious function whatsoever. 48 F. Supp. 3d at 1171; *cf. Hosanna-Tabor*, 565 U.S. at 204 (Alito, J, concurring) ("a purely secular teacher would not qualify for the 'ministerial' exception"). In short, there is precious little support for the decision below, and much to suggest that it is flatly incorrect.

III. The Question Presented Is Exceptionally Important, And This Is An Excellent Case To Resolve It.

As this Court recognized when it granted review in *Hosanna-Tabor*, the applicability of the ministerial exception is a question of exceptional importance, for it involves no less than whether a religious organization may decide who may teach its faith. And the stakes are particularly high here, as absent this Court's review, all manner of religious organizations throughout California and the rest of Ninth Circuit indeed, any group whose religious beliefs and practices are different from those of the Lutheran denomination in *Hosanna-Tabor* will be denied their constitutionally protected freedom to decide for themselves who will convey their rituals, observances, teachings, scriptures, and prayers without intrusive state interference.

This is a particularly appropriate case in which to resolve that clear split of authority, for the core concerns of the Religion Clauses are front and center. No less than an agency of the State of California itself has refused to acknowledge that the Temple's ECC teachers are ministers of the Temple's faith. That is so even though it is undisputed that ECC teachers "play an important role in the religious objectives of the Temple." AA887. The government thus seeks to treat petitioner's teachers differently from religious teachers at a Lutheran school indeed, is threatening petitioner with hundreds of thousands of dollars in backpay and penalties simply because the government does not seem to believe that teachers of religious can *really* play an important role in teaching

religion if they are not members of the faith that they teach.

That is precisely the kind of governmental interference that the Religious Clauses are supposed to prevent. If the "scrupulous policy of the Constitution in guarding against a political interference with religious affairs" means anything, *Hosanna-Tabor*, 565 U.S. at 184 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 Records of the American Catholic Historical Society 63-64 (1909)), surely it means that the government may not decide for itself which religion teachers are sufficiently religious. The Court should grant the petition and put an end to the Ninth Circuit's and California courts' claims to the power to do just that.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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September 17, 2019

No. 19-267

In the
Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES DEIRDRE MORRISSEY-BERRU,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* STEPHEN WISE TEMPLE IN SUPPORT OF PETITIONER

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The Temple recently filed a petition for writ of certiorari in a case raising the same underlying question as this case. *See Stephen S. Wise Temple v. Su*, No. 19-371 (U.S. filed Sept. 17, 2019). The Temple accordingly has a strong interest in this case.

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SUMMARY OF ARGUMENT

The petition in this case is the first of three that have been filed in recent weeks that raise the same basic question: whether performing critical religious functions is enough to qualify a religious group's employee as a "minister" under this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). The other two cases are *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), *pet. for cert. filed*, No. 19-348 (U.S. Sept. 16, 2019), and *Su v. Stephen S. Wise Temple*, 244 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019), *pet. for cert. filed*, No. 19-371 (U.S. Sept. 17, 2019). All three held that teachers who perform important religious functions are not ministers absent some other "plus factor," such as a ministerial title, theological training, or ordination. In so holding, they departed from decades of lower court precedent adopting a functional approach to the ministerial exception. Together, they put courts in California, both state and federal, in conflict with the majority position in the rest of the Nation. And they not only deprive religious employers in California of important protections, they set up a standard that unconstitutionally disfavors religious groups with distinct beliefs about who may minister to the faithful, providing more protection for some religions based on doctrinal differences—a concern highlighted by the separate concurrences in *Hosanna-Tabor*. The question presented merits the Court's review now.

As persuasively shown in Our Lady of Guadalupe School's petition for certiorari, the lower courts are deeply divided on the question presented. In just the

seven years since *Hosanna-Tabor*, five federal circuits and two state supreme courts have adhered to the near-consensus "functional approach," looking primarily to whether the employee performs important religious functions. And several of these cases have specifically held that religious school teachers who convey faith and religious doctrine to children are "ministers," even though they lack some of the Protestant-specific ministerial attributes of the "called teacher" in *Hosanna-Tabor*. The three cases from the Ninth Circuit and the California Court of Appeal now before this Court squarely rejected that approach. Those courts held that performance of important religious functions is not enough, and that the ministerial exception requires at least two of the considerations identified in *Hosanna-Tabor*.

The question presented in these cases is undeniably important. By requiring a religious organization's employees to match the distinctive characteristics of the Lutheran-school teacher in *Hosanna-Tabor*, the Ninth Circuit and California Court of Appeal condition the availability of constitutional protections on whether a religious group's theology and internal governance resemble that of the Lutheran tradition. This excludes many faiths that lack the Protestant conception of a "called minister" and that do not require their ministers to have extensive religious training, a formal religious title, or ordination. Indeed, this interpretation disproportionately harms "those religious groups whose beliefs, practices, and membership are outside of the 'mainstream,'" *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring)—the very groups who depend the most on the First Amendment's protection.

Unless this Court acts, religious groups in an area comprising twenty percent of the country's population will not receive the full protections of the First Amendment.

ARGUMENT

I. This Case Presents The First Of Three Petitions From Decisions Holding—Contrary To This Court's Precedent And Decades Of Lower Court Decisions—That Religious School Teachers Who Introduce Children To Religious Teachings, Scriptures, Prayer, And Sacred Observances Are Not Ministers.

In *Hosanna-Tabor*, this Court recognized that the First Amendment imposes a ministerial exception barring civil actions that concern the employment relationship between religious entities and their ministerial employees. *Id.* at 188-90. In doing so, the Court agreed with several decades of lower court decisions that had likewise recognized the ministerial exception. *Id.* at 188 & n.2. With remarkable consistency, those lower courts followed a functional approach to determine whether employees were ministers subject to the ministerial exception. *See, e.g.*, *id.* at 202-04 (Alito, J., concurring); Pet.13-14 (collecting cases).

Hosanna-Tabor left this functional consensus intact. The Court determined that Cheryl Perich, a "called teacher" at a Lutheran church and school, was a minister for purposes of the ministerial exception. *Hosanna-Tabor*, 565 U.S. at 190-91. The Court identified four considerations that supported its conclusion: (1) her formal title, (2) her use of that title,

(3) the substance behind her title, and (4) her important religious functions. *Id.* at 190-92. But the Court stressed that it was not adopting a "rigid formula" for deciding who is a minister. *Id.* at 190. Instead, the Court made clear that it would flesh out the contours of the ministerial exception in future cases. *Id.* at 196. And the Court specifically reserved judgment on whether a teacher with Perich's important religious duties "would be covered by the ministerial exception in the absence of the other considerations." *Id.* at 193.

Justice Thomas wrote separately to explain that courts should not second-guess a religious group's determination about who qualifies as its minister. Justice Thomas warned that a formulaic approach would "disadvantag[e] those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Id.* at 197 (Thomas, J., concurring). Justice Alito also wrote separately (joined by Justice Kagan) to explain that, since many religions have diverse beliefs about what qualifies as an important religious role, "courts should focus on the function performed by persons who work for religious bodies." *Id.* at 198 (Alito, J., concurring). Justice Alito noted that, until then, every circuit had taken a "functional approach" to the ministerial determination, and the unanimous opinion in *Hosanna-Tabor* "should not be read to upset this consensus." *Id.* at 204.

Until recently, lower courts applying *Hosanna-Tabor* have continued to focus on function and, in doing so, applied the ministerial exception to teachers who serve as a religious group's conduit for conveying

religious tenets and practices to the next generation. *See* Pet.19-24. But after the Ninth Circuit's decisions here and in *Biel*, and the California Court of Appeal's decision in *Su*, that consensus has been broken and religious employers are left unprotected in federal and state court. Only this Court can resolve this deep and irreconcilable split.

Biel was the first decision to break from the longstanding functional consensus. There, a fifth-grade teacher at a Catholic school carried out significant religious functions by teaching Catholicism to her students and incorporating religion into her classroom and curriculum. *Biel*, 911 F.3d at 609. But unlike Perich, she "did not have ministerial training or titles" and neither she nor the school held her out as a minister. *Id.* at 610. In a 2-1 panel decision, the Ninth Circuit held that Biel did not qualify for the ministerial exception because "teaching religion was only one of the four characteristics the Court relied upon" in *Hosanna-Tabor*. *Id.* at 609. The court refused to rely on that "shared characteristic alone" because it would supposedly render *Hosanna-Tabor*'s other considerations "irrelevant dicta." *Id.*

Judge Fisher of the Third Circuit (sitting by designation) dissented, noting that Biel's duties were "strikingly similar to those in *Hosanna-Tabor*." *Id.* at 619 (Fisher, J., dissenting). Judge Fisher would have held that the exception covers employees who are "entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* at 622 (quoting *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring)). Nine judges endorsed Judge Fisher's view in dissenting from the denial of en banc

rehearing. *Biel v. St. James School*, 926 F.3d 1238 (9th Cir. 2019) (Nelson, J., dissenting from denial of en banc rehearing). The en banc dissenters noted that *Biel* wrongly required "a carbon copy of the plaintiff's circumstances" in *Hosanna-Tabor*—an approach out of step with "decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles." *Id.* at 1239-40. The Ninth Circuit then doubled down on *Biel*'s formulaic approach in the case at hand. Relying solely on *Biel*, the panel concluded that "an employee's duties alone are not dispositive." App.3a. The court thus held that the plaintiff here was not a ministerial employee, even though she had "significant religious responsibilities." *Id.*

The California Court of Appeal followed suit in *Su*. There, the California Labor Commissioner sued the Temple, alleging wage-and-hour claims on behalf of teachers at the Temple's Jewish preschool. *Su*, 244 Cal. Rptr. 3d at 549. The trial court ruled that the claims were barred by the ministerial exception based on the many undisputed facts establishing that the teachers performed important religious functions. Among other religious responsibilities, the teachers developed a Jewish curriculum; taught their students Jewish scripture, holidays, commandments, and religious observances; led Seder rituals; recited Sukkot blessings; instructed the children in the ha-motzi blessing before every meal and snack; and played a role in weekly Shabbat services.

Invoking *Biel*, however, the California Court of Appeal reversed. *Id.* at 548. Despite acknowledging that the teachers were charged with "teaching Jewish

rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services," the court held that the ministerial exception could not cover them "based on this factor alone." *Id.* at 553. The panel reasoned that "while the teachers may play an important role in the life of the Temple," "a minister is not merely a teacher of religious doctrine." *Id.* Because the Temple did not require its teachers to have a spiritual title, undergo formal religious education, or adhere to the Temple's theology, the court held they were not ministers. *Id.*

As the petition for certiorari in this case thoroughly explains, all three of these recent cases are in sharp conflict with the longstanding functional consensus that was left undisturbed by *Hosanna-Tabor* as well as decisions by five federal circuits and two state supreme courts after *Hosanna-Tabor*. Even the *Su* and *Biel* courts recognized that their approach conflicts with that of other courts. *See Su*, 244 Cal. Rptr. 3d at 554 (citing *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018)); *Biel*, 911 F.3d at 609 (noting "we are not sure" that "*Grussgott* was correctly decided"). As a result of this split, religious schools in the Ninth Circuit and California "now have less control over employing ... elementary school teachers of religion than in any other area of the country." *Biel*, 926 F.3d at 1251 (Nelson, J., dissenting from denial of en banc rehearing).

There is little hope for resolving this conflict without this Court's intervention. The California Supreme Court denied review in *Su*, and the Ninth

Circuit voted against rehearing *Biel* en banc. And here, the Ninth Circuit panel reversed the district court in an unpublished memorandum disposition—suggesting that the court considered its holding to rest on settled law. This Court should grant certiorari to ensure that a religious group's First Amendment right to ecclesiastical autonomy does not turn on where in the country the group happens to worship.

II. The Question Presented In *Biel*, *Su*, And This Case Is Exceptionally Important.

A. The Ninth Circuit's and California Court of Appeal's Approach Removes Religious Groups' Autonomy to Select and Control Who Can Teach Their Faith and Practices.

Hosanna-Tabor recognized that the ministerial exception's core purpose is to safeguard the autonomy of religious groups "to select and control who will minister to the faithful—a matter 'strictly ecclesiastical.'" 565 U.S. at 195. That purpose is frustrated by the Ninth Circuit's and California Court of Appeal's cramped view of who can be a minister. Left unchecked, their approach will restrain a religious group's freedom to select and control the teachers of its faith—even teachers with religious functions "strikingly similar to those in *Hosanna-Tabor*." *Biel*, 911 F.3d at 618 (Fisher, J., dissenting).

There are few things more important (both constitutionally and practically) to a religious organization than who teaches its faith to the next generation. Over a century ago, this Court declared that the First Amendment grants religious groups an "unquestioned" freedom to form organizations that

"assist in the expression and dissemination of any religious doctrine." *Watson v. Jones*, 80 U.S. 679, 728-29 (1871). But a religious group's free exercise right to proclaim and teach its beliefs would ring hollow without the "corollary right to select its voice." *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006). Thus, courts have long used the ministerial exception to strike down "any restriction on the church's right to choose who will carry its spiritual message," *id.* at 306-07, as well as "the functions which accompany such a selection," such as "the determination of a minister's salary, ... place of assignment, and ... dut[ies]," *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972); *accord Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc).

The need for such autonomy is especially vital when it comes to religious instruction. Religious schools are a uniquely "powerful vehicle for transmitting ... faith to the next generation." *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). Indeed, the entire "*raison d'être*" of such schools is "the propagation of a religious faith." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 503 (1979). And since teachers at these "mission-driven schools" are the conduit for "convey[ing] the [religious group's] message and carry[ing] out its mission," the autonomy to make "[e]mployment decisions relating to those who serve this function is precisely what the ministerial exception is supposed to protect." *Biel*, 926 F.3d at 1248-49 (Nelson, J., dissenting from denial of en banc rehearing); *see Catholic Bishop of Chi.* 440 U.S. at 501-04 ("The church-teacher relationship in a church-operated school differs from the employment

relationship in a public or other nonreligious school" due to "the critical and unique role of the teacher in fulfilling the mission of a church-operated school.").

Counterintuitively, the Ninth Circuit and California Court of Appeal read this Court's unanimous affirmation of the ministerial exception to *lessen* religious autonomy over religious teachers. Before *Hosanna-Tabor*, both courts had employed a functional approach to decide who was a minister. *See, e.g.*, *Alcazar*, 627 F.3d at 1292; *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 134 Cal. Rptr. 3d 15, 25-26 (Cal. Ct. App. 2011) (reviewing a preschool teacher's "duties at the school" and concluding she was a minister because she performed many "ministerial functions"); *Schmoll v. Chapman Univ.*, 83 Cal. Rptr. 2d 426, 429 (Cal. Ct. App. 1999) (recognizing that the ministerial exception depends not "on the title given to the employee," but on "the function of the person's position"). Now these courts interpret *Hosanna-Tabor* to forbid that approach—even though Justices Alito and Kagan had properly explained that the Court's unanimous opinion "should not be read to upset" the functional consensus followed by *Alcazar* and similar decisions. *Hosanna-Tabor*, 565 U.S. at 203-04 (Alito, J., concurring). *Contra Biel*, 911 F.3d at 606-611 (departing from the functional approach without citing *Alcazar*); *Su*, 244 Cal. Rptr. 3d at 554 (rejecting *Henry* because it was "decided prior to *Hosanna-Tabor*").

Without this Court's correction, *Hosanna-Tabor*'s ultimate effect will be to decrease religious liberty for much of the country.

B. The Ninth Circuit's and California Court of Appeal's Approach Disfavors Minority Religious Groups.

The Ninth Circuit and California courts not only curtailed a core religious freedom for thousands of religious groups within their jurisdictions, but did so in a manner that unconstitutionally prefers some religious groups over others. By enshrining a "resemblance-to-Perich test," *Biel*, 926 F.3d at 1243 (Nelson, J., dissenting from denial of en banc rehearing), these courts have caused the ministerial exception to turn on how similar a religious organization's conception of a minister is to the Lutheran church's.

This approach effectively sets a single denomination as the standard for what religious beliefs and practices are worthy of constitutional protection and gives a distinct advantage to faiths "within the Protestant Christian framework." *Biel*, 911 F.3d at 614 (Fisher, J. dissenting). In contrast, the many denominations whose theology or internal structure are unlike the Lutheran faith will find it more difficult to invoke the ministerial exception. As Justices Alito and Kagan explained, our country's emphasis on religious freedom has produced a thriving diversity of faiths featuring "virtually every religion in the world," each with "different views on exactly what qualifies as an important religious position." *Hosanna-Tabor*, 565 U.S. at 198, 200 (Alito, J., concurring). Most faiths do not use the term "minister," many lack a concept of ordination (a lay person's formal elevation to the clergy), and some believe all or most of its members are ministers. *Id.*

at 202. Thus, many religious groups carry out critical spiritual functions through individuals who could not satisfy the test now imposed by the Ninth Circuit and California Court of Appeal.

Su is a case in point. As a Reform Jewish synagogue, the Temple operates an on-site Jewish preschool to instill Jewish faith and identity in young children, and it hires teachers to accomplish that purpose. But the Temple has no analog to the position of a "called minister" found in the Lutheran faith, and it does not require its preschool teachers to become Biblical scholars. Instead, the Temple relies on lay people to teach the Jewish faith to the children, as permitted by Jewish law. *Cf. Grusgott*, 882 F.3d at 659, 661 (teacher at Jewish school fulfilled an important role as a teacher of faith even though she had a "lay title" and "teachers at the school were not required to complete rigorous religious requirements comparable to the teacher in *Hosanna-Tabor*"); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012) (teacher at Jewish school was a minister even though she "was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi"). But due to these aspects of Jewish law, most Jewish-school teachers in the Ninth Circuit and California will now be excluded from the ministerial exception, even if they are a synagogue's primary conduit for transmitting Jewish faith to the next generation.

Indeed, the approach now followed in those jurisdictions will especially disfavor the *weakest* religious groups. *See Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (the First Amendment prohibits

discrimination favoring "well-established churches" over "churches which are new and lacking in a constituency"). Many small religious groups do not have seminaries where they can provide a formal education to their ministers. And some might not have enough members to fill critical roles exclusively with adherents, or the funds to allow for a professional clergy. But the First Amendment should protect these groups no less than well-established Protestant churches. Indeed, they are the groups who need that protection most. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) (warning against a test that "disadvantag[es] those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some").

What is more, minority religious groups will face significant pressure to bow to the threat of litigation—in some instances, as in *Su*, brought by the state itself—by conforming their internal governance and distinctive religious practices to those of the Lutheran church in *Hosanna-Tabor*. For example, they might change employees' titles to sound more religious, or they might require them to undergo extensive religious education that they do not need. But religious groups should not be compelled under threat of liability to conform their conception of a "minister" to the "prevailing secular understanding" or the prevailing Lutheran understanding. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Indeed, compelling religious conformity is a danger "the First Amendment was designed to guard against." *Id.*; *accord* 1 Annals of Cong. 758 (1789) (remarks of J. Madison) (explaining the Establishment Clause prevents the risk that "one sect

might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform"); *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962) (noting the Establishment Clause protects against "coercive pressure upon religious minorities to conform to the prevailing officially approved religion").

Without this Court's review, courts across a large swath of the country will continue to apply *Hosanna-Tabor* in a way that does not "show[ ] sensitivity to and respect for this Nation's pluralism, or the values of neutrality and inclusion that the First Amendment demands." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring).

CONCLUSION

The question presented warrants the Court's review. The Court should grant one or more of the three petitions presenting the question. If the Court does not grant all three petitions, it should hold the remaining petitions until its decision on the merits.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus* certifies that counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due and have consented to this filing.

SUMMARY OF ARGUMENT

The petition in this case is one of three that have been filed in recent weeks that raise the same basic question: whether performing critical religious functions is enough to qualify a religious group's employee as a "minister" under this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). The other two cases are *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App'x 460 (9th Cir. 2019), *pet. for cert. filed*, No. 19-267 (U.S. Aug. 28, 2019), and *Su v. Stephen S. Wise Temple*, 244 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019), *pet. for cert. filed*, No. 19-371 (U.S. Sept. 17, 2019). All three held that teachers who perform important religious functions are not ministers absent some other "plus factor," such as a ministerial title, theological training, or ordination. In so holding, they departed from decades of lower court precedent adopting a functional approach to the ministerial exception. Together, they put courts in California, both state and federal, in conflict with the majority position in the rest of the Nation. And they not only deprive religious employers in California of important protections, they set up a standard that unconstitutionally disfavors religious groups with distinct beliefs about who may minister to the faithful, providing more protection for some religions based on doctrinal differences a concern highlighted by the separate concurrences in *Hosanna-Tabor*. The question presented merits the Court's review now.

As persuasively shown in St. James School's petition for certiorari, the lower courts are deeply divided on the question presented. In just the seven

years since *Hosanna-Tabor*, five federal circuits and two state supreme courts have adhered to the near-consensus "functional approach," looking primarily to whether the employee performs important religious functions. And several of these cases have specifically held that religious school teachers who convey faith and religious doctrine to children are "ministers," even though they lack some of the Protestant-specific ministerial attributes of the "called teacher" in *Hosanna-Tabor*. The three cases from the Ninth Circuit and the California Court of Appeal now before this Court squarely rejected that approach. Those courts held that performance of important religious functions is not enough, and that the ministerial exception requires at least two of the considerations identified in *Hosanna-Tabor*.

The question presented in these cases is undeniably important. By requiring a religious organization's employees to match the distinctive characteristics of the Lutheran-school teacher in *Hosanna-Tabor*, the Ninth Circuit and California Court of Appeal condition the availability of constitutional protections on whether a religious group's theology and internal governance resemble that of the Lutheran tradition. This excludes many faiths that lack the Protestant conception of a "called minister" and that do not require their ministers to have extensive religious training, a formal religious title, or ordination. Indeed, this interpretation disproportionately harms "those religious groups whose beliefs, practices, and membership are outside of the 'mainstream,'" *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) the very groups who depend the most on the First Amendment's protection.

Unless this Court acts, religious groups in an area comprising twenty percent of the country's population will not receive the full protections of the First Amendment.

ARGUMENT

I. This Case Presents One Of Three Petitions From Decisions Holding Contrary To This Court's Precedent And Decades Of Lower Court Decisions That Religious School Teachers Who Introduce Children To Religious Teachings, Scriptures, Prayer, And Sacred Observances Are Not Ministers.

In *Hosanna-Tabor*, this Court recognized that the First Amendment imposes a ministerial exception barring civil actions that concern the employment relationship between religious entities and their ministerial employees. *Id.* at 188-90. In doing so, the Court agreed with several decades of lower court decisions that had likewise recognized the ministerial exception. *Id.* at 188 & n.2. With remarkable consistency, those lower courts followed a functional approach to determine whether employees were ministers subject to the ministerial exception. *See, e.g.*, *id.* at 202-04 (Alito, J., concurring); Pet.13-14 (collecting cases).

Hosanna-Tabor left this functional consensus intact. The Court determined that Cheryl Perich, a "called teacher" at a Lutheran church and school, was a minister for purposes of the ministerial exception. *Hosanna-Tabor*, 565 U.S. at 190-91. The Court identified four considerations that supported its conclusion: (1) her formal title, (2) her use of that title, (3) the substance behind her title, and (4) her

important religious functions. *Id.* at 190-92. But the Court stressed that it was not adopting a "rigid formula" for deciding who is a minister. *Id.* at 190. Instead, the Court made clear that it would flesh out the contours of the ministerial exception in future cases. *Id.* at 196. And the Court specifically reserved judgment on whether a teacher with Perich's important religious duties "would be covered by the ministerial exception in the absence of the other considerations." *Id.* at 193.

Justice Thomas wrote separately to explain that courts should not second-guess a religious group's determination about who qualifies as its minister. Justice Thomas warned that a formulaic approach would "disadvantag[e] those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Id.* at 197 (Thomas, J., concurring). Justice Alito also wrote separately (joined by Justice Kagan) to explain that, since many religions have diverse beliefs about what qualifies as an important religious role, "courts should focus on the function performed by persons who work for religious bodies." *Id.* at 198 (Alito, J., concurring). Justice Alito noted that, until then, every circuit had taken a "functional approach" to the ministerial determination, and the unanimous opinion in *Hosanna-Tabor* "should not be read to upset this consensus." *Id.* at 204.

Until recently, lower courts applying *Hosanna-Tabor* have continued to focus on function and, in doing so, applied the ministerial exception to teachers who serve as a religious group's conduit for conveying religious tenets and practices to the next generation.

See Pet.17-24. But after the Ninth Circuit's decisions here and in *Morrissey-Berru*, and the California Court of Appeal's decision in *Su*, that consensus has been broken and religious employers are left unprotected in federal and state court. Only this Court can resolve this deep and irreconcilable split.

Biel, the decision here, was the first to break from the longstanding functional consensus. In this case, a fifth-grade teacher at a Catholic school carried out significant religious functions by teaching Catholicism to her students and incorporating religion into her classroom and curriculum. App.12-13a. But unlike Perich, she "did not have ministerial training or titles" and neither she nor the school held her out as a minister. App.14a-15a In a 2-1 panel decision, the Ninth Circuit held that Biel did not qualify for the ministerial exception because "teaching religion was only one of the four characteristics the Court relied upon" in *Hosanna-Tabor*. App.12a. The court refused to rely on that "shared characteristic alone" because it would supposedly render *Hosanna-Tabor*'s other considerations "irrelevant dicta." App.12a.

Judge Fisher of the Third Circuit (sitting by designation) dissented, noting that Biel's duties were "strikingly similar to those in *Hosanna-Tabor*." App.32a (Fisher, J., dissenting). Judge Fisher would have held that the exception covers employees who are "entrusted with teaching and conveying the tenets of the faith to the next generation." App.39a (quoting *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring)). Nine judges endorsed Judge Fisher's view in dissenting from the denial of en banc rehearing. *See* App.42a-67a (Nelson, J., dissenting

from denial of en banc rehearing). The en banc dissenters noted that *Biel* wrongly required "a carbon copy of the plaintiff's circumstances" in *Hosanna-Tabor* an approach out of step with "decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles." App.42a. The Ninth Circuit then doubled down on *Biel*'s formulaic approach in *Morrissey-Berru*. Relying solely on *Biel*, the panel concluded that "an employee's duties alone are not dispositive." *Morrissey-Berru*, 769 F. App'x at 760. The court thus held that the plaintiff there was not a ministerial employee, even though she had "significant religious responsibilities." *Id.*

The California Court of Appeal followed suit in *Su*. There, the California Labor Commissioner sued the Temple, alleging wage-and-hour claims on behalf of teachers at the Temple's Jewish preschool. *Su*, 244 Cal. Rptr. 3d at 549. The trial court ruled that the claims were barred by the ministerial exception based on the many undisputed facts establishing that the teachers performed important religious functions. Among other religious responsibilities, the teachers developed a Jewish curriculum; taught their students Jewish scripture, holidays, commandments, and religious observances; led Seder rituals; recited Sukkot blessings; instructed the children in the ha-motzi blessing before every meal and snack; and played a role in weekly Shabbat services.

Invoking *Biel*, however, the California Court of Appeal reversed. *Id.* at 548. Despite acknowledging that the teachers were charged with "teaching Jewish rituals, values, and holidays, leading children in

prayers, celebrating Jewish holidays, and participating in weekly Shabbat services," the court held that the ministerial exception could not cover them "based on this factor alone." *Id.* at 553. The panel reasoned that "while the teachers may play an important role in the life of the Temple," "a minister is not merely a teacher of religious doctrine." *Id.* Because the Temple did not require its teachers to have a spiritual title, undergo formal religious education, or adhere to the Temple's theology, the court held they were not ministers. *Id.*

As the petition for certiorari in this case thoroughly explains, all three of these recent cases are in sharp conflict with the longstanding functional consensus that was left undisturbed by *Hosanna-Tabor* as well as decisions by five federal circuits and two state supreme courts after *Hosanna-Tabor*. Even the *Su* and *Biel* courts recognized that their approach conflicts with that of other courts. *See Su*, 244 Cal. Rptr. 3d at 554 (citing *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018)); App.13a (noting "we are not sure" that "*Grussgott* was correctly decided"). As a result of this split, religious schools in the Ninth Circuit and California "now have less control over employing … elementary school teachers of religion than in any other area of the country." App.66a-67a (Nelson, J., dissenting from denial of en banc rehearing).

There is little hope for resolving this conflict without this Court's intervention. The California Supreme Court denied review in *Su*, and the Ninth Circuit voted against rehearing *Biel* en banc. Moreover, in *Morrissey-Berru*, the Ninth Circuit panel

reversed the district court in an unpublished memorandum disposition suggesting that the court considered its holding to rest on settled law. This Court should grant certiorari to ensure that a religious group's First Amendment right to ecclesiastical autonomy does not turn on where in the country the group happens to worship.

II. The Question Presented In This Case, *Morrissey-Berru*, And *Su* Is Exceptionally Important.

A. The Ninth Circuit's and California Court of Appeal's Approach Removes Religious Groups' Autonomy to Select and Control Who Can Teach Their Faith and Practices.

Hosanna-Tabor recognized that the ministerial exception's core purpose is to safeguard the autonomy of religious groups "to select and control who will minister to the faithful a matter 'strictly ecclesiastical.'" 565 U.S. at 195. That purpose is frustrated by the Ninth Circuit's and California Court of Appeal's cramped view of who can be a minister. Left unchecked, their approach will restrain a religious group's freedom to select and control the teachers of its faith even teachers with religious functions "strikingly similar to those in *Hosanna-Tabor*." App.32a (Fisher, J., dissenting).

There are few things more important (both constitutionally and practically) to a religious organization than who teaches its faith to the next generation. Over a century ago, this Court declared that the First Amendment grants religious groups an "unquestioned" freedom to form organizations that

"assist in the expression and dissemination of any religious doctrine." *Watson v. Jones*, 80 U.S. 679, 728-29 (1871). But a religious group's free exercise right to proclaim and teach its beliefs would ring hollow without the "corollary right to select its voice." *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006). Thus, courts have long used the ministerial exception to strike down "any restriction on the church's right to choose who will carry its spiritual message," *id.* at 306-07, as well as "the functions which accompany such a selection," such as "the determination of a minister's salary, … place of assignment, and … dut[ies]," *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972); *accord Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc).

The need for such autonomy is especially vital when it comes to religious instruction. Religious schools are a uniquely "powerful vehicle for transmitting … faith to the next generation." *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). Indeed, the entire "*raison d'être*" of such schools is "the propagation of a religious faith." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 503 (1979). And since teachers at these "mission-driven schools" are the conduit for "convey[ing] the [religious group's] message and carry[ing] out its mission," the autonomy to make "[e]mployment decisions relating to those who serve this function is precisely what the ministerial exception is supposed to protect." App.60a, 63a (Nelson, J., dissenting from denial of en banc rehearing); *see Catholic Bishop of Chi.*, 440 U.S. at 501-04 ("The church-teacher relationship in a church-operated school differs from the employment

relationship in a public or other nonreligious school" due to "the critical and unique role of the teacher in fulfilling the mission of a church-operated school.").

Counterintuitively, the Ninth Circuit and California Court of Appeal read this Court's unanimous affirmation of the ministerial exception to *lessen* religious autonomy over religious teachers. Before *Hosanna-Tabor*, both courts had employed a functional approach to decide who was a minister. *See, e.g.*, *Alcazar*, 627 F.3d at 1292; *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 134 Cal. Rptr. 3d 15, 25-26 (Cal. Ct. App. 2011) (reviewing a preschool teacher's "duties at the school" and concluding she was a minister because she performed many "ministerial functions"); *Schmoll v. Chapman Univ.*, 83 Cal. Rptr. 2d 426, 429 (Cal. Ct. App. 1999) (recognizing that the ministerial exception depends not "on the title given to the employee," but on "the function of the person's position"). Now these courts interpret *Hosanna-Tabor* to forbid that approach even though Justices Alito and Kagan had properly explained that the Court's unanimous opinion "should not be read to upset" the functional consensus followed by *Alcazar* and similar decisions. *Hosanna-Tabor*, 565 U.S. at 203-04 (Alito, J., concurring). C*ontra* App.7a-17a (departing from the functional approach without citing *Alcazar*); *Su*, 244 Cal. Rptr. 3d at 554 (rejecting *Henry* because it was "decided prior to *Hosanna-Tabor*").

Without this Court's correction, *Hosanna-Tabor*'s ultimate effect will be to decrease religious liberty for much of the country.

B. The Ninth Circuit's and California Court of Appeal's Approach Disfavors Minority Religious Groups.

The Ninth Circuit and California courts not only curtailed a core religious freedom for thousands of religious groups within their jurisdictions, but did so in a manner that unconstitutionally prefers some religious groups over others. By enshrining a "resemblance-to-Perich test," App.50a (Nelson, J., dissenting from denial of en banc rehearing), these courts have caused the ministerial exception to turn on how similar a religious organization's conception of a minister is to the Lutheran church's.

This approach effectively sets a single denomination as the standard for what religious beliefs and practices are worthy of constitutional protection and gives a distinct advantage to faiths "within the Protestant Christian framework." App.23a (Fisher, J. dissenting). In contrast, the many denominations whose theology or internal structure are unlike the Lutheran faith will find it more difficult to invoke the ministerial exception. As Justices Alito and Kagan explained, our country's emphasis on religious freedom has produced a thriving diversity of faiths featuring "virtually every religion in the world," each with "different views on exactly what qualifies as an important religious position." *Hosanna-Tabor*, 565 U.S. at 198, 200 (Alito, J., concurring). Most faiths do not use the term "minister," many lack a concept of ordination (a lay person's formal elevation to the clergy), and some believe all or most of its members are ministers. *Id.* at 202. Thus, many religious groups carry out critical spiritual functions through

individuals who could not satisfy the test now imposed by the Ninth Circuit and California Court of Appeal.

Su is a case in point. As a Reform Jewish synagogue, the Temple operates an on-site Jewish preschool to instill Jewish faith and identity in young children, and it hires teachers to accomplish that purpose. But the Temple has no analog to the position of a "called minister" found in the Lutheran faith, and it does not require its preschool teachers to become Biblical scholars. Instead, the Temple relies on lay people to teach the Jewish faith to the children, as permitted by Jewish law. *Cf. Grusgott*, 882 F.3d at 659, 661 (teacher at Jewish school fulfilled an important role as a teacher of faith even though she had a "lay title" and "teachers at the school were not required to complete rigorous religious requirements comparable to the teacher in *Hosanna-Tabor*"); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012) (teacher at Jewish school was a minister even though she "was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi"). But due to these aspects of Jewish law, most Jewish-school teachers in the Ninth Circuit and California will now be excluded from the ministerial exception, even if they are a synagogue's primary conduit for transmitting Jewish faith to the next generation.

Indeed, the approach now followed in those jurisdictions will especially disfavor the *weakest* religious groups. *See Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (the First Amendment prohibits discrimination favoring "well-established churches" over "churches which are new and lacking in a

constituency"). Many small religious groups do not have seminaries where they can provide a formal education to their ministers. And some might not have enough members to fill critical roles exclusively with adherents, or the funds to allow for a professional clergy. But the First Amendment should protect these groups no less than well-established Protestant churches. Indeed, they are the groups who need that protection most. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) (warning against a test that "disadvantag[es] those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some").

What is more, minority religious groups will face significant pressure to bow to the threat of litigation in some instances, as in *Su*, brought by the state itself by conforming their internal governance and distinctive religious practices to those of the Lutheran church in *Hosanna-Tabor*. For example, they might change employees' titles to sound more religious, or they might require them to undergo extensive religious education that they do not need. But religious groups should not be compelled under threat of liability to conform their conception of a "minister" to the "prevailing secular understanding" or the prevailing Lutheran understanding. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Indeed, compelling religious conformity is a danger "the First Amendment was designed to guard against." *Id.*; *accord* 1 Annals of Cong. 758 (1789) (remarks of J. Madison) (explaining the Establishment Clause prevents the risk that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel

others to conform"); *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962) (noting the Establishment Clause protects against "coercive pressure upon religious minorities to conform to the prevailing officially approved religion").

Without this Court's review, courts across a large swath of the country will continue to apply *Hosanna-Tabor* in a way that does not "show[ ] sensitivity to and respect for this Nation's pluralism, or the values of neutrality and inclusion that the First Amendment demands." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring).

CONCLUSION

The question presented warrants the Court's review. The Court should grant one or more of the three petitions presenting the question. If the Court does not grant all three petitions, it should hold the remaining petitions until its decision on the merits.

Respectfully submitted,

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October 17, 2019

NOS. 19-267, 19-348

In the
Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,
v.
AGNES DEIRDRE MORRISSEY-BERRU,
Respondent.

ST. JAMES SCHOOL,
Petitioner,
v.
DARRYL BIEL, as Personal Representative for the Estate of Kristen Biel,
Respondent.

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

BRIEF FOR *AMICI CURIAE* STEPHEN WISE TEMPLE AND MILWAUKEE JEWISH DAY SCHOOL IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Stephen Wise Temple is a non-profit organization that has no parent corporation or stockholders.

Milwaukee Jewish Day School, Inc. is a non-governmental corporation, which is not publicly traded. The School does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. The School is a Wisconsin non-stock corporation that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code.

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STATEMENT OF INTEREST[1]

Stephen Wise Temple is a Reform Jewish synagogue in Los Angeles, California. Founded in 1964, the Temple's mission is to promote and preserve the Jewish faith; to serve and strengthen the Jewish community on behalf of its thousands of members; and through the Jewish concept of *Tikkun Olam*, to make meaning and change the world through its many efforts to help those in the broader community who are in need. The Temple operates a preschool and an elementary school, which the Temple believes are essential to the Temple's goal of passing the Jewish faith on to the next generation and strengthening the faith of families in its congregation.

Milwaukee Jewish Day School is a private community day school dedicated to providing a pluralistic Jewish education to schoolchildren from 3K through eighth grade. The School welcomes all children and families who identify as Jewish, irrespective of denomination or temple affiliation. To that end, the School strives to create an atmosphere respectful of all expressions of Judaism and to develop within each student a positive Jewish identity. By educating Jewish children in the values and traditions of their Jewish heritage, the School seeks to help its

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

students develop an enduring commitment to the Jewish community and the community at large.

Amici have experienced firsthand how different applications of the ministerial exception can affect religious schools. Both amici have litigated the ministerial exception's applicability to teachers at their schools, leading to conflicting published decisions by the California Court of Appeal and the Seventh Circuit. Although these cases are now final, amici continue to believe the ministerial exception should be broadly construed to protect *all* religious traditions (including religious minorities), especially in cases where courts examine the ministerial exception's applicability to teachers who perform the essential task of conveying the tenets of the faith to the next generation.

SUMMARY OF ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), this Court recognized the ministerial exception for the first time. Multiple factors supported applying the exception there, as the employee at issue in that case a teacher at a Lutheran school for young students not only performed a religious function, but had a religious title, received religious training, and considered herself a minister. But the Court warned against treating all those considerations as necessary; instead, having recognized the exception for the first time, the Court left defining its contours for another day. In a concurring opinion, however, Justices Alito and Kagan clarified that the Court's decision should not be read as upsetting the longstanding "functional approach" that prevailed in the lower courts, and that courts

should continue to focus on whether employees perform religious functions in ministerial-exception cases moving forward.

In the two decisions below, the Ninth Circuit held that teachers who perform important religious functions for religious schools did not qualify as "ministers" under the ministerial exception because they insufficiently resembled the "called" Lutheran school teacher in *Hosanna-Tabor*. In so holding, the Ninth Circuit not only performed the very type of formulaic analysis that *Hosanna-Tabor* instructed courts *not* to perform, but adopted a test that systematically excludes religious minorities.

Cases involving Jewish schools including amici show the religious discrimination minority faiths face depending on whether courts apply the type of formulaic standard embraced by the Ninth Circuit here. Teachers at amici's schools perform many important religious tasks: They pray alongside their students; they teach Jewish values, history, and traditions to the next generation of the Jewish faith; they share stories from the Torah; they lead sacred rituals; they participate in weekly Shabbat services; and much more.

In *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018), the Seventh Circuit properly held that the Milwaukee Jewish Day School's teacher was a minister. Although the court declined to look *only* to function, it ultimately concluded that the teacher's religious functions greatly outweighed the formalistic factors identified in *Hosanna-Tabor*.

Yet in *Su v. Stephen S. Wise Temple*, 244 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019), the California Court

of Appeal reached the opposite and incorrect conclusion. Following the Ninth Circuit's decision in *Biel*, the court held that the Stephen Wise Temple's preschool teachers' many religious functions were not enough to qualify them as ministers. The court reasoned that these teachers did not qualify as bona fide ministers because, unlike the Lutheran teacher in *Hosanna-Tabor*, the Temple's teachers had no ministerial title, had not received theological training, and did not hold themselves out as ministers. In short, the court faulted the Temple for assigning religious duties to teachers who did not more closely resemble the Lutheran school teacher in *Hosanna-Tabor*. As a result, the state of California was allowed to continue directly interfering in the relationship between the Temple and its ministers.

The Ninth Circuit's formulaic approach, adopted by *Su*, is flatly inconsistent with the First Amendment. By asking whether a religious group's ministers sufficiently resemble the Lutheran minister in *Hosanna-Tabor*, the Ninth Circuit sets a single denomination as the standard for First Amendment protection and puts religious minorities at a distinct disadvantage. Amici, for example, have no concept of "called teachers," do not confer formal titles on their teachers, and do not require their teachers to receive college-level theological training. Under the Ninth Circuit's and California Court of Appeal's approach, these doctrinal differences mean that courts can second-guess whether amici's teachers are truly ministers. As a result, amici will no longer be free to "choos[e] who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196.

The time has come for this Court to clarify that the First Amendment protects the autonomy of *all* religious groups to select and control those who perform important religious functions no matter how closely a group's beliefs resemble those of another denomination. In doing so, the Court should not only reverse the Ninth Circuit decisions here but also affirmatively state that *Su* was wrongly decided. Unless the Court repudiates *Su* alongside the Ninth Circuit decisions here whose standard *Su* adopted religious minorities in California will be at risk of California courts continuing to apply the legally erroneous state court precedent.

ARGUMENT

I. Jewish Schools Depend On Teachers Who Perform Critical Religious Functions But Who Differ In Many Ways From The Lutheran "Called" Teacher In *Hosanna-Tabor*.

In *Hosanna-Tabor*, this Court held that the ministerial exception barred a discrimination claim brought on behalf of Cheryl Perich, a Lutheran school teacher, against her Lutheran church employer. 565 U.S. at 192. The Court did not, however, provide a clear test for who qualifies as a ministerial employee. *Id.* at 190. Instead, considering "all the circumstances of Perich's employment," the Court held that Perich was plainly a minister. *Id.* The Court offered four "considerations" that reinforced its conclusion: Perich's formal title as a "'Minister of Religion'"; her extensive education required to earn that title; her use of that title by accepting a formal call to ministry from

the congregation; and her important religious functions for the church. *Id.* at 191-92.

But the first three of those considerations were rooted in the unique practices of the Lutheran church. As Justice Alito's concurring opinion in *Hosanna-Tabor* (joined by Justice Kagan) explained, not all faiths share the same concept of a minister or ministerial attributes as those embraced by Lutherans. *See id. at* 198 (Alito, J., concurring).

For instance, many faiths have no concept of "called" teachers, do not require teachers to receive college-level theological training, and do not grant the formal title of "Minister of Religion" to a teacher. Thus, schools from other faith traditions often rely on teachers who instruct children in religious practices and beliefs but who do not neatly fit the profile of the Lutheran school teacher in *Hosanna-Tabor*. *See, e.g.*, *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460 (9th Cir. 2019); *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433 (Mass. 2012).

Jewish schools are one such example. For many synagogues (particularly non-Orthodox synagogues), day schools are a critical means of transmitting the Jewish faith to the next generation. Fern Chertok et al., *The Impact of Day School: A Comparative Analysis of Jewish College Students* 35 (2007) (noting that "day schooling appears to significantly raise the salience of being Jewish for non-Orthodox students").

But Judaism differs from Lutheranism in its beliefs about who can teach the faith. In Judaism,

there is no concept of "called" teachers, nor any requirement of formal commissioning, ordination, or extensive theological training before someone can teach Jewish doctrine to children. To the contrary, Judaism encourages all adherents to promote faith to the next generation. *See Biel v. St. James Sch.*, 926 F.3d 1238, 1249 n.7 (9th Cir. 2019) (Nelson, J., dissenting from denial of en banc rehearing) (noting "a central Jewish prayer repeats the Biblical directive to '[t]ake to heart these instructions with which [God] charges you this day' and to '[i]mpress them upon your children'"). Jewish teachers are also unlikely to hold themselves out as "ministers" because that term is "rarely if ever used … by … Jews." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

Consider amici, for example. Stephen Wise Temple is a Reform Jewish synagogue that operates an on-site preschool for children aged five and under. At its preschool, the Temple relies on lay teachers to introduce the children to the Jewish religion and traditions through daily religious teaching, rituals, and activities. The teachers instruct their students about Jewish scripture, holidays, commandments, and religious observances; lead Seder rituals; recite Sukkot blessings; instruct the children in the *ha-motzi* blessing before every meal and snack; and play a role in weekly Shabbat services. They also develop and implement a uniquely Jewish curriculum that incorporates Jewish values like *kehillah* (community), *hoda'ah* (gratitude) and *shalom* (peace and wholeness) into all aspects of the class. When disputes arise, the teachers stress *menschlicheit*, Jewish religious standards for what is right and wrong. The preschool fulfills a significant religious obligation for the Temple

and the teachers are the primary conduit for instilling faith in the school's students. Judaism does not require ordination for an individual to teach Judaism, and non-Jews may teach Jewish doctrine. As a result, some of the Temple's preschool teachers are Jewish, and others are not. All teachers receive reading materials and guidance about Judaism from the Temple's rabbis and leaders, but they need not have extensive theological training due to the students' age.

Likewise, Milwaukee Jewish Day School also relies on lay teachers to pass the Jewish faith on to schoolchildren from 3K through eighth grade. The teachers teach Hebrew from an integrated Hebrew and Jewish Studies curriculum intended to develop Jewish knowledge and identity in the students. They are also expected to incorporate Jewish religious teachings into their curriculum and classroom and to instruct students about Jewish values, prayers, and holidays. The teachers guide their students in study of the Torah and practice the faith alongside the children by praying with them and performing Jewish rituals. But unlike the school teacher in *Hosanna-Tabor*, the teachers are not ordained or commissioned by a local congregation, there is no requirement that the teachers undergo high-level religious education, and their title is simply "grade school teacher." Like the Stephen Wise Temple, the school permits the hiring of teachers from all faiths to fill these teaching roles. Even so, they are integral to fulfilling the school's uniquely religious mission.

In sum, while amici's teachers may differ in many ways from the Lutheran school teacher in *Hosanna-Tabor*, they play no less critical a role in passing on

sacred beliefs and traditions to the next generation. Jewish schools should not have to act like Lutheran schools for the First Amendment to apply.

II. The Functional Approach Places Schools Of All Faiths On An Equal Constitutional Footing.

For decades, lower courts have applied the ministerial exception by asking whether a religious group's employee performs important religious functions. *See Hosanna-Tabor*, 565 U.S. at 203 (Alito, J., concurring) (explaining that, within a decade of the ministerial exception's inception, courts addressing the exception's applicability focused on employees' "religious function in conveying church doctrine"). This "functional consensus has held up over time." *Id.* "As a general rule," courts applied the exception when an employee's "'duties consist[ed] of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.'" *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007). In particular, courts recognized that a religious group's continued "existence may depend upon those whom it selects to … teach its message." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). For that reason, courts traditionally struck down "any restriction on the church's right to choose who will carry its spiritual message." *Petruska v. Gannon Univ.*, 462 F.3d 294, 306-07 (3rd Cir. 2006).

Embracing this functional approach, Justice Alito and Justice Kagan's concurring opinion in *Hosanna-Tabor* stressed that the ministerial exception should

apply to any employee who "serves as a messenger or teacher of its faith." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). Justices Alito and Kagan explained that "[b]ecause virtually every religion in the world is represented in the population of the United States, 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 presented" in ministerial exception cases. *Id.* at 198. Consequently, they emphasized that the Court's opinion in *Hosanna-Tabor* "should not be read to upset" the functional consensus. *Id.* at 204. After *Hosanna-Tabor*, most lower courts have heeded this view, continuing to focus on an employee's religious functions. *See, e.g.*, *Fratello*, 863 F.3d at 206 (applying ministerial exception to lay principal at Catholic school because "she served many religious functions"); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) (applying ministerial exception to music director who "performed an important function" by playing the piano during Mass); *Temple Emanuel*, 975 N.E.2d at 443 (applying ministerial exception to teacher at Jewish school because she taught religion to Jewish children).

In the two decisions below, however, the Ninth Circuit misread this Court's *Hosanna-Tabor* decision and adopted a formulaic rule that is dangerously out of step with the longstanding functional approach. In the Ninth Circuit's view, because "teaching religion was only one of the four characteristics" of *Hosanna-Tabor*'s Lutheran "called" teacher, relying on that "shared characteristic alone" would render *Hosanna-Tabor*'s other considerations "irrelevant dicta." *Biel*, 911 F.3d at 609. The Ninth Circuit thus believed that

the ministerial exception requires a greater "resemblance to *Hosanna-Tabor*" than "only one of the four" considerations from that case. *Id.* at 610; *accord Morrissey-Berru*, 769 F. App'x 460, 461 (9th Cir. 2019) (holding that "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework").

The Ninth Circuit's new approach, now embraced by the California Court of Appeal in *Su*, is deeply misguided. By requiring religious school teachers to resemble *Hosanna-Tabor*'s Lutheran "called" teacher, the Ninth Circuit sets a single denomination as the standard for constitutional protection under the ministerial exception and improperly charges courts with deciding how closely a faith's practices and internal structure mirror those of the Lutheran Church. Doing so gives preference to churches "within the Protestant Christian framework," *Biel*, 911 F.3d at 621 (Fisher, J., dissenting), and embarks courts "on a course of religious favoritism anathema to the First Amendment," *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 620 (2014) (Kagan, J., dissenting).

Unsurprisingly, Jewish schools have fared markedly worse under the Ninth Circuit's resemblance test. *Su* is a case in point. There, the California Labor Commissioner sued amicus Stephen Wise Temple, alleging wage-and-hour claims on behalf of teachers at the Temple's Jewish preschool. *Su*, 244 Cal. Rptr. 3d at 549. Following the functional approach, the trial court ruled that the claims were barred by the ministerial exception because dozens of undisputed facts confirmed that the teachers performed important religious functions. But the California Court of Appeal reversed in a published

decision. The court recognized that the teachers performed the key function of "transmitting Jewish religion and practice to the next generation" by "teaching Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services." *Id.* at 553. Even so, the court agreed with *Biel* that *Hosanna-Tabor* should not be read "to suggest that the ministerial exception applies based on this factor alone." *Id.* The court thus concluded that the Temple's preschool teachers were not ministers because they did not share the particular characteristics of the Lutheran teacher in *Hosanna-Tabor*. "Unlike Perich," the court reasoned, the Temple's "teachers are not given religious titles," "are not ordained or otherwise recognized as spiritual leaders," and need not undergo "any formal Jewish education or training." *Id.* at 552-53. The court also noted that some of the Temple's teachers, unlike Perich, were not adherents of the Temple's faith. *Id.* at 548, 552-54.

Courts focusing on religious functions, by contrast, have found similar Jewish school teachers to be ministers. In *Temple Emanuel*, the Massachusetts Supreme Judicial Court considered a Jewish temple's decision not to rehire a teacher in its Sunday and after-school religious school. *See* 975 N.E.2d at 434-35. Although the teacher "was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi," and the record was "silent as to the extent of her religious training," she performed important religious functions. *Id.* at 443. Her "teaching duties included teaching the Hebrew language, selected prayers, stories from the Torah, and the religious significance

of various Jewish holidays." *Id.* at 442. The court thus concluded that she was a minister, reasoning that "the State should not intrude on a religious group's decision as to who should (and should not) teach its religion to the children of its members." *Id.* at 443.

In *Grussgott*, the Seventh Circuit likewise applied the ministerial exception to a Hebrew teacher employed by amicus Milwaukee Jewish Day School. Although the court declined to look "*only* to the function of Grussgott's position," it determined that "the 'formalistic factors [we]re greatly outweighed by the duties and functions of [Grussgott's] position.'" *Grussgott*, 882 F.3d at 661; *see id.* (noting that "the importance of Grussgott's role as a 'teacher of [ ] faith' to the next generation outweighed other considerations"). Among other things, she "taught her students about Jewish holidays, prayer, and the weekly Torah readings," and "she practiced the religion alongside her students by praying with them and performing certain rituals." *Id.* at 660. Unlike the Ninth Circuit in *Biel*, the court declined to second-guess the religious importance of these duties, noting that it would be inappropriate for the government to "challeng[e] a religious institution's honest assertion that a particular practice is a tenet of its faith." *Id.* The court explained that such judicial "line-drawing" would not only be "incredibly difficult," but would impermissibly entangle the government with religion. *Id.*

These Jewish school cases highlight how the Ninth Circuit's analysis "poses grave consequences for religious minorities." *Biel*, 926 F.3d at 1239 (Nelson, J., dissenting from denial of rehearing en banc).

Under the Ninth Circuit's approach, the autonomy of Jewish synagogues and congregations of other minority faiths to choose the messengers and teachers of their faith may be set aside simply because their theological beliefs differ from those of the Lutheran Church.

Worse yet, the Ninth Circuit's resemblance test especially disfavors the weakest religious groups those "whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). By requiring employees to share some characteristic with the *Hosanna-Tabor* Lutheran school teacher other than performance of religious functions, the Ninth Circuit systematically disfavors groups who lack the means to fund theological training, who do not have enough members to fill critical roles exclusively with adherents, and who perhaps do not employ religious titles in the same way some other mainstream religions do.

The functional approach, by contrast, places all religious groups on an equal footing. Instead of looking to the particular practices of one denomination, courts applying the functional approach ask whether the employee carries out functions "essential to the independence of practically all religious groups." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). These roles at a minimum include "those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* Once a religious school decides a teacher is qualified to be entrusted with this vital religious function, the ministerial exception should

apply to the employee. "The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith." *Id.* at 202.

Equal treatment of all faiths is a core requirement of both Religion Clauses. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'"). By giving all groups equal access to the ministerial exception's protection, no matter their beliefs or internal structures, the functional approach honors our Nation's centuries-old "respect and tolerance for differing views" and its ongoing "honest endeavor to achieve inclusivity and nondiscrimination." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089 (2019).

In violating these core principles, the Ninth Circuit strips minority religious groups of "authority to select and control who will minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 195. But as this Court recognized in *Hosanna-Tabor*, the First Amendment safeguards "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. That interest simply is not confined to groups whose teachers study at seminaries, have formal titles, or hold themselves out as religious leaders.

To the contrary, members of all religions place their faith into their teachers' hands, entrusting them

with the communication of their tenets and practices to adherents, the next generation, and the world. Indeed, a group's teachers are the very "embodiment of its message" and "its voice to the faithful." *Petruska*, 462 F.3d at 306; *see Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (noting that "both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers"). In short, when the government controls the hiring and firing of religious teachers, it interferes with the selection of those who will personify a faith's beliefs.

All faiths should have "the freedom to choose who is qualified to serve as a voice for their faith." *Hosanna-Tabor*, 565 U.S. at 200-01 (Alito, J., concurring). This Court should reverse the decisions below and hold that the ministerial exception applies to employees who perform important religious functions.

III. If The Court Reverses Here, It Should Specifically Disapprove Of The California Court of Appeal's Opinion In *Su*.

If this Court reverses the Ninth Circuit's decisions in *Biel* and *Morrissey-Berru*, it should also disapprove of the California Court of Appeal's opinion in *Su*. Stephen Wise Temple petitioned for writ of certiorari in that case; but after this Court called for a response from the California Labor Commissioner, the parties settled and the Temple dismissed its petition. The *Su* opinion, however, still remains on the books and is the only post-*Hosanna-Tabor* published decision in California to address the ministerial exception. As such, it is binding on all California trial courts. *See*

Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937, 940 (Cal. 1962) (noting that decisions of any California Court of Appeal are binding "upon all the superior courts of this state," and California superior courts therefore "must accept" the law declared by the California Court of Appeal absent conflicting California appellate decisions).

Su's holding is functionally identical to the cases here. *See* 244 Cal. Rptr. 3d at 553 ("Although the ECC's teachers are responsible for some religious instruction, we do not read *Hosanna-Tabor* to suggest that the ministerial exception applies based on this factor alone."); *id.* ("Our conclusion is consistent with the Ninth Circuit's recent decision in *Biel*."). If this Court does not specifically reject *Su*'s holding, the California Labor Commissioner will remain free to target religious schools in California that do not conform to the Lutheran Church and California courts may well continue to apply erroneous state precedent to those cases, threatening the autonomy of religious schools throughout the country's most populous state. This Court should thus disapprove of *Su* to protect the foundational freedoms of *all* religious groups in California.

CONCLUSION

The Court should reverse the two decisions below and disapprove of the California Court of Appeal's decision in *Su*.

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February 10, 2020