No. 19-267

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES MORRISSEY-BERRU,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The brief in opposition serves only to confirm that the Ninth Circuit has split from the functional consensus identified by Justices Alito and Kagan and adopted by seven circuits and seven states. Given this sharp and intractable split over a structural protection for church-state relations, now is the right time and this is the right case to resolve the issue.

I. The circuit split is square, deep, acknowledged, and intractable.

A square, deep, acknowledged, and intractable split exists among the lower courts. Pet.14-26. Given the Ninth Circuit's refusal to address the issue en banc, there is no foreseeable path to a resolution of the circuit split absent this Court's intervention. Respondent offers no reason to think otherwise.

1. Respondent does not dispute that the Ninth Circuit's rule breaks from the "functional consensus," identified by Justices Alito and Kagan, which reflects broad judicial agreement that courts should focus "on the function performed by persons who work for religious bodies" to determine ministerial status. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 198, 203 (2012) (Alito, J., concurring); see also BIO 6, 22 (attacking "functional consensus"). Nor does Respondent address a single pre-*Hosanna-Tabor* case, or even mention the *Biel* en banc dissent's view that the new Ninth Circuit rule splits from the previous "widespread" function-focused standard. *Biel* v. *St. James Sch.*, 926 F.3d 1238, 1243 (9th Cir. 2019) (R. Nelson, J., dissenting). This circuit split has now been recognized by thirteen Court of

Appeals judges from three different circuits. Pet.22-25.

To escape the split, Respondent argues that *Hosanna-Tabor* in fact rejected the existing functional consensus, silently overturning decades of lower court caselaw. BIO 6-7; see also C.A. Oral Arg. at 13:00-14:15, *Our Lady,* https://bit.ly/2N4FIFq (arguing *Hosanna-Tabor* abrogated the "functional consensus"). And it is true that the panel below so held. App.3a ("an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework"); see also C.A. Oral Arg. at 18:55 and 24:05 (Judge Gilstrap: functional consensus was merely "dicta in a concurring opinion"; suggesting that function is inadequate to show ministerial status, since "[i]f she took her students on a field trip to NASA, does that make her an astronaut?").

But laying aside that such a reading of *Hosanna-Tabor* is not credible—Justices Thomas, Alito, and Kagan's concurrences said that they understood *Hosanna-Tabor* to mean exactly the opposite, Pet.18-19—it also does not advance her attempt to evade the split. Four other circuits and two state supreme courts have agreed with the concurring justices that *Hosanna-Tabor* left the functional consensus fully intact. Pet.19-21.

2. Respondent's argument that the functional consensus has been replaced by a "totality-of-the-circumstances" test is also misguided. BIO 1, 22. Neither Petitioner nor any of the courts following the functional consensus have voiced any quibble with a legal standard that reviews all of the relevant factual circumstances, including any of the four considerations identified in *Hosanna-Tabor*. Pet.14,

19-26. The question that has divided the lower courts is not the *scope* of what evidence a court should consider in deciding whether an employee is ministerial, but *how to weigh* that evidence. The Ninth Circuit says that the absence of a title, training, and tax status akin to the Lutheran teacher in *Hosanna-Tabor* is *always dispositive*, no matter what other facts are in evidence. All the other circuits say that there is no such rigid requirement, and instead treat function as the most important consideration under *Hosanna-Tabor*. See Pet.19-21.

3. Respondent's discussion of the cases in the split likewise falls flat. Remarkably, she fails to even mention the en banc dissent in *Biel* or engage the Second Circuit's decision in *Fratello* v. *Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017).

Where Respondent does engage the caselaw, she errs. She says that in *Sterlinski* v. *Catholic Bishop of Chicago*, the Seventh Circuit did not reject the Ninth Circuit's "Perich-comparison analysis" in favor of a functional approach. BIO 19-20 (citing 934 F.3d 568 (7th Cir. 2019)). But the Seventh Circuit expressly stated that (a) it sees the Ninth Circuit rule as "ask[ing] how much like Perich a given plaintiff is, rather than whether the employee served a religious function," and (b) it "disagreed with that approach," as did "[m]any judges" from other circuits. *Sterlinski*, 934 F.3d at 570.

Instead of *Fratello*, Respondent addresses the Second Circuit's later decision in *Penn* v. *New York Methodist Hospital*, 884 F.3d 416 (2d Cir. 2018). BIO 13-15. But *Penn* wasn't about who is a minist*er*; it was about what is a minist*ry*. To the extent that *Penn* addressed the definition of minister, it was consistent

with *Fratello*'s focus on function. *Penn*, 884 F.3d at 424 ("the ministerial doctrine should be applied" because, *inter alia*, "Mr. Penn's role * * * was to provide religious care").

Respondent next wrongly claims that the Third Circuit's *Sixth Mount Zion* v. *Lee* turned on religious title. BIO 13-15 (citing 903 F.3d 113 (3d Cir. 2018)). But the court says nothing about the definition of a minister other than to affirm its precedent that the definition covers anyone "who will perform particular spiritual functions." *Sixth Mount Zion*, 903 F.3d at 122 n.7 (quoting *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006)).

Respondent's attempt to align *Conlon* v. *InterVarsity Christian Fellowship* with the decision below also fails. *Conlon* found that ministerial status was "clearly" established by just two considerations: religious function and a good-faith identification of the employee having a ministerial role. Pet.20-21 (citing 777 F.3d 829 (6th Cir. 2015). What *Conlon* did not do, in sharp contrast to the Ninth Circuit, was rule that *religious function alone could never be enough*.[1]

Respondent's fleeting attempt to distinguish the Massachusetts and Kentucky supreme courts' decisions also falls short. BIO 15-16 (citing *Temple Emanuel of Newton* v. *Massachusetts Comm'n Against Discrimination*, 975 N.E.2d 433 (Mass. 2012); *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014)). She never identifies *any* specific consideration

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[1] Indeed, lower courts applying *Conlon* have found that "religious function alone can trigger the [ministerial] exception." See, *e.g.*, *Ciurleo* v. *St. Regis Parish*, 214 F. Supp. 3d 647, 651-52 (E.D. Mich. 2016).

either court relied on that was *not* function-related. Nor does she contest *Kirby*'s explanation that, when considering the totality of the circumstances, courts should give "more" weight to function and less to indicia such as title. 426 S.W.3d at 613 & n.61.

Finally, Respondent's treatment of *Cannata* v. *Catholic Diocese of Austin* amounts to a concession. As she is forced to admit, the Fifth Circuit's ruling turned on the plaintiff's religious functions, including that he played an "integral role" "'in the celebration of Mass,'" "ch[]ose hymns," "'furthered the mission of the church," and "helped convey its message to the congregants.'" BIO 11-12 (quoting 700 F.3d 169, 177-180 (5th Cir. 2012)).

4. Respondent concedes the crucial facts of this case: that she taught religion class, prayed with her students, daily led them in praying the Hail Mary, regularly took them to Mass, and incorporated the faith into her curriculum. BIO i, 5. She also does not contest that she taught fundamental Catholic doctrines through worship, prayer, and scripture readings; trained her students in core practices of the Catholic faith; directed religious performances by her students; and took her students to serve at the altar at the Cathedral of Our Lady of Angels. Pet.8-9. Those facts are more than enough to show that she performed a crucial role in conveying Petitioner's faith to the next generation.

Respondent does misstate two parts of the undisputed record. First, she claims she had no leadership role in prayer and in the Mass. BIO i-ii. But she conceded below that she "led the class in daily prayer," and she testified that she taught her students the parts of Mass, prepared students to give Scripture

readings during weekly school Masses and monthly family Masses, and was in charge of liturgy planning for a monthly Mass. App.21a, 81a-84a, 86a-88a.

Second, Respondent misleadingly states that Our Lady merely preferred, not required, that teachers be Catholics. BIO i, 3. But as relevant here, teachers who taught religion classes, such as Respondent, *were* required to be Catholic. App.56a-57a. Moreover, Respondent testified that she had a special role in conveying the Catholic faith and was "committed" to providing a "faith-based education" grounded in "Catholic values." App.81a-82a, 93a-94a.

II. The scope of the ministerial exception is a vital and recurring question of nationwide importance.

The ministerial exception is a crucial First Amendment protection for a wide variety of faith traditions, but under the current circuit split, the First Amendment means different things in different places. Pet.27-32. Respondent downplays the issue, arguing that no split exists and that, far from important, the decades-old functional consensus is "not tenable." BIO 3.

But the importance of this case cannot be gainsaid. The largest federal circuit has adopted a new substantive rule of First Amendment law and twice applied it against the largest archdiocese in the country in a sensitive church-state context. The most populous state in the country has already followed suit. And the underlying new rule was sought by the EEOC—which has been attempting to narrow *Hosanna-Tabor* nationwide—precisely because of the "importance of clarifying the scope of the ministerial

exception." EEOC C.A. Br. at 1, *Biel* v. *St. James Sch.*, 911 F.3d 603 (9th Cir. 2018) (No. 17-55180).

Left undisturbed, the Ninth Circuit decision will harm religious education. The decision forces religious schools in the Ninth Circuit to decide who their ministers are based on title and training, which depending on the religion, may not necessarily reflect the importance of a religious role. In the Ninth Circuit, a teacher's title could change her status without changing her function in "conveying the Church's message and carrying out its mission" of teaching children the faith. *Hosanna-Tabor*, 565 U.S. at 192. See NCEA Br. 14. Indeed, "[h]ad *Ms.* Morrissey-Berru been *Sister* Morrissey-Berru, she would have been a 'minister.'" *Id.*

The Ninth Circuit's favoritism for the Lutheran beliefs in *Hosanna-Tabor* particularly threatens religious minorities who do not use ministerial titles. See Uddin Br. at 9-10, *St. James Sch.* v. *Biel*, No. 19-348. The Ninth Circuit rule pressures minority groups to start "checking the box" with majoritarian religious nomenclature. See Church of God in Christ & Orthodox Union Br. 16, 23. "Such governmental micromanagement of how religious organizations structure their own affairs" "elevate[s] form over substance, with potentially disastrous results for * * * religious pluralism." ERLC Br. 5-6.

The Ninth Circuit decision also threatens the ability of parents and religious communities to pass their faith to the next generation. Seventh-day Adventists Br. 9 (citing data showing that religious education influences children's faith). Again, this is particularly true for minority groups, whose beliefs are less likely to be reflected or reinforced in popular

culture. *Id.* at 10 (citing study on the importance of Jewish day schools to passing on the faith).

Moreover, forcing courts to second-guess the religious doctrine of schools and other religious organizations will significantly harm the church-state relationship envisioned by the Founders and protected in this Court's precedent. See Professors Br. 8-12 (noting that early separation of church and state in the colonies benefitted both polities). Indeed, "narrow definitions of 'minister'—especially laws setting educational and other credentials for ministers—were among the key evils" that the Founders sought to prevent in the Religion Clauses, since they could be used to "disadvantage[] religions with conflicting views." CLS Br. 12, 17. States therefore cannot and should not be required to make religious judgments such as whether the title of Lutheran "minister" is the equivalent to a Muslim *alim* or a Sikh *ragi*. States Br. 9.

The national importance of this case is further shown by the EEOC's role in creating the problem. The EEOC successfully argued to the Ninth Circuit that ministerial status should generally be limited to "ecclesiastical leaders" and that "religious duties, without more" are insufficient to make that showing since "the first three factors" in *Hosanna-Tabor* are "particularly critical." *Biel* EEOC C.A. Br. at 13, 22; see also *Biel* C.A. Oral Arg. at 17:28-17:40, 20:30-20:55, 911 F.3d 603, https://bit.ly/2WwwWmN; (exception applies only with "a role of leadership within the church" or a showing of "at least two factors"). Notably, this tracks the EEOC's unsuccessful arguments in *Hosanna-Tabor*. EEOC Br. at 51, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553)

(ministerial exception limited to those with an "exclusively" religious role, such as "clergy," "chaplain[s]," and "spiritual leaders"). Without correction by this Court, the EEOC can enforce its narrow view of the ministerial exception and press courts to do the same.

III. This appeal is the best vehicle for addressing the split.

Respondent says this case is a poor vehicle for resolving the split because it is a fact-bound determination and Petitioner merely disagrees with the outcome. BIO 22-23. Not so. The split is over the Ninth Circuit's now twice-applied new rule, and the facts of this case position it in the heartland of ministerial exception cases that have arisen since *Hosanna-Tabor*, making it an excellent vehicle.

There are at least six ministerial exception cases that are either already pending or may soon be pending in this Court:

(1) This appeal;

(2) *St. James School* v. *Biel*, No. 19-348;

(3) *Stephen Wise Temple* v. *Su*, No. 19-371;

(4) *Sterlinski* v. *Catholic Bishop of Chicago*, 934 F.3d 568 (7th Cir. 2019) (opinion amended and en banc petition denied Oct. 31, 2019);

(5) *Demkovich* v. *Archbishop of Chicago*, No. 19-2142 (7th Cir.) (argument scheduled Nov. 5, 2019);

(6) *Puri* v. *Khalsa*, No. 18-35479 (9th Cir.) (argument scheduled Nov. 8, 2019).

Of these six potential vehicles, this appeal is by far the best one for addressing the set of fact patterns giving rise to the split.

A. This appeal is in the heartland of the ministerial exception cases applying *Hosanna-Tabor*.

All of the federal circuit cases applying *Hosanna-Tabor* arise from claims that a specific employee was unlawfully terminated from a position in a religious organization. And like the decision below, all but one of the federal appeals have concerned whether the ministerial exception bars an employment discrimination claim:

- *Cannata* (church organist brought age and disability discrimination claims against his church employer)
- *Conlon* (spiritual director brought gender discrimination claims against her campus mission employer)
- *Fratello* (Catholic school principal brought gender discrimination claims against her church employer)
- *Penn* (chaplain brought race and religious discrimination claims against his hospital employer)
- *Grussgott* (Hebrew teacher brought disability discrimination claim against her Jewish day school employer)
- *Biel* (Catholic schoolteacher brought disability discrimination claim against her school)

- *Sterlinski* (church organist brought national origin and age discrimination claims against his church employer)
- *Demkovich* (church organist terminated for entering into a same-sex marriage brought hostile work environment claims against his church employer)

The exception, *Sixth Mount Zion*, concerned whether a pastor could bring breach of contract claims against his church when he was terminated for cause.

The typical fact pattern for ministerial exception cases in the courts of appeals is thus the same as the one in this appeal: a specific, single terminated employee brings an employment discrimination claim against a former religious employer.

The state supreme courts in the *Hosanna-Tabor* split also decided employment discrimination claims. *Temple Emanuel* concerned an age discrimination claim against a synagogue. And *Kirby* held that a Christian social ethics professor's race discrimination claims against his seminary employer were subject to the ministerial exception, while his contract and good-faith-and-fair-dealing claims were not.

The one state intermediate appellate court decision in the split is not far off. In *Su*, the California Department of Industrial Relations sued a synagogue regarding all of its preschool teachers, alleging "that the Temple classifies its non-credentialed teachers as 'non-exempt,' but it does not provide them with 10-minute rest breaks, uninterrupted 30-minute meal breaks, or overtime pay, as required by California's wage-and-hour laws." *Su* v. *Stephen S. Wise Temple*, 244 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019). The

synagogue obtained summary judgment on a stipulated record, on the grounds that the ministerial exception barred California's wage-and-hour claims with respect to the class of pre-school teachers working for the synagogue. The Second Appellate District of the California Court of Appeal, Division Three, reversed, relying heavily on the Ninth Circuit's new rule.

This survey of the ministerial exception cases arising since *Hosanna-Tabor* thus demonstrates that Petitioner's appeal is in the heartland of the fact patterns that frequently recur in ministerial exception cases. And the significant number of amici supporting this petition is a further indication of how frequent, and how weighty, this type of dispute is for religious organizations.

B. The factual record in this case is robust.

The facts in this appeal provide a strong foundation for deciding a First Amendment issue of this importance. This case has been litigated from the ground up as a ministerial exception case, with the district court deciding the case on that basis and the Ninth Circuit also deciding the appeal solely on ministerial exception grounds.

The facts in the record were developed in detailed deposition testimony providing strong evidence about the scope and nature of Respondent's religious functions at Our Lady of Guadalupe, as well as the other *Hosanna-Tabor* considerations. These facts include concessions during deposition testimony that she personally taught her students to "express [the] belief that Jesus is the son of God," to celebrate the sacraments, to "pray the Apostles' Creed and the

Nicene Creed," App.91a-93a; showed the "children how to go to [M]ass, the parts of the [M]ass, communion, prayer, and confession," App.81a; helped plan the liturgy for a monthly Mass, App.83a-84a; led daily prayer with the students, App.86a-87a; and infused Catholic faith and values into all other academic subjects that she taught, App.86a, 95a.

* * *

In short, this appeal provides the best way for the Court to resolve the circuit split over *Hosanna-Tabor*. It may therefore wish to grant the petition in this appeal and hold the other pending petitions for resolution of this appeal on the merits.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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