Nos. 19-267 & 19-348

IN THE

Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,

v.

AGNES MORRISSEY-BERRU,
Respondent.

ST. JAMES SCHOOL,
Petitioner,

v.

DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KRISTEN BIEL,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR TORAH UMESORAH AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

IGOR V. TIMOFEYEV
Counsel of Record
MICHAEL S. WISE
JOANNE JOSEPH
ROSS HOLLEY
WILLIAM MILBURN
PAUL HASTINGS LLP
875 15TH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 551–1700
igortimofeyev@paulhastings.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE[1]

Torah Umesorah is an Orthodox Jewish educational institution headquartered in Brooklyn, New York. Its mission is to ensure that every Jewish child in Yeshivos, day schools, and Bais Yaakovs receives the highest standards of Torah education, along with the skills to lead a successful life and become a productive member of society. Torah Umesorah provides support for schools, teachers, and students through its education resource centers, conventions, conferences, newsletters, and workshops. While Torah Umesorah does not operate a school or have teachers in the traditional sense, it considers many of its employees, both rabbi and non-rabbi, essential to its goal of passing on the Jewish faith to the next generation. As an organization that is faithful to a minority religion, Torah Umesorah believes that the ministerial exception should be applied with all religious traditions and their various religious activities in mind to ensure that the Religion Clauses are given their full effect.

SUMMARY OF THE ARGUMENT

Courts generally employ a function-based analysis for determining if the ministerial exception covers a given employee. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 198 (2012) (Alito, J., concurring). But while courts may

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for Petitioners provided blanket consent to the filing of *amici* briefs on January 27, 2020, and counsel for Respondents provided consent to this filing on January 28, 2020.

generally be able to determine if a given function is religious, courts are less able to decipher the importance of a given religious function. In cases where there is a dispute about the importance of an employee's religious functions, courts should defer to the religious organization's sincere belief.

Asking courts to assess religious importance is particularly problematic in the case of minority religions that may not have doctrines and practices that resemble those of mainstream organized religions, such as those at issue in *Hosanna-Tabor*. Notions of religious importance generally draw from mainstream religious practices, and may not apply to minority religions. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) ("Judicial attempts to fashion a civil definition of 'minister' through . . . a multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some.").

When courts encounter difficulty assessing the importance of a religious function, they should not engage in an independent scrutiny of the religion's doctrine to determine if a given function is religiously important. Courts are not equipped to answer this type of purely ecclesiastical question, nor to adjudicate between competing interpretations of the religious doctrine. Rather, courts must defer to the religious organization to avoid precisely the type of interference in the organization's religious affairs that the Religion Clauses were designed to prevent. Of course, courts may inquire into the facts and circumstances surrounding the employee's situation, and courts may inquire into the sincerity of the organization's religious

belief. But deference to a religious organization's sincerely held belief regarding which functions are religiously important must be an essential feature of the ministerial exception analysis to prevent courts from interfering in issues of religion.

Here, it is undisputed that both teachers, Morrissey-Berru and Biel, had religious functions. And it is also undisputed that the religious organizations believed that those functions were important. This Court should reaffirm that, under *Hosanna-Tabor*, the ministerial exception applies to both teachers because their religious organizations sincerely believed that the teachers performed important religious functions.

ARGUMENT

I. THE PRIMARY PURPOSE OF THE MINISTERIAL EXCEPTION IS TO PREVENT GOVERNMENT INTERFERENCE IN RELIGIOUS AFFAIRS.

In 2012, the Supreme Court recognized that the Religion Clauses require the "ministerial exception" to employment discrimination laws. *Hosanna-Tabor*, 565 U.S. at 188–90. There, this Court unanimously held that the ministerial exception applied to a "called" teacher in a school run by the Evangelical Lutheran Church who held "the formal title" of a "minister" and performed "important religious functions." *Id.* at 192. As the Court explained, "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184, 187–88 & n.2. Therefore, "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire

one of its ministers." *Id.* at 181. Thus, when an employee is a "minister," the Religion Clauses forbid the government from penalizing the employer for removing that individual.[2]

The ministerial exception derives from the "internal affairs [doctrine]," which marks "a boundary between two separate polities, the secular and the religious." *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013); *see Hosanna-Tabor*, 565 U.S. at 185–86 (citing *Watson v. Jones*, 13 Wall. 679, 727 (1872)). In *Watson*, the Court held that in adjudication of church property disputes, "whenever questions of discipline, or of faith, or ecclesiastical rule, custom, or law" have been decided by church judicatories, "the legal tribunals must accept such decisions as final, and as binding on them, in their application of the case before them." 13 Wall. at 727. The opinion in *Watson* "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. America*, 344 U.S. 94, 116 (1952)). The Court explained that:

> Religious organizations have an interest in autonomy in ordering their internal affairs, so

---

[2] The Court's decision in *Hosanna-Tabor* ratified the decades-long uniform jurisprudence by federal courts of appeals recognizing the ministerial exception. *See* 565 U.S. at 188 & n.2; Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1375 (1981).

> that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the Free Exercise Clause.

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 341 (1987). The religious organization's rules, not secular law, regulate its internal governance.

A religious organization can only use and benefit from these freedoms (all of which flow from being able to "run their own institutions") if it has the sole authority to choose its personnel performing religious functions. As the Court explained in *Hosanna-Tabor*, "[t]he exception . . . ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical . . . is the church's alone." 565 U.S. at 194–95. The rule exists to prevent judicial interference in religious affairs, including subjecting religious doctrine to discovery, jury trial, and second-guessing by the courts. *See Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019); *see also Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, J., concurring). Forcing a religious institution to keep a minister whom the church does not want is destructive of religious autonomy irrespective of the reasons for his or her termination. Under the principle of judicial autonomy—which the ministerial exception vindicates—such inquiry is not for the courts to undertake. *Hosanna-Tabor*, 565 U.S. at 194 ("The purpose of the exception is not to safeguard a church's

decision to fire a minister only when it is made for a religious reason.").

II. THE FUNCTION-BASED INQUIRY CAN BE DIFFICULT TO APPLY IN CASES WHERE THE IMPORTANCE OF A RELIGIOUS FUNCTION IS CONTESTED.

In *Hosanna-Tabor*, this Court found that these four considerations were sufficient to determine that an employee was a "minister" under the ministerial exception: (1) "the formal title" given by the religious organization, (2) "the substance reflected in that title," (3) "[the employee's] own use of that title," and (4) "the important religious functions she performed for the Church." 565 U.S. at 192. Lower courts have subsequently applied these considerations in their ministerial exception analysis. *See, e.g.*, *Sterlinski*, 934 F.3d at 944; *Grussgott v. Milwaukee Jewish Day Sch.*, 882 F.3d 655, 658 (7th Cir. 2018); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 204 (2d Cir. 2017).

These four considerations are not an exhaustive list. *See Hosanna-Tabor*, 565 U.S. at 190 (eschewing the use of a "rigid formula"); *Fratello*, 863 F.3d at 202, 204–05 ("*Hosanna-Tabor* instructs only as to what we *might* take into account as relevant . . . it neither limits the inquiry to those considerations nor requires their application in every case."); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) ("Any attempt to calcify the particular considerations that motivated the Court in *Hosanna-Tabor* into a "rigid formula" would not be appropriate."). The instant case gives this Court an opportunity to clarify the rule that governs whether a given employee of a religious organization is covered under the ministerial exception. The different approaches adopted by lower

courts (*compare, e.g.*, *Sterlinski*, 934 F.3d at 568, *with Biel v. St. James Sch.*, 926 F.3d 1238 (9th Cir. 2019)) demonstrate that such guidance is needed.

Most of the lower courts follow the functional approach elaborated in the concurring opinion by Justices Alito and Kagan: "[R]eligious authorities must be free to determine who is qualified to serve in positions of *substantial* religious importance," which includes those who are "essential" to "conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) (emphasis added). In difficult cases, however, deference to religious organizations would help courts to further avoid impermissible interference in religious affairs. *See, e.g.*, *Sterlinski*, 319 F. Supp. 3d 940 (declining to determine whether an organist had a religiously important role); *Amos*, 483 U.S. at 343 ("[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs.").

There are easy cases and hard cases. In *Davis v. Baltimore Hebrew Congregation*, 985 F. Supp. 2d 701 (D. Md. 2013), for example, the district court could easily determine that the ministerial exception did not apply to an employee whose primary duties were "maintenance, custodial, and janitorial work." *Id.* at 711. Similarly, in *Fratello*, the Second Circuit could easily conclude that a school principal who led prayers for the school, supervised hymns at school masses, and supervised teachers integrating Catholic

religious values in their lessons was a minister. 863 F.3d at 209.

Conversely, when courts wade into religious questions, they risk drawing erroneous lines. Thus, the Kentucky Supreme Court in *Kant v. Lexington Theological Seminary*, 426 S.W.3d 587 (Ky. 2014), held that the ministerial exception did not apply to a professor who taught the history of religion, including "theology, ethics, Hebrew Bible, New Testament, world religions, American religion, Greek, and Hebrew," (among others). *Id.* at 592. "[A]lthough [the professor] *did perform a religious function*," the court opined that teaching these topics "did not personify the Seminary's beliefs." *Id.* at 595 (emphasis added). Who knew?[3] By contrast, in another case, the same court held that the ministerial exception did apply to a professor who taught religious "socio-ethical issues," "ethics in ministry," and "Christian modes of moral judgment." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 611 (Ky. 2014). The court reasoned that these topics are "closely connected to the tenets of the faith espoused by the Seminary and [are] active

[3] In fact, in the Jewish tradition, the history of religion has significant theological value. History is not a mere secular unfolding of events; rather, it reveals God's salvific plan and his relationship with his people. The major Jewish holidays of Passover, Hanukkah, and Purim all commemorate God's intervention in history. Studying history allows Jews to understand their shared story, where they came from, and where they are going. Torah Umesorah, for instance, organizes a year-long fellowship for a cohort of Holocaust educators, which includes a week-long trip to Poland. It should not be for a court to second-guess whether teaching the history of the Holocaust—including the theological and philosophical debates regarding its meaning (which is known as Holocaust theology)—is a religiously important function.

involve[ment] in the Seminary's mission," rendering the professor "*a representative of the Seminary's message*." *Id.* at 612 (emphasis added).

"[T]his type of religious line-drawing [is] incredibly difficult [and] impermissibly entangles the government with religion." *Grussgott*, 882 F.3d at 660. "What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident." *Amos*, 483 U.S. at 343 (Brennan, J., concurring).

Torah Umesorah's work is a vivid example. Torah Umesorah has a mere 48 employees. Most of its employees are directly involved in designing faith-centered materials for Jewish schools, even if they are not rabbis. For example, the Directors of Teacher Centers (who are women and cannot be rabbis in the Orthodox tradition), are actively engaged in creating an Orthodox Jewish educational community and imparting religious values to the children who are students of the schools they serve. A court's inquiry into whether, under Jewish law, these Directors occupy a religiously important function would run afoul of *Hosanna-Tabor*. A court should not substitute its own assessment of Jewish law for that of a religious organization; instead, it should defer to that organization's sincerely held beliefs.

The difficult question these courts confront is not so much determining whether a given function is religious. The difficult question—and one risking impermissible intrusion into a religious organization's constitutionally protected domain—is determining whether a given religious function is important. But there is already a simple solution: deference to the religious organization's sincerely held beliefs. When a

religious organization believes that a religious function is important, the court must defer to that judgment. While courts may still conduct a factual inquiry into the employee's role, the functions he or she performed, and the sincerity of the organization's belief regarding the religious importance of those functions, the Religion Clauses mandate that the inquiry stops there.

III. THE CHALLENGE OF APPLYING THE FUNCTION-BASED INQUIRY IS PARTICULARLY ACUTE IN THE CIRCUMSTANCES OF MINORITY RELIGIOUS GROUPS.

The ministerial exception must be applied equitably to both "mainstream" and minority religions, alike. *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."). As Justices Alito and Kagan explained in *Hosanna-Tabor*, the ministerial exception must "protect[] the freedom of [each] religious group[] to engage in certain key religious activities . . . as well as the critical process of communicating the faith . . . in its own voice, both to its own members and to the outside world." 565 U.S. at 199, 201 (Alito, J., concurring). An emphasis on function over title or ordination ensures the fair treatment of minority religions. *See id.* at 198 (Alito, J., concurring) (noting that the term "minister" and ordination do not have analogs in all religions, even all the mainstream world religions).

There exist some "objective functions that are important for the autonomy of any religious group, regardless of its beliefs." *Id.* at 200 (Alito, J.,

concurring). For instance, the janitor does not perform a ministerial function while a theology teacher likely does, regardless of the religious organization to which he or she belongs. As between more dissimilar religions, however, or as between employees who have varied and mixed secular and religious functions, it becomes more difficult for the court to determine what is an important religious function without unduly narrowing the definition of minister. To embark on such inquiry would weaken protections for minority religions. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) ("Judicial attempts to fashion a civil definition of 'minister' through . . . a multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some."). That is not an approach consonant with our pluralistic religious society.[4]

---

[4] "[T]he autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). For example, the whole purpose of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") was to prevent this type of disparate treatment resulting from government interference in religious affairs. *See, e.g.*, H.R. Rep. No. 106–219, at 23 (1999) (an objector to a land-use proposal for building a synagogue stating, "Hitler should have killed more of you," and an objector to a church for a Pentecostal group stating, "Let's keep these God damned Pentecostals out of here"). "[O]ften, discrimination lurks behind such vague and universally applicable reasons as traffic [and] aesthetics[.]" *Tree of Life Christian Schs. v. City of Upper Arlington, Ohio*, 905 F.3d 357, 377 (6th Cir. 2018) (citing joint statement of Senators Orrin Hatch and Ted Kennedy, 146 Cong. Rec. 16,698 (2000)); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (invalidating a facially-generally-

This is not a hypothetical concern. Indeed, decisions misapplying *Hosanna-Tabor* already had negative consequences for minority religious groups. Consider *Su v. Stephen Wise Temple*, 244 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019), which involved an inequitable application of the exact standard at issue in *Biel*. The court there held that because the teachers at the Jewish school did not "play . . . a role in synagogue life" that was directly analogous to the role that Perich played in *Hosanna-Tabor* (i.e., the role of a *Lutheran* educator), the ministerial exception did not apply. *Id.* at 553.

The Ninth Circuit's decision in *Biel* highlights how reasonable differences in interpretation will lead to disparate treatment between religions. *See* 926 F.3d at 1251 (Nelson, J., dissenting from denial of rehearing en banc) ("Catholic schools in [the Ninth] circuit now have less control over employing [their] elementary school teachers of religion than in any other area of the country," and "thousands of Catholic schools in the West have less religious freedom than their Lutheran counterparts nationally."). As a minority-faith (Jewish) organization, Torah Umesorah is acutely concerned about how a court will determine which of its employees qualify for the ministerial exception.[5] *Su*, *Morrissey-Berru*, and *Biel* demonstrate that a

---

applicable law because "suppression of the central element of the Santeria worship service was the object of the ordinances").

[5] *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) ("[U]ncertainty about whether [a religious organization's] 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.") (citing *Amos*, 483 U.S. at 336).

functional analysis severed from deference over-promises and under-delivers: it claims to grant First Amendment protection but "risk[s] disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream'", *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring), dooming them to unfortunate and unnecessary litigation.

IV. THE APPROACH THAT PROTECTS AUTONOMY OF MINORITY RELIGIONS IS DEFERENCE TO A RELIGIOUS ORGANIZATION'S DETERMINATION OF WHETHER ITS EMPLOYEE'S RELIGIOUS FUNCTION IS IMPORTANT.

The approach that protects the autonomy of minority religious organizations is one that defers to those organizations' sincerely held belief as to what roles are religiously important. As Justice Thomas observed in *Hosanna-Tabor*, "the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister." 565 U.S. at 196 (Thomas, J., concurring). A religious organization's theological tenets are critical to determining who among that organization's employees are covered by the ministerial exception, and deference should extend to the *importance* of that employee's religious role.[6] "A religious organization's right to choose its ministers would be hollow . . . if secular courts could second-guess the organization's sincere

[6] Of course, such deference would apply only to sincerely held beliefs. *See, e.g.*, *Sterlinski*, 934 F.3d at 571 ("A church claiming 'minister' status for bus drivers would invite a finding of" insincerity).

determination that a given employee is a 'minister' under the organization's theological tenets." *Id.* at 197 (Thomas, J., concurring).

Thus, deference in this context is narrow. A court would conduct the functional analysis under *Hosanna-Tabor* and assess the facts surrounding the employee's employment. But once the court has determined that the employee has a religious function, it must defer to the religious organization's judgment as to whether that function is religiously important. The court should be assured of the sincerity of the religious organization's belief, but the importance of the religious function is a matter of interpreting religious doctrine and a question for the religious organization—not for a secular court. This approach insulates courts from impermissible intrusion into the religious sphere. As this Court observed, "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977).

Decisions by courts of appeals applying *Hosanna-Tabor* support this approach. *See, e.g.*, *Grussgott*, 882 F.3d at 660 (deferring to religious organizations on what religious functions are important); *see also Cannata*, 700 F.3d at 179–80 ("The mere adjudication of such questions [about who is a minister] would pose grave problems for religious autonomy . . . we may not second-guess whom the Catholic Church may consider a lay liturgical minister under canon.") (citing *Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, J., concurring)).

Thus, in *Grussgott*, the Seventh Circuit had to decide whether the ministerial exception covered a Hebrew teacher at a Jewish school. 882 F.3d at 656–58. The court first determined that the Jewish school was a religious institution because "the organization's mission [was] marked by clear or obvious religious characteristics." *Id.* at 658. It then inquired into whether the teacher's role was ministerial, applying the four sufficient considerations in *Hosanna-Tabor*. *Id.* The court then approached the "important religious function" analysis (the fourth consideration) and found that the teacher had performed functions such as "[teaching] about Jewish holidays, prayer, and the weekly Torah readings . . . and performing certain rituals." *Id.* The Seventh Circuit concluded that all of these were religious functions but recognized that there was controversy as to whether or not they were *important* functions because the teacher argued that she taught from a cultural, rather than a religious perspective. *Id.*

The Seventh Circuit resolved this dilemma by deferring to the religious organization's sincere belief:

> [T]here may be contexts in which drawing a distinction between secular and religious teaching is necessary, but it is inappropriate when doing so involves the government challenging a religious institution's honest assertion that a particular practice is a tenet of its faith. . . . And not only is this type of religious line-drawing incredibly difficult, it impermissibly entangles the government with religion. . . . This does not mean that we can never question a religious organization's designation of what constitutes religious

> activity, but *we defer to the organization in situations like this one, where there is no sign of subterfuge*.

Id. (emphasis added). Ultimately, the court of appeals concluded that "at most two of the four *Hosanna-Tabor* factors [were] present," but "the importance of Grussgott's role as a teacher of faith to the next generation outweighed other considerations." *Id.* at 661. The fact that the teacher did have a religious function, and that the school considered that function important was sufficient to determine that the ministerial exception applied.

The Seventh Circuit reached the same result in *Sterlinski*, 934 F.3d 568. There, the court of appeals concluded that an organist at a Catholic church was a minister because a non-pretextual religious doctrine of the Catholic Church held so. *Id.* at 571–72. First, the court inquired into what job the organist had, distinguishing between the organist's roles as Director of Music and as Organist. *Id.* at 571. The court then concluded that the organist had a religious role, based on a Catholic publication "explaining how music advances not only celebration of the mass but also other devotional matters." *Id.* at 570. The court of appeals then confronted the question of whether the organist's role was religiously important. The Seventh Circuit refused to undertake that inquiry, instead deferring to the religious institution's judgment:

> Sterlinski wants us to decide for ourselves whether an organist's role is sufficiently like that of a priest to be called part of the ministry . . . If the Roman Catholic Church believes that organ music is vital to its religious services . . . who are we to disagree?

Id. The court concluded that the organist held an important religious function, and was therefore covered by the ministerial exception. *Id.* at 572.

The Seventh Circuit's approach strikes the right balance that is protective of the minority religions' institutional autonomy. A Jewish educational organization, for instance, would not use the same terms as other religions (i.e., "minister") or structure its schools in the same way. Thus, Torah Umesorah's Directors of Teacher Centers perform a religious function (design religious curricula) but a court might determine that they do not have either a religious title or use their title in a religious way. Nevertheless, Directors of Teacher Centers are religious positions that *teach Judaism*. Thus, they perform religiously important functions and should be encompassed by the ministerial exception.

Indeed, any religion that does not use an outwardly religious title or employ express ministerial training would find it difficult to pass the Ninth Circuit's erroneous standard.[7] Moreover, the Ninth Circuit's standard leads precisely to the type of intrusive discovery and governmental interference

[7] Consider, as an example, Jehovah's Witnesses and Latter Day Saints ("Mormons"). Each of these religions has a doctrine that all individuals are "called" to minister, regardless of any formal training. Congregation leaders in the Latter Day Saint Church ("Bishops") typically hold the role for a temporary period, have no formal training, and serve in addition to a full-time job. It would be more difficult for a Mormon Bishop to meet the Ninth Circuit's test than (for example) for a Catholic Priest. Such a result would be repugnant to the First Amendment. *See Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

that the Religion Clauses were designed to prevent. A religious organization should not be forced to question whether the exception would apply in some future context because a court might or might not see the religious role as sufficiently important.

V. THE NINTH CIRCUIT WAS INCORRECT TO HOLD THAT THE MINISTERIAL EXCEPTION DID NOT COVER RESPONDENTS.

Under the proper approach, the decisions below cannot stand. Both respondents, Morrissey-Berru and Biel, held important religious functions within their respective schools and therefore the ministerial exception applied.

The Ninth Circuit opined that the ministerial exception did not cover Morrissey-Berru because, although "Morrissey-Berru did have significant religious responsibilities as a teacher at the school," "an employee's duties alone are not dispositive." *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 Fed. Appx. 460 (9th Cir. 2019). This is a misapplication of the law. Rather than dismiss Morrissey-Berru's indisputably religious duties as "not dispositive," the court of appeals should have recognized that those functions were important and substantial. For instance, Morrissey-Berru showed "children how to go to Mass, the parts of the Mass [and] communion." Petitioner's Appendix in *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* No. 19-267 ("OLG.App."), 81a. Morrissey-Berru also performed a number of other religious functions, but preparing children for Mass and the reception of communion—"the fount and apex of the whole Christian life" for Catholics, POPE PAUL VI, DOGMATIC CONSTITUTION ON THE CHURCH: LUMEN GENTIUM 11 (1964)—is itself independently sufficient

to apply the ministerial exception. Our Lady of Guadalupe School considered these duties religiously important and the sincerity of this belief was not contested. It evaluated Morrissey-Berru's teaching of the faith, OLG.App.94a–95a, and required faculty to obtain catechist certification based on guidelines set by the United States Conference of Catholic Bishops, OLG.App.61a. The district court recognized that "[t]he faculty and staff of Our Lady of Guadalupe School are committed to faith-based education, providing a quality Catholic education for the students and striving to create a spiritually enriched learning environment, grounded in Catholic social teachings, values, and traditions." *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, No. 2:16-cv-09353, 2017 WL 6527336, at *2 (C.D. Cal. Sept. 27, 2017). For faculty and staff, including Morrissey-Berru, "*[m]odeling, teaching of and commitment to Catholic religious and moral values are considered essential job duties*." OLG.App.55a (emphasis in original). The ministerial exception should apply to her suit.

As to Biel, the Ninth Circuit concluded that although Biel was a religious teacher (and "taught religion in the classroom . . . four days a week"), her role did not fall within the ministerial exception because she did not have "ministerial training or titles . . . [a]nd she neither presented herself as nor was presented by St. James as a minister." *Biel v. St. James Sch.*, 911 F.3d 603, 609 (9th Cir. 2018). This was, again, a misapplication of the rule. Biel certainly had a religious function. St. James School required her to "personally demonstrate [her] belief in God," to "delight and enjoy [her] noble position as [a] Catholic educator[]," and to "take part in worship-centered school events," Petitioner's Appendix in *St. James Sch.*

v. Biel, No. 19-348 ("StJ.App."), 19a, Excerpts of Record filed in *Biel v. St. James Sch.*, No. 17-55180, Dkt. 21, 568, while incorporating the Catholic faith into her curriculum, StJ.App.902a. Biel also had specific religious duties such as teaching a religion class four days a week, StJ.App.82a; displaying Catholic sacramental symbols throughout her classroom, StJ.App.18a, 83a–84a, 106a; praying the Lord's Prayer and the Hail Mary with her students twice each day, StJ.App.93a; attending Mass with her students twice every month, StJ.App.34a, 95a–96a; and attending the Los Angeles Religious Educators Congress, at which she learned how to incorporate the Catholic faith into her teaching. StJ.App.30a; Supplemental Excerpts of Record filed in *Biel v. St. James Sch.*, No. 17-55180, Dkt. 37, 77–78.

Biel's religious function at St. James School was important. She prepared students to be "active participants" at Mass, StJ.App.109a, which is the most important religious activity of the Catholic faith. And she directly engaged students with the tenets of Catholicism through her religion classes. St. James School clearly considered Biel's role to be religiously important. The school's evaluation of Biel's teaching during her first semester as a fifth grade teacher "included a section evaluating 'Catholic Identity Factors' in which [the evaluator] noted that there was 'visible evidence of signs, sacrament[s], [and] traditions of the Roman Catholic Church in the classroom,' and that the 'curriculum included Catholic values infused through all subject areas." *Biel*, 911 F.3d at 612 (Fisher, J., dissenting). St. James School also requires teachers to "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church." StJ.App.97a. It was improper for

the Ninth Circuit to ignore St. James's own understanding of its mission and its teachers. The court should have deferred to St. James's sincere belief and held that the ministerial exception applied to Biel's lawsuit.

CONCLUSION

The Ninth Circuit's approach in *Biel* and *Morrissey-Berru* is inconsistent with this Court's decision in *Hosanna-Tabor* and the intent of the Religion Clauses of the First Amendment. This Court should reject that faulty approach and endorse that followed by the other circuits, which considers the function performed by the religious organization's employee and whether that function is religiously important. To avoid impermissible interference in religious affairs, and to mitigate potential harm to minority religions, this Court should instruct courts to defer to the religious organization's sincerely held belief regarding the importance of the religious function.

Respectfully submitted,

/s/Igor V. Timofeyev

IGOR V. TIMOFEYEV
Counsel of Record
MICHAEL WISE
JOANNE JOSEPH
ROSS HOLLEY
WILLIAM MILBURN
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington D.C. 20005
(202) 551-1700
igortimofeyev@paulhastings.com

February 10, 2020