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 OF THE AMERICAN JEWISH COMMITTEE AND THE UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The American Jewish Committee ("AJC"), a national organization of over 125,000 members and supporters and twenty-six regional offices, was founded in 1906 to protect the civil and religious rights of Jews. AJC believes that the most effective way to achieve that goal is to safeguard the civil and religious rights of all Americans. AJC has a long tradition of defending Americans' religious liberty, and believes that maintaining church-state separation through limiting government entanglement with religion is the surest guarantor of that liberty. With these paramount First Amendment rights in mind, AJC urges the Court to find that the Ninth Circuit erred when it applied an overly rigid, quantitative test that overemphasized an employee's title to deny Petitioners protection under the "ministerial exception" that this Court recognized in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). The ministerial exception safeguards the right of religious institutions to select clergy free from government interference. Rooted in both of the First Amendment's Religion Clauses, the ministerial exception is necessary to preserve the guarantee of religious liberty. An application of the ministerial exception that overemphasizes an employee's title or arbitrary factors such as the comparative quantity of time spent on

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of the brief.

activities the court deems sufficiently "religious" severely curtails that freedom. This Court should make clear that the Ninth Circuit's analysis was out of step with the First Amendment and reaffirm that the proper application of the ministerial exception requires a functional, holistic analysis.

Amicus curiae The United Synagogue of Conservative Judaism ("USCJ") is the congregational arm of Conservative Judaism in North America. USCJ and its 561 member congregations employ thousands of individuals, with various job titles, to operate their synagogues, religious schools, camps, United Synagogue Youth programs, adult education programs, "gap" year pre-college programs for teens, Israel and European travel programs, and the like, and USCJ also represents the interest of those synagogues and their individual members in the religious freedom of all Jewish institutions in their communities, such as the Conservative Jewish Day Schools and the Ramah Camps. All of these programs are operated in accordance with Conservative Jewish religious practices and teaching, and USCJ accordingly joins in this brief to protect its and their freedom to employ individuals whose values and religious beliefs and practices are consistent with those of the Conservative Movement.

SUMMARY OF THE ARGUMENT

The impact of these cases reaches far beyond Catholic school teachers in California. The lower court's rigid approach to the ministerial exception would threaten the religious freedom of Jewish schools and organizations (and thousands of other religious groups) throughout the country. Those groups, including the *amici curiae* who submit this brief, exist to pass on, promote, and live out their faith. As a result, their First Amendment right to freely exercise their religion without government interference depends on the autonomy to choose who will lead their faith-based efforts and express religious beliefs on their behalf. A ministerial exception that overemphasizes an employee's title or artificially seeks to quantify the employee's time spent on exclusively ecclesiastical tasks ignores the reality that faith is infused throughout religious schools and organizations. The measure of an individual's religious duties may not be reflected in her title or be amenable to some neat accounting of hours. Instead, it requires a holistic, qualitative analysis rooted in common sense and day-to-day reality. That is what the First Amendment demands and it is what this Court provided in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). It is thus imperative to the religious liberty of the *amici* Jewish organizations and the thousands of other faith-based organizations like them that this Court reaffirm those principles and reverse the decisions below.

ARGUMENT

I. The Lower Court's Rigid Application Of The Ministerial Exception Threatens The First Amendment Rights Of Jewish Organizations.

Recognizing religious organizations' need for autonomy over critical decisions that impact their ability to propound, transmit, and defend the principles of their faith, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, this Court held that the First Amendment's "Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." 565 U.S. 171, 181 (2012). The decision emphasized that "the First Amendment . . . gives special solicitude to the rights of religious organizations." *Id.* at 189. As the Court explained, the Free Exercise Clause "protects a religious group's right to shape its own faith and mission through its appointments," while the Establishment Clause "prohibits government involvement in such ecclesiastical decisions." *Id.* at 188–89. As a result, "the ministerial exception is not limited to the head of a religious congregation," and it requires a qualitative assessment of the employees' religious functions. *Id.* at 190.

Those principles are rooted not only in the text of the First Amendment, but also the history that led to its adoption. Many of the earliest colonists came to this continent in search of the freedom to shape their religious practice, and the liberty to choose their ecclesiastical message and messengers independent of government control. When the founding generation established our Republic, they were determined that

the federal government could neither forbid nor compel religious practice, nor favor any religion over any other. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1515–16 (1990). The ministerial exception gives life to these guarantees by preserving religious liberty and preventing government encroachment on ecclesiastical matters.

Despite these fundamental constitutional principles and this Court's clear mandate in *Hosanna-Tabor*, lower courts have struggled to properly define the contours of the ministerial exception. Especially in the context of religious education and social services, some courts, like the lower court here, have relied on an overly mechanistic approach that unduly emphasizes formal titles and relies excessively on the quantum of time spent exclusively on formal religious teaching. Rather than applying the holistic and qualitative analysis that the First Amendment and this Court's precedents demand, some courts have employed a check-the-box approach that denies reality and common sense to refuse protection where the doctrine should plainly apply. The lower court's decisions here illustrate that troubling trend.

The consequences of such a blinkered application of the doctrine are particularly concerning to the Jewish organizations represented by *amici curiae*. Quite obviously, the Constitution prohibits the government from interfering with a synagogue's decision on which rabbi should lead its congregation. But the First Amendment's protections are not limited to such obvious examples. A Jewish school or social services

provider forced against its will to employ certain individuals whose job is to exhibit and transmit the principles of the Jewish faith would likewise lose its constitutionally protected ability to guide the religious mission of the organization. Yet that is precisely the regime that the lower court's analysis threatens to impose by placing outsized weight on an employee's formal title or the precise amount of time spent on exclusively theological activities, as opposed to the overall essential functions they actually are called upon to perform.

The reality is that Jewish congregations are much more than one rabbi conducting religious services for those who come to synagogue. Rather, they are extended religious communities. As with the Catholic communities at the center of these cases, the community built around a single synagogue might include an associated school, community center, summer camp, adult education classes, lecture series, and charity or outreach organizations. Each element of that community is devoted, in some way, to the preservation of the Jewish faith and to living out its tenets and traditions. As a result, a Jewish community might have only a single rabbi, but employ dozens of teachers, counsellors, administrators and others whose primary duties are centered on the propagation and implementation of the Jewish faith. The Ninth Circuit's test would risk excluding all of these critically important roles, despite the fact that government interference in those employment decisions plainly would deny the organizations "control over the selection of those who will personify [their] beliefs." *Hosanna-Tabor*, 565 U.S. at 188.

Moreover, a test like the Ninth Circuit's that overemphasizes an employee's formal title would invite (rather than avoid) Establishment Clause concerns by disadvantaging faiths that do not recognize or emphasize the concept of ordination. "[M]ost faiths do not employ the term 'minister,' and some eschew the concept of formal ordination." *Id.* at 202 (Alito, J., concurring). While Judaism recognizes rabbis as leaders of their congregations, their title reflects their qualification to serve in that capacity, not a sacramental ordination akin to the Catholic priesthood. And others who play a critical role in conveying, defending, and promoting the faith typically are not bestowed with "ministerial" sounding titles. Imposing a requirement that religions must adopt such titles in order to receive protection under the ministerial exception would be a patent violation of the Establishment Clause.

A proper application of the ministerial exception is especially important in the context of religious education—and that is particularly so in the Jewish faith. "When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters." *Id.* at 201. In Judaism, the title "rabbi" literally means "teacher." This should hardly be surprising since the Jewish faith's survival has always depended on the teaching of its history, rituals, and beliefs. As a result, a teacher at a Jewish school clearly helps "shape" the "faith and mission" of the organization. *Id.* at 188 (majority opinion). And the ministerial exception plays an important role in protecting that "critical process of communicating the faith." *Id.* at 199 (Alito, J., concurring).

By design, religion infuses every class in a religious school. Courses such as history are taught through the lens of the religion that operates the school. For instance, in the Jewish faith, religious holidays and traditions are often rooted in historical events: Hanukkah celebrates the Maccabean Revolt, while Passover harkens back to the Exodus from Egypt. The teaching of those events and traditions in a Jewish school will necessarily involve religious instruction. Even in ostensibly secular fields, such as science and math—which deal with, among other things, the ordering of the universe—core religious values still impact the view of the substantive information being taught and inform classroom discipline, ethics, and overall pedagogy. "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's contents is ascertainable, but a teacher's handling of a subject is not." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (citations and emphasis omitted). In schools operated by religious groups, "[r]eligious authority necessarily pervades the school system." *Id.* Indeed, that is often why parents choose to send their children to religious schools in the first place.

The Ninth Circuit's rigid test also threatens the religious autonomy of Jewish non-profit organizations and charities. Indeed, the Court needs to look no further than the Jewish non-profit organizations that comprise *amici* here to understand the negative impact that the Ninth Circuit's crabbed approach would have on their ability to "shape" the "faith and mission" of the organizations. *Hosanna-Tabor*, 565 U.S. at 188. *Amici* exist to advocate for the Jewish faith, fight

antisemitism, promote religious tolerance, and safeguard the religious freedom of the Jewish people. Autonomy over choosing the individuals who lead these organizations is essential to ensuring that they are able to freely exercise their faith without government interference—which is precisely what the ministerial exception provides.

In addition, across the Nation, Jewish charitable organizations fulfill vital community and social services for their members. Like religious schools, the mission of these organizations is infused with faith. For example, the Organization for the Resolution of Agunot (ORA) is a 501(c)(3) non-profit organization which focuses on outreach to Jewish women who have been civilly divorced, but whose ex-husbands refuse to grant them a *get*, or religious divorce. In the Jewish faith, the withholding by a recalcitrant husband of a *get* imposes significant social disadvantages on the wife, and is considered by some to be a form of domestic abuse. Mark Oppenheimer, *Religious Divorce Dispute Leads to Secular Protest*, N.Y. TIMES (Jan. 3, 2011), https://www.nytimes.com/2011/01/04/us/04divorce.html. ORA helps persuade husbands to grant a *get*, offers emotional counseling, and provides financial support. ORA, https://www.getora.org/what-we-do (last visited Feb. 7, 2020). "ORA works within the parameters of Jewish law and civil law to advocate for the timely and unconditional issuance of a *get*." ORA, https://www.getora.org/about-us (last visited Feb. 7, 2020).

Obviously, not all employees of these charities hold the title of "rabbi." However, while employees may be called "caseworker" or "counselor," there should be no

doubt that a caseworker who provides counselling and advocacy for Jewish women within the parameters of Jewish law, or provides family services as a commitment to Jewish values, functionally fulfills a ministerial role. Yet a court applying a rigid test that overemphasizes an employee's title at the expense of analyzing the actual role of the employee would permit the government to disrupt the organization's freedom to determine who will perform that sensitive religious task. The same is true for many other, non-Jewish organizations. For instance, Baptist hospitals and Catholic homeless shelters perform their missions as an answer to a higher calling. Not every employee performs substantial religious duties, but those who do often have no formal ordination or ecclesiastical title. That does not change the fact that the religious organization "shape[s] its own faith and mission through [those] appointments." *Hosanna-Tabor*, 565 U.S. at 188. Because an employee's role is defined by their functions and not merely their formal title, it is critical for the test articulated by this Court to focus on the day-to-day reality of those functions when applying the ministerial exception.

II. The First Amendment And This Court's Precedents Require A Qualitative Application Of The Ministerial Exception.

The First Amendment principles that animate the ministerial exception require courts to apply the doctrine through a qualitative analysis—rather than through a quantitative analysis that elevates form over substance. As the Court emphasized in *Hosanna-Tabor*, "the ministerial exception is not limited to the

head of a religious congregation," and the doctrine is not amenable to "a rigid formula for deciding when an employee qualifies as a minister." 565 U.S. at 190. Instead, in order to ensure that religious organizations like *amici* here receive the protections enshrined in the First Amendment, a functional, qualitative analysis is necessary.

This Court's decision in *Hosanna-Tabor* eschewed the sort of rigid, quantitative analysis that the Ninth Circuit adopted below—and for good reason. Although the Sixth Circuit erred in *Hosanna-Tabor* by affording *no* weight to the employee's title, the Ninth Circuit erred in these cases by affording *too much* weight to that factor. While concluding that an employee's title is *one* factor to consider in the analysis, this Court's decision in *Hosanna-Tabor* was quick to emphasize that it is also critical to consider whether "a recognized religious mission underlie[s] the description of the employee's position." *Id.* at 193. Likewise, the Court rejected the sort of quantitative analysis that the Ninth Circuit employed below, when it held that the issue "is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the *nature of the religious functions performed* and the other considerations" articulated by the Court. *Id.* at 193–94 (emphasis added). In short, the Court's unanimous opinion in *Hosanna-Tabor* was crystal clear that, in order to preserve religious organizations' autonomy, courts must apply the ministerial exception in a holistic, qualitative manner.

Yet, the Ninth Circuit did precisely the opposite here. In *Biel v. St. James School*, the court acknowledged that the plaintiff "taught lessons on the Catholic faith four days a week [and] incorporated religious themes and symbols into her overall classroom environment and curriculum," StJ.APP.12a, but nonetheless focused its analysis almost exclusively on her "education, qualifications, and employment arrangements," StJ.APP.11a, to determine that she was not a "minister." Similarly, in *Morrissey-Berru v. Our Lady of Guadalupe School*, the court acknowledged that the plaintiff "did have significant religious responsibilities . . . . She committed to incorporate Catholic values and teaching into her curriculum . . . led her students in daily prayer, was in charge of liturgy planning for a monthly mass, and directed and produced a performance of her students during the School's Easter celebration." OLG.APP.3a. However, because her "formal title of 'Teacher' was secular," the court determined she was not within the exception. In these cases the Ninth Circuit employed an overly formalistic test, disregarding the functional nature of the employees' religious duties.[2]

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[2] Because, as noted above, rabbi means "teacher," the simplistic notion that the unadorned title "teacher" connotes a purely secular role is especially flawed in the context of Judaism. If title were as dispositive as the Ninth Circuit treated it to be, then the title of "teacher" in a Jewish school should always cut decisively *in favor* of protection. The proper test, however, is not so wooden as to blindly grant protection with respect to all "teachers" in a Jewish school while denying it with respect to all those with an identical title in a Catholic school.

The same reasoning has been applied to deny Jewish schools autonomy over their faculty and could likewise be used to deny Jewish charities autonomy over their leadership. A court has found, for example, that teachers at a synagogue school who were responsible for "teaching Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services" were not covered by the exception because the teachers did not bear a sufficiently religious title. *See Su v. Stephen S. Wise Temple*, 32 Cal. App. 5th 1159, 1168 (Ct. App. 2019). That same approach could also be applied to interfere with other Jewish organizations' critical staffing decisions unless the staff member is labeled with a sufficiently ministerial title. Indeed, former employees have previously sued Jewish organizations on the view that their actions are not sufficiently religious to warrant protection. *See, e.g.*, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226–31 (3d Cir. 2007) (resolving claim based on Title VII's "religious organizations" exemption); *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 308–10 (4th Cir. 2004) (same).

Furthermore, an overly rigid test necessarily requires courts to meddle in religious doctrine by, first, determining what is and is not a "religious" function and then, second, assessing how much religious activity is sufficient to qualify the employee as a "minister" in the given faith. In *Biel v. St. James School*, StJ.APP.5a, the Ninth Circuit determined that the teacher's commitment to work "within [the school's] overriding commitment to Church doctrines, laws, and norms and [to] model, teach, and promote behavior in

conformity to the teaching of the Roman Catholic Church," was not sufficiently religious to bring the teacher within the exception. In the court's view, the time she spent teaching doctrinal classes, "thirty minutes a day, four days a week," *id.*, was simply not enough. These results occurred despite the fact that, in both *Biel* and *Su*, the employee was clearly "a messenger or teacher of [the] faith." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). Thus, the courts' rigid analysis denied the schools their religious freedom to control the "expression and propagation of shared religious ideals." *Id.* at 200.

Outside of the education context, this sort of strict timekeeping becomes even more fraught. As noted above, many non-profit organizations and charities, including various Jewish organizations, engage in work that is driven by a religious mission, but that also, necessarily, includes non-sectarian duties. Where a charity organization gives food to the poor, for example, it is difficult to determine whether that activity is religious or secular without intruding into the motivations which guide the charity. Many Jewish charities have programs to feed the needy; they also have programs to provide special meals to the faithful on Jewish holidays, such as Sukkot. A court applying a mechanistic timekeeping test is forced to determine which acts are religious. Is providing food to impoverished people a "ministerial" activity always, never, or only on Jewish holidays? Even if a court could make this determination without violating the First Amendment, it would then have to determine what percentage of time spent on religious activity qualifies an organization for the ministerial exception.

Both of these determinations require intrusive oversight of the nature and quality of religious activity, and are therefore inappropriate under the religious clauses of the First Amendment.

Not all courts have misapplied the exception. In *Grusgott v. Milwaukee Jewish Day School, Inc.*, 260 F. Supp. 3d 1052 (E.D. Wis. 2017), aff'd, 882 F.3d 655 (7th Cir. 2018), a federal court was asked to adjudicate an employment discrimination lawsuit against a Jewish school. The employee asserted that the ministerial exception should not apply to her in part because she did not have a ministerial title and further that her duties—teaching Jewish studies and Hebrew language—were not religious. *Id.* at 1056. The court first rejected her lack of title as dispositive. "[Plaintiff] is not an ordained minister and no one held her out as one, and her job did not require prior religious training or commissioning. In Plaintiff's case, however, these formalistic factors are greatly outweighed by the duties and functions of her position." *Id.* at 1058. The court also determined that teaching Jewish culture and the Hebrew language were religious duties, essentially because the school believed they were. "Plaintiff's argument questions the tenets of Defendant's practice of Judaism, namely whether they can hold Hebrew as sacred. The First Amendment clearly protects Defendant's right to choose its religious beliefs, and the Court is unable to interfere in what is a matter of faith." *Id.* at 1060.

Finally, the court refused to "consult a stopwatch to determine the ratio between her religious and secular instruction." *Id.* Rather, given that "a substantial

portion of her classroom activities were directed at teaching the Jewish faith," the court determined that she was a minister for First Amendment purposes, and dismissed the claim. *Id.* This type of analysis, with a focus on the "duties and functions" of an employee, with deference to the expressed beliefs of the organization in question, is compelled by the First Amendment and this Court's decision in *Hosanna-Tabor*. A mechanical approach, which requires courts to weigh the beliefs of religious organizations, and then to calculate a ratio of time spent on certain duties, violates both. "[T]he mere adjudication of such questions would pose grave problems for religious autonomy . . . ." *Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, J. concurring).

At bottom, the decisions below evince an implicit attitude that the ministerial exception should be narrowly construed so as to intrude as little as possible on the application of employment discrimination statutes. But that view confuses the order of priority. The ministerial exception protects fundamental *constitutional* rights protected by the Free Exercise Clause, and it avoids government intrusion on religious matters that is prohibited by the Establishment Clause. If anything, the exception should be granted a broad berth, not a narrow one, because it "protects a religious group's right to shape its own faith and mission through its appointments," and "prohibits government involvement in such ecclesiastical decisions." *Id.* at 188–89 (majority opinion). Thus, rather than serving as some derivative adjunct of the First Amendment, it is the lifeblood of the Constitution's religious protections.

The Court should therefore reverse the Ninth Circuit's crabbed view of the First Amendment and protect religious autonomy through a more nuanced, holistic application of the ministerial exception.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the Ninth Circuit.

Respectfully submitted,

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