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 Appeal For The Ninth Circuit

BRIEF OF AMICI CURIAE OF CLERGY AND LAITY UNITED FOR ECONOMIC JUSTICE AND BET TZEDEK IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

Clergy and Laity United for Economic Justice (CLUE) was founded in 1996 by clergy of diverse faith traditions to create a just and sacred society. CLUE's mission is to educate, organize, and mobilize the faith community to accompany workers and their families in their struggle for good jobs, dignity, and justice. CLUE brings together clergy and lay leaders of all faiths with laborers, immigrants and low-income families in the cause of a just economy that works for all who live in Southern California. CLUE cultivates a region-wide network of more than 600 religious leaders who partner with unions and community organizations to negotiate with employers for better working conditions, with lawmakers for policies that improve the lives of workers and immigrants, and with developers for contracts that require local hiring and other community benefits.

CLUE's broad interfaith coalition includes Jews of all denominations, Christian Evangelicals, Muslims, historic African-American churches, Spanish-speaking Pentecostals, and Korean Christian congregations, among others. Members of CLUE's coalition share a commitment to public policies and workplace practices that are inclusive and equitable for the most

[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution to fund its preparation or submission. No person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation and submission of this brief. All parties have timely consented to the filing of this brief.

vulnerable among us, including workers, immigrants, and low-income families.

For CLUE, it is a moral imperative to ensure that all workers, including those employed by religious institutions, receive livable wages and are treated with basic human dignity and accorded basic workplace protections. CLUE believes that religious institutions have a responsibility to respect the dignity of workers by adhering to wage and hour laws designed to establish a baseline of fair and decent working conditions.

Bet Tzedek is Bet Tzedek—Hebrew for the "House of Justice"—was established in 1974 as a nonprofit organization that provides free legal services to Los Angeles County residents. Each year their attorneys, advocates, and staff work with more than one thousand pro bono attorneys and other volunteers to assist more than 20,000 people regardless of race, religion, ethnicity, immigrant status, or gender identity. Bet Tzedek's Employment Rights Project focuses specifically on the needs of low-wage workers, providing assistance through a combination of individual representation before the Labor Commissioner, civil litigation, legislative advocacy, and community education.

Bet Tzedek's interest in this case comes from over 15 years of experience advocating for the rights of low-wage workers in California. As a leading voice for Los Angeles's most vulnerable workers, Bet Tzedek has an interest in the development and interpretation of worker-protection laws, specifically those governing the application of neutral wage and hour laws. Bet

Tzedek believes that denying workers the protections of neutral wage ordinances, where complying with such laws would not interfere with a religious organization's constitutionally protected rights, will undermine the broad protections California's workers are afforded under the Labor Code.

SUMMARY OF ARGUMENT

Under the Free Exercise Clause of the First Amendment, religious organizations have unfettered authority to select their own clergy. The ministerial exception, first recognized by this Court in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, springs from this right, providing a complete affirmative defense for religious organizations to federal or state employment discrimination claims. 565 U.S. 171, 196 (2012).

This Court has had no occasion to determine the breadth of the ministerial exception's coverage—whether it solely covers discrimination claims or sweeps more broadly. But this Court should take into consideration the scope of the exception in deciding whether Petitioners here qualify as ministerial employees. If this Court holds that Ms. Biel, an elementary school teacher who was not required to be part of the faith, was not subject to religious training, and did not participate in governance or select the liturgy for worship, is a ministerial employee, it would mean that a vast number of employees working for religious

organizations would qualify. And this group would likely grow following a decision by this Court, as religious organizations could simply change lay employees' duties to render them ministerial in accordance with the opinion.

The Court's decision may well lead to an ever-expanding group of ministerial employees exempt from filing discrimination claims. But what happens when the Court has to decide whether such employees are also exempt from most neutral, generally applicable laws governing employment? That is, what if elementary schoolteachers in Catholic schools are not only unprotected by discrimination laws, but also by neutral laws that do not implicate the religious organization's freedom to appoint its own ministers? One consequence is that schoolteachers in religious-affiliated schools would not be protected by neutral, generally applicable laws guaranteeing minimum wage and overtime, safe working conditions, or that such schoolteachers would not be protected by laws prohibiting sexual harassment in the workplace. With the government and private actors helpless to enforce existing laws, religious organizations may be free to hire underaged teachers in contravention of child labor laws. Furthermore, schoolteachers may be barred from pursuing contract or tort claims, such as common law fraud against their employer.

That consequence is not founded in the ministerial exception itself nor in the First Amendment's Religion Clauses. Nothing in *Hosanna-Tabor* exempts a religious organization from complying with neutral,

generally applicable laws, such as minimum wage guarantees, child labor laws, and OSHA regulations. At its core, the ministerial exception prevents governmental interference with a religious institution's right to determine its doctrine, and how and by whom such doctrine is taught.

A ministerial exception with cognizable limits is consistent with this Court's First Amendment jurisprudence. For instance, this Court recognizes that the Free Exercise Clause does not permit a religious organization to circumvent certain kinds of neutral, generally applicable laws. *See Employment Div. Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). And the Establishment Clause does not preclude the government from probing into employment matters, if only to ascertain whether the matter implicates ecclesiastical controversies. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986).

Furthermore, while some circuit courts have found that the ministerial exception covers certain neutrally applicable laws, such as the Fair Labor Standards Act (FLSA), upon closer scrutiny these cases involved bona fide ministers and *not* non-ordained employees who generally handle secular tasks, but have some ancillary religious duties, as in this case. A regime where the ministerial exception is absolute, covers a wide swath of employees exempted from workplace protections, would create a large class of employees working in a netherworld where ordinary civil laws do not apply. The general public, which is often a beneficiary of those laws along with the employees, will be harmed.

And religious schools that do not have to comply with labor laws would gain a considerable competitive advantage over secular private schools.

Undoubtedly, not every one of these parade of horribles will come to fruition. But the unintended consequences of a decision in favor of Respondents warrant a modest approach to this case. The Court should reaffirm the *Hosanna-Tabor* test and, in applying it, hold that neither Ms. Morrissey-Berru nor Ms. Biel is a ministerial employee.

ARGUMENT

I. Ministerial Employees Are Not Absolutely Exempt From the Protection of Neutral, Generally Applicable Laws

A. ***Hosanna-Tabor*** **is rooted in the selection of ministers and provides an absolute defense to anti-discrimination law**

This Court has long held that religious organizations have the "'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 (citation omitted); *see also Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717 (1976). These matters of "church government" include the authority to control the selection of their own religious leaders. *See Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952).

In *Hosanna-Tabor*, this Court formally recognized a "'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." 565 U.S. at 188. The ministerial exception thus forecloses governmental interference with "the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id*.

The Court rooted the ministerial exception in both "the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments," and the "Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 188-189.

Following *Hosanna-Tabor*, circuit courts have invoked the ministerial exception as a complete defense to "claims that impinge on protected employment decisions regarding a 'religious organization and its ministers.'" *Puri v. Khalsa*, 844 F.3d 1152, 1158 (9th Cir. 2017) (quoting *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955 (9th Cir. 2004)). Those "properly characterized as 'ministers' are flatly barred from bringing employment-discrimination claims against the religious groups that employ or formerly employed them." *Fratello v. Archdiocese of New York*, 863 F.3d 190, 202-203 (2d Cir. 2017). The Second Circuit precluded district courts from probing whether the personnel decision had a religious basis before applying the ministerial exception because "courts are

ill-equipped to assess whether, and, to what extent, an employment dispute between a minister and his or her religious group is premised on religious grounds." *Id*. at 203. As these cases make clear, where the ministerial exception applies, it is a full and complete defense to any employment discrimination claim.

B. The Free Exercise Clause does not preclude religious organizations from complying with neutral, generally applicable laws that do not infringe upon protected employment decisions.

Although the Free Exercise Clause protects a religious organization's right to "shape its own faith and mission through its appointments," 565 U.S. at 189, its protections are not unlimited. Nothing in this Court's precedents suggests that religious employers are exempt from complying with neutral, generally applicable laws which *do not* relate to protected employment decisions, i.e., hiring and firing decisions.

Indeed, in *Hosanna-Tabor* this Court carefully distinguished between impermissible "government interference with an internal church decision that affects the faith and mission of the church itself" and permissible government regulation of "outward physical acts" of religious practice, which the Court held to be at the core of *Employment Div. Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). 565 U.S. at 186. In *Smith*, two members of the Native American Church were denied state unemployment benefits after it was

determined that they had been fired from their jobs for ingesting peyote, which is a crime under Oregon law. *Id*. at 879. The Court held "this did not violate the Free Exercise Clause, even though the peyote had been ingested for sacramental purposes, because 'the right of free exercise did not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes or proscribes.'" *Id*. (internal citation omitted). The Court explicitly rejected the contention that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation." *Id.* at 882.

In harmonizing *Smith* with the ministerial exception affirmative defense, *Hosanna-Tabor* confirms that, at a minimum, the exception would not cover governmental regulation of "physical acts." 565 U.S. at 190. The Court, however, expressly declined to define any limits, refusing to offer its view as to whether the ministerial exception "bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." *Id*. at 196.

Although *Hosanna-Tabor* did not limit the ministerial exception, several prior decisions from this Court have circumscribed the extent of which the Free Exercise Clause operates as a defense to the application of neutral applicable laws. For example, the Free Exercise Clause does not operate to invalidate a state law school's policy that limits the use of school funds and facilities to student groups that permit all students to

join. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 696-698 (2010). The Court found that Petitioner Christian Legal Society, "seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause." *Id*. at 697 n.1.

Minimum wage protections also cannot be circumvented by religious organizations broadly invoking the Free Exercise Clause. *See Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). In that case, the Tony and Susan Alamo Foundation, a nonprofit religious organization established to "conduct and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and rescue the fallen, and generally to do those things needful for the promotion of Christian faith, virtue, and charity," operated various commercial enterprises. *Id.* at 292. When the Secretary of Labor sued the Foundation for violations of the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act ("FLSA") with respect to approximately 300 associates, the Foundation claimed the FLSA did not apply because the various businesses "differ from 'ordinary' commercial businesses because they are infused with a religious purpose." *Id.* at 299. The Foundation further argued that imposition of the minimum wage and record-keeping requirements violated their employees' rights to freely exercise their religious beliefs and the Foundation's right to be free of excessive government entanglement in its affairs. *Id.*

at 303. This Court rejected the Foundation's contentions. *Id.* at 296-306.

In so ruling, the Court emphasized that courts are "liberally to apply [the FLSA] to the furthest reaches consistent with congressional directions, [as they are] . . . essential to accomplish the goal of outlawing from interstate commerce goods [and services] produced under conditions that fall below minimum standards of decency." *Id.* at 296 (citations omitted). Moreover, "[t]he statute contains no express or implied exception for commercial activities conducted by religious . . . organizations." *Ibid.* The Court also found that the Foundation's "businesses serve the general public in competition with ordinary commercial enterprises, and the payment of substandard wages would undoubtedly give [the Foundation] an advantage over their competitors," which is exactly the kind of "'unfair method of competition' that the Act was intended to prevent." *Id.* at 299 (quoting 29 U.S.C. § 202(a)(3)).

After determining the Foundation was an "enterprise" and its associates were "employees" under the FLSA, the Supreme Court concluded that enforcement of the FLSA's wage and record-keeping requirements "would have no impact on [the Foundations'] evangelical activities," that their employees are entitled to the full protection of the FLSA, and that "application of the Act to the Foundation's commercial activities is fully consistent with the requirements of the First Amendment." *Id.* at 305-306. Just as the First Amendment does not exempt religious organizations from "such secular government activity as fire inspections and

building and zoning inspections," it does not exempt them from the FLSA. *Id.* at 305.

While *Alamo Foundation* does not speak directly to the ministerial exception, the Court stated that "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." 471 U.S. at 303. This proposition is consistent with the view that the ministerial exception fully exempts a religious organization's *protected employment decisions* from governmental interference, but it does not exempt ministerial employees from other neutral, generally applicable laws that do not infringe upon those employment decisions.[2]

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[2] The First Amendment likewise does not exempt media organizations from complying with generally applicable laws. In a leading case, the Supreme Court held that the Associated Press cannot circumvent the Sherman Act, explaining that "[t]he fact that the publisher handles news, while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." *Associated Press v. United States*, 325 U.S. 1, 7 (1944) (citations omitted). The Court also enforced generally applicable anti-trust law in another case, rejecting a newspaper's First Amendment "prior restraint" defense to an injunction requiring it to run ads for a radio station, when it refused to do so for anti-competitive reasons. *See Lorain Journal v. United States*, 342 U.S. 143, 155 (1951).

C. The Establishment Clause Does Not Bar Inquiries into Wholly Non-Religious Employment Issues

The ministerial exception is also rooted, in part, in the Establishment Clause, which prohibits the state from interfering with ecclesiastical decisions. *Hosanna-Tabor*, 565 U.S. at 189. This is consistent with this Court's jurisprudence on the Establishment Clause, which precludes courts from having to take sides in a dispute over religious doctrine. *See*, *e.g.*, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) ("[R]eligious controversy is not the proper subject of civil court inquiry."). The Establishment Clause specifically forbids any governmental interference that may cause "excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (internal quotation marks and citations omitted).

But the Establishment Clause is not violated when a governmental entity investigates a dispute concerning a religious organization where no religious concerns are implicated. *See Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986). In *Dayton Christian Schools*, a religious school decided not to renew a pregnant teacher's contract because of the school's "religious doctrine that mothers should stay home with their preschool age children." *Id*. at 623. After the teacher threatened to sue for sex discrimination, the school terminated her employment, stating that she had violated the school's mandatory internal dispute resolution procedure.

The teacher then filed a complaint with the Ohio Civil Rights Commission, alleging sex discrimination and unlawful retaliation. The school filed an injunctive relief action in federal district court, asserting that "any investigation of [its] hiring process or any imposition of sanctions for [the school's] nonrenewal or termination decisions would violate the Religion Clauses of the First Amendment." *Dayton Christian Schools*, 477 U.S. at 624-625.

The Court rejected the school's argument, finding that "[e]ven religious schools cannot claim to be wholly free from some state regulation." *Id*. at 628. Although four justices wrote a separate concurring opinion, the Court unanimously concluded that the Commission "violates no constitutional rights by merely investigating the circumstances of [the teacher's] discharge in the case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Ibid*.

Dayton Christian Schools confirms that the Establishment Clause does not bar limited state inquiries into the actions of a religious organization that does not result in impermissible government entanglement with religion. This is consistent with other decisions by this Court permitting governmental inquiry into the sincerity of a defendant's professed religious belief that is invoked as an affirmative defense. *See Hernandez v. Commissioner*, 490 U.S. 680, 693 (1989) ("[U]nder the First Amendment, the IRS can reject otherwise valid claims of religious benefit only on the ground that a taxpayers' alleged beliefs are not sincerely held, but

not on the ground that such beliefs are inherently irreligious."); *United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]e hasten to emphasize that while 'truth' of such a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case.").

But the Establishment Clause does not flatly prohibit state inquiries into religious organization's employment decisions. To the extent it is grounded in the Establishment Clause, the ministerial exception bars the government from interfering with personnel decisions involving ministers. But the Court's jurisprudence does not extend the ministerial exception to a categorical bar of the government from inquiring into all employment practices by a religious organization—nor should it.

D. Circuit courts have limited the scope of the ministerial exception.

The recognized limits of the Religion Clauses means that the ministerial exception cannot swallow the rule that religious organizations must generally abide by neutral laws of general applicability. Rather, as several circuit courts have observed, "[t]he scope of the ministerial exception . . . is limited to what is necessary to comply with the First Amendment." *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999).

Thus, "[t]he salience of this concern [with excessive entanglement with religion] depends upon the claim asserted by the plaintiff." *Ryeyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008). The Second Circuit in *Ryeyemamu* ultimately did not decide the issue, since the First Amendment issues were straightforward. *See id*. at 209-210 (holding that a bona fide minister is barred from asserting Title VII claim against religious employer for wrongful termination). But *Ryeyemamu* observed that "if a plaintiff alleges, for instance, that his religious employer has deceived him within the meaning of a state's common law of fraud, his case is less likely to run afoul of the Establishment Clause." *Id*. at 208-209.

The Ninth Circuit likewise articulated claims that would fall outside the coverage of the ministerial exception—concentrating on the scope of the Free Exercise Clause. In *Bollard*, a novice in training to be ordained in the Jesuit Order sued the order for sexual harassment, which he claimed "was so severe that he was forced to leave the Jesuit order before taking his vows to become a priest." 196 F.3d at 944. The order contended that the ministerial exception precluded Bollard's suit. The Ninth Circuit disagreed—even though it regarded Bollard as a minister. *Id*. at 958.

The circuit court first found that the case did not involve a personnel decision subject to the ministerial exception: "Bollard does not complain that the Jesuits refused to ordain him or engaged in any other adverse personnel action." *Id*. at 947. On the contrary, the Jesuit order enthusiastically encouraged Bollard's pursuit

of the priesthood. *Ibid*. The only relevant decision the Jesuits made was "the decision not to intervene to stop or curtail the sexual harassment Bollard reported." *Ibid*.

Significantly, just because the plaintiff "sued under an employment discrimination statute does not mean that the aspect of the church-minister relationship that warrants heightened protection—a church's freedom to choose its representatives—is present." *Ibid*. Rather, the exception must be traced to the rationale of the Free Exercise Clause of "allowing the church to choose its representatives using whatever criteria it deems relevant." *Ibid*. Allowing alleged sexual harassment to persist against someone who qualifies as a "minister" certainly does not implicate this rationale, according to the Ninth Circuit. *Ibid*.; *see also Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 963-965 (9th Cir. 2004) (finding that the ministerial exception does not apply to certain claims for sexual harassment and retaliation that do not implicate a protected decision or religious doctrine).

Moreover, the Jesuits in *Bollard* "did not offer a religious justification" for the alleged harassment of Bollard. *Bollard*, 196 F.3d at 947. The Ninth Circuit therefore concluded that there is "no danger that, by allowing this suit to proceed, we will thrust the secular courts into the constitutionally untenable position of passing judgment on questions of faith or doctrine." *Id*. "The Jesuits' disavowal of harassment also reassure[d] [the Ninth Circuit] that application of Title VII in [that] context will have no significant impact on their

religious beliefs or doctrines." *Id*. (citations omitted). "[T]he aspect of the church-minister employment that warrants heightened constitutional protection [is] a church's freedom to choose its representatives." *Id*. That rationale does not apply where, as here, the religious entity does not claim that allowing the conduct at issue to continue is a method for choosing their clergy.

In an order denying rehearing en banc, Judge Fletcher, joined by three other judges, remarked on the scope and limits of the ministerial exception:

> The First Amendment does not exempt religious institutions from all statutes that regulate employment. For example, the First Amendment does not exempt religious institutions from laws that regulate the minimum wage or the use of child labor, even though both involve employment relationships. *See Smith*, 494 U.S. [at] 888 (citing *Alamo Foundation* (minimum wage); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). The First Amendment protects a church's right to hire, fire, promote, and assign duties to its ministers as it sees fit *not because churches are exempt from all employment regulations (for they are not), but rather because judicial review of those particular employment actions would interfere with rights guaranteed by the First Amendment.*

Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 792-793 (9th Cir. 2005) (Fletcher, Kozinski, Graber, Fisher, J.J., concurring; emphasis added). Judge Fletcher draws

a stark distinction between protected decisions, for which the ministerial exception may apply, and mere compliance with generally applicable employment laws, which all employers, including religious organizations, must follow.

The Ninth Circuit's reasoning is sound. The Religion Clauses do not support a rule that would categorically exempt ministerial employees from all employment protections, including sexual harassment laws. Allowing a ministerial employee to sue in civil court for sexual harassment does not implicate a protected employment decision or interfere with the organization's rights under the Free Exercise Clause. Nor would the court have to entangle itself in religious decision-making to resolve the dispute. *Bollard*, 196 F.3d at 947. In the unusual case, where the court is faced with the question of whether the allegations of misconduct, if true, are nonetheless sanctioned by religious doctrine or tradition, it may be a closer call. But the broader point is unaltered: certain workplace protections are not subject to the ministerial exemption.

This point is reinforced in Judge Luttig's sharp dissent from the denial of rehearing in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 369 F.3d 797, 805 (4th Cir. 2004). In *Shaliehsabou*, a Fourth Circuit panel held that the ministerial exception applies to bar Fair Labor Standards Act (FLSA) claims, finding that the exception is embedded within FLSA's text and

Labor Department guidelines.[3] In dissenting from the denial rehearing, Judge Luttig rejected the panel's textual interpretation, including the corollary that the FLSA's statutory ministerial exception is coterminous with the ministerial exception grounded in the First Amendment. *Id*. at 803-804.

Judge Luttig then found that neither the Free Exercise Clause nor the Establishment Clause bar employees of the Hebrew Home from asserting wage claims under the FLSA. He observed that, consistent with *Alamo Foundation*, "record-keeping provisions of the FLSA" applies to religious organizations engaging in commercial activities. *Id.* at 805. He reasoned that the "holding would apply equally to the application of the FLSA's overtime provisions," which he analogized to the imposition of sales and use tax at issue in *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 395-397 (1990). *Ibid*.

Judge Luttig's powerful dissent, rooted in this Court's precedents on the Religion Clauses, also articulates limits on the type of claims to which the ministerial exception provides a complete defense.

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[3] *See also* Letter from Department of Labor (Dec. 21, 2018). https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_12_21_29_FLSA.pdf.

II. Expanding the Scope of the Ministerial Exception Will Lead to Unintended Consequences

A. Courts that have exempted ministers from minimum wage laws have also restricted the application of ministerial exception to bona fide ministers performing tasks related to the organization's mission.

This Court has had no occasion to decide whether ministerial employees are exempt from neutral, generally applicable employment laws, such as minimum wage protections or occupational safety laws. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993). A law is neutral if it does not "target religious conduct for distinctive treatment" either on its face or as applied in practice, and it is generally applicable if it does not "impose burdens only on conduct motivated by religious belief[.]" *Id.* at 533-534, 543-544.

While the decision here does not require the Court to reach any conclusions on this issue, an expansive holding in favor of Respondents may affect the analysis in a subsequent case.[4] This is because circuit courts that have addressed the claim coverage for the

[4] This issue may be presented in *Fulton v. City of Philadelphia, Pennsylvania*, No. 19-123, *cert. granted*, Feb. 24, 2020.

ministerial exception focus on both the nature of the job and the work; if the job is indisputably ministerial in nature, and the work directly relates to the religious mission, then the exception applies. Otherwise, the exception may not. For instance, several circuit courts have held that ministerial employees are not necessarily protected by the Fair Labor Standards Act (FLSA). *See Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292-1293 (9th Cir. 2010) (en banc); *Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008).

Importantly, these circuit courts addressed cases where there was no question that the employees seeking civil law redress were "bona fide ministers" and that the work they did was in furtherance of a religious mission. In *Alcazar*, the Ninth Circuit en banc panel found that the ministerial exception applies to bar a seminarian's claims of unpaid wages for work done as part of his seminary training. *Alcazar*, 627 F.3d at 1293. Because the wages owed are for work that was "all part of his seminary training," it did not matter whether some of the trainee's work involved secular duties. *Ibid*. Accordingly, the ministerial exception applied to bar his claim.

Alcazar did not hold that the ministerial exception bars wage claims generally. For instance, the Ninth Circuit en banc panel observed, without deciding, that the ministerial exception may potentially not apply to minors. *Id*. at 1292. And, importantly, the panel stated that "the ministerial exception may not apply to a seminarian who obtains employment with a church

outside the scope of his seminary training." *Ibid*. The decision thus turns on plaintiff's work having indisputably been part of a paradigmatic protected religious activity—seminary training. *Alcazar* leaves open the possibility that the ministerial exception may not be available for even seminarians under certain circumstances—and it may not be a complete defense to a seminarian's wage claim for non-religious work.

The Seventh Circuit has also emphasized that FLSA claims are barred by the ministerial exception when they involved a bona fide minister working directly to serve the religious organization's mission. *Schleicher*, 518 F.3d at 475-477. In *Schleicher*, the plaintiff was a minister of the Salvation Army who was paid $150 a week to serve as an administrator at Salvation Army's Adult Rehabilitation Center. *Id*. at 474. When he asked for unpaid minimum wages under the FLSA, he was terminated. *Ibid*.

Judge Posner found that the ministerial exception applies because the plaintiff is undoubtedly a minister and the Adult Rehabilitation Center, according to the Salvation Army, is a church. *Id*. at 475-477. According to Judge Posner, the wages here are akin to a vow of poverty for monks, and therefore the plaintiff is not entitled to minimum wage. *Id*. at 477. But as in *Alcazar*, the decision turns on the plaintiff's work, which the court characterized as "manag[ing] a religious complex that includes thrift shops." *Ibid*.

The work is primarily religious in nature; had the plaintiffs simply operated the thrift shop, they would

be "subject to the [FLSA]." *Schleicher*, 518 F.3d at 477. In so concluding, Judge Posner reasoned that:

> [t]he best way to decide a case such as this . . . is to adopt a presumption that clerical personnel are not covered by the [FLSA]. This presumption . . . can be rebutted by proof that the church is a fake; the 'minister' a title arbitrarily applied to employees of the church even when they are solely engaged in commercial activities, or less flagrantly, the minister's function [is] entirely rather than incidentally commercial.

Id. at 478. What Judge Posner proposes here is practical and reasonable. The ministerial exception is not a categorical bar of FLSA claims; rather, the court applied a rebuttable presumption that clerical personnel are subject to the ministerial exception. But if their ecclesiastical credentials are not genuine, or if their work is commercial in nature, then the presumption would be rebutted. Indeed, the court in *Schleicher* held that its proposed rule is entirely "consistent even with the fierce dissent from the denial of rehearing en banc in *Shaliehsabou* case," *infra*. *Ibid*. Under *Schleicher*, a "bona fide minister who had . . . stepped entirely out of his religious role to manage a commercial enterprise full time" would not be subject to the ministerial exception. *Ibid.*

Both *Alcazar* and *Schleicher* applied the ministerial exception to bona fide ministers who were performing work directly connected to the church's mission. And both courts indicate that if either fact

was altered, the ministerial exception may not apply. Of course, some other courts have gone further, holding that the ministerial exception "applies without regard to the type of claims being brought." *Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003).

Conversely, in *Su v. Stephen S. Wise Temple*, 32 Cal. App. 5th 1159 (2019), a California state appellate court found that a schoolteacher at a reform Jewish synagogue was not a ministerial employee under *Hosanna-Tabor*.[5] In *Su*, the California Labor Commissioner filed a complaint against the Stephen Wise Temple for various violations of the California Labor Code, including for misclassifying its teachers and failing to provide overtime pay, and failure to provide meal and rest breaks. *Id.* at 1163. The trial court granted summary judgment in favor of the Temple, concluding that the teachers at issue were ministerial employees. It did so despite evidence that the Temple did not require its teachers to have any religious training or were held out as ministers. *Id*. at 1164.

The state appellate court reversed While the Temple's teachers do teach Jewish rituals, values and holidays, and participate in weekly Shabbat services, they did not "'personify' a church's (or synagogue's) beliefs and 'minister to the faithful.'" *Id*. at 1168 (quoting *Hosanna-Tabor*, 565 U.S. at 188-189, 196). The

[5] The undersigned attorneys submitted an amicus brief on behalf of amicus curiae CLUE in the *Su v. Stephen S. Wise Temple* appeal.

teachers, ultimately, were not "members of the Temple's religious community or adherents of its faith." *Ibid*. Therefore, according to the California appellate court, they are not ministerial employees under *Hosanna-Tabor*. *Ibid*.

Had the appellate court affirmed, teachers employed by religious organizations, so long as they devote some time to religious instruction, would be exempt from workplace protections enacted under a state's police powers. For example, the provisions under California law requiring employers to provide their non-exempt employees with meal and rest periods and pay them overtime when they work shifts of more than eight hours or workweeks of more than 40 hours are neutral in that they do not "target religious conduct for distinctive treatment" either on their face or as applied in practice. *Church of the Lukumi Babalu Aye*, 508 U.S. at 533-534. They are also generally applicable in that they do not "impose burdens only on conduct motivated by religious belief[.]" *Id.* at 543-544. These laws protect the safety of workers—as well as those to whom they come into contact. As the state's high court found, "[e]mployees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor." *See*, *e.g*., Tucker et al., *Rest Breaks and Accident Risk*, The Lancet, at 680 (Feb. 22, 2003); Dababneh et al., *Impact of Added Rest Breaks on the Productivity and Well Being of Workers*, 44(2) Ergonomics, at 164-174 (2001); Kenner, *Working Time, Jaeger and the Seven-Year Itch*, 11 Colum. J. Eur. L. 53,

55 (2004/2005). "Employees denied their meal and rest break periods face greater risk of work-related accidents and increased stress. . . ." *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1113 (2007). "Indeed, health and safety considerations (rather than purely economic injuries) are what motivated the IWC to adopt mandatory meal and rest periods in the first place." *Ibid*.

The *Su* case illustrates the stakes of loosening the ministerial exception, coupled with allowing its application to neutral, generally applicable laws. Private school teachers hired by religious organizations across the state would no longer be protected by laws governing workplace conditions, upending an important state policy for a significant group of employees.

B. A loose ministerial exception standard could result in a large class of employees without civil protections.

As set forth above, courts have envisioned, if not quite defined, limits to the scope of the ministerial exception and the First Amendment principles undergirding that exception. Several courts have extended the ministerial exception to cover FLSA claims, but only where the plaintiff is a bona fide minister and the work performed is directly a part of the religious mission. This makes sense.

Given the potential force of the ministerial exception—as an absolute defense to claims under its coverage—its application should depend on whether they

are bona fide ministerial employees—that is, as clergy-like in their duties as possible. If the Court ultimately concludes that the ministerial exception serves as an absolute defense against a broad swath of claims involving neutral, generally applicable laws, then it should not extend to the marginal case such as that of Ms. Biel, who has no religious training and taught primarily secular subjects but had ancillary religious duties. Otherwise, almost any schoolteacher at schools run by religious organizations would likely qualify. It would result in a ministerial exception that covers both a large swath of employees of religious organizations and many, if not most, claims that they could bring, including claims for unpaid wages, retaliation, occupational safety, breach of contract, and potentially, fraud and sexual harassment.

This leads to a perilous two-tiered system. Few if any civil law protections would be available to schoolteachers and other employees hired by religious organizations that must undertake ancillary religious duties. Secular schoolteachers and other employees, on the other hand, would be offered the full gamut of employment protections. This two-tiered system may also lead to economic disarray. If religious organizations are permitted to circumvent neutral, generally applicable employment laws and insulate themselves from certain contractual and tort claims from employees, they will have a heightened competitive advantage in fields where they compete with secular organizations, such as private schools.

Schoolteachers in religious schools could face a whole host of other deprivations for which they have no remedy. If the employer is exempt from civil laws that penalize retaliation having no connection to the religious organization's doctrine or mission, then schoolteachers could be freely terminated for exercising their statutory rights. For instance, a teacher who complains about a workplace hazard "causing or . . . likely to cause death or serious bodily harm," 29 U.S.C. § 654(a), could get terminated for doing so. *See* 29 U.S.C. § 660(c) (prohibiting retaliation against employee who files complaints regarding OSHA violations). A teacher who sues for damages associated with sexual harassment could be terminated with no consequence for the employer. *See Elvig*, 375 F.3d at 966.

It would also chill reporting of unlawful workplace conditions by all employees. Many employees would not know, pre-complaint, whether they are in fact ministerial employees; and if they complain and are ultimately deemed ministerial, they can be terminated unilaterally. The uncertainty would discourage employees, ministerial and non-ministerial alike, from reporting workplace violations, thereby eroding another important workplace protection.

A sweeping ministerial exception may also immunize a religious organization from using threats of dismissal to tamper with a witness to a criminal investigation. *See* 18 U.S.C. § 1512(b) (offense to "use[] intimidation . . . with intent to .. induce any person to . . . withhold testimony . . . from an official proceeding.").

It may bar tort or worker's compensation claims. *See Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (4th Cir. 1998) (barring tort claims).

A wrong turn could create a society whereby religious employers are beyond the reach of civil and criminal law, while their employees are stripped of basic workplace rights. Indeed, as this Court warned, a stark double-standard would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, drug laws and traffic laws, *to social welfare legislation such as minimum wage laws*, child labor laws, animal cruelty laws, environmental laws, and laws providing for equality of opportunity for the races." *Smith*, 494 U.S. at 888-889 (internal citations omitted; emphasis added). The *Smith* court concluded that "[t]he First Amendment's protection of religious liberty cannot require this." *Id*. at 889.

Of course, the Court is not obligated to decide issues that are not before it. But there is a direct correlation between the unaddressed issue, whether the ministerial exception covers application of neutral, generally applicable employment laws, and the issue squarely before this Court: what is the test to determine who falls within the ministerial exception. The answer to that will determine whether the ministerial exception would cover primarily bona fide ministers—

clergy or other religious employees whose duties are primarily religious in nature—or expand it to cover employees with no religious training who are doing largely secular work but who is assigned ancillary religion-inflected tasks as part of the job.

The two issues will inform one another. A modest, fact-specific decision here leaves the Court with more breathing space for a future case that asks whether the ministerial exception even applies.

CONCLUSION

Based on the foregoing reasons, the Court should decide the issue before it narrowly, in favor of Respondents.

Respectfully submitted,

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