No. 19-371

IN THE

Supreme Court of the United States

STEPHEN S. WISE TEMPLE,

Petitioner,

v.

JULIE SU, as Labor Commissioner, etc.,

Respondent.

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

BRIEF OF *AMICUS CURIAE* UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Amicus Union of Orthodox Jewish Congregations of America ("Orthodox Union") represents nearly 1,000 synagogues in the United States and is the nation's largest Orthodox Jewish umbrella organization. Its member synagogues employ rabbis, cantors, and other employees who engage in religious teaching to congregants and their children. Orthodox Union also represents hundreds of Jewish non-public, parochial K-12 schools in the United States. These schools teach religious and secular studies in a holistic environment. They employ teachers, coaches, administrators, and others who engage in teaching through classroom instruction and role-modeling.

Amicus is committed to defending not only the right to direct its own religious teaching and governance free from state interference, but also the same rights of other churches, synagogues, mosques, and religious bodies. It believes that the ministerial exception is necessary to the religious vitality of our nation and inherent in the system of limited government guaranteed by the Constitution.

SUMMARY OF ARGUMENT

The Religion Clauses of the First Amendment "preclude[] application of [employment discrimination

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to this brief's preparation or submission. All parties have received timely notice and consented to the filing of this brief.

laws] to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 188 (2012). This "ministerial exception" is a facet of the principle that the state may not interfere in the internal matters of religious bodies. That non-interference principle is deeply rooted in our nation's history and tradition and has been recognized and applied many times by this Court.

Courts must be able to identify "ministers" to apply the ministerial exception. In *Hosanna-Tabor*, this Court declined "to adopt a rigid formula" and instead looked to four considerations in deciding that the plaintiff, a fourth-grade teacher at a Lutheran school, was a "minister": (i) "Hosanna-Tabor held [plaintiff] out as a minister, with a role distinct from that of most of its members"; (ii) "[plaintiff's] title as a minister reflected a significant degree of religious training followed by a formal process of commissioning"; (iii) "[plaintiff] held herself out as a minister of the Church by accepting the formal call to religious service"; and (iv) "[plaintiff's] job duties reflected a role in conveying the Church's message and carrying out its mission." 565 U.S. at 190–92.

After *Hosanna-Tabor*, federal courts of appeals and state supreme courts have largely endorsed a functional approach that focuses on the totality of the circumstances with an emphasis on whether the employee performs religious functions. That is consistent with the "consensus" among courts before *Hosanna-Tabor*, 565 U.S. at 202–03 (Alito, J., concurring), and aligns the ministerial exception with the First Amendment's non-interference principle.

The California Court of Appeal, however, has embraced a mechanical application of the four *Hosanna-Tabor* considerations and adopted what is effectively a rigid, four-factor test. As petitioner has demonstrated, the court below—along with the Ninth Circuit's recent holdings in *Biel* v. *St. James School*, 911 F.3d 603 (9th Cir. 2018), and *Morrissey-Berru* v. *Our Lady of Guadalupe School*, 769 F. App'x 460 (9th Cir. 2019)—has created a clear and irreconcilable conflict over application of *Hosanna-Tabor*.

The Court should step in now to resolve this split of authority that subjects religious groups to different rules depending on the accident of geography. The California Court of Appeal's elevation of formalities such as title over substantive duties invites judges to make inappropriate determinations about the affairs of religious organizations and leads to arbitrary and discriminatory results. Indeed, the California court's misguided standard could subject religious organizations to ruinously high damages. *See, e.g.*, Pet. 14 (*Su* complaint sought nearly $1 million in, among other things, damages, costs, and fees). Courts should resolve questions regarding a religious organization's employment of ministers by engaging in a functional analysis that looks at the totality of the circumstances of the employment relationship and ultimately gives deference to sincere beliefs of religious organizations. That approach best respects the First Amendment's commitment that government will not interfere in the internal affairs of religious institutions.

ARGUMENT

I. THE FIRST AMENDMENT GUARANTEES NON-INTERFERENCE IN RELIGIOUS GROUPS' GOVERNANCE AND STRUCTURE.

The ministerial exception is a facet of a broader principle of non-interference in the internal affairs of religious organizations. As this Court has explained, the Religion Clauses prohibit governments from "interfer[ing] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. This principle developed in the American colonial period and was recognized by this Court long before it was applied in the specific context of employment law as the "ministerial exception."

A. Non-Interference Is A Central Feature Of Both Disestablishment And Free Exercise.

Freedom from state interference in internal religious affairs is integral to the original public understanding of the Religion Clauses. The desire to be free of state interference in religious affairs was a significant catalyst of early European migration to North America. The *Mayflower*'s Puritan Pilgrims "fled to New England, . . . hop[ing] to elect their own ministers and establish their own modes of worship." *Hosanna-Tabor*, 565 U.S. at 182. Yet established churches soon became commonplace in the colonies. "[T]he central feature" of an establishment of religion was "control" by the government. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). Of several

different methods employed by government, "[t]he two principal means of government control over the church were laws governing doctrine and *the power to appoint prelates and clergy*." *Id.* at 2132 (emphasis added).

The Founding generation thus understood that "[t]he power to appoint and remove ministers is the power to control the church." McConnell, 44 Wm. & Mary L. Rev. at 2138. In England, the Crown controlled the appointment of clergy. *See, e.g.*, An Act Restraining the Payments of Annates Etc. of 1534, *reprinted in The Tudor Constitution: Documents and Commentary* 358–60 (G.R. Elton ed., 1982). In the American colonies that had Anglican establishments, "[m]inisters had to be ordained in England, approved by the governor, and selected by the local vestry. Local political bodies thus controlled appointments to the ministry." McConnell, 44 Wm. & Mary L. Rev. at 2138.

Governmental control over ministers was so central to an establishment that when the people of the States that had established churches later disestablished them, they invariably "adopted at the same time an express [constitutional] provision that all 'religious societies' have the 'exclusive' right to choose their own ministers." Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 829 (2012). As former Judge McConnell concludes, this "history of disestablishment is persuasive evidence that the freedom of all religious institutions to choose their clergy, *free of government interference*, was understood to be part and parcel of disestablishment." *Id.* (emphasis added).

The free exercise clauses in the new constitutions adopted by the States between 1776 and 1780 enshrined a similar understanding of non-interference. These clauses "allow[ed] churches and other religious institutions to define their own doctrine, membership, organization, and internal requirements without state interference." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1455, 1464–65 (1990). This understanding and background undoubtedly informed adoption of the Religion Clauses within the federal Constitution. *See Hosanna-Tabor*, 565 U.S. at 184.

Congress under the Articles of Confederation applied the non-interference principle, too. In response to the Vatican's proposed agreement in 1783 to approve a Bishop-Apostolic for America, "Congress responded that it had 'no authority to permit or refuse' the appointment, and the Pope could appoint whomever he wished because 'the subject . . . being purely spiritual . . . is without the jurisdiction and powers of Congress.'" Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 181 (2011) (omissions in original) (quoting 1 Anson Phelps Stokes, *Church and State in the United States* 479 (1950)). In other words, "Congress said that it had no jurisdiction over the subject matter, not that it had jurisdiction so long as it acted on the basis of a religion-neutral, secular, or nontheological basis." *Id.* at 181 n.30.

Post-ratification history confirms that the prohibition on establishment precludes government involvement in or interference with the selection of

clergy. After the ratification of the Constitution, Secretary of State James Madison declined a request from a Catholic bishop to advise "who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase." *Hosanna-Tabor*, 565 U.S. at 184. Madison "responded that the selection of church 'functionaries' was an 'entirely ecclesiastical' matter left to the Church's own judgment." *Id.* (quoting Letter from Secretary of State James Madison to Bishop John Carroll (Nov. 20, 1806), *reprinted in* 20 *Records of the American Catholic Historical Society* 63 (1909)). Madison located this principle in the Constitution: "The 'scrupulous policy of the Constitution in guarding against a political interference with religious affairs,' . . . prevented the Government from rendering an opinion on the 'selection of ecclesiastical individuals.'" *Id.* (quoting 20 *Records of the American Catholic Historical Society* 63–64). Later, as President, Madison vetoed a bill incorporating a church because it "'enact[ed] into, and establishe[d] by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehend[ed] even the election and removal of the Minister of the same*; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises.'" *Id.* at 185 (quoting 22 *Annals of Cong.* 982–83 (1811)).

President Jefferson similarly observed that the Constitution prevents the government "'from intermeddling with religious institutions, their doctrines, discipline, or exercises.'" McConnell, 103 Harv. L. Rev. at 1465 (quoting Letter from Thomas Jefferson

to the Rev. Samuel Miller (Jan. 23, 1808), *reprinted in* 11 *The Works of Thomas Jefferson* 7, 7 (P. Ford ed., 1905)). And this included religious education. In 1804, President Jefferson assured the Ursuline Nuns, who operated a school for girls in New Orleans, that "the principles of the constitution and government of the United States are a sure guarantee . . . that your institution will be permitted to govern itself according to [its] own voluntary rules, without interference from the civil authority." Letter from Thomas Jefferson to Mother Superior Therese de St. Xavier Farjon (July 13, 1804), *Louisiana Anthology*, https://tinyurl.com/y7xckpje.

The historical record thus demonstrates the Founding generation's understanding that the government could not control the appointment or removal of ministers. In this context, therefore, the ministerial exception reflects the "foundational premise that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law's corrective reach." Berg, 106 Nw. U. L. Rev. Colloquy at 176; *see also* John Locke, *A Letter Concerning Toleration* 26 (James H. Tully ed., 1983) (explaining "that the whole Jurisdiction of the Magistrate reaches only to these Civil Concernments; and that all Civil Power, Right and Dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the Salvation of Souls").

B. The Court Has Repeatedly Applied This Non-Interference Principle.

This Court has long recognized the non-interference principle, which it first articulated in *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871). *Watson* involved a dispute about which group properly controlled a Presbyterian church in Louisville, Kentucky. Based on a "broad and sound view of the relations of church and state under our system of laws," the Court deferred to the highest governing body of the Presbyterian church. *Id.* at 727. The Court explained that adjudicating matters of "church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" would infringe the freedom of religious bodies to direct their own affairs and inappropriately require civil courts "to inquire into . . . the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination." *Id.* at 733.

This Court applied the same principle in *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), explicitly grounding it in the Religion Clauses. During the Cold War, New York passed a law transferring church property from one faction of the Russian Orthodox Church to another. The Court held the law unconstitutional because it "displace[d] one church administrator with another" and "passe[d] the control of matters strictly ecclesiastical from one church authority to another." *Id.* at 119. "Freedom to select the clergy," the Court explained, "must now be said to have federal constitutional protection as a part of the free exercise

of religion against state interference." *Id.* at 116. Furthermore, meddling with "control" of churches "violates our rule of separation between church and state." *Id.* at 110. The Constitution preserves the power of religious bodies "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116; *see also Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) ("[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."); *Serbian E. Orthodox Diocese for the U.S. & Canada* v. *Milivojevich*, 426 U.S. 696, 720 (1976) (concluding that forced reinstatement of former bishop of the Serbian Orthodox Church was unconstitutional).

This Court reaffirmed the non-interference principle most recently in *Hosanna-Tabor*. Cheryl Perich, a "called" fourth-grade teacher at a Lutheran school, was diagnosed with narcolepsy and later fired. The EEOC sued the school, alleging a violation of the Americans with Disabilities Act's anti-retaliation provision. The Court concluded, however, that the suit was barred by the ministerial exception, explaining that "[a]ccording the state the power to determine which individuals will minister to the faithful . . . violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." 565 U.S. at 188–89. The Court further explained that "imposing an unwanted minister . . . infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Id.* Employment laws cannot be applied to removing a ministerial employee

because "punishing a church" for that act "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 188. *Hosanna-Tabor* thus reflects specific application of the non-interference principle in the modern context of employment anti-discrimination law.

II. THE MINISTERIAL EXCEPTION ANALYSIS SHOULD FOCUS ON THE EMPLOYEE'S RELIGIOUS FUNCTIONS.

A functional analysis of "ministerial" status aligns the ministerial exception with the First Amendment's non-interference principle. The Court of Appeal's subordination of religious function to other, often more superficial, considerations upends the historical and constitutional tradition embodied in *Hosanna-Tabor* and swings open the door to judicial meddling with religious doctrine. To further minimize the risk of judicial interference in internal religious affairs, courts should defer to religious institutions' good-faith understanding that duties are religiously important rather than crediting plaintiffs' characterizations.

A. The California Court Of Appeal's Application Of *Hosanna-Tabor* Improperly Subordinates A Functional Analysis To Formulaic Criteria.

In *Hosanna-Tabor*, the Court analyzed four "considerations" in concluding that Perich was a "minister" who fell within the exception: (i) "Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members"; (ii) "Perich's title as a minister reflected a significant degree of religious

training followed by a formal process of commissioning"; (iii) "Perich held herself out as a minister of the Church by accepting the formal call to religious service"; and (iv) "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission." 565 U.S. at 191–92. The Court's opinion "neither limits the inquiry to those considerations nor requires their application in every case." *Fratello* v. *Archdiocese of N.Y.*, 863 F.3d 190, 205 (2d Cir. 2017).

Justice Alito, joined by Justice Kagan, wrote separately in *Hosanna-Tabor* specifically to explain that the "Court's opinion . . . should not be read to upset th[e] consensus" among the courts of appeals that an employee's "religious function in conveying church doctrine" is more important than "ordination status or formal title." 565 U.S. at 202–04. "[I]t would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one." *Id.* at 198. "What matters," they explained, is whether the employee performs "important religious functions." *Id.* at 204. In short, "[r]eligious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance," and looking to the "functions" performed by the employee is best calibrated to protect that autonomy. *Id.* at 200.

Function is crucial in part because many religious organizations and denominations, including Catholics, "eschew" the term "minister." 565 U.S. at 198, 202 (Alito, J., concurring). Members of some faiths—such as Jehovah's Witnesses—"consider all" adherents to be "ministers," while in Islam "every Muslim can perform the religious rites, so there is no class or

profession of ordained clergy." *Id.* at 202 nn.3–4 (quotation marks omitted). "Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Id.* at 197 (Thomas, J., concurring). The "fear of liability" alone "may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding." *Id.* The ministerial exception should not be applied in a manner that could create incentives for minority religions to abandon religious precepts in order to survive. "[I]t is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws." *Id.* at 199 (Alito, J., concurring).

The court below, however, subordinated the functional analysis, and instead applied a formulaic analysis that focuses on superficial considerations like the employee's title. The court held the ministerial exception inapplicable to teachers at a synagogue's Early Childhood Center ("ECC") because petitioner, unlike the Lutheran school in *Hosanna-Tabor*, did not give its teachers "religious titles," Pet App. 14, and "d[id] not require its teachers to have any formal Jewish education or training," *id.* The court also found that, "in contrast to Perich, there is no evidence that any of the ECC's teachers held themselves out as ministers." *Id.* at 15. With three of the *Hosanna-Tabor* considerations weighing against petitioner, it mattered not to the court below that ECC teachers, like Perich, "taught religion in the classroom," and "[were] responsible for implementing the school's Judaic curriculum

by teaching Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services." *Id.* So "while the teachers may [have] play[ed] an important role in the life of the Temple, they [were] not its ministers." *Id.* 16.

The court below bolstered its analysis with a discussion of the Ninth Circuit's decision in *Biel*. Pet. App. 16. In *Biel* v. *St. James School*, the plaintiff was a fifth grade teacher at a Catholic school. "She taught religion class four times a week based on the catechetical textbook *Coming to God's Life*," and "was responsible for instructing her students on various areas of Catholic teachings, including Catholic sacraments, Catholic Saints, Catholic social teaching, and Catholic doctrine related to the Eucharist and the season of Lent." 911 F.3d at 618 (Fisher, J., dissenting). She prayed with her class every day and brought her students to Mass. *Id.* Her employment contract required her "to model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church," and she was evaluated on that basis. *Id.* at 618–19 (quotation marks omitted); *see also Biel* v. *St. James Sch.*, 926 F.3d 1238, 1246 (9th Cir. 2019) (Mem.) (R. Nelson, J., dissenting from denial of rehearing en banc). While an employee's function might not be the *sole* consideration, the Ninth Circuit's opinion in *Biel* unreasonably minimized "the importance of [Biel's] role as a teacher of faith to the next generation." *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) (quotation marks and alteration omitted).

Biel has quickly become entrenched in the Ninth Circuit. In *Morrissey-Berru*, the Ninth Circuit relied

on *Biel* in essentially summarily reversing a district court's holding that a teacher at a different Catholic school qualified as a "minister." The Ninth Circuit reached that conclusion despite recognizing the teacher's substantial religious duties, such as "incorporat[ing] Catholic values and teachings into her curriculum, . . . le[ading] her students in daily prayer, . . . planning [liturgy] for a monthly Mass, and direct[ing] and produc[ing] a performance by her students during the School's Easter celebration every year." *Morrissey-Berru*, 769 F. App'x at 461.

Devaluing the functional analysis, as demonstrated by the decisions of the court below and the Ninth Circuit, results in demoting a key religious function—teaching the faith—in contravention of *Hosanna-Tabor*. Although by no means the sole marker of ministerial status, "teaching and conveying the tenets of the faith to the next generation" is one of a handful of "objective functions that are important for the autonomy of any religious group, regardless of its beliefs," much like "serv[ing] in positions of leadership" and "perform[ing] important functions in worship services and . . . religious ceremonies and rituals." *Hosanna-Tabor*, 565 U.S. at 199–200 (Alito, J., concurring). Teaching the faith to others, especially children, is vital to many religions' continued existence. And religious traditions often put heavy emphasis on teaching the faith to children.

Education is a central component of Jewish faith and practice, for example. *Deuteronomy* 11:19, which refers to teaching your children, is understood by the rabbis of the Talmud to impose an affirmative obligation upon parents to have their children educated. *Babylonian Talmud*, *Kiddushin* 29b. Of course, not

all parents have the time or depth of knowledge to educate their children. Thus, the Talmud further recounts that in the year 65 C.E., Rabbi Yehoshua ben Gamla initiated an education system: "Initially, whoever had a father would learn Torah and whoever did not have a father would not learn at all. Then, the sages instituted that teachers of children should be established in Jerusalem . . . until Rabbi Yehoshua ben Gamla came and instituted that teachers of children should be established in every town and they would commence at ages 6 and 7." *Babylonian Talmud*, *Bava Batra* 21a.

The contemporary American Jewish community continues to place the education of children in its faith and rites at the center of its communal efforts. As of 2008, there were hundreds of Jewish parochial schools in the United States educating more than 225,000 Jewish children. Rona Sheramy, *The Day School Tuition Crisis: A Short History*, Jewish Review of Books (Fall 2013), https://tinyurl.com/y6ktd6o3. These schools employ thousands of teachers, some of whom teach explicitly religious subjects, some of whom teach math and science or coach sports, and all of whom serve as role models for the students in their schools.

Of course, the importance of education is not limited to Jewish tradition. The Bible teaches Christians and Jews alike to "[t]rain up a child in the way he should go; even when he is old he will not depart from it." *Proverbs* 22:6 (English Standard Version). And Catholic education "is premised on the view that 'the knowledge the students gradually acquire of the world, life and man[,] is illumined by faith.'" Brief for *Amicus Curiae* Nat'l Catholic Educ. Ass'n at 6, *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru* (No. 19-

267) (alteration in original) (quoting Second Vatican Council, Declaration on Christian Education, *Gravissimum Educationis* § 8 (1965)).

Because of the central importance of teaching in religious practice, the ministerial exception necessarily protects and empowers "the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher . . . of its faith." *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring); *see also id.* at 192 (majority opinion) (noting importance of teacher's role in "lead[ing] others toward Christian maturity" (alteration in original; quotation marks omitted)); *Grussgott*, 882 F.3d at 660 (noting importance of teacher's role in "develop[ing] Jewish knowledge and identity" (quotation marks omitted)); *Fratello*, 863 F.3d at 209 (noting importance of principal's role in "work[ing] closely with teachers" for accomplishing Catholic school's "religious education mission").

In determining whether a teacher's responsibilities and the substance of the teacher's role—the *function* the teacher performs—qualifies her as a minister, "[i]t makes no difference that [she] also taught secular subjects." *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring); *see also id.* at 193 (majority opinion) (chastising the Sixth Circuit for following the EEOC in "plac[ing] too much emphasis on [plaintiff's] performance of secular duties"). It is self-evident that merely teaching at a parochial school does not necessarily make one a minister, but "play[ing] an important role as an instrument of [one's] church's religious message and as a leader of its worship activities" does. *Id.* at 204 (Alito, J., concurring).

The reasoning behind Justice Alito's concurrence in *Hosanna-Tabor* may explain why most courts that have addressed this issue have rejected the California Court of Appeal and Ninth Circuit's approach of "ask[ing] how much like Perich a given plaintiff is, rather than whether the employee served a religious function." *Sterlinski* v. *Catholic Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019). These courts' errant application of the ministerial exception is at odds with a majority of federal courts of appeals' decisions—including many that even predate *Hosanna-Tabor*. This more formal approach to the ministerial exception will have—indeed, is already having—harmful consequences: "Now thousands of Catholic schools"—and Jewish schools and countless other religious organizations with important teaching components—"in the West have less religious freedom than their Lutheran counterparts nationally." *Biel*, 926 F.3d at 1251 (R. Nelson, J., dissenting from denial of rehearing en banc).

B. Courts Should Defer To A Religious Organization's Good-Faith Understanding That Duties Are Religiously Important.

When confronted with both an employee's "argument that she performed her duties in a secular manner" and a religious organization's sincere understanding that those same duties are religiously important, courts should defer to the religious organization. *Biel*, 911 F.3d at 619– 20 (Fisher, J., dissenting); *see also Grussgott*, 882 F.3d at 660 ("[I]t is sufficient that the school clearly intended for [the teacher's] role to be connected to the school's Jewish mission."); *id.* ("[The employee's] belief that she approached her

teaching from a 'cultural' rather than a religious perspective does not cancel out the specifically religious duties she fulfilled."); *Cannata* v. *Catholic Diocese of Austin*, 700 F.3d 169, 179–80 (5th Cir. 2012) ("[W]e may not second-guess whom the Catholic Church may consider a lay liturgical minister under canon law."); *cf. Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) ("[T]he Religion Clauses require civil courts . . . to defer to a religious organization's good-faith understanding of who qualifies as its minister."); 20 *Records of the American Catholic Historical Society* 63–64 (Madison concluding that "the Government [is prevented from] rendering an opinion on the selection of ecclesiastical individuals").

Deference preserves religious organizations' free exercise rights. Without a measure of deference, a religious body's "right to choose its ministers would be hollow," for "secular courts could second-guess the organization's sincere determination[s]" regarding its "theological tenets." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). "Determining that certain activities are in furtherance of an organization's religious mission" is central to how "a religious community defines itself." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

Moreover, deference prevents courts from "wading into doctrinal waters" or adjudicating claims that "turn on an ecclesiastical inquiry." *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 312 (3d Cir. 2006); *see also Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (interpretation of religious doctrine in a contract case would be tantamount to "secular courts taking on the additional role of religious

courts"), *abrogated on other grounds by Hosanna-Tabor*, 565 U.S. at 195 n.4. "First Amendment values are plainly jeopardized when . . . litigation is made [to] turn on the resolution by civil courts of controversies over religious doctrine and practice." *Milivojevich*, 426 U.S. at 709–10 (quotation marks omitted); *see also New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The 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."); *Bollard* v. *Cal. Province of Soc'y of Jesus*, 196 F.3d 940, 949 (9th Cir. 1999) (The Establishment Clause guards against "a protracted legal process" which "inevitably" would result in discovery and other mechanisms that "probe the mind of the church in the selection of its ministers" (quotation marks omitted)). At least in the absence of a sham or subterfuge, the First Amendment "mandate[s] that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Milivojevich*, 426 U.S. at 713; *see also Grussgott*, 882 F.3d at 660 ("[W]e defer to the organization in situations like this one, where there is no sign of subterfuge.").

Doctrinal questions are also outside the competence of secular judges and juries; in the words of the Seventh Circuit, they are "issue[s] that [courts] cannot resolve intelligently." *Tomic*, 442 F.3d at 1042*; see also Lee* v. *Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 122 (3d Cir. 2018) ("Such inquiry would intrude on internal church governance, require

consideration of church doctrine, constitute entanglement prohibited under the ministerial exception, and violate the Establishment Clause."). This is not a question of "technical or intellectual capacity." Berg, 106 Nw. U. L. Rev. Colloquy at 176. Rather, "matters of faith" may not be strictly "rational or measurable by objective criteria." *Milivojevich*, 426 U.S. at 714–15 & n.8; *see, e.g.*, *Fratello*, 863 F.3d at 203 (noting that "[i]n the Abrahamic religious traditions, for instance, a stammering Moses was chosen to lead the people, and a scrawny David to slay a giant"); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), National Archives, https://tinyurl.com/yb9qoojz ("[T]hat the Civil Magistrate is a competent Judge of Religious Truth . . . is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world.").

That lack of knowledge is especially acute in the United States because "[o]ur country's religious landscape includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Each denomination—even each congregation—may have "a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith." *Watson*, 80 U.S. (13 Wall.) at 729. Thus, it is not only appropriate but also necessary to defer to the religious organization's sincere understanding that an individual per-

forms ministerial duties, at least where the basic underlying facts—such as the number of hours worked—are undisputed.

As Justices Alito and Kagan explained in their concurrence in *Hosanna-Tabor*, "[i]n order to probe the *real reason* for [plaintiff's] firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine." 565 U.S. at 205. Yet the approach employed by the California Court of Appeal and the Ninth Circuit "invites the very analysis the ministerial exception demands [courts] avoid." *Biel*, 911 F.3d at 619 (Fisher, J., dissenting). As the court below candidly explained, those courts believe they are "compel[led] . . . to distinguish between those church or synagogue employees who are sufficiently central to a religious institution's mission" from "those who are not." Pet. App. 18. Thus courts in California and throughout the Ninth Circuit have "essentially disregard[ed]" religious entities' views "about [their] own organization and operations" in favor of inserting themselves squarely into ultimately religious considerations and determinations. *Sterlinski*, 934 F.3d at 570. The ministerial exception exists precisely to prevent these types of judicial inquisitions. *See supra* 4–11; *accord Biel*, 911 F.3d at 619 (Fisher, J., dissenting) ("The courts may not evaluate the relative importance of a ministerial duty to a religion's overall mission or belief system.").

Deference does not have to mean uncritical acceptance of every claim of ministerial status. It "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."

Grussgott, 882 F.3d at 660; *see also Sterlinski*, 934 F.3d at 571. The approach taken by both the California Court of Appeal and the Ninth Circuit flips the inquiry on its head. Those courts in effect apply a presumption in favor of infringing religious institutions' fundamental and constitutionally guaranteed liberty. That application of the First Amendment's non-interference principle and this Court's decision in *Hosanna-Tabor* is wildly out of step with the consensus among other circuits and States. The Court should step in now and resolve this important conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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