No. 24-

IN THE

Supreme Court of the United States

YAAKOV MARKEL,

Petitioner,

v.

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, A CORPORATION; NACHUM RABINOWITZ,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL E. FRIEDMAN
Counsel of Record
STEVEN R. FRIEDMAN
FRIEDMAN² LLP
1880 Century Park East, Suite 1411
Los Angeles, CA 90067
(310) 273-2505
legalsolutionsemail@gmail.com

Counsel for Petitioner

120409

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

The Ministerial Exception arises out of the Religion Clauses of the First Amendment. It plays a legitimate and important function in preventing governmental intrusion into a religious institution's hiring, firing, training, disciplining and retention of its ministers. But the Ninth Circuit has now expanded the exception such that it conflicts with this Court's holdings interpreting both the Ministerial Exception and other generally applicable regulations so as to call into question whether religious institutions may be regulated at all.

The Questions presented are:

1. Whether Religious institutions are bound by the contracts they voluntarily enter into, or are entitled, after performance by their minister, to breach those contracts and invoke the Ministerial Exception as a complete defense?

2. Whether the Ministerial Exception is so broad as to bar all suits by a minister against a religious institution, even when those claims arise out of contract or fraud?

3. Whether the Ninth Circuit was correct in exempting religious institutions from all Federal and State regulations governing employee compensation, when this Court has already held that religious institutions are bound by the minimum wage and overtime laws?

4. Whether the Ministerial Exception exempts a religious institution from paying a Minister

for overtime hours worked by the Minister when the Religious institution agreed to pay for those overtime hours in writing and when the Religious institution agrees those overtime hours are compensable?

5. Whether the Ministerial Exception is to be expanded to exempt a religious institution from all Federal and State minimum wage and overtime laws even when the religious institution does not even claim a religious belief or issue exists to exempt it from such regulations?

6. Whether the Ministerial Exception acts as a complete defense when a religious institution breaches a contract with its minister?

7. Whether the Ministerial Exception exempts a religious institution from a claim of fraud brought by a Minister based upon a religious institution's refusal to honor its written agreement when such a refusal is not based on any claimed connection to religion?

8. What is the outer limit of the Ministerial Exception as it relates to suits brought against religious institutions by ministers?

9. Does the Ninth Circuit's new definition of "tangible employment action" contradict this Court's long established definition, and if so, which definition controls?

PARTIES TO THE PROCEEDING

The Petitioner is Yaakov Markel who was the plaintiff and appellant below.

The Respondents are Union of Orthodox Jewish Congregations of America, a Corporation; and Nachum Rabinowitz who were the defendants and respondents below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Yaakov Markel is an individual. There are no corporate petitioners and no disclosure is required under Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.(b)(iii):

- *Markel v. Union of Orthodox Jewish Congregations of Am. et al.* No. 23-55088, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on December 30, 2024, rehearing denied on February 20, 2025.

- *Markel v. Union of Orthodox Jewish Congregations of Am. et al.* No. 2:19-cv-10704, U.S. District Court for the Central District of California. Judgment entered on January 3, 2023.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Yaakov Markel does hereby request that this Court issue a writ of certiorari reversing and remanding the decisions below.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 124 F.4th 796 (9th Cir. 2024) and reproduced at App.1a.

The order denying the petition for rehearing en banc is reproduced at App.67a.

The district court's opinion granting summary judgment as to all Respondents is accessible at 648 F. Supp. 3d 1181 and is reproduced at App.32a.

JURISDICTION

The Ninth Circuit issued its opinion on December 30, 2024. App.1a.

Petitioner timely petitioned for rehearing.

The Ninth Circuit denied Petitioner Markel's petition for rehearing on February 20, 2025. App.67a.

This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law

respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST. amend. I.

STATEMENT OF THE CASE

I. Legal and Factual Background

For the purposes of this petition, Markel assumes, without conceding, that Markel was acting as a minister and the Union of Orthodox Jewish Congregations of America (OU) qualifies as a religious institution as those terms have been applied in the context of the Ministerial Exception and that the legal analysis contained herein applies equally to OU's employee Rabinowitz.

This Court therefore need not address or touch upon the questions of whether or not OU is a religious institution or whether Markel, or the position he held with OU, qualifies as a minister.

A. Markel Is Hired By OU With An Agreement That OU Would Pay Him Hourly For All Hours Worked And At A Higher Rate For All Overtime Hours. Markel Works and OU Fails to Pay Him.

Yaakov Markel was hired by OU to serve as a kosher supervisor at a factory in California which produced concentrates and juice. (App.2a) His duties involved working on the factory floor as well as following checklists of requirements set forth by OU. (App.15a).

Markel was an hourly employee working 12 hour shifts at the factory who frequently was required by the OU

to work more than 12 hours in a single shift. (App.75a, App77a). Markel was either actively working on the factory floor, on call waiting to work at the factory, or sleeping on a couch at the factory or in his car. (App.69a)

The OU expressly told Markel he would be paid for all hours Markel worked and that OU would pay an increased overtime rate. (App.89a-90a.)

A written email correspondence authored by Elon Winkler on behalf of OU memorialized the agreement between OU and Markel as to Markel's compensation. (App.89a-90a).

The agreement was OU would pay Markel "$25 PER HOUR $37.50 OVERTIME PAY AFTER 8 HOURS." (App.89a-90a).

Markel agreed to these terms. (*Id.*).

From 2011 through 2018 Markel worked for OU under the same hourly rate arrangement. (App.2a), often working over 24 hours in a shift.

Over the next seven years, OU typically paid Markel his hourly rate as well as the increased overtime rate for hours worked beyond 8 hours. (App.74a, App.3a-4a, App.73a.)

Markel's claims alleged that OU failed to pay for all of the hours worked, and also failed to pay the overtime rate as required by the agreement and by California law for all hours worked beyond 8 hours. (App.3a-4a)

Markel resigned in 2018. (App.80a App.77a,, App.3a-4a)

Thereafter, Markel filed suit seeking to be paid for the work he performed at the factory, including at the overtime rates agreed to by OU and mandated by California law. Markel also sued OU and its agent Rabinowitz for fraud. (App.3a-4a)

This is not a case of wrongful termination. It is agreed that Markel resigned and never sought reinstatement or damages under any wrongful termination theory.

Similarly, OU agrees that it does pay overtime rates for overtime hours and has no religious or other objection to paying overtime rates for overtime hours. (App.72a-App.75a).

At no point did the OU claim that paying for Markel's overtime was objectionable or contrary to any religious decision, nor did the OU ever argue that paying for overtime in general was against OU policy or religion.

It is also undisputed that all of Markel's hours are compensable.

OU's only dispute with Markel is *whether or not* Markel worked the hours he claims.

II. Proceedings Below

A. Markel Files His Complaint Seeking To Be Paid For the Hours He Claims He Worked.

Markel filed his complaint in California State Court. Markel alleged an agreement by the OU to pay Markel hourly for the hours he worked and an agreement by the OU to pay an overtime amount for all hours worked beyond eight hours.

OU removed to Federal Court under diversity jurisdiction. (App.34a).

After discovery, OU moved for summary judgment, arguing that the Ministerial Exception to the First Amendment acted as a total bar to all claims by Markel. App.32a, App.33a.

OU argued in favor of an expansion of the Ministerial Exception to act as a total bar to all State and Federal employment regulations, including wage and hour regulations and minimum wage regulations. OU also argued to expand the Ministerial Exception to act as a complete defense to all contract based claims. (App.64a)

Recognizing the matter of one of first impression, the District Court granted summary judgment of Markel's entire claim. (App.65a, App.47a, App.4a)

Markel appealed. (App.4a.)

B. Ninth Circuit Proceedings

On appeal the Ninth Circuit recognized again that this was a matter of first impression (App.4a). After taking the matter under submission for eight months, the Ninth Circuit affirmed the granting of summary judgment. Judge Sanchez authored a concurring opinion rejecting the rigid approach taken by the majority and counseling that this Court in *Our Lady of Guadalupe School v. Morrissey-Berru* (2020) 140 S.Ct. 2049 ("*Our Lady*") "counsels a 'flexible' approach" (App.27a).

The Ninth Circuit's decision materially expanded this narrowly tailored First Amendment based exception into the generally applicable rule that no minister may ever sue their religious employer *for any reason*. This included claims based in contract or fraud.

The Ninth Circuit also created a new and incorrect definition for the defined term "tangible employment action" and its definition contradicts this Court's definition.

The Ninth Circuit also rejected this Court's controlling language that the Ministerial Exception "does not mean that religious institutions enjoy a general immunity from secular laws" *Our Lady* at 2060. Instead, the Ninth Circuit expanded the Ministerial Exception on an unlimited basis and granted the general immunity prohibited by this Court.

The Ninth Circuit's decision also creates a split of authority with other Circuits, including the Seventh, Tenth, and D.C. Circuits. This new approach also created a split of authority within the Ninth Circuit itself.

The Ninth Circuit's decision expanded the Ministerial Exception so as to bring it into conflict with the Supreme Court, and assumes the conclusion that *every single claim* brought by a minister against their religious employer is now barred by the Ministerial Exception.

REASONS FOR GRANTING THE PETITION

The Ministerial Exception's function is to protect the autonomy of religious institutions from government interference which might prevent a religion from charting its own course.

The Ministerial Exception arises out of the First Amendment and allows religious institutions to be the final word on the hiring, firing, training, and disciplining of its ministers.

But the Ministerial Exception is a narrowly tailored exception to the generally applicable rule articulated by this Court that religious institutions do not enjoy a general immunity from secular laws.

Never before has the Ministerial Exception been applied to entirely eliminate the ability of government to regulate religious employers or to categorically bar suits by ministers against their employers.

The Ninth Circuit reached the startling conclusion that the Ministerial Exception is so broad as to exempt a religious institution from all claims made by their minister employees, no matter the type or claim, and no matter whether the conduct which must be adjudicated has any claimed relationship with religion.

This Court's review is essential because this new law articulated by the Ninth Circuit creates chaos whereby all religious institutions are now exempt from all state and federal regulation regarding their employees.

This Court should grant review for five reasons.

First, the decision below is irreconcilable with this Court's precedent limiting the Ministerial Exception's applicability and reaffirming the general rule that religious institutions must comply with federal and state laws, including the minimum wage and overtime laws. The Ninth Circuit has ignored this Court's repeated holdings and has instead expanded the Ministerial Exception to create an exception which immunizes religious institutions from all regulation of its employees and allows religious institutions to breach their contracts with impunity and after performance has been obtained.

Second, the circuit courts are now divided on the application of the Ministerial Exception, the breadth of the exception and the meaning of defined terms created by this Court. The Tenth Circuit has narrowly applied the Ministerial Exception while upholding the requirement of religious institutions to comply with generally applicable laws. The Seventh Circuit continues to apply minimum wage laws to religious institutions. The D.C. circuit has held that religious institutions may be sued for breaches of their agreements and that oral and written agreements by a religious institution are fully enforceable in civil court. These circuits stand in stark contrast to the Ninth Circuit's *Markel* decision which absolves religious institutions of the requirement to honor their contracts,

and has expanded the application of the Ministerial Exception far beyond, and contrary to, the holdings of the other circuits.

Third, there is now a split of authority within the Ninth Circuit itself. Prior to the ruling in Markel, the Ninth Circuit uniformly applied the minimum wage laws to religious institutions. See *Elvig v. Calvin Presbyterian Church,* 397 F.3d 790, 792 (9th Cir. 2005). The decision in *Markel* does not address *Elvig* and instead creates a split of authority regarding the applicability of the federal and state minimum wage laws to religious institutions.

Fourth, the decision itself comes into conflict with the First Amendment's establishment clause by granting special preferential status favoring religion by exempting religious institutions from generally applicable regulations.

Fifth, the issues raised by the *Markel* decision are of national importance and impact broad swaths of authority regulating religious employers and employees, as well as those who contract with religious institutions. There is now uncertainty as to when, or even if, Federal and State regulations can be applied to religious institutions. There is further uncertainty as to whether ministers with binding contracts may even bring suit if their religious employer breaches the contract. This uncertainty is likely to lead to further splits of authority and the termination of meritorious cases.

This Court should grant Markel's petition to finally make clear for all circuits the outer limits of the Ministerial Exception.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH THIS COURT'S HOLDINGS OVER THE LAST HALF CENTURY.

The Ninth Circuit's holding in Markel vastly expanded the Ministerial Exception with the initial statement that "By its terms, the [Ministerial Exception] rule permits no exceptions. It is categorical" (App.6a).

But this foundational assumption, upon which the entire decision is built, is in direct conflict with this Court's holdings going back more than a half century.

This Court has considered whether the Ministerial Exception grants religious institutions an exemption from generally applicable regulations, including the minimum wage laws.

When faced with this, and other similar legal issues, *this Court has repeatedly held that the religious institutions must comply with generally applicable regulations*, and that the Ministerial Exception is a narrowly tailored exception which still requires compliance with generally applicable regulations, including those regulating employees of religious institutions.

This Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) recognized the existence of the ministerial exception as an outgrowth of the First Amendment's Religion Clauses. It was premised upon the stated goal that "**that the new Federal Government**—unlike the English Crown—**would have no role *in filling ecclesiastical offices***." *Hosanna-Tabor* at 184 (emphasis added).

This Court therefore concluded that the Ministerial Exception:

> "precludes application of [employment discrimination legislation] to claims concerning the employment relationship between a religious institution and its ministers . . . [because] [r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, **intrudes upon more than a mere employment decision**. **Such action interferes with the internal governance of the church**, depriving the church of control over the selection of those who will personify its beliefs."

Hosanna-Tabor at 188–89 (emphasis added).

But, contrary to the Ninth Circuit's holding in *Markel*, this Court did not grant religious institutions unfettered immunity from all suits by ministers. Instead, this Court stated it might allow claims like Markel's to proceed:

> "The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. **We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers**."

Hosanna-Tabor at 196 (emphasis added).

Almost a decade later, this Court revisited the Ministerial Exception in *Our Lady of Guadalupe School v. Morrissey-Berru* (2020) 140 S.Ct. 2049 and **reaffirmed that religious institutions are not immune from laws and regulations**.

This Court made crystal clear that **"[The ministerial exception] does not mean that religious institutions enjoy a general immunity from secular laws**, but it does protect their autonomy **with respect to *internal management decisions that are essential to the institution's central mission***." *Our Lady* at 2060 (emphasis added).

This Court went on:

> "it is instructive to consider why a church's independence *on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities*. Without that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. The ministerial exception was recognized to preserve a church's independent authority *in such matters*."

Our Lady at 2060–2061 (emphasis added).

Indeed, this Court looked back to *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) in applying the Ministerial Exception to such limited acts of church

governance as "selecting", "accept[ing] or retain[ing] an unwanted minister, or punishing a church for failing to do so" *Hosanna-Tabor* at 188-189. But this Court prohibited a general immunity for religious institutions.

The Ninth Circuit's decision in *Markel* does exactly what this Court in *Our Lady* found to be improper, and grants religious institutions a general immunity from the secular laws of minimum wage and overtime regulations in **all** scenarios.

Judge Sanchez's concurring opinion in *Markel* similarly rejected the majority's conclusion that the Ministerial Exception was broad and without exception. (App.28a).

Indeed, this Court has found the matter to be "virtually self-evident" that religious institutions are never entitled to automatic exemptions from government regulations.

In *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 291–92 (1985) ("*Alamo*") this Court upheld the application of minimum wage and overtime laws to religious employers:

> "Petitioners . . . argue that imposition of the minimum wage and record keeping requirements will violate [the Religion Clauses of the First Amendment] . . . Neither of these contentions has merit. It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program **unless, at a minimum, inclusion in**

> **the program actually burdens the claimant's freedom to exercise religious rights**."

Alamo at 303. (Bold added)

Alamo then recognized that exempting religious institutions from minimum wage laws "would undoubtedly give petitioners and similar organizations an advantage over their competitors." *Id*. at 298–99.

The *Markel* decision does not even discuss *Alamo* and instead contradicts its holdings. There is no possible way to read *Alamo* as permitting the conclusion in *Markel* that religious institutions are exempt from minimum wage laws.

But *Alamo* remains controlling law. As the Supreme Court has instructed, its "decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (*Hohn v. U.S.* 524 U.S. 236, 252-253 (1998); see also *Mallory v. Norfolk Southern Railway Co.* 600 U.S. 122, 136-37 (2023) [Pennsylvania Supreme Court "clearly erred" in finding U.S. Supreme Court's intervening decisions "implicitly overruled" prior U.S. Supreme Court decision from 1917].) No subsequent Supreme Court decision has overruled *Alamo*, or even cast doubt on its analysis.

Yet the Ninth Circuit's holding in Markel stands in stark contrast to this Court's direction in *Alamo* that minimum wage laws (and claims based thereon) can be adjudicated even against religious employers.

Similarly, the Free Exercise Clause is violated if "the truth or verity of respondents' religious doctrines or beliefs [is submitted] to the jury." *United States v. Ballard*, 322 U.S. 78, 86 (1944). Meaning claims against religious entities are not barred by the Ministerial Exception if their merits can be adjudicated without adjudicating the truth of religious doctrines. But here, there was never any need to submit any religious doctrine or belief to the jury in order to adjudicate Markel's claims, nor does OU even argue Markel's claims would require such an adjudication of religious doctrines or beliefs.

These holdings by this Court, make absolutely clear that the Ministerial Exception has itself, many exceptions by which a religious institution may be regulated or sued for failure to pay a minister or for breach of its agreements.

It was contrary to this Court's numerous holdings for the Ninth Circuit to expand the ministerial exception so as to shield OU from all claims brought by Markel, including those based in contract and fraud.

II. THERE IS NOW A SPLIT AMONG THE CIRCUITS AS TO WHEN TO APPLY THE MINISTERIAL EXCEPTION, THE BREADTH OF THE MINISTERIAL EXCEPTION, AND THE APPLICABILITY OF MINIMUM WAGE LAWS TO RELIGIOUS INSTITUTIONS.

In affirming the dismissal of Markel's claims, the Ninth Circuit created a split of authority among the circuits. The Ninth Circuit's departure from this Court's precedent now conflicts with at least the Seventh and Tenth Circuits, with the latter two continuing to rule in

conformity with this Court's precedent. This Court should resolve the split.

Contrary to the Ninth Circuit's new and extremely broad application of the Ministerial Exception to every single claim by a minister against a religious institution, other circuits have followed this Court's application of the Ministerial Exception as barring only claims which impact the religious governance of an institution.

Following this Court's decision in *Our Lady,* the Tenth Circuit took up the application of the Ministerial Exception in the context of a wrongful termination claim by a teacher against a religious school. It held that "The 'ministerial exception' is a narrower offshoot of the broader church autonomy doctrine; it only precludes employment discrimination claims brought by a 'minister' against his religious employer." *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1028–29 (10th Cir. 2022). The court permitted the claims to proceed and clarified that "**the [ministerial] exception also applies more narrowly only to employment discrimination claims** asserted by a minister." *Id.* at 1029 (emphasis added).

Unlike the Ninth Circuit's decision in *Markel*, the Tenth Circuit in *Tucker* held the Ministerial Exception to be a narrow affirmative defense which does not categorically bar all claims by a minister against a religious institution.

Similarly, the Seventh Circuit has held for 70 years that laws which serve "to insure" workers a "wage sufficient to maintain a minimum standard of living" "necessary to their [health and] well-being," are critical to all workers,

without regard to the religious or non-religious nature of the work. *Mitchell v. Pilgrim Holiness Church Corp.* 210 F.2d 879, 884 (7th Cir. 1954) (religious employer bound by minimum wage law despite employer's first amendment claim and even though workers believed they were doing the Lord's work).

This split among the lower courts is certain to lead to divergent results and inconsistent applications of the same legal doctrine. Such a result favors the granting of Markel's petition by this Court.

A. The Ninth Circuit's Decision In *Markel* Conflicts With The D.C. Circuit's Holding That Religious Institutions May Properly Be Sued In Civil Court for Breaches of Their Agreements.

OU agreed to pay Markel an hourly rate for each hour worked as well as an overtime rate for all hours worked beyond eight hours. (App.89a, App.90a). Despite having a binding agreement the Ninth Circuit's decision precluded Markel from seeking to enforce this agreement because "[the ministerial exception] disallows lawsuits for damages based on lost or reduced pay . . . [and] Markel's claims . . . are all employment related." (App.6a).

But such a holding in *Markel* contradicts the D.C. Circuit's articulation of the law in *Minker v. Baltimore Ann. Conf. of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990).

In *Minker* the D.C. Circuit, citing this Court's 1871 decision, held that oral employment agreements between a

minister and a religious institution are binding and could absolutely be adjudicated and enforced in court even when the subject matter of the agreement involved religion:

> "We assume that the district superintendent did in fact promise to provide appellant with a congregation more suited to his training and skills in exchange for his continued work at the Mount Ranier Church. Such facts clearly would create a contractual relationship. **A church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court.** . . Even cases that rejected ministers' discrimination claims have noted that churches nonetheless 'may be held liable upon their valid contracts.'"

Minker v. Baltimore Ann. Conf. of United Methodist Church, 894 F.2d 1354, 1359 (D.C. Cir. 1990) (emphasis added) citing *Watson v. Jones*, 80 U.S. 679, 714, 20 L. Ed. 666 (1871).

The decision in *Minker* is in line with this Court's holdings as well state court holdings in both California and Kentucky including *Sumner v. Simpson Univ.*, 27 Cal. App. 5th 577, 593–94 (2018) (permitting adjudication of a minister's breach of contract claims against the religious institution employer) and *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 619 (Ky. 2014) (holding a seminary professor's breach of contract claims against his religious institution employer could proceed and were not barred by the ministerial exception or ecclesiastical abstention doctrine).

The Ninth Circuit's novel and contradictory approach to the ministerial exception now calls into question whether any contract with a religious institution may be enforced by its ministers, a matter of nationwide importance and upon which there is now no settled law.

B. The Ninth Circuit's *Markel* Decision Conflicts With Other Ninth Circuit Precedent.

In *Alcazar v. Corporation of the Catholic Archbishop of Seattle* 627 F.3d 1288 (9th Cir. 2010) the Ninth Circuit applied the Ministerial Exception to bar a seminarian's claims that his hours of religious training were actually compensable time because it would require adjudication of religious doctrine. *Alcazar* at 1292.

However, *Alcazar* began its opinion with the generally applicable law that:

> "**Churches**, like all other institutions, **must adhere to state and federal employment laws**. But the federal courts have recognized a "ministerial exception" to that general rule. The exception exempts a church's employment relationship with its "ministers" from the application of ***some*** employment statutes"

Alcazar at 1290 (emphasis added).

Alcazar went on to limit its own decision and leave open a variety of claims by a minister against a religious institution for unpaid wages:

> "Our holding today is limited. . . . **the ministerial exception may not apply to a seminarian who obtains employment with a church outside the scope of his seminary training**."

Alcazar at 1292 (emphasis added).

Alcazar, like *Hossana-Tabor* and *Our Lady* emphasized that there were instances where a minister would still be entitled to pay for the minister's work and could bring suit for unpaid wages against the religious institution.

The Ninth Circuit took the opposition position in ruling upon Markel's appeal when it endorsed a blanket application of the Ministerial Exception to *every single claim brought by any minister*, even if there is no religious issue for the Court to adjudicate.

Contrary to *Alcazar*, the Ninth Circuit here held that the Ministerial Exception is absolute and without any exceptions:

> **"By its terms, the rule permits no exceptions. It is categorical.** The ministerial exception encompasses **all** adverse personnel or tangible employment actions between religious institutions and their employees and disallows lawsuits for damages based on lost or reduced pay. See *Alcazar v. Corp. of Cath. Archbishop*, 627 F.3d 1288, 1293 (9th Cir. 2010) (en banc). **Thus, if OU is a religious organization and Markel is its minister, the exception applies to Markel's claims**, which are all employment related."

(App.6a, bold added).

The conflict between *Alcazar* and *Markel* is stark.

Alcazar expressly states that even a minister working for the church can still bring a claim for unpaid wages if the work was done *outside of seminary training*. By contrast, the *Markel* opinion ignores *Alcazar*'s language in favor of imposing a novel and rigid application of the Ministerial Exception which, to use the Ninth Circuit's words in *Markel*, "permits no exceptions" and bars every single claim by a minister against a religious institution.

The Ninth Circuit's decision also conflicts with the well established law in *Elvig v. Calvin Presbyterian Church* 375 F.3d 951 (9th Cir. 2004). In *Elvig*, the court allowed a minister's retaliation and hostile work environment claims to proceed where they presented no "doctrinal" questions. (*Id*. at p. 965.) Applying the Ministerial Exception narrowly, the Ninth Circuit barred only the minister's unlawful termination claims and those based on "tangible employment actions," which all implicated the church's ecclesiastical "choice of minister." (*Id.* at pp. 961, 966.)

The concurring opinion in *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 792 (9th Cir. 2005) repeated this Court's holdings that "[t]he First Amendment does not exempt religious institutions from all statutes that regulate employment." See also *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1100, fn. 1 (9th Cir. 2004) (holding **Ministerial Exception applies to statutes impinging on church's "prerogative to choose its ministers"** and does not apply on an unlimited basis.)

These conflicts within the Ninth Circuit and other circuits all merit the granting of the instant writ by this Court.

Without review by this Court, there is no unifying authority under which the lower courts are able to apply the ministerial exception.

1. Judge Sanchez's Concurrence Highlights Another Conflict Within the Ninth Circuit As to Whether This Court Has Overruled Prior Ninth Circuit Authority Interpreting the Ministerial Exception.

Judge Sanchez's concurrence in the Markel opinion points out (App.28a-29a and FN1) that the majority incorrectly concluded that *Bollard v. California Province of the Soc'y of Jesus,* 196 F.3d 940 (9th Cir. 1999) has been overruled by this Court in *Hosanna-Tabor.* Indeed, *Bollard* is still binding and the conflicts within the Ninth Circuit abound on this issue. Moreover, *Hosanna-Tabor* left open claims like Markel's, and *Bollard*'s language merely bars claims which impact a religious institution's ability to *select* its ministers. *Bollard at* 947.

III. THE NINTH CIRCUIT'S NEW DEFINITION OF "ADVERSE PERSONNEL OR TANGIBLE EMPLOYMENT ACTIONS" DIRECTLY CONFLICTS WITH THIS COURT'S WELL ESTABLISHED DEFINITION, THEREBY IMPACTING DOZENS OF TYPES OF CLAIMS BEYOND JUST MARKEL OR THE MINISTERIAL EXCEPTION.

In the *Markel* decision, the Ninth Circuit assumes without analysis or authority that Markel's claim for unpaid wages automatically meets the definition of an "adverse personnel or tangible employment action." (App.8a)

Using this erroneous assumption, the court found that Markel's claims were barred by the Ministerial Exception.

But the Ninth Circuit's definition contradicts this Court's own definition of the phrase "tangible employment action.":

> "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

This definition had been utilized by the Ninth Circuit in cases such as *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 960–61 (9th Cir. 2004).

The application by the Ninth Circuit of this new definition of "tangible employment action" without analysis and in this novel context calls into question the existing definition of "tangible employment action" as utilized by this Court. It brings uncertainty to a variety of claims which go well beyond the Ministerial Exception and alters all wrongful termination claims and other retaliation claims.

Not once has any Court prior to *Markel* held that the act of quitting and suing for unpaid wages qualifies as an "adverse personnel or tangible employment action." Nor has any court ever before held that a religious institution's decision not to pay wages because they believe the hours were not worked by the minister would ever fit the

definition of "adverse personnel or tangible employment action."

Instead, in the context of the Ministerial Exception, the "adverse personnel or tangible employment action" as addressed by this Court and Ninth Circuit prior to *Markel* always involved a decision by the religious institution regarding the hiring, firing, training, managing or disciplining of a minister.

Hosanna-Tabor was "an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her [for religious reasons" *Id.* at 196.

Our Lady involved two wrongful termination claims based upon discrimination where the religious institutions claimed a religious basis for the terminations. *Id.* at 870.

Alcazar involved a dispute about whether hours worked were religious training or not and the church claimed the hours worked were non-compensable religious training tasks. *Alcazar* at 1290-1292.

In *Elvig* an employee was terminated after claiming sexual harassment and this Circuit held such conduct was "our purview because it clearly involves the Presbytery's process of pastoral selection." *Elvig* at 961.

In *Schleicher v. Salvation Army*, 518 F.3d 472, 477 (7th Cir. 2008) the claim was for gender discrimination for failure to promote an employee which the Salvation Army claimed was based upon a religious decision. *Id.*

As this Court's holding in *Ellerth* made clear: **adverse or tangible employment action *necessarily* involves a change in employment status**. Such a definition fits squarely within the Ministerial Exception's articulated goal of allowing religious institutions to chart their own course by hiring, firing, training, managing or disciplining their ministers as they see fit.

But using the Supreme Court's definition, **Markel never suffered an adverse or tangible employment action because Markel quit** (App.4a, App.79a, App.80a) and never brought a claim for being disciplined, harassed or discriminated against or wrongfully terminated.

The Ninth Circuit has now changed the Supreme Court's definition of "tangible employment action" and this Court should grant Markel's petition and correct this definition or hundreds of different types of employment claims brought in every context will be impacted by the new definition.

IV. THE NINTH CIRCUIT'S DECISION CREATES AN UNCONSTITUTIONAL RELIGIOUS ESTABLISHMENT BY GRANTING PREFERENTIAL TREATMENT TO RELIGIOUS INSTITUTIONS BASED UPON MERE RELIGIOUS IDENTITY AND NOT ANY BELIEF.

This Court has clearly held that religious employers may not engage in commercial activity as specially privileged groups, free from the laws to which other businesses are bound:

> "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes that are binding on others in that activity."

United States v. Lee, 455 U.S. 252, 253 (1982) (religious employer bound by social security tax law where social security concept violated religious belief).

The Ninth Circuit's holding that the fact of OU's status as a religious entity bars all of Markel's claims runs afoul of the First Amendment's Establishment Clause. (See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet* 512 U.S. 687, 703 (1994) ["that government should not prefer one religion to another, or religion to irreligion" is "at the heart of the Establishment Clause"]; see also *Abington School District v. Schempp* 374 U.S. 203, 305(1963)(Goldberg, J., concurring, "The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion").

"To permit [religious beliefs to exempt criminal acts] would be to make the professed doctrines of religious belief superior to the law of the land. . . ." *Reynolds v. U.S.* 98 U.S. 145, 166-167 (1878).

This stance was reaffirmed by this Court one hundred years later in *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 291–92 (1985) when this Court held that exempting religious institutions from minimum wage laws "would undoubtedly give petitioners and similar organizations an advantage over their competitors." *Id.* at 298–99.

But in *Markel*, unlike in *Reynolds*, OU did not even assert it should be exempt based on a religious belief--the alleged exemption is based on the facts of religious identity. Meaning the Ninth Circuit's decision granted OU a general exemption from secular law and a specially privileged status based on religious identity, which is precisely what this Court prohibited in both *Our Lady* at 746 and *Lee* supra, 455 U.S. at 261.)

The Ninth Circuit's decision in *Markel* violates the Establishment Clause in that it exempts all religious institutions from ever having to comply with overtime laws and does not even require the religious institution to *argue* (not establish) a connection between the religious right being infringed and the application of the law.

Indeed, the record before the Court shows that OU has no religious or doctrinal objection to paying Markel overtime rates. The dispute between the parties is *whether the hours were worked by Markel*, not whether the hours are compensable.

OU even agreed in writing to pay Markel overtime rates (App.89a-App.90a). Similarly, OU testified that OU generally has a policy of paying overtime rates for overtime work and that same policy was applied to Markel. (App.72a-App.75a). OU also testified that Markel was actually paid for overtime work. (App.76a).

Despite these facts, the Ninth Circuit expanded the Ministerial Exception by granting religious institutions a blanket exemption from all wage and hour laws based upon religious identity without even a claim by OU that minimum wage and overtime laws relate to a religious decision or doctrine.

V. THE LEGAL ISSUES RAISED IN THE PETITION ARE OF NATIONAL AND WIDESPREAD IMPORTANCE AS COURT'S ARE NOW LEFT TO GRAPPLE WITH WHETHER OR HOW A RELIGIOUS INSTITUTION MAY BE SUED

Up until *Markel*, the Ministerial Exception provided a limited defense to religious institutions exclusively where a religious doctrine or religious issue would need to be adjudicated by the Courts.

The expansion of the Ministerial Exception by the Ninth Circuit calls into question whether federal, state and local agencies are permitted to regulate religious employers.

As it currently stands in the Ninth Circuit, it is unclear whether religious institutions will be required to comply with health and safety, minimum wage, overtime, meal and rest break and wage theft regulations, or whether a religious institution may do as they see fit with their ministers, even when it violates basic safety regulations.

Exempting all religious institutions from governmental regulations which protect the health and safety of their minister employees will have dire consequences and leave many Americans with unsafe workplaces and subject them to mistreatment and wage theft by their employer.

There is now a fundamental conflict of law which calls into question whether religious institutions can ever be sued by their minister employees.

Moreover, the decision grants religious institutions complete immunity, without any exceptions, for their fraud and breaches of contract against their minister employees

even if the religious institution's conduct has nothing to do with its management of its ministers or its religion.

Such a decision is of exceptional importance to every employee and every federal and state agency which regulates and protects employees. Similarly, the decision calls into question whether any minister can rely upon their contracts with religious institutions or whether society will enter a new phase where religious institutions can breach contracts with impunity and thereby be granted preferential treatment under the law.

Because the issues raised by the novel *Markel* decision are of national importance and go so far as to prevent government regulation of a religious institutions' mistreatment of their minister employees this writ petition should be granted.

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

Michael E. Friedman
Counsel of Record
Steven R. Friedman
FRIEDMAN² LLP
1880 Century Park East, Suite 1411
Los Angeles, CA 90067
(310) 273-2505
legalsolutionsemail@gmail.com

Counsel for Petitioner

May 21, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 30, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55088

YAAKOV MARKEL,

Plaintiff-Appellant,

v.

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, A CORPORATION; NACHUM RABINOWITZ, AN INDIVIDUAL; DOES, 1-100,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
John W. Holcomb, District Judge, Presiding

Argued and Submitted April 3, 2024
Pasadena, California

Filed December 30, 2024

Before: Ryan D. Nelson, Lawrence VanDyke, and Gabriel P. Sanchez, Circuit Judges.

Appendix A

Opinion by Judge R. Nelson;
Concurrence by Judge Sanchez

OPINION

R. NELSON, Circuit Judge:

We review the district court's holding that the First Amendment's ministerial exception applies to a *mashgiach*—an Orthodox Jew who supervises food preparation to ensure kosher compliance. Because the Union of Orthodox Jewish Congregations of America is a religious organization and a *mashgiach* is a minister, we affirm.

I

The undisputed evidence, with the facts construed in the light most favorable to Plaintiff Yaakov Markel, are as follows. From 2011 to 2018, Markel, an Orthodox Jewish man, worked for the Union of Orthodox Jewish Congregations of America (OU) as a *mashgiach*. A *mashgiach* is "an inspector appointed by a board of Orthodox rabbis to guard against any violation of the Jewish dietary laws"—colloquially known as "keeping kosher." *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 301 (4th Cir. 2004) (quotation marks omitted).

OU is organized as a 26 U.S.C. § 501(c)(3) not-for-profit corporation, and its mission is to serve the Orthodox Jewish community. It supports a network of synagogues,

providing religious programming, advocacy, and youth programs. One of OU's primary activities in service to its member synagogues is ensuring that kosher food is widely available. To that end, it runs the largest kosher certification program in the United States. That program provides most of OU's revenues. It uses those revenues to support its youth, teen, and educational programming, and to further its core religious mission of serving the Orthodox Jewish community.

A team administers OU's kosher program. The team includes *poskim* (preeminent scholars on Jewish law); senior administration; rabbinic coordinators; *mashgichim* (the plural of *mashgiach*), such as Markel; and rabbinic field representatives. Markel was responsible for the kosher integrity of grape products at two wineries, and thus served OU's kosher team. Grape products are unique in Jewish dietary law because—to be kosher—only Orthodox Jews can handle them until they are *mevushal* (sufficiently cooked or boiled). To qualify to serve as a *mashgiach*, Markel needed to submit a letter from an Orthodox rabbi certifying that he was Sabbath observant, knowledgeable about kosher law, and compliant with the same. If Markel had questions about Jewish law, he would often (though not always) ask *poskim* for instruction and direction.

After several years, Markel's relationship with OU soured. Markel claims that his supervisor, Rabbi Nachum Rabinowitz, promised him a promotion and a raise. He allegedly received neither. He also claims that OU withheld from him certain compensation for overtime.

OU, in turn, denies that Markel was denied any owed compensation.

Markel resigned and filed suit, bringing wage and hour and fraud and misrepresentation claims against both OU and Rabbi Rabinowitz (collectively Appellees). Appellees moved for summary judgment, invoking the ministerial exception. As a matter of first impression—at least in this circuit—the district court held that a *mashgiach* is a "minister" within Orthodox Judaism and that OU is a religious organization. *Markel*, 648 F. Supp. 3d at 1190-96. Given this, the district court held that Markel's claims—including those brought against Rabbi Rabinowitz—were categorically barred by the ministerial exception because they were employment related. *Id.* at 1195-96. Markel appealed.

II

We review a grant of summary judgment de novo. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1029-30 (9th Cir. 2004). Summary judgment is appropriate when "there is no genuine dispute [of] material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

III

The First Amendment prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Religion

Clauses collectively "protect[] the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 737, 140 S. Ct. 2049, 207 L. Ed. 2d 870 (2020) (*Our Lady*) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116, 73 S. Ct. 143, 97 L. Ed. 120 (1952)). From this general principle of church autonomy stems the "ministerial exception," which precludes the application of "laws governing the employment relationship between a religious institution and certain key employees." *Id.*

The ministerial exception "protect[s] [a religious institution's] autonomy with respect to internal management decisions," which includes the "selection of the individuals who play key roles." *Id.* at 746. "[A]ny attempt . . . to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Id.* Thus, the Religion Clauses require deference to a "religious institution's explanation of the role of [its] employees in the life of the religion in question." *Id.* at 757. As a result, "it is impermissible for the government to contradict a church's determination of who can act" as one of these mission-critical employees. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 185, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012). "[C]ourts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady*, 591 U.S. at 746.

By its terms, the rule permits no exceptions. It is categorical. The ministerial exception encompasses all adverse personnel or tangible employment actions between religious institutions and their employees and disallows lawsuits for damages based on lost or reduced pay. *See Alcazar v. Corp. of Cath. Archbishop*, 627 F.3d 1288, 1293 (9th Cir. 2010) (en banc). Thus, if OU is a religious organization and Markel is its minister, the exception applies to Markel's claims, which are all employment related. We address each in turn.

A

Because the ministerial exception only applies to disputes between "religious institutions" and their "ministers," *see Hosanna-Tabor*, 565 U.S. at 188-89, we first consider whether OU is a religious institution. Markel argues that OU is not religious because its kosher food certification program turns a profit and because OU competes with for-profit kosher certification companies in the market. The act of profiting, or competing with for-profit companies, however, does not inherently make an organization non-religious for purposes of the ministerial exception. Nor does it do so on these facts.

The Supreme Court has never defined what a "religious institution" is. Nor have we in the context of the ministerial exception. But the Court has declined to adopt a "rigid formula" for determining when an employee is a "minister." *Our Lady*, 591 U.S. at 737 (citing *Hosanna-Tabor*, 565 U.S. at 190-91). We likewise decline to adopt such a formula for determining whether an institution is

religious. That said, the considerations below, though far from exhaustive, are relevant metrics.

We start with *Our Lady*, the Court's most recent ministerial exception opinion in which the Supreme Court reversed two decisions that originated in the Ninth Circuit.[1] The defendants were Our Lady of Guadalupe School and St. James School, both Catholic primary schools in Los Angeles. *Id.* at 738, 743. The Court implicitly held that both were "religious institutions" by holding the ministerial exception applied. *Id.* at 762. The Court explained that the schools had "religious mission[s] . . . of educating and forming students in the faith." *Id.* Thus, "judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Id.* That these schools charged tuition fees or competed to some extent with other private schools in the market was of no moment. All that mattered was that the schools had a religious mission. We see no reason to deviate from that broad understanding of what constitutes a religious organization. The acceptance of revenue does not deprive an organization with a religious mission of First Amendment protections.

Other guiding principles can be found in our cases defining "religious organization" in statutes. There too, we have expressly rejected Markel's limited understanding

1. In the Supreme Court, *Our Lady* was considered together with *St. James School v. Biel*, No. 19-348, another case that originated in our court. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 679, 205 L. Ed. 2d 448 (2019).

of religious organizations. Consider Title VII. In *Spencer v. World Vision*, we considered whether a not-for-profit, faith-based, humanitarian organization was exempt from Title VII's general prohibition against religious discrimination. 633 F.3d 723, 724 (9th Cir. 2011) (per curiam). Under 42 U.S.C. § 2000e-1(a), Title VII does not apply to a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion." This closely mirrors the ministerial exception. The majority explained that an entity is "religious" if (1) "it is organized for a religious purpose," (2) it "is engaged primarily in carrying out that religious purpose," (3) it "holds itself out to the public as an entity for carrying out that religious purpose," and (4) it "does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Spencer*, 644 F.3d at 724. Though we do not adopt this test wholesale, it tracks the guidance in *Our Lady* and may be looked to when considering whether defendants are religious organizations.

Spencer's first three prongs all point toward OU being a religious organization. First, it is undisputed that OU was organized to support the Orthodox Jewish community, as shown in its articles of incorporation. Indeed, OU's activities primarily serve this purpose, including by providing religious programming to its community of synagogues to "promo[te] traditional, or Orthodox, Judaism worldwide." For example, OU provides youth and teen programs, as well as educational services to special-needs students. And OU, of course, holds itself out to the public as religious.

The last prong merits further discussion. Markel claims OU cannot satisfy prong four because OU's kosher certification program generates revenue. But, as we discussed above, the presence of revenue does not make OU non-religious. For that reason, *Spencer*'s fourth prong, while helpful, should not be applied literally when analyzing whether a religious organization is protected under the First Amendment.[2] OU may generate revenue, but it is still a tax-exempt 501(c)(3) organization. So its revenue does not benefit any private interest.[3] Rather, like all 501(c)(3) organizations, any earnings must be used for exempt purposes. OU uses its earnings for religious and educational purposes, including supporting its "youth, teen, and educational programming" as well as its "core mission." Markel's claim that OU cannot be religious because it generates revenue conflicts with our tax code and would elevate one prong in *Spencer* above all the

2. The Supreme Court has held, for example, that persons are not stripped of statutory protections for religious beliefs simply because they organize their businesses as for-profit corporations. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) (The "plain terms of [the Religious Freedom Restoration Act of 1993] make it perfectly clear that Congress did not discriminate in this way against [persons] who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.").

3. IRS, *IRS Exemption Requirements – 501(c)(3) Organizations*, https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations ("no part of a section 501(c)(3) organization's net earnings may inure to the benefit of any private shareholder or individual.").

others. Nothing in *Spencer* compels such a result, which is inconsistent with what happened in *Our Lady*. The essence of the *Spencer* inquiry points in only one direction—OU is a religious organization.

B

Having decided that OU is a religious organization, we turn to whether Markel was its minister. We first recognize that the "ministerial exception encompasses more than a church's ordained ministers." *Alcazar*, 627 F.3d at 1291 (collecting cases). Indeed, "most faiths do not employ the term 'minister,' and some eschew the concept of formal ordination." *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring). Perhaps recognizing this, the Supreme Court has declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Our Lady*, 591 U.S. at 750 (quoting *Hosanna-Tabor*, 565 U.S. at 190). That said, the Court has provided ample guidance. We first review the Court's recent precedent for how to assess whether Markel is a minister.

We start with *Hosanna-Tabor*. There, Cheryl Perich was a "called teacher" employed by Hosanna-Tabor, a member congregation of the Lutheran Church—Missouri Synod. *Hosanna-Tabor*, 565 U.S. at 177-78. "'Called' teachers are regarded as having been called to their vocation by God through a congregation." *Id.* at 177. She taught elementary students multiple subjects, including "a religion class four days a week." *Id.* at 178. She also "led the students in prayer and devotional exercises each day[] and attended a weekly school-wide chapel service."

Id. Twice a year, she led this chapel service herself. *Id.* Perich was terminated by Hosanna-Tabor because medical issues precluded her from doing her job. *Id.* at 179. She filed a charge with the Equal Employment Opportunity Commission, who then filed suit against Hosanna-Tabor. *Id.* at 180. Perich intervened. *Id.*

The Supreme Court held that the ministerial exception barred consideration of Perich's claims. *Id.* at 190. Ministers, the Court explained, are "not limited to the head of a religious congregation." *Id.* Rather, Perich was a minister because she was chosen to "preach [a religious institution's] beliefs, teach their faith, and carry out their mission." *See id.* at 196.

To arrive at this conclusion for Perich, the Court "identified four relevant circumstances but did not highlight any as essential." *Our Lady*, 591 U.S. at 750 (discussing *Hosanna-Tabor*). First, Hosanna-Tabor "held Perich out as a minister, with a role distinct from that of most of its members." *Hosanna-Tabor*, 565 U.S. at 191. Second, "Perich's title as a minister reflected a significant degree of religious training followed by a formal process of commissioning." *Id.* Third, Perich "held herself out as a minister of the Church by accepting the formal call to religious service." *Id.* at 191-92. Finally, Perich's "job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 192. This conclusion held even though "others not formally recognized as ministers by the church perform the same functions." *Id.* at 193. Nor did it matter that "her religious duties consumed only 45 minutes of each workday" while the rest was "devoted to teaching secular subjects." *Id.*

The Court next applied the ministerial exception in *Our Lady*. There, the Court considered whether two Catholic school teachers were mission-critical employees. 591 U.S. at 738. The Court held that they were. *Id.* at 762. In the process, the Court did not mechanically apply *Hosanna-Tabor*'s factors, and thus did not "demand[] . . . a 'carbon copy' of the [same] facts." *Id.* at 745-46 (citing *Biel v. St. James Sch.*, 926 F.3d 1238, 1239 (9th Cir. 2019) (R. Nelson, J., dissenting from denial of rehearing en banc)). The Court explained that such an approach would be "contrary to [the Court's] admonition" not to "impos[e] any 'rigid formula.'" *Id.* at 757-58 (quoting *Hosanna-Tabor*, 565 U.S. at 190).

To make this clear, the Court identified ways that strict application of *Hosanna-Tabor* did not dictate the outcome. For example, the Court acknowledged that both plaintiffs had "less religious training than Perich," but did not regard this as dispositive. *Id.* at 738. The Court also explained that "[s]imply giving an employee the title of 'minister' is not enough to justify the exception," and "by the same token, since many religious traditions do not use the title 'minister,' it cannot be a necessary requirement." *Id.* at 752. Requiring such a title would likely "constitute impermissible discrimination." *Id.*

Our Lady thus rejected attempts in the lower courts to turn the *Hosanna-Tabor* guideposts into a one-size-fits-all test. *Id.* But *Our Lady* extols one of its factors above all—the one that concerns the employee's "role" within the religious organization. *See id.* at 757. As the Court explained, "[t]he circumstances that informed [the Court's]

decision in *Hosanna-Tabor* were relevant because of their relationship to Perich's 'role in conveying the Church's message and carrying out its mission.'" *Id.* at 751-52 (quoting *Hosanna-Tabor*, 565 U.S. at 192). Put differently, those factors showed Perich's mission-critical role and purpose, but they were not "necessarily important[] in all other cases." *Id.* at 752. "What matters, at bottom, is what an employee does." *Id.* at 753.

Our Lady thus clarifies that a faith's minister broadly includes any individual "essential to the institution's central [religious] mission." *Id.* at 746. Since the "very reason for the existence" of Catholic schools was the "religious education and formation of students," the "selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission." *Id.* at 738. Thus, because the school's "religious mission entrusts [its] teacher[s] with [such] responsibility," "judicial intervention into disputes between the school and teacher threatens the school's independence in a way that the First Amendment does not allow." *Id.* at 762.

Our Lady thus recognized a broad view of who counts as a minister for purposes of the ministerial exception. Indeed, the Supreme Court reversed our prior narrow view of who counts as a minister. *Id.* at 758, 760-61 (rejecting the Ninth Circuit's prior test as "rigid" and "distorted"); *see also Biel*, 926 F.3d at 1239-40 (R. Nelson, J., dissenting from denial of rehearing en banc) (noting the "narrow construction" adopted in *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018), and *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460 (9th

Cir. 2019), should be reversed). If individuals "perform[] vital religious duties," they are "ministers" of that faith for purposes of the ministerial exception. *See Our Lady*, 591 U.S. at 756.

Applying both *Hosanna-Tabor* and *Our Lady*, and considering the Religion Clauses, Markel was OU's minister, and thus the ministerial exception applies. We first recognize, as the Supreme Court did, that "Judaism has many 'ministers'" because "the term 'minister' encompasses an extensive breadth of religious functionaries in Judaism." *Id.* at 752 (internal citation omitted). And we conclude that Markel's role as a *mashgiach* was "essential to [OU's] [religious] mission." *Id.* at 746. It thus follows that he was OU's minister.

As a head *mashgiach* for two wineries, Markel was responsible for the kosher integrity of its grape products. *Kashruth*, or "keeping kosher," is essential to observing Orthodox Judaism, and OU's central mission is to support Orthodox Jews as they strive to fully live their faith. To fill that role, Markel had to submit a letter from an Orthodox rabbi certifying that he was an observant Jew, including that he kept the Sabbath and followed kosher laws. A core part of the ministerial exception's purpose is to protect a religious institution's autonomy to "select[] . . . the individuals who play certain key roles" that are "essential to the institution's central mission." *Id.* Because only observant Orthodox Jews can serve as *a mashgiach* for the OU, and because they are necessary to carrying out OU's religious mission of "ensuring the wide availability of kosher food," a *mashgiach* is a minister for purposes of the ministerial exception.

In so holding, we join the Fourth Circuit, which held that a *mashgiach* is a Jewish minister. *See Shaliehsabou*, 363 F.3d at 301. There, the plaintiff, Shaliehsabou, worked as a *mashgiach* at Hebrew Home, a Jewish-affiliated elder care home. *Id.* at 308-09. His "basic responsibility [at the Hebrew Home] was to guard against any violations of Jewish dietary law." *Id.* at 303 (citation omitted) (alteration in original). Shaliehsabou "alleged that [] Hebrew Home failed to pay him overtime wages as required by federal and state laws." *Id.* at 304. The Fourth Circuit held that the ministerial exception barred Shaliehsabou's claims. *Id.* at 311.

Shaliehsabou raised the same objections to the ministerial exception as Markel does here. These were that (1) "his primary duties [were] not ministerial," *id.* at 307-08, and (2) "the Hebrew Home [was] not a religious institution," *id.* at 308. Markel argues similarly that his job did not involve any religious duties, but was factory or food services work, not religious work. Shaliehsabou also argued that "apart from being an Orthodox Jew, no special training is required to serve as a *mashgiach*." *Id.* (emphasis added). Markel claims the same.

The Fourth Circuit agreed with Hebrew Home. Comparing Shaliehsabou's role to others deemed to be ministerial, such as music ministers or communications managers, the court did not "see any meaningful distinction." *Id.* at 308-09. "Shaliehsabou's duties required him to perform religious ritual," and he "occupied a position that is central to the spiritual and pastoral mission of Judaism." *Id.* at 309. Because of this, "failure

to apply the ministerial exception [to a *mashgiach*] would denigrate the importance of keeping kosher to Orthodox Judaism." *Id.*

Shaliehsabou's reasoning—which predated *Hosanna-Tabor* and *Our Lady*—is even more compelling considering the Supreme Court's subsequent decisions. Our holding today thus squarely follows the Fourth Circuit's lead twenty years ago. Failing to apply the ministerial exception here would inappropriately denigrate the Jewish faith. Just like Hebrew Home, OU has represented that Markel served as "the vessel through whom compliance with the *kashruth* was ensured" for those that purchased OU's kosher grape products. Thus, while Markel identifies ways that this case is dissimilar to *Hosanna-Tabor*, such as that he was not a Rabbi, had no formal title, and did not receive religious training from OU, these distinctions do not control our analysis. It would be inappropriate to require the same factors be met here as in *Hosanna-Tabor*, given the differences between Lutheranism and Orthodox Judaism. *Cf. Our Lady*, 591 U.S. at 752-53. All that matters is that Markel played a role in "carrying out [OU's religious] mission," *see id.* at 752, of providing kosher-certified foods so that Orthodox Jews could observe their faith. There is no material dispute of fact that he did. He is thus a minister.

C

Finally, we clarify the scope and purpose of the ministerial exception. Markel argues that it should not apply here because his dispute with OU is secular. Put

differently, Markel invites us to create a rule that if a religious purpose did not animate the relevant employment decisions, then the ministerial exception should not apply, and the case should be allowed to proceed to discovery. Markel claims discovery would not create a constitutional issue here because no "religious decision" was involved.

Markel's argument raises two separate, but related issues. First, can issues involving a religious institution ever be bifurcated into being either "religious" or "non-religious?" And second, does a religious institution need to identify a "religious" justification for its employment-related decisions to invoke the ministerial exception? The answer to both questions is no. Delineating a religious organization's decisions between religious and secular would create excessive entanglement between the church and state, given the coercive nature of the discovery process. Nor would it be appropriate. A religious institution's decisions, even if facially secular, are often intertwined with religious doctrine. By that same token, our cases forbid religious institutions from requiring a religious justification for their decisions. We thus reiterate that a religious organization need not provide any religious justification to invoke the ministerial exception.

1

To address the first question, we look to the Establishment Clause's original public meaning. *See Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 19, 60, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019) ("look[ing] to history for guidance" to interpret the Establishment Clause); *see also*

Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 950 (9th Cir. 2021) (R. Nelson, J., dissenting from denial of rehearing en banc) (A "history-based test is not *a* way to approach Establishment Clause cases . . . [but] *the* way." (citation omitted) (emphasis in original)). As explained earlier, its fundamental purpose was to disentangle government and religion, or to prevent excessive entanglement. It was drafted under the backdrop of the established Church of England, over which the King of England and Parliament exercised significant control, not only in matters of personnel, but also in matters of doctrine and worship. *Hosanna-Tabor*, 565 U.S. at 182-83. This type of established religion was present in the colonies too. "[F]or example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England." *Lee v. Weisman*, 505 U.S. 577, 641, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) (Scalia, J., dissenting).

"The Framers"—and the American public—thus "understood an establishment necessarily to involve actual legal coercion." *Van Orden v. Perry*, 545 U.S. 677, 693, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (Thomas, J., concurring) (cleaned up); *see District of Columbia v. Heller*, 554 U.S. 570, 576, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) ("the Constitution was written to be understood by the voters" at the time it was ratified). And the "coercion that was a hallmark of historical establishments was coercion of religious orthodoxy." *Lee*, 505 U.S. at 640 (Scalia, J., dissenting); *see Our Lady*, 591 U.S. at 747 ("The constitutional foundation for our holding was the general principle of church autonomy to which we have already

referred: independence in matters of faith and doctrine."). "Orthodoxy" is broad and includes a religion's "belief[s] or practice[s]."[4] The ministerial exception thus must be robust enough to disallow the government, including the judiciary, from ever parsing out or defining for any religion what its beliefs or practices are.

Here, OU represents that it is generally recognized within Orthodox Judaism that a *mashgiach* fills a key role in helping Orthodox Jews practice their religion. This representation falls within the scope of "orthodoxy," given that it touches on both Jewish beliefs, including about Jewish law, and Jewish practices—"keeping kosher." Thus, since OU's representation concerns its "orthodoxy," this ends our inquiry into whether OU's practices are central to its religious mission. Any other approach would permit the government to involve itself in matters of a religion's orthodoxy. "The First Amendment outlaws such intrusion." *Our Lady*, 591 U.S. at 746.

Consider the Supreme Court's decision in *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979). There, the Court considered whether teachers in religious schools who taught both religious and secular subjects are subject to the National Labor Relations Act, and if so, whether this violated the First Amendment. *Id.* at 491. At the time, the Board distinguished between "completely religious" and "merely religiously associated" schools, exercising

4. *Webster's New International Dictionary* 1594 (3d ed. 2002).

jurisdiction only over the latter. The Court rejected this binary, explaining that "religious doctrine" can always be—and often is—intertwined with "secular" things. *See id.* at 501-03. Put differently, excessive entanglement is unavoidable, because even if an issue seems secular, a minister's "handling of the subject [may] not [be]." *Id.* at 501. And the harm would not just stem from the government *reaching* conclusions about a religion and its ministers. Instead, "the very process of inquiry leading to findings and conclusions" "may [itself] impinge on rights guaranteed by the Religion Clauses."[5] *Id.* at 502.

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5. This is not, of course, to say that all discovery is impermissible. As the Seventh Circuit recently explained, "The ministerial exception's status as an affirmative defense makes some threshold inquiry necessary . . . [but] discovery to determine who is a minister differs materially from discovery to determine how that minister was treated." *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 983 (7th Cir. 2021) (en banc). Discovery must be limited to whether an employee is ministerial—the First Amendment generally prohibits merits discovery and trial.

We also agree with other courts who have recognized that the ministerial exception can be raised by courts sua sponte if considering a claim would risk entangling the judiciary in religious issues in violation of the Religion Clauses. *See Billard v. Charlotte Cath. High Sch.*, 101 F.4th 316, 325 (4th Cir. 2024) ("because the ministerial exception 'implicate[s] important institutional interests of the court,' we retain discretion to raise and consider it *sua sponte* – even if waived"); *see also Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) ("the exception is rooted in constitutional limits on judicial authority"); *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 459-60, 317 U.S. App. D.C. 343 (D.C. Cir. 1996) (same).

Later cases raised similar concerns with allowing the government—including the courts—to scrutinize religious decisions. The Supreme Court explained that "[i]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. . . . [A]nd an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987).

We decline to impose such a burden on religious organizations or to subject them to a concern that their religious beliefs are being judicially misunderstood or unfairly maligned. To conclude otherwise could mean that "[f]ear of potential liability [would] affect the way an organization carried out what it understood to be its religious mission," *id.*, contrary to the First Amendment's protections. Given the risk that stems from the process of judicial inquiry itself, we reject Markel's argument that the ministerial exception is inapplicable because his dispute involves only "secular" issues. This distinction not only lacks constitutional significance but would lead to unconstitutional judicial action.

2

Having clarified that a religious institution's decisions should not be delineated between "religious" and "secular," we reiterate that the ministerial exception forbids courts from requiring religious institutions to proffer a religious justification before invoking the exception.

We decided this issue in *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999). There, the plaintiff, who was training to be a priest, sued his religious employer alleging severe sexual harassment. *Id.* at 944. The defendants did not offer a religious justification for the harassment the plaintiff experienced. *Id.* at 947. To the contrary, "they condemn[ed] it as inconsistent with their values and beliefs." *Id.* And the defendants wanted plaintiff as a minister of the Catholic faith and "enthusiastically encouraged [his] pursuit of the priesthood." *Id.* But the sexual harassment was so severe that the plaintiff alleged he was constructively discharged. *Id.* at 944.

Even though there was no religious justification offered, we explained that the "ministerial exception lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decision." *Id.* We explained that "[t]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it." *Id.* (citation omitted). Thus, *Bollard* recognized that any inquiry or scrutiny into a religious justification (or lack thereof) for a tangible employment action is per se unconstitutional.[6]

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6. Even so, *Bollard* did not apply the ministerial exception. It concluded that the damages the employee sought were "limited and retrospective" and therefore did not intrude into the religious organization's religious decisions. *Id.* at 950. *Hosanna-Tabor* has since made clear that the ministerial exception bars damages claims for adverse employment actions that fall under the ministerial exception since "[a]n award of such relief would operate

The Seventh Circuit in *Demkovich*, 3 F.4th at 973, reached a similar conclusion. There, the plaintiff, a music director for a Catholic parish, was fired allegedly because he was gay. *Id.* He sued, and the defendants invoked the ministerial exception. *Id.* at 973-74. The district court held that the ministerial exception did not apply because the religious organization did not "proffer[] a religious justification for [its] alleged conduct." *Id.* at 974.

The Seventh Circuit reversed. It recognized that "a minister's legal status . . . differs from nonreligious employment, or even from nonministerial employment within a religious organization," because "[r]eligion permeates the ministerial workplace." *Id.* at 978-79. So, "[t]he contours of the ministerial relationship are best left to a religious organization, not a court." *Id.* at 979. The court thus rejected the idea that a religious organization needed to provide any religious justification for its ministerial relationships, explaining that "[t]o do so would contravene the Religion Clauses" and "lead to impossible intrusion into, and excessive entanglement with, the religious sphere." *Id.* at 980. We agree.

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as a penalty on the Church for terminating an unwanted minister." 565 U.S. at 194. *Bollard*'s suggestion that damages are permissible against religious organizations where the ministerial exception is triggered is impossible to reconcile with *Hosanna-Tabor*. To the extent there is any debate about that question, that portion of *Bollard* is overruled. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003). Judge Sanchez addresses a different issue—whether the ministerial exception bars *all* damages actions against a religious institution by a ministerial employee. Concurrence at 28-29 n.1. That issue is neither raised nor addressed in this case.

Both *Bollard* and *Demkovich* show that religious organizations need not have a specific religious purpose to invoke the ministerial exception. Such a narrow conception of religiousness would contradict Supreme Court precedent, *cf. Cath. Bishop*, 440 U.S. at 501-03; *see also Hosanna-Tabor*, 565 U.S. at 194 ("The purpose of the ministerial exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."), and our own. Having determined that Markel was a ministerial employee, we also conclude that OU was not required to provide a religious reason for its actions.

IV

Finally, we address who the ministerial exception protects. Markel brings claims against both his former employer and his former supervisor. We have not yet considered whether the exception protects a plaintiff employee's supervisor or other religious leaders as well as the plaintiff's religious employer. Given the broad purpose of the ministerial exception, however, we conclude that it protects a religious organization's supervisors and religious leaders from claims brought by ministerial employees.

The Seventh Circuit's decision in *Demkovich* is again helpful in answering this question. There, the plaintiff's allegations "center[ed] on his relationship with his fellow minister and supervisor," and what "one minister[] said to another," 3 F.4th at 977-80, just as Markel's allegations do here. The court recognized that "[h]ow one minister

interacts with another, and the employment environment that follows, is a religious, not judicial, prerogative." *Id.* at 980. Thus, "[a]djudicating [the plaintiff's] allegations of minister-on-minister [misconduct] would not only undercut a religious organization's protected relationship with its ministers, but also cause civil intrusion into, and excessive entanglement with, the religious sphere." *Id.* at 977-78.

Nothing about the constitutional analysis changes if the defendant is another minister. Substantively, litigation would still permit a court to "prob[e] the ministerial work environment," which would "interfere[] with the Free Exercise Clause." *Id.* at 980. Procedurally, discovery would still result in "depositions of fellow ministers and the search for a subjective motive behind the alleged hostility," which would create excessive government entanglement, no matter who the defendant was. *See id.* at 983. Once more, "the very process of inquiry" in considering claims brought by one minister against another regarding tangible employment actions "may impinge on rights guaranteed by the Religion Clauses." *Cath. Bishop*, 440 U.S. at 502.

Since the same constitutional harm looms regardless of whether an employee-plaintiff's employment-related claims are against the religious organization or its leaders, we hold that the ministerial exception protects both. Given this, we affirm the district court's dismissal of the claims against Rabbi Rabinowitz.[7]

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7. We grant Appellees' motion for judicial notice of an amicus brief filed with the Supreme Court in *Our Lady*, 591 U.S. 732. *See*

V

OU is a religious organization and Markel is its minister. Markel's claims implicate a tangible employment decision. And the ministerial exception protects both religious organizations and religious leaders. Accordingly, the ministerial exception bars claims brought by Markel against either OU or its leadership.

AFFIRMED.

Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006).

SANCHEZ, Circuit Judge, concurring in part and concurring in the judgment:

I agree with my colleagues that the ministerial exception applies under the facts of this case. As a head mashgiach who ensured the kosher certification of grape products, Yaakov Markel's work was essential to the spiritual mission of his employer, the Union of Orthodox Jewish Congregations of America ("Orthodox Union"). The record makes clear that the Orthodox Union is a not-for-profit religious organization whose purpose is to promote and serve the Orthodox Jewish community, including by fostering a central tenet of Orthodox Jewish faith—the observance of dietary laws. Because Markel qualifies as a minister, his claims challenging the Orthodox Union's "tangible employment actions" are barred under the ministerial exception. *See Alcazar v. Corp. of Cath. Archbishop of Seattle*, 598 F.3d 668, 674 (9th Cir. 2010) (*Alcazar I*), adopted in part, 627 F.3d 1288 (9th Cir. 2010) (en banc) (*Alcazar II*); *see also Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 308-09 (4th Cir. 2004).

I do not join Section III.C. or in the majority's conclusion that the Supreme Court has taken a "broad" view of who counts as a minister in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 140 S. Ct. 2049, 207 L. Ed. 2d 870 (2020). *Our Lady* counsels a "flexible" approach for determining when a religious organization's employee may qualify as a minister, but

the exception itself is neither broad nor narrow. *See id.* at 752-53. Indeed, *Our Lady* recognized that "[t]his does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id.* at 746; *see also Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 196, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012) ("express[ing] no view on whether the [ministerial] exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.").

Nor have our own cases read the ministerial exception broadly. In *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999), we held that a Title VII claim of sexual harassment against a Jesuit order was not barred under the ministerial exception because the claim did not involve the Church's "choice of representative" or any other "adverse personnel action." *Id.* at 947. Nor was the Church "offer[ing] a religious justification for the harassment Bollard alleges," and there was thus "no danger that, by allowing this suit to proceed, we will thrust the secular courts into the unconstitutionally untenable position of passing judgment on questions of religious faith or doctrine." *Id.*[1]

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1. The majority's assertion that *Bollard* was overruled in part by *Hosanna-Tabor* is wrong in its characterization of both *Bollard* and *Hosanna-Tabor*. See Maj. Op. at 23, n.6. As the majority acknowledges in the same footnote, *Bollard* did not

In *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), we similarly did not adopt a broad or narrow view of the ministerial exception. The plaintiff, an ordained minister, alleged she was sexually harassed by the Church's pastor and fired for reporting it. *Id.* at 953-54. To the extent her claims involved an inquiry into the Church's decision to terminate her employment, that inquiry was foreclosed because it involved "the Church's decision-making about who shall be a minister of the Church—a decision clearly within the scope of the ministerial exception." *Id.* at 958 (citing *Bollard*, 375 F.3d at 947). But the plaintiff's narrower sexual harassment and retaliation claims were allowed to proceed because they did not implicate a protected employment decision,

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apply the ministerial exception because "the issue in [that] case [was] whether Bollard was subjected to sex-based harassment by his superiors that was sufficiently severe or pervasive as to be actionable under Title VII." 196 F.3d at 949. *Bollard* does not suggest, as the majority contends, that damages are permissible where the ministerial exception is triggered because the ministerial exception was never triggered. *See id.* at 947. Nor did *Hosanna-Tabor* overrule *Bollard* in any way. *Hosanna-Tabor* expressly did not address whether the ministerial exception applies in suits involving tortious conduct by a religious employer, 565 U.S. at 196, and indeed, the Court cited *Bollard* with approval in concluding that the ministerial exception operates as an affirmative defense to an otherwise cognizable claim. *See id.* at 195 n.4. *Hosanna-Tabor* does not address—much less undermine—*Bollard*'s conclusion that a retrospective damages suit for sexual harassment against a religious employer was not barred by the First Amendment. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (explaining "clearly irreconcilable" standard).

and as in *Bollard*, the Church did not offer a religious justification for the alleged sexual harassment. *Id.* at 959, 962.

The ministerial exception thus requires a nuanced analysis "that respects both the individual rights Congress enacted and a church's constitutional right to be free of doctrinal interference." *Id.* at 969. Under the exception, "courts are bound to stay out of *employment* disputes involving those holding certain important positions with churches and other religious institutions," such as in "the selection of the individuals who play certain key roles" within the institution. *Our Lady*, 591 U.S. at 746 (emphasis added). As the majority notes, if individuals "perform[] vital religious duties" that lie "at the core of the mission" of the religious institution, they are "ministers" for purposes of the ministerial exception. *Id.* at 756.

This case does not require us to adopt either a broad or narrow view of the ministerial exception, or to wade into questions about whether a court can differentiate between "secular" or "religious" decisions.[2] To the extent the

2. Such analysis is unnecessary because once an employee is determined to be a minister, it does not matter whether the religious institution invokes a religious justification for its employment decision. *See Hosanna-Tabor*, 565 U.S. at 194-95 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone.") (cleaned up).

majority suggests that the ministerial exception also bars non-employment-related claims brought by a ministerial employee, that view is at odds with both Supreme Court and circuit precedent.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED JANUARY 3, 2023

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No.: 2:19-cv-10704-JWH-SK

YAAKOV MARKEL,

Plaintiff,

v.

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, A CORPORATION; NACHUM RABINOWITZ, AN INDIVIDUAL; AND DOES 1-100,

Defendants.

Filed Janury 3, 2023

MEMORANDUM OPINION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR JUDICIAL NOTICE [ECF NOS. 56 & 67]

This case calls upon this Court to determine whether the First Amendment's "ministerial exception" applies to a *mashgiach*—an individual who serves as on-site

supervisor and inspector to ensure that a restaurant, winery, or other food service establishment is acceptably kosher under the Jewish religion. This Court concludes that, under the facts presented here, the "ministerial exception" forecloses the employment-related claims of the *mashgiach*-Plaintiff Yaakov Markel.

Before the Court are (1) the motion of Defendants Union of Orthodox Jewish Congregations of America (the "*OU*") and Rabbi Nachum Rabinowitz for summary judgment; and (2) Defendants' request for judicial notice.[1] After considering the papers filed in support and in opposition,[2] as well as the oral argument of counsel at the hearing on the Motion, the Court orders that the Motion is **GRANTED** and the Request for Judicial Notice is **GRANTED in part** and **DENIED in part**, for the reasons set forth herein.

I. PROCEDURAL BACKGROUND

In September 2019, Markel filed a Complaint in California state court against Defendants asserting five claims for relief:

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1. Defs.' Mot. for Summ J. (the "*Motion*") [ECF No. 56]; Defs.' Req. for Judicial Notice (the "*RJN*") [ECF No. 67].

2. The Court considered the documents of record in this case, including the following: (1) Compl. (the "*Complaint*") (including its attachments) [ECF No. 1-2]; (2) the Motion (including its attachments); (3) Am. Joint Statement of Undisputed Facts and Genuine Disputes (the "*Joint Statement*") [ECF No. 73]; (4) Joint Ex. For the Motion, Parts A through F [ECF Nos. 60-65]; (5) Pl.'s Opp'n to the Motion (the "*Opposition*") [ECF No. 76]; and (6) Defs.' Reply in Supp. of the Motion (the "*Reply*") [ECF No. 81].

- Violation of Labor Code;
- Unfair Business Practices;
- Fraud;
- Negligent Misrepresentation; and
- Failure to Provide Itemized Wage Statements.[3]

Defendants removed the case to this Court in December 2019 on the basis of diversity jurisdiction.[4]

Defendants filed their instant moving papers in September 2022, including a Joint Statement of Undisputed Facts and Genuine Disputes and corresponding exhibits.[5] In response to Markel's *Ex Parte* Application to continue the hearing on the instant Motion, the Court granted Markel an additional week to file his Opposition and permitted him the opportunity to file a Supplemental Statement of Disputed Facts.[6] The deadline passed without Markel filing a Supplemental Statement. The Court conducted a hearing on the Motion in November 2022.

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3. *See* Complaint.

4. *See* Notice of Removal [ECF No. 1] 1:24-27.

5. *See* Joint Statement.

6. *See* Order Granting In Part and Denying In Part Pl.'s *Ex Parte* Appl. [ECF No. 75].

Appendix B

II. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When deciding a motion for summary judgment, the court construes the evidence in the light most favorable to the non-moving party. *See Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (emphasis in original). The substantive law determines the facts that are material. *See id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* Factual disputes that are "irrelevant or unnecessary" are not counted. *Id.* A dispute about a material fact is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Under that standard, the moving party has the initial burden of informing the court of the basis for its motion and identifying the portions of the pleadings and the record that it believes demonstrate the absence of an issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need not produce evidence negating

or disproving every essential element of the non-moving party's case. *See id.* at 325. Instead, the moving party need only prove there is an absence of evidence to support the nonmoving party's case. *See id.*; *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The party seeking summary judgment must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250.

If the moving party sustains its burden, the non-moving party must then show that there is a genuine issue of material fact that must be resolved at trial. *See Celotex*, 477 U.S. at 324. A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. "This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Oracle Corp. Sec. Litig.*, 627 F.3d at 387 (citing *Anderson*, 477 U.S. at 252). The non-moving party must make that showing on all matters placed at issue by the motion as to which it has the burden of proof at trial. *See Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 252.

Furthermore, a party "may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). "The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated." Advisory Committee Notes, 2010 Amendment, to Fed. R. Civ. P. 56. Reports and declarations in support of an opposition to summary judgment may be considered only if they

comply with Rule 56(c), which requires that they "be made on personal knowledge, set forth facts that would be admissible evidence, and show affirmatively that the declarant is competent to testify to the matters stated therein." *Nadler v. Nature's Way Prods., LLC*, 2015 U.S. Dist. LEXIS 187132, 2015 WL 12791504, at *1 (C.D. Cal. Jan. 30, 2015); *see also Loomis v. Cornish*, 836 F.3d 991, 996-97 (9th Cir. 2016) (noting that hearsay statements do not enter into the analysis on summary judgment).

III. REQUEST FOR JUDICIAL NOTICE

Defendants request that the Court take judicial notice of the following four items:

- a U.S. Equal Employment Opportunity Council ("EEOC") "Dismissal and Notice of Rights" regarding non-party Devorah Lunger's charge against the OU dated June 14, 2012;

- the judicial decision *Wechsler v. Orthodox Union*, 2008 U.S. Dist. LEXIS 105780 (S.D.N.Y. Dec. 18, 2008);

- the decision of the Supreme Court of the State of New York, New York County, in *Rabbi Taakov Yitzhak Horowitz v. Union of Orthodox Jewish Confederations, et al.*, and the corresponding transcript of the proceeding; and

- the OU's Articles of Incorporation filed with the State of New York in 1898.[7]

The Federal Rules of Evidence permit the Court to take judicial notice of facts that are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Such facts include "matters of public record." *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007). Additionally, "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). In the Ninth Circuit, "court filings and other matters of public record" are sources whose accuracy cannot reasonably be questioned for the purposes of Rule 201. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). "The court . . . must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2).

First, Lunger's EEOC complaint is not relevant to the instant Motion. Although the EEOC denied Lunger's complaint due to the ministerial exception, Lunger is not a party to this lawsuit, and Defendants have not provided sufficient grounds to introduce the EEOC complaint in the instant case.[8] There is no evidence of overlap in facts

7. *See* RJN.

8. Pl.'s Opp'n to the RJN [ECF No. 77] 3:24-27 & 4:1-5.

or law between Lunger's complaint and Markel's lawsuit. Therefore, this request is **DENIED**.

Next, Defendants request that the Court take judicial notice of two publicly available judicial decisions—a published opinion in *Wechsler v. Orthodox Union*, 2008 U.S. Dist. LEXIS 105780 (S.D.N.Y. Dec. 18, 2008), and an order dated September 7, 2016, entered by the New York Supreme Court in a case captioned as *Rabbi Taakov Yitzhak Horowitz v. Union of Orthodox Jewish Confederations of America and the Manischewitz Company*, together with a transcript of that proceeding. Because those are "court filings and other matters of public record" whose authenticity Markel does not dispute, Defendants' request for judicial notice is **GRANTED**. *See* Fed. R. Evid. 201(b)(2).

Finally, Markel did not oppose Defendants' request that the Court take judicial notice of the OU's Articles of Incorporation, which is a publicly filed document and which is relevant to the OU's status as a religious organization. According, this request is **GRANTED**, and the Court will take judicial notice of the OU's Articles of Incorporation.

IV. FACTUAL BACKGROUND

The material facts set forth below are sufficiently supported by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for the purposes of summary judgment. *See* Fed. R. Civ. P. 56(e)(2); L.R. 56-3. The Court deems a fact undisputed when the parties' "disputes" of that fact are merely restatements of

the same fact, they do not actually contradict the substance of a fact, or they argue the relevancy and materiality of an otherwise undisputed fact. *See* Fed. R. Civ. P. 56(e)(2); L.R. 56-3.[9]

A. Defendants the OU and Rabbi Rabinowitz

The OU is an Orthodox Jewish synagogue organization that represents several hundred congregations across the United States.[10] The OU is organized as a 26 U.S.C. § 501(c)(3) not-for-profit corporation, and it receives donations from individuals, foundations, and synagogues.[11] The OU is a religious organization whose mission is to serve the Orthodox Jewish community. It provides services and programs supporting the Orthodox Jewish community

9. Markel and Defendants object to multiple items of evidence filed with the Motion. "[O]bjections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard itself"; they are thus "redundant" and need not be considered. *Burch v. Regents of Univ. of California*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("Factual disputes that are irrelevant or unnecessary will not be counted."). The Court therefore **OVERRULES** all such objections. Additionally, the Court need not consider some of the evidence to which the parties have objected, in order to decide the Motion. Objections not specifically addressed are **OVERRULED**.

10. Joint Statement, Defs.' No. 1.

11. *Id.* at Defs.' Nos. 2 & 3; *see* RJN, Ex. D.

and the greater Jewish faith.[12] The services and programs that the OU offers include religious advocacy, religious study programs, religious youth programs, and kosher food certification.[13] One of the OU's primary services is ensuring the availability of kosher foods by acting as the leading national certification agency of kosher food products.[14]

One of the important rituals that the Orthodox Jewish community follows is the observance of "*kashruth*," or keeping kosher—the body of Jewish religious laws concerning the suitability of food and the fitness for use of ritual objections.[15] The OU provides kosher certifications, which verify that a product's ingredients, its production facility, and its actual production derivatives, tools, and machinery meet kosher standards.[16] The OU markets its kosher certifications to producers, and it licenses those producers to label their products with the OU's symbol indicating that the goods are kosher.[17]

"*Mashgiach*" is the Hebrew term for a supervisor of *kashruth*. The OU certifies grape products and wine as kosher and retains *mashgichim* (plural of *mashgiach*)—

12. Joint Statement, Defs.' No. 4; *see* RJN, Ex. D.

13. Joint Statement, Defs.' No. 6.

14. *Id.* at Defs.' No. 7.

15. *Id.* at Defs.' No. 11.

16. *Id.* at Defs.' No. 12.

17. *Id.* at Def.'s No. 13.

who must be verified Sabbath-observing Jews with basic knowledge of the concepts of Jewish laws pertaining to winemaking, to oversee the *kashruth* of grape products.[18] In order for grape products and wine to be considered kosher, the production must be restricted to handling and manipulation] exclusively by Sabbath-observing Jews during specified periods.[19] The OU's Kosher Division earns income through its kosher certification process and licensing, and the OU uses its funding to finance its activities supporting the Orthodox Jewish community.[20]

Rabbi Rabinowitz served as the OU's Senior Rabbinic Coordinator during all times relevant to Markel's Complaint, and he acted as Markel's supervisor during Markel's employment with the OU.[21]

B. Plaintiff Markel

To become a *mashgiach*, one must be Jewish, Sabbath-observant, and Torah-observant, and one must personally fulfill the laws of *kashrut*.[22] *Mashgichim* must be knowledgeable about Jewish law, and they play a social and technical role in the production of kosher products.[23]

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18. *Id.* at Defs.' No. 14.

19. *Id.* at Defs.' No. 15.

20. *Id.* at Defs.' No. 49.

21. Joint Exhibit D 168:5-12; Joint Statement Defs.' No. 39.

22. Joint Statement Defs.' No. 19.

23. *Id.* at Defs.' No. 21.

Markel was employed by the OU as a *mashgiach* from the summer of 2011 to March 18, 2018.[24] While Markel was employed as a *mashgiach*, he worked at facilities at Delano and Fresno, California, at which the OU had contracts to oversee the kosher production of grape products.[25]

Before the OU hired Markel as a *mashgiach*, Markel was required to submit a letter from an Orthodox Rabbi that he was a Sabbath observer who was trustworthy and fit to carry out the] OU's religious mission.[26] Markel describes himself as a "Frum Jew"—a Yiddish term for religiously devoted—and he avers that he grew up in an Orthodox household and attended a Jewish Day School where he learned about keeping kosher.[27] Prior to his work with the OU, Markel was employed for more than 10 years as a *mashgiach* with a different kosher agency.[28] Additionally, Markel worked at his father's kosher supervision agency for years before he began his employment with the OU.[29]

Markel served as a head *mashgiach* for the OU. He wrote job descriptions for *mashgichim* performing *hashgacha*—the rabbinic supervision by a *mashgiach*—

24. Complaint ¶ 6.

25. *Id.*; *see also* Joint Statement Defs.' No. 23.

26. Joint Statement Defs.' Nos. 29 & 30.

27. *Id.* at Defs.' No. 31-33.

28. *Id.* at Defs.' No. 34.

29. *Id.* at Defs.' No. 35.

and provided detailed instructions via email regarding the koshering of grape products at the Delano and Gallo wineries.[30] Markel would consult with *poskim*—experts—who assisted him with his duties as a *mashgiach*, and he would report *halachic* issues—issues pertaining to Jewish law—to Rabbi Rabinowitz and others.[31] As a head *mashgiach*, Markel would request *Piskei Dinim*—rabbinical rulings on Jewish law—for assistance with issues or operations at the wineries.[32]

In his capacity as a head *mashgiach* for the OU, Markel was also responsible for supervising workers, and] he would provide them with instructions on how to maintain kosher standards at the wineries.[33] Markel would make determinations regarding whether the wine was *meshuval*—boiled or cooked—at which point a non-Jew could handle the wine without negatively impacting its kosher status.[34] Markel also trained others on procedures for koshering tanks—*i.e.*, cleaning them to kosher specifications—and he was generally responsible for implementing OU policies and for kosher integrity at the Delano winery.[35]

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30. *Id.* at Defs.' No. 26 & 27.

31. *Id.*at Defs.' No. 38-39.

32. *Id.* at Defs.' No. 38; Joint Exhibit B 56:4-25, 57:1-4, 57:24-25, & 58:1-5.

33. Joint Statement Defs.' No. 40; after reviewing Joint Exhibit A 32:25-33:21, the Court did not find evidence that Markel instructed ***non-Jewish*** workers.

34. *Id.* at Defs.' No. 41.

35. *Id.* at Defs.' No. 42.

Appendix B

V. DISCUSSION

A. The "Ministerial Exception"

It appears that courts within the Ninth Circuit have not addressed whether the First Amendment's "ministerial exception" applies to *mashgichim*. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. "The 'ministerial exception' to application of employment laws to religious institutions arose from the First Amendment's protection of the right of churches and other religious institutions to decide 'matters of church government as well as those of faith and doctrine' without government intrusion." *Orr v. Christian Bros. High Sch. Inc.*, 2021 U.S. App. LEXIS 34810, 2021 WL 5493416, at *1 (9th Cir. Nov. 23, 2021) (non-precedential) (citing *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055, 207 L. Ed. 2d 870 (2020)), *cert. denied sub nom. Orr v. Christian Bros. Sch.*, 143 S. Ct. 91, 214 L. Ed. 2d 16, 2022 WL 4651533 (U.S. 2022).

The Supreme Court recently held that "[s]tate interference] in [matters of faith and doctrine] would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Morrissey-Berru*, 140 S. Ct. at 2060. The independence of religious institutions in matters of "faith and doctrine" is closely linked to "matters of church government," and the "ministerial

exception" protects "their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id.* (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 186, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012)).

Under the "ministerial exception," "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* The rule's name stemmed from initial cases concerning individuals described as "ministers," "[b]ut the ministerial exception encompasses more than a church's ordained ministers." *Alcazar v. Corp. of the Cath. Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010) (*en banc*). The Supreme Court and the Ninth Circuit have declined "to adopt a rigid formula for deciding when an employee qualifies as a minister"; instead, courts must analyze individual plaintiffs within the context of their religious employment. *Morrissey-Berru*, 140 S. Ct. at 2062; *Alcazar*, 627 F.3d at 1291-92.

In *Hosanna-Tabor*, the Supreme Court] listed four circumstances that might qualify an employee as a "minister" within the meaning of the "ministerial exception": (1) when a religious organization holds out an employee as a minister by bestowing a religious title; (2) when an employee's title as minister reflects a significant degree of religious training followed by a formal process of commissioning; (3) when an employee's job duties reflect a role in conveying the religious organization's message and carrying out its mission; and (4) when an employee holds him or herself out as a religious leader. *See Puri v. Khalsa*, 844 F.3d 1152, 1160 (9th Cir. 2017) (citing *Hosanna-Tabor*, 565 U.S. at 191-92).

B. Applying the "Ministerial Exception" to *Mashgichim*

Although there is no binding precedent regarding the "ministerial exception" and kosher food supervisors, two persuasive authorities apply the doctrine to the facts presented here. First, in *Morrissey-Berru*, the Supreme Court noted that "since many religious traditions do not use the title 'minister,' it cannot be a necessary requirement" for applying the "ministerial exception" to religious employees. *Morrissey-Berru*, 140 S. Ct. at 2064. The Supreme Court highlighted with approval "[a] brief submitted by Jewish organizations [that] makes the point that 'Judaism has many "ministers,"' that is, 'the term "minister"] encompasses an extensive breadth of religious functionaries in Judaism.'" *Id.* In the specified amicus brief, the authors stated:

> In today's Jewish communities, teachers, cantors, ***kosher-food supervisors***, and administrators of other religious facilities carry out functions that are central in Jewish observance. All these "ministers" are appointed and supervised by their Jewish communities. Government does not designate them or participate in their selection.

Brief Amicus Curiae of Colpa, Agudath Israel of America, Agudas Harabbonim, National Council of Young Israel, Orthodox Jewish Chamber of Commerce, Rabbinical Alliance of America, and Rabbinical Council of America in Support of Petitioners, 2020 WL 687700, at *3-*4 (emphasis added).

The same amici also urged the Supreme Court to adopt the "ministerial exception" as applied to *kashruth* supervisors in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004). In *Shaliehsabou*, the Fourth Circuit held that a Jewish nursing home could not be held liable under federal and state labor laws because the plaintiff—a kosher supervisor—was considered a "minister" under the "ministerial exception." *Id.* at 311.

The plaintiff in *Shaliehsabou* worked as a *mashgiach* for the defendant. The court defined the position as "an inspector appointed by a board of Orthodox rabbis to guard against any violation of the Jewish dietary laws." *Id.* at 301. The defendant was a non-profit religious and charitable corporation whose mission was, according to its by-laws, to serve "aged of the Jewish faith in accordance with the] precepts of Jewish law and customs, including the observance of dietary laws." *Id.* As a *mashgiach*, the plaintiff was responsible for the nursing home's compliance with *kashruth*. He was selected by the Rabbinical Council of Greater Washington (the "Vaad") because he was knowledgeable about the basic laws of *kashruth* and was Sabbath-observant. The plaintiff would liaise with the Vaad on difficult questions of Jewish dietary law. *Id.* at 303-04.

The plaintiff resigned as a *mashgiach* and sued the defendant for unpaid overtime wages under the Fair Labor Standards Act ("FLSA") and Maryland wage and hour law. *Id.* at 303-04. The Fourth Circuit examined two questions in connection with its application of the "ministerial exception" to the *mashgiach* plaintiff:

- Did the plaintiff serve as a minister?

- Was the defendant a religious institution?

The court held that *mashgichim* were "ministers" for the purposes of the "ministerial exception" because their "primary duties included supervision and participation in religious ritual and worship, and [the plaintiff's] position is important to the spiritual mission of Judaism." *Id.* at 309. The court noted that the "failure to apply the ministerial exception in this case would denigrate the importance of keeping kosher to Orthodox] Judaism" and that *mashgichim* "occupied a position that is central to the spiritual and pastoral mission of Judaism" because "in the Jewish faith, non-compliance with dietary laws is a sin." *Id.*

The court also held that the defendant Jewish nursing home was a religious institution because "a religiously affiliated entity is a 'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics." *Id.* at 310. Although the defendant offered and profited from secular services, the court held that entities can provide secular services and still have a substantially religious character. *Id.* Furthermore, the defendant's by-laws defined it as a charitable and non-profit corporation with a mission to care for the elderly "aged of the Jewish faith in accordance with the precepts of Jewish law and customs," and, in accordance with that mission, it "employed *mashgichim* to ensure compliance with the Jewish dietary laws." *Id.* at 310-11.

Consequently, the court held that the defendant Jewish nursing home was a religious institution for purposes of the "ministerial exception," and the Fourth Circuit upheld the district court's grant of summary] judgment in favor of the defendant and held it not liable for overtime wages pursuant to the "ministerial exception." *Id.* at 311.

C. Applying the "Ministerial Exception" to Markel

To determine whether the "ministerial exception" applies in this case, the Court must analyze whether: (1) Markel served as a "minister"; and (2) the OU was a religious organization. If the answers to those two questions are "yes," then the Court must look to each of Markel's claims for relief and ascertain whether the "ministerial exception" bars relief.

1. "Minister" Analysis

It is undisputed that Markel worked as a *mashgiach* for the OU and that he supervised the kosher production of wine. Markel states in his Complaint that:

Beginning on or about the summer of 2011 and continuing until March 15, 2018, plaintiff was employed by defendant as a supervisor of kashruth (known by the Hebrew term "mashgiach"), the system of Jewish rules that ensure that food products are kosher according to religious regulations.[36]

36. Complaint ¶ 6.; *see also* Joint Statement Defs.' No. 23.

Although of questionable relevance to the instant action, Markel argues that this fact is in dispute in view of the OU's previous statements in unrelated litigation.[37] Specifically, Markel provides a declaration from] Brian Yarmeisch, who was an opposing party in a different lawsuit pending in New York state court—in which the OU intervened on behalf of the defendants—regarding regulations of kosher certifications and businesses.[38] Markel contends that the OU previously argued that kosher food production "is not a religious exercise"[39] and that "[k]osher food, in and of itself, has no religious significance."[40] But Markel's citation takes the OU's statement out of context. The following sentences from the OU's brief in that previous New York state court case reveal that kosher foods nevertheless involve Jewish religious beliefs:

> That certain foods are designated as "kosher" does not signify or imply that they have received a special blessing. Food that is "kosher" is merely food that is fit or proper for consumption according to Jewish dietary laws**. *It is the observance the dietary laws themselves, as opposed to the actual food product, which implicates Jewish religious beliefs***.[41]

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37. Opposition 7:6-9.

38. Joint Ex. E 302 ¶¶ 6 & 7.

39. *Id.* at 302 ¶ 13.

40. *Id.* at 302 ¶ 15.

41. *Id.* (emphasis added).

Despite the statements that Yarmeisch made in his declaration, nothing in the OU's prior litigation position contradicts the facts that Markel was employed as a *mashgiach* and that he was tasked with duties involving] Jewish religious beliefs.

Moreover, Markel does not identify a genuine dispute of material fact here because the implication of Jewish religious belief is what designates *mashgichim* as "ministers":

> The Hebrew term kashrut, meaning "fit" or "proper," is "the collective term for the Jewish laws and customs pertaining to the types of food permitted for consumption and their preparation." Because the dietary laws are closely related to holiness in several passages of the Bible, many scholars believe that the dietary laws were established to promote holiness rather than hygiene.

Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. Chi. L. Rev. 667, 668 (1993) (footnotes omitted). Kosher preparation is particularly important for wine:

> On the Orthodox view, Jews are forbidden to drink wine prepared by a non-Jew: "The interdiction against the drinking of non-Jewish wine is so severe, that even if a gentile merely touches wine prepared by a Jew it is still prohibited, unless the bottle was

> securely corked and sealed." However, only the Orthodox observe these strict prohibitions. In the United States, the Rabbinical Assembly of the Conservative movement requires the Orthodox standard only for the wine used during religious] ceremonies.

Id. at 671; *see also Elick v. Keefe Commissary Network, LLC*, 2020 Md. App. LEXIS 607, 2020 WL 3429482, at *1 n.1 (Md. Ct. Spec. App. June 23, 2020) (non-precedential). Because *mashgiach* are undisputedly implicated in Jewish religious beliefs, for the purposes of the "ministerial exception" the Court concludes that their duties are consistent with that of a "minister."

2. ***Hosanna-Tabor*** **Factors**

Because the record is clear that Markel served as a *mashgiach* for the OU, the Court turns next to analyzing the *Hosanna-Tabor* factors to assist with determining whether Markel falls within the "ministerial exception."

First, as described above, the OU designated Markel as a head *mashgiach* at the Delano winery, and he was tasked with overseeing the kosher production of wine.[42] Although a *mashgiach* may not be a "minister in the usual sense of the term—[he] was not a pastor or deacon, did not lead a congregation, and did not regularly conduct religious services"—Markel's title and assigned duties as *mashgiach* satisfy the first *Hosanna-Tabor* factor.

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42. Joint Statement Defs.' No. 23.

See Morrissey-Berru, 140 S. Ct. at 2062. As *mashgiach*, Markel was integral to the koshering of wine for use by Orthodox Jews and the greater Jewish community, and his efforts were necessary in fulfilling an important function of the Jewish faith.

Second, Markel's position "reflected a significant degree of religious training followed by a formal] process of commissioning." *Id.*; *see also Puri*, 884 F.3d at 1161 (stating that "significant religious training" may be indicative of a ministerial position). For Markel to be hired as a *mashgiach*, he was required to be a Sabbath-observant Jew who kept kosher, and he needed a letter from an Orthodox Rabbi averring that Markel was fit and trustworthy to carry out the OU's religious mission.[43] Additionally, Markel was required to have attended Jewish Day School (*i.e.* yeshiva), and, while Markel's Jewish education was limited to middle school and part of high school, it is undisputed that he learned about keeping kosher.[44]

When the Supreme Court reversed the Ninth Circuit in *Morrissey-Berru*, it held that "judges have no warrant to second-guess that judgment or to impose their own credentialing requirements." *Morrissey-Berru*, 140 S. Ct. at 2068. Accordingly, the Court accepts the OU's educational and training requirements for *mashgichim* and finds the second factor satisfied.

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43. *Id.* at Defs.' Nos. 26 & 27.

44. *Id.* at Defs.' No. 33.

Third, Markel's duties as a head *mashgiach* reflected the religious mission of the OU and the importance of supervising the kosher production of wine for the Orthodox Jewish faith. It is undisputed that Markel held himself out as a "head *mashgiach*" in his correspondence with OU clients, and] even in his Complaint Markel recognized that his work duties were centered on applying Jewish rules of *kashruth* for food production according to religious regulations.[45] Markel would consult with *poskim* on questions of Jewish law, and he reported issues to rabbis senior to him in the OU while he executed his duties as a *mashgiach*.[46] Markel may not have had the same teaching role as the plaintiff in *Hosanna-Tabor*, but he did instruct other workers at the Delano winery regarding how to produce kosher wine, and he applied the tenants of the Jewish faith to his work.[47] Because Markel's duties reflected a religious mission as a head *mashgiach*, the third and fourth factors are met. *See Hosanna-Tabor*, 565 U.S. at 192.

D. Applying the "Ministerial Exception" to the OU

It is undisputed that the OU is a 26 U.S.C. § 501(c)(3) not-for-profit corporation with a mission of supporting the Orthodox Jewish faith.[48] Nevertheless, Markel contends

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45. *Id.* at Defs.' No. 26; Complaint ¶ 6.

46. Joint Statement Defs.' Nos. 38-39.

47. *Id.* at Defs.' No. 40.

48. *Id.* at Defs.' Nos. 2 & 3; *see* Defs.' Req. for Judicial Notice, Ex. D.

that the OU should not qualify as a religious institution and that the OU is best characterized as a business because it operates its kosher certification division for profit. Markel notes that the OU claimed $10 million in federal aid through COVID-19-related loan forgiveness programs as a food service contractor.[49]

] The Ninth Circuit has considered the requirements for an entity to be considered a "religious organization" within the context of Title VII claims, and it has held that courts must "conduct a factual inquiry and weigh '[a]ll significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious.'" *Spencer v. World Vision, Inc.*, 570 F. Supp. 2d 1279, 1283 (W.D. Wash. 2008), *aff'd*, 619 F.3d 1109 (9th Cir. 2010), and *aff'd*, 633 F.3d 723 (9th Cir. 2011) (citing *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir.1988)). "Each case must turn on its own facts." *Id.*

The Ninth Circuit's case law concerning tests for "religious organizations" is scattered; several decisions present different tests. In *Townley*, the Ninth Circuit considered the secular characteristics of the corporation at issue:

> (1) the company's for-profit status; (2) the company's purpose—production of a secular product; (3) the company's non-affiliation with or support by a church; and (4) the company's lack of religious purpose in its articles of incorporation.

49. *Id.*at Pl.'s Nos. 15 & 16; Joint Ex. D 178-200.

Spencer, 570 F. Supp. 2d at 1284 (citing *Townley*, 859 F.2d at 619). The Ninth Circuit also considered the corporation's religious characteristics:

> (1) the enclosure of Gospel tracts in its outgoing mail; (2) the inclusion of printed Bible verses on its commercial documents (such as invoices and purchase orders); (3) the financial support given to churches, missionaries, and ministries; (4) the mandatory weekly devotional service for employees; and (5) the "discipleship [the corporation's founders and majority owners] have for the Lord Jesus Christ."

Id.[50] Incorporating the Ninth Circuit case law cited above, the Third Circuit held that a Jewish community center "qualified as a 'religious corporation, organization, or institution'" and applied a nine-factor test:

> (1) whether the entity operates for a profit; (2) whether it produces a secular product; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue; (5)

50. The Ninth Circuit has also held that the following six factors are relevant in the educational context for a religious school: (1) ownership and affiliation; (2) purpose; (3) faculty; (4) student body; (5) student activities; and (6) curriculum. *See EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458, 461-63 (9th Cir.1993).

> whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; (6) whether the entity holds itself out to the public as secular or sectarian; (7) whether the entity regularly includes prayer or other forms of worship in its activities; (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and (9) whether its membership is made up by coreligionists.

LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007). Although the district court's decision] in *Spencer* was upheld by the Ninth Circuit—a non-profit Christian humanist organization was a "religious organization" for Title VII purposes by applying the nine *LeBoon* factors—the panel disagreed over which test to use and merely held that an entity is a "religious organization" "if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011). Although the Ninth Circuit denied a petition for rehearing *en banc*, Judge O'Scannlain elaborated in his concurrence that an entity should be considered a "religious organization" when it:

> (1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), (2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and (3) holds itself out to the public as religious.

Spencer, 633 F.3d at 734 (O'Scannlain, J., concurring). Although the above-cited Ninth Circuit case law considered only Title VII complaints in applying the "ministerial] exception," it provides a starting point in evaluating whether the OU is a religious institution for the purpose of this case.

Beginning with Judge O'Scannlain's simplified test in *Spencer*, the OU meets the requirements for a "religious organization." First, the OU's Articles of Incorporation, filed with the State of New York in 1898, provide that:

> [t]he objects of said corporation shall be to uphold and strengthen the observance of orthodox Judaism, otherwise designated as traditional, historical or biblical-rabbinical Judaism, by associating and uniting such congregations, organizations and individuals as adhere to or profess orthodox Judaism and affording them mutual aid and encouragement in religious faith and devotion to their common ideals, by maintaining or encouraging the maintenance of synagogues, schools, and other institutions for teaching or practicing the principles of orthodox Judaism; to promote the

> interests of orthodox Judaism by all lawful and proper means.[51]

The OU's services include kosher food production that enables religiously devout Jews to keep kosher. The duties that Markel performed as a *mashgiach* were necessary to produce kosher wine, which is essential to Jewish] religious ceremonies. Additionally, the OU provides education and advocacy programs to the larger Jewish community.[52] Weighing the three *Spencer* factors, the OU should be considered a "religious organization" for purpose of the "ministerial exception." *Spencer*, 633 F.3d at 734 (O'Scannlain, J., concurring).

Markel's primary objection to the OU's religious status is that the OU earns an income from its kosher certification business and it uses that income to support business operations in non-religious ways.[53] It is undisputed, though, that the OU is a 26 U.S.C. § 501(c)(3) not-for-profit corporation,[54] which means that the OU is exempt from taxation. *See* 26 U.S.C. § 501(c)(3). Although Markel claims that the OU "generates $130 million in revenue annually and pays its top employees high six figure salaries," that number comes from the minutes of a board meeting by the Build NYC Resource Corporation, and it is inadmissible hearsay.[55] Fed. R. Evid.

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51. Defs.' Req. for Judicial Notice, Ex. D § 2.

52. Joint Statement Defs.' No. 6.

53. Opposition 6:6-20.

54. Joint Statement Defs.' No. 2.

55. Joint Ex. E 488.

801. Furthermore, when evaluating the OU for a tax-exempt § 501(c)(3) bond, the Build NYC board unanimously approved the OU's application—bolstering the evidence that the OU is a not-for-profit corporation.[56]

Although Markel alludes to arguments that the OU is a fraudulent § 501(c)(3) not-for-profit corporation, he does not present admissible evidence] that materially disputes that fact.[57] The OU's not-for-profit status is not invalidated simply because the OU's kosher certification division generates a profit and thereby funds its religious and advocacy missions. *Morrissey-Berru* and *Hosanna-Tabor* involved religious schools that generated income, but that fact did not disqualify them from qualifying as "religious institution[s]." *See Morrissey-Berru*, 140 S. Ct. at 2055.

Markel's arguments concerning the OU's acceptance of COVID relief funds similarly fail to negate the OU's religious status. It is undisputed that the OU received $10 million through its application for the Paycheck Protection Program and that the OU applied under two North American Industry Classification System ("*NAICS*") numbers—"Religious Organization" and "Food Service Contractor."[58] The OU explained in its addendum to its Paycheck Protection Program application that it qualified under both NAICS numbers, and Markel presents no evidence or case law that invalidates the OU's status as a

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56. *Id.*

57. Opposition 9:1-11.

58. Joint Ex. D 183.

"religious institution."[59]

Under either the simplified test in *Spencer* or the more involved balancing tests in *Townley* or *LeBoon*, this Court concludes that the OU is a "religious institution" for the purpose of the "ministerial exception." Markel does not present] any admissible evidence to create a triable dispute of fact that the income earned by the OU's kosher division is outweighed by its religious mission and charitable programming. Although balancing tests often require courts to weigh evidence in a manner inappropriate for summary judgment, in this instance the Court need not undertake such a balancing test because Markel has failed to adduce sufficient evidence for a reasonable jury to find that the OU is not a "religious institution" under governing law. *See Celotex Corp.*, 447 U.S. at 325 ("[T]he burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case."); *see also Oracle Corp. Sec. Litig.*, 627 F.3d at 387 ("[T]he non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor.") (citing *Anderson*, 477 U.S. at 252). Because the Court also concludes as a matter of law that Markel served as a "minister" in his role as a *mashgiach*, his claims must be evaluated within the context of the "ministerial exception."

E. Claim Analysis

All five claims for relief that Markel asserts in his Complaint are anchored in violations of state employment

59. *Id.*

and wage-related law. The California Labor Code serves] as the foundation for Markel's tort-based claims, and all claims stem from the same facts regarding the OU's employment-related decision making.

Although the most recent Supreme Court cases of *Morrissey-Berru* and *Hosanna-Tabor* involved wrongful termination claims against religious employers, the Ninth Circuit has held that the "ministerial exception" governs wage-related claims as well. In *Alcazar*, the Ninth Circuit—sitting *en banc*—held that the "ministerial exception" barred wage-related claims against an employer in connection with a plaintiff's ministerial duties. *Alcazar*, 627 F.3d at 1293.

In that case, a plaintiff who was training in Catholic seminary to be a priest asserted claims for unpaid wages under Washington's Minimum Wage Act. Although the plaintiff was not yet ordained, the Ninth Circuit held that the church's employment decisions concerning him were protected by the First Amendment. *Id.* at 1292. The Ninth Circuit stated that the "ministerial exception" "exempts a church's employment relationship with its 'ministers' from the application of some employment statutes, even though the statutes by their literal terms would apply." *Id.* at 1290.

The Ninth Circuit's decision is in line with the Fourth Circuit in *Shaliehsabou*, which held that *mashgichim* fell within the "ministerial exception,"] which barred actions under the FLSA for unpaid wages. *Shaliehsabou*, 363

F.3d at 303-04. The Ninth Circuit has also upheld district courts applying the "ministerial exception" to bar wage-related claims under California law. *See Headley v. Church of Scientology Int'l*, 2010 U.S. Dist. LEXIS 84869, 2010 WL 3157064, at *5 (C.D. Cal. Aug. 5, 2010), *aff'd*, 687 F.3d 1173 (9th Cir. 2012) ("Because the ministerial exception is constitutionally compelled, it applies as a matter of law across statutes, both state and federal, that would interfere with the church-minister relationship'. . . . The exception 'encompasses all tangible employment actions and disallows lawsuits for damages based on lost or reduced pay.'").

Markel's tort-based claims for fraud and negligent misrepresentation are also barred under the "ministerial exception," because "[j]ust as the ministerial exception precludes . . . *claims* that implicate Defendants' protected ministerial decisions, it similarly precludes [the plaintiff] from seeking *remedies* that implicate those decisions." *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 966 (9th Cir. 2004) (emphasis in original). Markel's claims under the California Labor Code underly his entire Complaint, and all of the employment-related decisions by the OU implicated in each claim are barred by the "ministerial exception."

Markel's claims against Rabbi Rabinowitz are similarly barred, as courts have held that the "ministerial] exception" insulates both religious organizations and individually named defendants. In *Higgins v. Maher*, 210 Cal. App. 3d 1168, 258 Cal. Rptr. 757 (1989), a priest who was terminated from his position filed both a state contract and tort claim against the diocese and an

individual bishop. *Id.* at 1172-73. The California appellate court held that the bishop's actions were "part and parcel" to his "administration of his ecclesiastical functions," and, therefore, they were subject to an ecclesiastical exemption. *Id.* at 1176.

Here, Markel makes no allegations against Rabbi Rabinowitz that are separate from the employment-related decisions that the OU made. Accordingly, summary judgment is **GRANTED** in favor of Defendants on all of Markel's claims for relief.

VI. CONCLUSION

For the foregoing reasons, the Court hereby **ORDERS** as follows:

1. The Court **GRANTS** Defendants' Motion in full and **DISMISSES** Markel's Complaint **with prejudice**.

2. The Court **GRANTS in part** and **DENIES in part** the OU's request for judicial notice.

3. Judgment shall issue accordingly.

IT IS SO ORDERED.

Dated: January 3, 2023

/s/ John W. Holcomb
John W. Holcomb
UNITED STATES
DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 20, 2025 DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23-55088

D.C. No.
2:19-cv-10704-JWH-SK
Central District of California,
Los Angeles

YAAKOV MARKEL,

Plaintiff-Appellant,

v.

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, A CORPORATION; *et al.*,

Defendants-Appellees.

Filed Februiary 20, 2025

ORDER

Before: R. NELSON, VANDYKE, and SANCHEZ, Circuit Judges.

Appendix C

The panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40. The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX D —
EXCERPTS OF PMQ DEPOSITION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:19-cv-10704-JWH-SK

YAAKOV MARKEL,

Plaintiff,

vs.

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, A CORPORATION; NACHUM RABINOWITZ, AN INDIVIDUAL; DOES 1-100,

Defendants.

VIDEOTAPED REMOTE DEPOSITION OF PMQ OF UNION ORTHODOX JEWISH CONGREGATION NAHUM RABINOWITZ

VOLUME I

New York, New York
Thursday, January 27, 2022

* * *

[188] A The understanding that I had was that he—I still would never believe otherwise was that he didn't work for 24 hours consecutively, rather, because I'm familiar with what he did during harvest, rather he was on call during, you know, around the clock, but he was not working consecutively 24 hours because I myself visited the site during harvest and many times would come to the plant and Yaakov wasn't present. He would come, he would, you know, appear at later times. He would certainly have a radio or be available by cell phone when necessary. So I've never understood when you say he was working for 24 hours that that meant that he was present and working 24 hours consecutively.

Q Did the OU ever pay Yaakov Markel for 24 hours of consecutive work?

A As I recall, when the OU paid an elevated supervision or a fee during harvest period and it was during the final harvest to the OU Yaakov complained that it was just physically taxing on him and it was too much for him. And at that time the OU agreed to double his already high rate for the—for the harvest period. So, yes, we did raise him to double what his normal harvest rate would have been. But, again, that doesn't mean we considered

* * *

Appendix D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:19-cv-10704-JWH-SK

YAAKOV MARKEL,

Plaintiff,

vs.

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, A CORPORATION; NACHUM RABINOWITZ, AN INDIVIDUAL; DOES 1-100,

Defendants.

VIDEOTAPED REMOTE DEPOSITION OF PMQ OF UNION ORTHODOX JEWISH CONGREGATION NAHUM RABINOWITZ

VOLUME II

New York, New York
Thursday, May 26, 2022

* * *

[232] job that Mr. Markel did not assume?

A Yes.

Q And what were those?

A There were management issues that Winkler had responsibility for in client relations which Markel did not assume.

Q When you say "management issues," what were those management issues?

A There were aspects of managing the kosher program, personnel, and— and like I mentioned, client relations, that—that Markel did not assume.

Q Thank you. I appreciate that. And what I'm asking for is the specific categories of management issues and client relations issues that were not assumed by Mr. Markel that Elon Winkler performed as an employee of the OU.

A As an example, Mr. Winkler was involved with negotiations of staff. He was involved in negotiation with the entities that we were kosher certifying, neither of which Mr. Markel assumed.

(Reporter clarification.)

THE WITNESS: There were—there was management—there was—

MS. SCHLOSS: Just the last—just the

* * *

[250] Does the OU have any employees who are kosher supervisors?

A We have many—

MS. SCHLOSS: Sorry. Can you—what was that again?

BY MR. FRIEDMAN:

Q Does the OU have any employees who are kosher supervisors?

A Yes, we do.

Q And is there a specific policy as to when they are paid overtime?

A Typically—

MS. SCHLOSS: Objection. Calls for speculation.

BY MR. FRIEDMAN:

Q You can answer.

A Typically, salaried employees are not paid overtime.

Q Okay. Does the OU ever pay overtime for kosher supervisors?

MS. SCHLOSS: Objection. Calls for speculation.

THE WITNESS: Do you want me to answer the question?

MS. SCHLOSS: Yes. Yes. If I don't [251] instruct—unless I instruct you, you need to answer.

THE WITNESS: Okay. Okay. The OU occasionally does pay overtime. It depends on the context.

BY MR. FRIEDMAN:

Q And on those occasions when it does pay overtime, what's the policy? When does overtime start?

MS. SCHLOSS: Objection. Calls for speculation.

THE WITNESS: That depends on the terms of the—of the agreement with that either employee or that contractor.

MR. FRIEDMAN: Okay.

BY MR. FRIEDMAN:

Q Within California, does the OU ever pay overtime?

MS. SCHLOSS: Objection. Calls for speculation.

THE WITNESS: By agreement, where there is such an agreement in place, then the OU sometimes does pay overtime, correct.

MR. FRIEDMAN: Okay.

[252] BY MR. FRIEDMAN:

Q And within California, when is—when does the OU—at what hour point does the OU begin to pay overtime?

A That depends on the agreement. When you hire somebody for a certain number of hours—sometimes you're hiring them for four hours, sometimes for six hours, sometimes for eight hours. When a person—if the agreement is to pay them for that number of hours and the person has gone overtime, so then that person receives a—an overtime payment.

Q Did you ever agree to pay Yaakov Markel any overtime amount?

A There were occasions where Mr. Markel had to work beyond his general scope, and he did receive bonuses for those extra hours that he worked.

Q Okay. And what's the difference in your mind between a bonus for working more than the time agreed to and overtime pay for working more than the time agreed to?

A A bonus is given to somebody—remember, he's a contractor. He's not a—he's not an employee.

So as a contractor, we could negotiate for [253] additional hours. We wouldn't call them overtime hours.

We would negotiate for additional hours, as—as were appropriate.

Q And if he was being paid $300 per 12 hours, what would the additional hour rate be?

A We would negotiate that. We would discuss that.

Q I'm asking what did you negotiate.

A There were different circumstances. He—he described certain additional responsibilities he had to take on, and based on what those circumstances were, we negotiated additional or bonuses or whatever you might call it to his regular daily 12-hour shift rate.

Q Okay. Can you, please, list for me all the different circumstances which resulted in these additional payments that you're referencing.

A If he had to—if he had to work beyond his normal covered shift, if he had other managerial responsibilities that he had to take on.

Q Are these things he actually did, or are these hypotheticals that you're providing?

A No. These are actual.

Q Okay. So you said—I have two things on the list right now: Work beyond the 12 hour agreed [254] time, and the second one is other managerial tasks that he had to take on. Are those—are those correct?

A Yes.

Q Anything else which would be a different circumstance which would result in more payment to Mr. Markel beyond the 300 for 12 hours?

A Not that I can recall at this time.

Q Okay. Were there instances where Mr. Markel worked beyond the 12 hours which was initially agreed or requested by the OU?

A I can't remember specifically, but where he described that—as an example, if he was supposed to partner with another individual to provide 24 hour coverage or, you know, the—the other individual didn't show up and he needed to put in some extra hours of coverage, so then, when—when asked, we—you know, we provided bonuses for that additional work. When—during the harvest period, when he took on managerial duties, we also paid him bonuses for that additional responsibility.

Q And what were the additional responsibilities?

A He supervised a team of kosher workers or

* * *

[306] "firing" was a loaded word for you, so let's just use a different word. Could you—could the OU terminate Mr. Markel's working for the OU at any point, or did the OU have to wait for a specific term of the agreement to elapse?

A There was no specific term of—of commitment.

Q So Mr. Markel in theory could report to work on a—on a Tuesday, and then you could tell him Tuesday evening, "Do not appear anymore on behalf of the OU at Delano, starting effective immediately"?

A Theoretically.

Q And in practice, how did the relationship end between Mr. Markel and the OU?

A Mr. Markel wrote to me that he—"I was no longer interested in continuing." He was gracious enough to give us I think it was a couple of weeks' notice. And he—you know, that's when he left his—that position.

Q Okay. If Mr. Markel worked for 24 hours in a row, meaning was providing some service to the OU for 24 hours in a row, was he paid for 24 hours, or was he paid for two 12-hour shifts?

[307] MS. SCHLOSS: Objection. Incomplete hypothetical. Calls for speculation.

THE WITNESS: Mr. Markel—on an exception basis, if he would inform us that he was working beyond the scope of his required coverage, the OU may have reimbursed him for that. But—but typically, he was required only to work for 12 hours.

MR. FRIEDMAN: Okay.

Appendix D

BY MR. FRIEDMAN:

Q Now, does the OU still provide kosher certification to Delano?

A Yes, it does.

Q Does it still provide it to Gallo Winery?

A Yes, it does.

Q And are these essentially the cycles you had discussed in your last—at the last volume of the deposition, of the crush and the harvest and the recons and each of those types of things, is that—those are annual cycles that the OU goes through?

MS. SCHLOSS: I'm just going to object to this line of questioning as completely irrelevant as to what happened years ago as to what's going on now in the present as compared to what happened years ago. But you—you may answer. I'm just making an

* * *

Appendix D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:19-cv-10704-JWH-SK

YAAKOV MARKEL,

Plaintiff,

vs.

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, A CORPORATION; NACHUM RABINOWITZ, AN INDIVIDUAL; DOES 1-100,

Defendants.

VIDEOTAPED REMOTE DEPOSITION OF RABBI NAHUM RABINOWITZ, AS AN INDIVIDUAL, taken on behalf of the Plaintiff, from New York, New York, commencing at 12:38 p.m. PDT and at 3:38 p.m. EDT, and ending at 4:45 p.m. PDT, 7:45 p.m. EDT, Wednesday, June 1, 2022, before Caryn S. Carruthers-Walter, CSR No. 4389, RPR, CP, reporting remotely.

* * *

[121] regarding—

A. A request was made.

THE STENOGRAPHER: Wait, sir, please.

MR. FRIEDMAN: No. Go ahead, Rabbi. Go ahead.

THE STENOGRAPHER: I don't have the end of your question, sir.

MR. FRIEDMAN: (Unreportable cross-talk.)

THE STENOGRAPHER: Fine.

THE WITNESS: Okay. A request was made to provide dates worked from the OU's computer department. The information was provided from the OU's computer department, and the attorneys assembled this document.

BY MR. FRIEDMAN:

Q. Now, you state here that Mr. Markel voluntarily—voluntar-—was—his resignation was voluntary in March of 2018. Is that your understanding?

A. Yes.

Q. At that point, had you been informed regarding any medical issues Mr. Markel had?

MS. SCHLOSS: I'm sorry. I didn't hear—we what—

MR. FRIEDMAN: Regarding any medical issues that Mr. Markel had.

* * *

APPENDIX E — EXCERPTS OF EVIDENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. CV 96-0179 (Gershon, J.) (Boyle, M.J.)

COMMACK SELF-SERVICE KOSHER MEATS, INC., D/B/A COMMACK KOSHER, BRIAN YARMEISCH AND JEFFREY YARMEISCH,

Plaintiffs,

v.

RABBI SCHULEM RUBIN AS DIRECTOR OF THE KOSHER LAW ENFORCEMENT DIVISION OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS,

Defendant,

and

HON. SHELDON SILVER, RABBI MOSHE PORTNOY, ABE ALPER, JACK LEE, JON GREENFIELD, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, THE RABBINICAL ALLIANCE OF AMERICA, THE RABBINICAL COUNCIL OF AMERICA, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, TORAH UMESORAH— NATIONAL SOCIETY OF HEBREW DAY

Appendix E

SCHOOLS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, AND RICHARD SCHWARTZ,

Defendants-Intervenors.

DEFENDANTS-INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS-INTERVENORS' MOTION FOR PARTIAL SUMMARY JUDGMENT

* * *

[33] prepared according to Jewish law does not require plaintiffs to modify their religious beliefs or alter them in any way. The sole "burden" on the plaintiffs is the burden of not committing fraud.

B. Plaintiffs Are Not Prevented from Practicing Their Religious Beliefs.

Plaintiffs do not describe how they are "prevented" from practicing any form of Judaism (or any other religion for that matter). *See Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) ("The central questions in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices."). That is because plaintiffs are at liberty to practice whatever creed their conscience directs. The labeling and sale of foods as kosher is not a religious exercise. Individuals who are not Jewish or who do not

observe Orthodox Jewish law can prepare and sell kosher foods, in the same way that those individuals can sell any product. As the Maryland Court of Appeals noted:

> Kosher food, in and of itself, has no religious significance. That certain foods are designated as "kosher" does not signify or imply that they have received a special blessing. Food that is "kosher" is merely food that is fit or proper for consumption according to Jewish dietary laws. *It is the observance of the dietary laws themselves, as opposed to the actual food product, which implicates Jewish religious beliefs.*

Barghout v. Mayor and City Council, 600 A.2d 841, 847 (Md. 1992) (emphasis added).

Plaintiffs are not disabled by the kosher fraud laws from observing or choosing not to observe dietary laws consistent with Jewish religious beliefs. They are not compelled to have or practice any religious beliefs whatsoever. As a New York appellate court stated in rejecting an early religious freedom challenge to the kosherfraud statutes: "There is no invasion here of religious freedom or pen mai rights. The statute is directed against a form of fraud." *People v. Goldberger*, 163 N.Y.S. 663, 666 (N.Y. Ct. Sp. Sess. 1916). Indeed, tht kosher fraud laws enhance the free exercise of religious belief by protecting individuals who wish to adhere to the

* * *

APPENDIX F — EXCERPTS OF DEPOSITION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:19-cv-10704-JWH-SK

YAAKOV MARKEL,

Plaintiff,

vs.

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, A CORPORATION; NACHUM RABINOWITZ, AN INDIVIDUAL; DOES 1-100,

Defendants.

VIDEOTAPED REMOTE DEPOSITION OF RABBI NAHUM RABINOWITZ, AS AN INDIVIDUAL, taken on behalf of the Plaintiff, from New York, New York, commencing at 12:38 p.m. PDT and at 3:38 p.m. EDT, and ending at 4:45 p.m. PDT, 7:45 p.m. EDT, Wednesday, June 1, 2022, before Caryn S. Carruthers-Walter, CSR No. 4389, RPR, CP, reporting remotely.

* * *

[39] religious Kosher designation.

But companies have an interest in the OU and not because they are particularly religious but because they realize that it opens markets for their products.

BY MR. FRIEDMAN:

Q. You said you agree with the statement made by Rabbi Genack that we just -- that I just read to you?

MS. SCHLOSS: Objection; asked and answered.

THE WITNESS: I don't know that he -- he said otherwise. I think that that was what his intent was.

I don't know if -- you know, I have to hear back verbatim to see if, you know -- that's the way I understood the comment, and I would agree with it if that was his intent.

BY MR. FRIEDMAN:

Q. Okay. Rather than looking into the mind of Rabbi Genack, I'm just asking you to state whether you agree with the words Rabbi Genack used.

MS. SCHLOSS: And what exactly were those words?

MR. FRIEDMAN: And I've read them already.

Q. OU is, aside from a Kashrus symbol, it is also a marketing symbol.

Do you agree with that statement by Rabbi Genack in Exhibit 19?

A. As I explained it, I would agree with it.

[40] Q. So, yes, you do agree with it.

A. I agree with it that it's used as a marketing symbol by companies, not that the OU presents it as a marketing symbol, but it's used by companies to market their products.

Q. Okay. And have you ever interacted with a client who is considering hiring the OU and retaining the OU services?

MS. SCHLOSS: Objection; overbroad.

THE WITNESS: Yes.

BY MR. FRIEDMAN:

Q. And have you ever presented the OU's mark as something which could be a marketing tool for the company?

A. That's usually the motivation of a company to acquire OU certification.

Q. Respectfully, that wasn't my question. My question was:

Have you ever presented to a potential client of the OU the pitch that the OU's symbol could be used as a marketing tool by the potential client?

MS. SCHLOSS: Objection; overbroad.

You may answer.

THE WITNESS: Yeah. Well, it is used for that purpose. That's why companies become certified.

[41] And sometimes I would—I would, you know, explain to them how—how that—how that could help their business as well, because it opens markets to their product.

BY MR. FRIEDMAN:

Q. Is that a "yes" to my question that you would have presented to potential clients of the OU the pitch that the OU symbol could be used as a marketing tool by the potential client?

A. Yes.

Q. Okay, thank you.

Now I want to turn to Mr. -- to the discussions with Mr. Markel regarding whether or not he would be a salaried employee.

Do you recall we touched on that at the prior deposition?

A. Yes.

Q. Okay. So I wanted to explore that in depth now.

Do you ever make a written offer to Mr. Markel as to terms of employment which the OU -- upon which the OU would employ Mr. Markel as an employee?

A. Yes.

Q. And when was that written offer made?

A. Most recently in -- prior to Mr. Markel's

* * *

APPENDIX G — EXCERPTS OF EVIDENCE OF EMAIL COMMUNICATIONS BETWEEN OU AND MARKEL

From: "Winkler, Elon" winklere@ou.org
Subject: Re: FRESNO/GALLO CRUSH 2011-2012.
Date: October 23, 2011 at 9:42 AM
America/Los_Angeles
To: "yaakovmarkel@gmail.com"
yaakovmarkel@gmail.com

Send candidates if you have any.

Sent via BlackBerry by AT&T

From: "yaakovmarkel@gmail.com"
<yaakovmarkel@gmail.com>
Date: Sun, 23 Oct 2011 12:29:53 -0400
To: Winkler, Elon<winklere@ou.org>
Subject: Re: FRESNO/GALLO CRUSH 2011-2012.

Bs'D
Good morning Elon,

Consider me confirmed.

Thanks,
Yaakov Markel

Sent from my iPhone

On Oct 17, 2011, at 6:43 PM,
"Winkler, Elon" <winklere@ou.orq> wrote:

Appendix G

MOADIM LESIMCHA, GEMAR TOV TO ALL.

WE WILL NEED YOUR CONFIRMATION POSITIVE OR NEGATIVE BY FRIDAY OCTOBER 28TH 2011.

4 DAY CRUSH STARTING MONDAY NOVEMBER 7TH THRU FRIDAY NOVEMBER 11TH 2011. DETAILS AS WE HAVE RIGHT NOW SO THAT THERE IS NO MISUNDERSTANDINGS.

1. 16 MASHGICHIM ARE NEEDED, 8 DAY , 8 NIGHT, 7AM-7PM AND 7PM-7AM.

2. $25 PER HOUR $37.50 OVERTIME PAY AFTER 8 HOURS.

3. 6 CARS TOTAL 3 PER SHIFT, NO RENTALS.

4. 550 MILES REIMBURSEMENT PER CAR AT 0.49C PER MILE.

5. $100 FOOD ALLOWANCE PER MASHGIACH FOR WEEK.

6. MASHGICHIM MAY/MAY NOT HAVE TO SHARE DOUBLE ROOMS, DAY-NIGHT ALTERNATE IS RECOMMENDED.

7. CUT OFF FOR DAY SHIFT MAY GO TO NOON ON FRIDAY 11/11/2011, MOST LIKELY NOT BUT BE PREPARED.

Appendix G

LOOKING FORWARD TO YOUR RESPONSE, PLEASE REFRAIN FROM CONTACT UNTIL AFTER SHABBAT.

FEEL FREE TO E-MAIL OTHER MASHGICHIM E-MAILS AND CONTACT NUMBERS TO ME. ELON WINKLER.