NO. 19-267

In the
Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES DEIRDRE MORRISSEY-BERRU,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* STEPHEN WISE TEMPLE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF *AMICUS CURIAE*[1]

Stephen Wise Temple is a Reform Jewish synagogue in Los Angeles, California. Founded in 1964, the Temple's mission is to promote and preserve the Jewish faith; to serve and strengthen the Jewish community on behalf of its thousands of members; and through the Jewish concept of Tikkun Olam, to make meaning and change the world through its many efforts to help those in the broader community who are in need. The Temple operates a preschool and an elementary school, which the Temple believes are essential to the Temple's goal of passing the Jewish faith on to the next generation and strengthening the faith of families in its congregation. The Temple believes it is vital to craft religious liberty precedent with all religious traditions in mind and especially so in cases applying the ministerial exception to those who perform the essential task of conveying the tenets of the faith.

The Temple recently filed a petition for writ of certiorari in a case raising the same underlying question as this case. *See Stephen S. Wise Temple v. Su*, No. 19-371 (U.S. filed Sept. 17, 2019). The Temple accordingly has a strong interest in this case.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus* certifies that counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due and have consented to this filing.

SUMMARY OF ARGUMENT

The petition in this case is the first of three that have been filed in recent weeks that raise the same basic question: whether performing critical religious functions is enough to qualify a religious group's employee as a "minister" under this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). The other two cases are *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), *pet. for cert. filed*, No. 19-348 (U.S. Sept. 16, 2019), and *Su v. Stephen S. Wise Temple*, 244 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019), *pet. for cert. filed*, No. 19-371 (U.S. Sept. 17, 2019). All three held that teachers who perform important religious functions are not ministers absent some other "plus factor," such as a ministerial title, theological training, or ordination. In so holding, they departed from decades of lower court precedent adopting a functional approach to the ministerial exception. Together, they put courts in California, both state and federal, in conflict with the majority position in the rest of the Nation. And they not only deprive religious employers in California of important protections, they set up a standard that unconstitutionally disfavors religious groups with distinct beliefs about who may minister to the faithful, providing more protection for some religions based on doctrinal differences—a concern highlighted by the separate concurrences in *Hosanna-Tabor*. The question presented merits the Court's review now.

As persuasively shown in Our Lady of Guadalupe School's petition for certiorari, the lower courts are deeply divided on the question presented. In just the

seven years since *Hosanna-Tabor*, five federal circuits and two state supreme courts have adhered to the near-consensus "functional approach," looking primarily to whether the employee performs important religious functions. And several of these cases have specifically held that religious school teachers who convey faith and religious doctrine to children are "ministers," even though they lack some of the Protestant-specific ministerial attributes of the "called teacher" in *Hosanna-Tabor*. The three cases from the Ninth Circuit and the California Court of Appeal now before this Court squarely rejected that approach. Those courts held that performance of important religious functions is not enough, and that the ministerial exception requires at least two of the considerations identified in *Hosanna-Tabor*.

The question presented in these cases is undeniably important. By requiring a religious organization's employees to match the distinctive characteristics of the Lutheran-school teacher in *Hosanna-Tabor*, the Ninth Circuit and California Court of Appeal condition the availability of constitutional protections on whether a religious group's theology and internal governance resemble that of the Lutheran tradition. This excludes many faiths that lack the Protestant conception of a "called minister" and that do not require their ministers to have extensive religious training, a formal religious title, or ordination. Indeed, this interpretation disproportionately harms "those religious groups whose beliefs, practices, and membership are outside of the 'mainstream,'" *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring)—the very groups who depend the most on the First Amendment's protection.

Unless this Court acts, religious groups in an area comprising twenty percent of the country's population will not receive the full protections of the First Amendment.

ARGUMENT

I. This Case Presents The First Of Three Petitions From Decisions Holding—Contrary To This Court's Precedent And Decades Of Lower Court Decisions—That Religious School Teachers Who Introduce Children To Religious Teachings, Scriptures, Prayer, And Sacred Observances Are Not Ministers.

In *Hosanna-Tabor*, this Court recognized that the First Amendment imposes a ministerial exception barring civil actions that concern the employment relationship between religious entities and their ministerial employees. *Id.* at 188-90. In doing so, the Court agreed with several decades of lower court decisions that had likewise recognized the ministerial exception. *Id.* at 188 & n.2. With remarkable consistency, those lower courts followed a functional approach to determine whether employees were ministers subject to the ministerial exception. *See, e.g.*, *id.* at 202-04 (Alito, J., concurring); Pet.13-14 (collecting cases).

Hosanna-Tabor left this functional consensus intact. The Court determined that Cheryl Perich, a "called teacher" at a Lutheran church and school, was a minister for purposes of the ministerial exception. *Hosanna-Tabor*, 565 U.S. at 190-91. The Court identified four considerations that supported its conclusion: (1) her formal title, (2) her use of that title,

(3) the substance behind her title, and (4) her important religious functions. *Id.* at 190-92. But the Court stressed that it was not adopting a "rigid formula" for deciding who is a minister. *Id.* at 190. Instead, the Court made clear that it would flesh out the contours of the ministerial exception in future cases. *Id.* at 196. And the Court specifically reserved judgment on whether a teacher with Perich's important religious duties "would be covered by the ministerial exception in the absence of the other considerations." *Id.* at 193.

Justice Thomas wrote separately to explain that courts should not second-guess a religious group's determination about who qualifies as its minister. Justice Thomas warned that a formulaic approach would "disadvantag[e] those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Id.* at 197 (Thomas, J., concurring). Justice Alito also wrote separately (joined by Justice Kagan) to explain that, since many religions have diverse beliefs about what qualifies as an important religious role, "courts should focus on the function performed by persons who work for religious bodies." *Id.* at 198 (Alito, J., concurring). Justice Alito noted that, until then, every circuit had taken a "functional approach" to the ministerial determination, and the unanimous opinion in *Hosanna-Tabor* "should not be read to upset this consensus." *Id.* at 204.

Until recently, lower courts applying *Hosanna-Tabor* have continued to focus on function and, in doing so, applied the ministerial exception to teachers who serve as a religious group's conduit for conveying

religious tenets and practices to the next generation. *See* Pet.19-24. But after the Ninth Circuit's decisions here and in *Biel*, and the California Court of Appeal's decision in *Su*, that consensus has been broken and religious employers are left unprotected in federal and state court. Only this Court can resolve this deep and irreconcilable split.

Biel was the first decision to break from the longstanding functional consensus. There, a fifth-grade teacher at a Catholic school carried out significant religious functions by teaching Catholicism to her students and incorporating religion into her classroom and curriculum. *Biel*, 911 F.3d at 609. But unlike Perich, she "did not have ministerial training or titles" and neither she nor the school held her out as a minister. *Id.* at 610. In a 2-1 panel decision, the Ninth Circuit held that Biel did not qualify for the ministerial exception because "teaching religion was only one of the four characteristics the Court relied upon" in *Hosanna-Tabor*. *Id.* at 609. The court refused to rely on that "shared characteristic alone" because it would supposedly render *Hosanna-Tabor*'s other considerations "irrelevant dicta." *Id.*

Judge Fisher of the Third Circuit (sitting by designation) dissented, noting that Biel's duties were "strikingly similar to those in *Hosanna-Tabor*." *Id.* at 619 (Fisher, J., dissenting). Judge Fisher would have held that the exception covers employees who are "entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* at 622 (quoting *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring)). Nine judges endorsed Judge Fisher's view in dissenting from the denial of en banc

rehearing. *Biel v. St. James School*, 926 F.3d 1238 (9th Cir. 2019) (Nelson, J., dissenting from denial of en banc rehearing). The en banc dissenters noted that *Biel* wrongly required "a carbon copy of the plaintiff's circumstances" in *Hosanna-Tabor*—an approach out of step with "decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles." *Id.* at 1239-40. The Ninth Circuit then doubled down on *Biel*'s formulaic approach in the case at hand. Relying solely on *Biel*, the panel concluded that "an employee's duties alone are not dispositive." App.3a. The court thus held that the plaintiff here was not a ministerial employee, even though she had "significant religious responsibilities." *Id.*

The California Court of Appeal followed suit in *Su*. There, the California Labor Commissioner sued the Temple, alleging wage-and-hour claims on behalf of teachers at the Temple's Jewish preschool. *Su*, 244 Cal. Rptr. 3d at 549. The trial court ruled that the claims were barred by the ministerial exception based on the many undisputed facts establishing that the teachers performed important religious functions. Among other religious responsibilities, the teachers developed a Jewish curriculum; taught their students Jewish scripture, holidays, commandments, and religious observances; led Seder rituals; recited Sukkot blessings; instructed the children in the ha-motzi blessing before every meal and snack; and played a role in weekly Shabbat services.

Invoking *Biel*, however, the California Court of Appeal reversed. *Id.* at 548. Despite acknowledging that the teachers were charged with "teaching Jewish

rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services," the court held that the ministerial exception could not cover them "based on this factor alone." *Id.* at 553. The panel reasoned that "while the teachers may play an important role in the life of the Temple," "a minister is not merely a teacher of religious doctrine." *Id.* Because the Temple did not require its teachers to have a spiritual title, undergo formal religious education, or adhere to the Temple's theology, the court held they were not ministers. *Id.*

As the petition for certiorari in this case thoroughly explains, all three of these recent cases are in sharp conflict with the longstanding functional consensus that was left undisturbed by *Hosanna-Tabor* as well as decisions by five federal circuits and two state supreme courts after *Hosanna-Tabor*. Even the *Su* and *Biel* courts recognized that their approach conflicts with that of other courts. *See Su*, 244 Cal. Rptr. 3d at 554 (citing *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018)); *Biel*, 911 F.3d at 609 (noting "we are not sure" that "*Grussgott* was correctly decided"). As a result of this split, religious schools in the Ninth Circuit and California "now have less control over employing … elementary school teachers of religion than in any other area of the country." *Biel*, 926 F.3d at 1251 (Nelson, J., dissenting from denial of en banc rehearing).

There is little hope for resolving this conflict without this Court's intervention. The California Supreme Court denied review in *Su*, and the Ninth

Circuit voted against rehearing *Biel* en banc. And here, the Ninth Circuit panel reversed the district court in an unpublished memorandum disposition—suggesting that the court considered its holding to rest on settled law. This Court should grant certiorari to ensure that a religious group's First Amendment right to ecclesiastical autonomy does not turn on where in the country the group happens to worship.

II. The Question Presented In *Biel*, *Su*, And This Case Is Exceptionally Important.

A. The Ninth Circuit's and California Court of Appeal's Approach Removes Religious Groups' Autonomy to Select and Control Who Can Teach Their Faith and Practices.

Hosanna-Tabor recognized that the ministerial exception's core purpose is to safeguard the autonomy of religious groups "to select and control who will minister to the faithful—a matter 'strictly ecclesiastical.'" 565 U.S. at 195. That purpose is frustrated by the Ninth Circuit's and California Court of Appeal's cramped view of who can be a minister. Left unchecked, their approach will restrain a religious group's freedom to select and control the teachers of its faith—even teachers with religious functions "strikingly similar to those in *Hosanna-Tabor*." *Biel,* 911 F.3d at 618 (Fisher, J., dissenting).

There are few things more important (both constitutionally and practically) to a religious organization than who teaches its faith to the next generation. Over a century ago, this Court declared that the First Amendment grants religious groups an "unquestioned" freedom to form organizations that

"assist in the expression and dissemination of any religious doctrine." *Watson v. Jones*, 80 U.S. 679, 728-29 (1871). But a religious group's free exercise right to proclaim and teach its beliefs would ring hollow without the "corollary right to select its voice." *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006). Thus, courts have long used the ministerial exception to strike down "any restriction on the church's right to choose who will carry its spiritual message," *id.* at 306-07, as well as "the functions which accompany such a selection," such as "the determination of a minister's salary, … place of assignment, and … dut[ies]," *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972); *accord Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc).

The need for such autonomy is especially vital when it comes to religious instruction. Religious schools are a uniquely "powerful vehicle for transmitting … faith to the next generation." *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). Indeed, the entire "*raison d'être*" of such schools is "the propagation of a religious faith." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 503 (1979). And since teachers at these "mission-driven schools" are the conduit for "convey[ing] the [religious group's] message and carry[ing] out its mission," the autonomy to make "[e]mployment decisions relating to those who serve this function is precisely what the ministerial exception is supposed to protect." *Biel*, 926 F.3d at 1248-49 (Nelson, J., dissenting from denial of en banc rehearing); *see Catholic Bishop of Chi.* 440 U.S. at 501-04 ("The church-teacher relationship in a church-operated school differs from the employment

relationship in a public or other nonreligious school" due to "the critical and unique role of the teacher in fulfilling the mission of a church-operated school.").

Counterintuitively, the Ninth Circuit and California Court of Appeal read this Court's unanimous affirmation of the ministerial exception to *lessen* religious autonomy over religious teachers. Before *Hosanna-Tabor*, both courts had employed a functional approach to decide who was a minister. *See, e.g.*, *Alcazar*, 627 F.3d at 1292; *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 134 Cal. Rptr. 3d 15, 25-26 (Cal. Ct. App. 2011) (reviewing a preschool teacher's "duties at the school" and concluding she was a minister because she performed many "ministerial functions"); *Schmoll v. Chapman Univ.*, 83 Cal. Rptr. 2d 426, 429 (Cal. Ct. App. 1999) (recognizing that the ministerial exception depends not "on the title given to the employee," but on "the function of the person's position"). Now these courts interpret *Hosanna-Tabor* to forbid that approach—even though Justices Alito and Kagan had properly explained that the Court's unanimous opinion "should not be read to upset" the functional consensus followed by *Alcazar* and similar decisions. *Hosanna-Tabor*, 565 U.S. at 203-04 (Alito, J., concurring). C*ontra Biel*, 911 F.3d at 606-611 (departing from the functional approach without citing *Alcazar*); *Su*, 244 Cal. Rptr. 3d at 554 (rejecting *Henry* because it was "decided prior to *Hosanna-Tabor*").

Without this Court's correction, *Hosanna-Tabor*'s ultimate effect will be to decrease religious liberty for much of the country.

B. The Ninth Circuit's and California Court of Appeal's Approach Disfavors Minority Religious Groups.

The Ninth Circuit and California courts not only curtailed a core religious freedom for thousands of religious groups within their jurisdictions, but did so in a manner that unconstitutionally prefers some religious groups over others. By enshrining a "resemblance-to-Perich test," *Biel*, 926 F.3d at 1243 (Nelson, J., dissenting from denial of en banc rehearing), these courts have caused the ministerial exception to turn on how similar a religious organization's conception of a minister is to the Lutheran church's.

This approach effectively sets a single denomination as the standard for what religious beliefs and practices are worthy of constitutional protection and gives a distinct advantage to faiths "within the Protestant Christian framework." *Biel*, 911 F.3d at 614 (Fisher, J. dissenting). In contrast, the many denominations whose theology or internal structure are unlike the Lutheran faith will find it more difficult to invoke the ministerial exception. As Justices Alito and Kagan explained, our country's emphasis on religious freedom has produced a thriving diversity of faiths featuring "virtually every religion in the world," each with "different views on exactly what qualifies as an important religious position." *Hosanna-Tabor*, 565 U.S. at 198, 200 (Alito, J., concurring). Most faiths do not use the term "minister," many lack a concept of ordination (a lay person's formal elevation to the clergy), and some believe all or most of its members are ministers. *Id.*

at 202. Thus, many religious groups carry out critical spiritual functions through individuals who could not satisfy the test now imposed by the Ninth Circuit and California Court of Appeal.

Su is a case in point. As a Reform Jewish synagogue, the Temple operates an on-site Jewish preschool to instill Jewish faith and identity in young children, and it hires teachers to accomplish that purpose. But the Temple has no analog to the position of a "called minister" found in the Lutheran faith, and it does not require its preschool teachers to become Biblical scholars. Instead, the Temple relies on lay people to teach the Jewish faith to the children, as permitted by Jewish law. *Cf. Grusgott*, 882 F.3d at 659, 661 (teacher at Jewish school fulfilled an important role as a teacher of faith even though she had a "lay title" and "teachers at the school were not required to complete rigorous religious requirements comparable to the teacher in *Hosanna-Tabor*"); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012) (teacher at Jewish school was a minister even though she "was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi"). But due to these aspects of Jewish law, most Jewish-school teachers in the Ninth Circuit and California will now be excluded from the ministerial exception, even if they are a synagogue's primary conduit for transmitting Jewish faith to the next generation.

Indeed, the approach now followed in those jurisdictions will especially disfavor the *weakest* religious groups. *See Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (the First Amendment prohibits

discrimination favoring "well-established churches" over "churches which are new and lacking in a constituency"). Many small religious groups do not have seminaries where they can provide a formal education to their ministers. And some might not have enough members to fill critical roles exclusively with adherents, or the funds to allow for a professional clergy. But the First Amendment should protect these groups no less than well-established Protestant churches. Indeed, they are the groups who need that protection most. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) (warning against a test that "disadvantag[es] those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some").

What is more, minority religious groups will face significant pressure to bow to the threat of litigation—in some instances, as in *Su*, brought by the state itself—by conforming their internal governance and distinctive religious practices to those of the Lutheran church in *Hosanna-Tabor*. For example, they might change employees' titles to sound more religious, or they might require them to undergo extensive religious education that they do not need. But religious groups should not be compelled under threat of liability to conform their conception of a "minister" to the "prevailing secular understanding" or the prevailing Lutheran understanding. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Indeed, compelling religious conformity is a danger "the First Amendment was designed to guard against." *Id.*; *accord* 1 Annals of Cong. 758 (1789) (remarks of J. Madison) (explaining the Establishment Clause prevents the risk that "one sect

might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform"); *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962) (noting the Establishment Clause protects against "coercive pressure upon religious minorities to conform to the prevailing officially approved religion").

Without this Court's review, courts across a large swath of the country will continue to apply *Hosanna-Tabor* in a way that does not "show[ ] sensitivity to and respect for this Nation's pluralism, or the values of neutrality and inclusion that the First Amendment demands." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring).

CONCLUSION

The question presented warrants the Court's review. The Court should grant one or more of the three petitions presenting the question. If the Court does not grant all three petitions, it should hold the remaining petitions until its decision on the merits.

Respectfully submitted,

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