Nos. 19-267, 19-348

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES MORRISSEY-BERRU,

Respondent.

ST. JAMES SCHOOL,

Petitioner,

v.

DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KRISTEN BIEL,

Respondent.

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

BRIEF OF INNER LIFE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Inner Life Fund ("ILF"), as *amicus curiae*, respectfully urges this Court to reverse the decision of the Ninth Circuit in both Petitions.

Inner Life Fund is a North Carolina non-profit, tax-exempt corporation formed on June 22, 2006 to preserve and defend the customs, beliefs, values, and practices of religious faith, as guaranteed by the First Amendment, through education, legal advocacy, and other means. ILF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). Counsel for Inner Life Fund participated in an *amicus curiae* brief on behalf of a related non-profit entity (Justice and Freedom Fund) for the landmark decision about the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEC*, 565 U.S. 171 (2012).

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In recent years there has been a proliferation of nonprofit religious organizations which may or may not be connected, formally or informally, to a church, denomination, or religious tradition. In California, where these cases originated, there is a separate set of statutes governing corporations formed "primarily or exclusively for religious purposes." Cal. Corp. Code § 9111; *see* Cal. Corp. Code § 9110, *et. seq*. Some are churches—many are not. But all of them must carry out their mission and disseminate their message through selected representatives. Courts have historically declined to intervene in the employment relationship between religious organizations and these "ministerial employees."

This Court recognized the concept of "ministerial employee" in *Hosanna-Tabor*, based on the longstanding principle of church autonomy. Now the Court must wrestle with how to determine who qualifies as a "ministerial employee." The Petitioners before the Court are both private religious schools that serve the Catholic faith community. Respondent Morrissey-Berru was a fifth grade teacher at Our Lady of Guadalupe School, and Respondent Biel was a fifth grade teacher at St. James School. Both had significant religious duties—prayer, liturgy planning for Mass, teaching religious doctrine—and furthermore were charged with integrating the Catholic faith into their entire teaching curriculum. Op. Br. 11-12 (Morrissey-Berru's religious duties listed), 19 ("St. James evaluated Biel's teaching of the Catholic faith across all

subjects to ensure she was accomplishing the school's religious mission."). Respondents contend that their religious duties were minimal and did not render them "ministers" for purposes of the ministerial exception.

Neither Respondent precisely fits the mold of the Lutheran school teacher in *Hosanna-Tabor*. But in determining who qualifies as a ministry representative, a factor that tips the scales in one case—such as the title, training, and/or tax benefits present in *Hosanna-Tabor*—does not set a standard for what must be present in every case. "We are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister." *Hosanna-Tabor*, 565 U.S. at 190. Many cases have considered an employee's function and primary duties in determining ministerial status. The broad themes of *message* and *mission* emerge, both before and after *Hosanna-Tabor*. As the Fifth Circuit phrased it, ministerial employees are the "lifeblood" of a religious organization. *McClure v. Salvation Army*, 460 F.2d 553, 558-559 (5th Cir. 1972). They speak for it and carry out its purposes as they perform their duties. In the educational context, teachers are that "lifeblood."

The determination of ministerial employment status implicates a trilogy of First Amendment rights—religion, speech, and association. The impact of the ministerial exception stretches beyond an entity's right to hire and fire. Some courts have extended the analysis to wage and hour claims. Breach of contract claims may be covered, particularly if the alleged breach involves an employment contract

ARGUMENT

I. MINISTERIAL EMPLOYEES ARE THE "LIFEBLOOD" OF A RELIGIOUS ORGANIZATION BECAUSE THEY ARE CRITICAL TO THE ORGANIZATION'S ABILITY TO FULFILL ITS MISSION AND DISSEMINATE ITS MESSAGE.

The ministerial exception enables a religious organization to preserve its core identity and perpetuate its existence by freely choosing "those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). As the Fifth Circuit explained nearly fifty years ago: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *McClure*, 460 F.2d at 558-559. Petitioners and many court decisions about the ministerial exception consider the employee's function and primary duties. These reveal whether that person is part of the "lifeblood" that flows through the veins of the institution to fulfill its mission and disseminate its message. Teachers are the quintessential "lifeblood" of a religious school. Petitioner schools both serve the Catholic community, passing their faith along to the next generation.

A. The ministerial exception implicates a *trilogy* of core First Amendment rights—speech, association, and religion.

Speech, association, and religion would qualify as fundamental rights even if the First Amendment did not expressly guarantee them. All of them are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," so that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997).

Without the robust protection of the ministerial exception, the Petitioner schools would have to forfeit all three of these core First Amendment rights. Moreover, these basic liberties "are protected not only against heavy-handed frontal attack, but also from being stifled by *more subtle governmental interference*." *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960); *Healy v. James*, 408 U.S. 169, 183 (1972) (emphasis added). Dilution of the ministerial exception would function as a prior restraint on these rights. *Id.,* 408 U.S. at 184. A religious school could be forced to retain a teacher who refused to teach and model the school's religious doctrine.

B. The schools are religious associations entitled to define and express themselves.

This Court's expressive association jurisprudence is helpful to understanding the ministerial exception and its relationship to key First Amendment rights. "The right to freedom of association is a right enjoyed by religious and secular groups alike." *Hosanna-Tabor*,

565 U.S. at 189. An expressive association, religious or otherwise, is formed to create a voice that will faithfully communicate its message and carry out its mission. "Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith." *Id.*, 565 U.S. at 200-201 (Alito, J., concurring). The freedom to establish membership criteria is essential, because "[f]orcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). The same is true—perhaps even more so—for leadership criteria, because "perpetuation of a church's existence" hinges on the persons "select[ed] to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). This principle is equally true for a religious school entrusted with conveying the message to the next generation.

Every religious association has a *mission* and the corresponding right to craft and disseminate a *message* that furthers that mission. Religious organizations are "dedicated to the collective expression and propagation of shared religious ideals." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). The free exercise of religion requires that an organization "must retain the corollary right to select its voice." *Petruska v. Gannon University*, 462 F.3d 294, 306 (3d Cir. 2006).

An association is a composite of individual persons that can only speak through its authorized representatives. "[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 643 (1984) (O'Connor, J., concurring). More generally, "an entity can act and speak only through the individuals that comprise and represent it." *Wilson v. Cable News Network, Inc.*, 7 Cal. 5th 871, 894 (2019). Speech is often most effective when many voices are combined. Government restrictions on expressive association can have a chilling effect on protected speech. *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 68 (2006); *Jaycees,* 468 U.S. at 622. Leaders speak for an organization through their conduct and spoken words. If they are not committed to the association's purposes, they are likely to be disloyal or misrepresent the group.

Regulating the identity of a political party's leaders interferes with the content and promotion of its message. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 579 (2000). There is no substitute for a group's right to select its members and leaders. *Id.* at 581. Similarly, associational autonomy is critical to preserving the expressive freedom of religious organizations. Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391, 436 (1987). A religious institution may not be forced to say "anything in conflict with [its] religious tenets." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). Government regulation of the membership and/or leadership of a religious association threatens to unconstitutionally "alter both content and the mode of

expression of its shared commitments over time." Lupu, *Free Exercise Exemption*, 67 B.U. L. Rev. at 434.

The freedom to associate presupposes the freedom to *not* associate. *Cal. Democratic Party,* 530 U.S. at 574. The ability of an organization to speak is severely curtailed if the group is denied the right to identify the members who comprise it or the leaders who speak for it. This limited right to *discriminate* enables an expressive association to create its unique voice, and that encompasses the corollary right to determine who does *not* represent and speak for it. Ministerial exception cases typically occur in the context of employment termination. Courts generally decline to become entangled in the initial hiring decisions of a religious organization, but it is equally important not to compromise church autonomy when the relationship ends.

In another associational context, the term "speech" included a high school Bible club's leadership policy provisions to the extent these were created to protect the club's religious message. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 856 (2d Cir. 1996). Similarly, the restrictive policies of any religious organization are essential to preserving its identity and distinctive "voice." Without the ministerial exception covering its teachers, Petitioner schools would have no comparable alternative channels to mold and preserve the message they were formed to express and pass on to the next generation.

Like any organization committed to the transmission of a system of values, the schools are engaged in constitutionally protected expression. *Dale*,

530 U.S. at 650. That expression is threatened if a school is compelled to accept a teacher whose presence may significantly affect its ability to promote a particular viewpoint. *Id*. at 648; *New York State Club Assn., Inc. v. City of New York,* 487 U.S. 1, 13 (1988). The presence of an unwanted teacher would encroach on the school's ability to advocate its religious values.

A religious school's ability to select its teachers is imperative to the preservation of its mission and identity. Teachers shape the content and quality of the school's speech. If they are not committed to the school's religious values, the group's voice will be garbled. *Hsu*, 85 F.3d at 857.

C. A religious school is engaged in speaking a *message* that is inextricably linked to its *mission*. The schools must retain the exclusive right to select the messenger.

The ministerial exception facilitates a religious association's ability to create its own unique "voice." Religious speech, "far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression . . . government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). *See also Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Bd. of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

Regardless of motives, the State "may not substitute its judgment as to how best to speak" for that of an organization. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (crisis pregnancy centers protected against compelled speech regarding state-financed abortions). Compelling an organization to retain an unwanted ministerial employee (or pay a hefty fine) is tantamount to compelled speech. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). Even a secular business may create a unique brand, free of government compulsion, to convey a message to the public. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (trademark); *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (mushroom producer).

The free speech principles at stake here are evident in lower court decisions as well as *Hosanna-Tabor*, where the plaintiff teacher had a role in "conveying the Church's message and carrying out its mission." *Hosanna-Tabor*, 565 U.S. at 192; *id.* at 204 (Alito, J., concurring). The ministerial exception "should be tailored to this purpose" and applied to any employee who "serves as a messenger or teacher of its faith." *Id.* at 199 (Alito, J., concurring). Cases before and after *Hosanna-Tabor* have done so, including:

- *EEC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (1981) (Baptist seminary faculty members instruct future ministers on church doctrine)

- *Natal v. Christian & Missionary Alliance,* 878 F.2d 1575, 1578 (1st Cir. 1989) (rejecting discharged minister's claim to have a property right in his job and recognizing "the difficulties inherent in separating the message from the messenger")
- *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990) (the determination of "whose voice speaks for the church" is *per se* a religious matter)
- *Scharon v. St. Luke's Episcopal Presbyterian Hospital,* 929 F.2d 360, 363 (8th Cir. 1991) (same)
- *Rayburn*, 772 F.2d at 1168 ("perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines")
- *EEC v. Catholic University of America*, 83 F.3d 455, 463 (D.C. Cir. 1996) ("the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission")
- *Petruska,* 462 F.3d at 306 (an entity must have the right to select its voice in order to exercise the right to free exercise of religion)

- *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177, 179 (5th Cir. 2012) (church music director "furthered the mission of the church and helped convey its message to the congregants . . .furthering the mission and message of the church at Mass")
- *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 209 (2d Cir. 2017) (religious school principal "convey[ed] the School's Roman Catholic message and carr[ied] out its mission") (internal quotation marks and citations omitted)
- *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 659 (7th Cir. 2018) (Hebrew teacher expected to integrate religious teachings into her lessons)

In light of the critical role of those who speak for a religious association, "[t]he Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith." *Hosanna-Tabor*, 165 U.S. at 202 (Alito, J., concurring).

Communication is a key element of a religious association's ability to fulfill its religious mission. As this Court noted, "the Free Exercise Clause, . . . protects a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 565 U.S. at 173. Many cases mention a ministerial employee's function in relationship to the employer's mission (or purpose). In addition to some of the cases cited above:

- *Gellington v. Christian Methodist Episcopal Church,* 203 F.3d 1299, 1304 (11th Cir. 2000) ("[T]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." *McClure*, 460 F.2d at 558-559.)
- *EEC v. Roman Catholic Diocese of Raleigh, NC,* 213 F.3d 795, 804 (4th Cir. 2000) (music teacher for church-operated school is a ministerial employee because music is an integral part of the church's spiritual mission)
- *Werft v. Desert Southwest Annual Conference,* 377 F.3d 1099, 1101 (9th Cir. 2004) (a "minister" is one who holds a position important to the spiritual and pastoral mission of the church)
- *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 837 (6th Cir. 2015) (a religious association has an interest in choosing the persons who will carry out its mission)
- *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 571 (7th Cir. 2019) ("A priest who delivered the homily in a monotone would not advance the church's religious mission; no more does an organist who proclaims that he plays mechanically.")

The Constitution, and the church autonomy doctrine derived from it, demands that a religious association be free to select the persons who convey its *message* and carry out its *mission*.

D. A religious association conveys its message not only through speech, but also the *conduct* of its representatives.

Religion is a comprehensive worldview, not a compartment isolated from daily life. Teachers in a religious school do not simply teach *about* religion—they must model its values to students in their conduct and interactions with students, faculty, and the families they serve. A religious school must consider the families and parents it serves and respond to their needs, as St. James School and Our Lady of Guadalupe both did in the events that precipitated the actions in the two cases before this Court. Pet. (19-348) 8; Pet. (19-267) 8-9. A recent district court case in South Carolina illustrates the broad scope of what religious groups expect of their representatives. In that case, the school's Educational Guide provided that:

> Since the teacher has been called to CIU by God, there should be a full-time commitment to this ministry . . . the faculty role is not compatible with a "40-hour week" mentality.

Lishu Yin v. Columbia Int'l Univ., 335 F. Supp. 3d 803, 806 (D. S.C. 2018).

This Court has long recognized that a religious organization can require conformity to its moral standards as a condition of membership. *Watson v. Jones,* 80 U.S. (13 Wall.) 679 (1872). The criteria for leaders, who speak for the organization, is even more critical. That is something the government cannot dictate. "When it comes to the expression and inculcation of religious doctrine, there can be no doubt

that the messenger matters. . . . [B]oth the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. . . ." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). Teachers not only convey the school's religious message—they are "the embodiment" of that message. *Petruska,* 462 F.3d at 306.

E. The ministerial exception complements the broad Title VII statutory exemption from religious discrimination.

There is unquestionably tension between "our cardinal Constitutional principles of freedom of religion . . . and our national attempt to eradicate all forms of discrimination." *Rayburn*, 772 F.2d at 1167. But a religious organization must be free to exclude non-adherents from employment positions where they could distort the organization's message or hinder its mission. Otherwise, an association could be hijacked by non-adherents who would distort its identity and message.

Recognizing the unique constitutional protection for religion, the Civil Rights Act of 1964 (Title VII) accommodates religious employers by exempting them from the prohibition against religious discrimination. 42 U.S.C. § 2000e-1. This Court upheld the exemption against Establishment and Equal Protection Clause challenges, observing that government should not interfere with "the ability of religious organizations to define and carry out their religious missions." *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 335-336 (1987) (building engineer discharged by nonprofit gymnasium associated with church). This

broad exemption allows a religious employer to terminate an employee "for exclusively religious reasons, without respect to the nature of their duties." *Spencer v. World Vision, Inc.*, 619 F.3d 1109, 1111 (9th Cir. 2010). In *Spencer*, the Ninth Circuit upheld World Vision's termination of three employees who performed maintenance, office, and shipping services. All of them initially signed the required "Statement of Faith, Core Values, and Mission Statement" but later were terminated when they renounced the religious doctrine that defines World Vision's mission. *Id*. at 1112.

The constitutionally compelled ministerial exception, based on an *employee's* ministerial status, complements the broad Title VII statutory exemption, which is grounded in an *employer's* religious nature. Both guard the free exercise rights of religious employers. If otherwise applicable antidiscrimination laws were applied to religious entities without some adjustment for their religious character and purposes, there would be enormous potential for collision with their religious liberty as well as rights to free speech and association. Title VII grants religious entities broad liberty to "discriminate" on the basis of religious doctrine. Although Title VII's other provisions remain generally applicable, the ministerial exception guards against lawsuits filed by ministerial employees for other types of employment discrimination. The ministerial exception thus complements Title VII by ensuring the government does not encroach on a religious organization's liberty to select those who are most critical to fulfilling its mission—its ministerial employees.

II. THE MINISTERIAL EXCEPTION IS POTENTIALLY RELEVANT TO OTHER CLAIMS INVOLVING MINISTERIAL EMPLOYEES.

Ministerial status has implications for other types of claims against religious employers, including wage and hour claims or breach of contract. Some claims—such as sexual harassment—may be actionable regardless of the employee's ministerial status. It is common to see multiple claims combined in one lawsuit—some may be subject to the ministerial exception while others are not. Courts must often determine the employee's ministerial status at the outset. The outcome of the two cases before this Court will enhance their ability to do that.

A. The ministerial exception may extend to other aspects of the employment relationship, including wage and hour claims.

There are no wage claims in the two Petitions currently before this Court, but the Court's approach to identifying ministerial employees will impact the outcome of such claims in the lower courts.

Employee wages and hours are governed by a variety of federal and state laws, with significant variation in the statutory exemptions for religious employers and/or workers. The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*., applies to church-operated schools but contains a specific exemption for ministerial employees:

> Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be "employees."

Wage and Hour Division, U.S. Dep't of Labor Field Operations Handbook § 10b03 (1967).

State laws must also be considered. In California, where Petitioner schools are located, the Cal. Fair Employment and Housing Act contains an express exemption for religious nonprofit employers:

> "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows: "Employer" does not include a *religious* association or corporation not organized for private profit.

Cal. Gov. Code § 12926(d). The Cal. Labor Code governs minimum wage and overtime requirements. Private school teachers are "exempt employees" for overtime purposes (Cal. Lab. Code § 515.8), but only if the teacher earns at least twice the current minimum wage.

Several circuit courts have found wage claims barred by the ministerial exception: *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004) (ministerial exception barred

kosher supervisor's overtime claim under FLSA); *Schleicher v. Salvation Army,* 518 F.3d 472 (7th Cir. 2008) (ministerial exception barred minimum wage and overtime claims brought by Salvation Army ministers under FLSA); *Alcazar v. Corporation of Catholic Archbishop of Seattle*, 598 F.3d 668, 673–674 (9th Cir. 2010), affd. in part and vacated in part, 627 F.3d 1288 (ministerial exception barred application of Washington's minimum wage act to Catholic seminarian suing for overtime wages); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010) (ministerial exception barred religious director's post-termination claims against church, including violations of the Equal Pay Act of 1963 (Pub.L. No. 88-38 (June 10, 1963) 77 Stat. 56)).

The initial determination of ministerial status may determine whether an employee is covered by a particular statutory exemption. Petitioners cite a recent California case involving a preschool teacher who sued her religious employer for failing to provide the rest breaks, meal breaks, and overtime pay required by California. *Su v. Stephen S. Wise Temple*, 32 Cal.App.5th 1159 (2019); see Pet. (19-267) at 24-25; Pet. (19-348) at 22, 27. The California appellate court applied *Biel*, analyzing the four factors in *Hosanna-Tabor*, to reach its conclusion that the teacher did not qualify. *Id*. at 1168-1169. One concurring judge would have reached the same conclusion for a different reason—"is not *who* the Temple will select to educate its youngest students, but only whether it will provide the people it has chosen with meal breaks, rest breaks, and overtime pay." *Id*. at 1175 (Edmon, J., concurring). Application of the law did not require inquiry into

religious doctrine. But it is not always that simple, as demonstrated by the circuit citations above. Wages and hours are part of the overall employer-employee relationship, and it is arguably improper—depending on the facts in each case—for a court to become involved when the employee serves in a ministerial role. That is a question for another day.

B. The ministerial exception bars some breach of contract claims.

Lawsuits filed against religious employers by ministerial employees are sometimes framed as breach of contract actions. Contract claims may or may not entangle the court in questions of religious doctrine. Courts must examine the substance of claims made by a "ministerial employee." This Court's ruling will assist lower courts in the threshold determination as to a plaintiff's ministerial status.

The Third Circuit recently applied the ministerial exception to bar a breach of contract action because in reality it was exactly the type of employment decision courts refuse to adjudicate. *Lee v. Sixth Mt. Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018). After his employment was terminated, the pastor sued the church alleging a breach of his *employment* contract. The church congregation had voted to terminate the contract because the pastor "materially breached" it by failing to provide "adequate spiritual leadership." *Id*. at 121. Other circuit decisions have reached similar results (*id*. at 122): *Natal*, 878 F.2d at 1577 (pastor's claims, including breach of contract and alleged "property right" in his job, barred by ministerial exception); *Bell v. Presbyterian Church*

(U.S.A.), 126 F.3d 328, 331-332 (4th Cir. 1997) (ministerial exception barred minister's breach of contract and tort claims against religious nonprofit after the organization downsized because of financial difficulties); *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 942-43 (6th Cir. 1992) (ministerial exception barred minister's claims, including breach of contract, which involved his handling of church finances and his conduct as executor of an estate to which he and the church were both beneficiaries); *Hutchison v. Thomas*, 789 F.2d 392, 395 (6th Cir. 1986) (ministerial exception foreclosed breach of contract claim asserted by minister forced to retire because of his inability to work with church congregations and members). The label "breach of contract" is not conclusive and does not foreclose the ministerial exception. As the saying goes, "if it looks like a duck and quacks like a duck . . . ."

On the other hand, churches, "[l]ike any other organization . . . may be held liable . . . upon their valid contracts." *Rayburn*, 772 F.2d at 1171; *see also Minker*, 894 F.2d at 1360, "[a] church is always free to burden its activities voluntarily through contract, and such contracts are fully enforceable in civil court." Under some circumstances, the claims are not barred: *Jenkins v. Refuge Temple Church of God in Christ, Inc.*, 818 S.E.2d 13, 18 (S.C. App. 2018) ("the parties in this case are not asking this court to resolve an employment discrimination suit . . . but rather to determine the validity of a contract between a church and a former minister's wife"); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 615 (Ky. 2014) (ministerial exception did not bar tenured professor's breach of

contract claims against theological seminary because professor did not seek reinstatement and the court would not be interfering in the seminary's "selection of [its] ministers"); *Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 817 (D.C. 2012) (ministerial exception did not bar minister's breach of contract action against church seeking payment for services fully performed in the past, because it would not "require the court to entangle itself in church doctrine").

Some cases are more complex, e.g., where multiple claims are asserted. In *Petruska*, the ministerial exception barred most of a university chaplain's claims, but her state law contract claim could proceed unless (or until) further proceedings "raise[d] issues which would result in excessive entanglement." *Id.*, 462 F.3d at 310-312.

CONCLUSION

This Court should reverse the two decisions of the Ninth Circuit and clarify the scope of the ministerial exception.

Respectfully submitted,

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