No. _______

In the Supreme Court of the United States

ST. JAMES SCHOOL,

Petitioner,

v.

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

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ERIC C. RASSBACH
Counsel of Record
DANIEL H. BLOMBERG
DIANA M. VERM
ADÈLE AUXIER KEIM
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
erassbach@becketlaw.org

JACK S. SHOLKOFF
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
400 South Hope Street Suite 1200
Los Angeles, CA 90071

MARGARET G. GRAF
ROMAN CATHOLIC ARCHDIOCESE OF LOS ANGELES
3424 Wilshire Boulevard
Los Angeles, CA 90010

Counsel for Petitioner

QUESTION PRESENTED

The First Amendment's Religion Clauses forbid government interference in a religious group's selection of its ministerial employees. The federal courts of appeals and state courts of last resort have long agreed that the key to determining ministerial status is whether an employee performed important religious functions. This Court's unanimous 2012 ruling in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC* was consistent with that existing analytical consensus, and other circuits and states since 2012 have continued to rely on it. Yet the Ninth Circuit has now twice ruled that, under *Hosanna-Tabor*, important religious functions alone can never suffice—those functions must always be accompanied by considerations such as a religious title or religious training in order to demonstrate ministerial status.

The question presented is:

Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner St. James School was the defendant-appellee below. Respondent Kristen Biel was the plaintiff-appellant below. Ms. Biel passed away on June 7, 2019 and her husband Darryl Biel, in his capacity as the personal representative of her estate, was substituted as the party to this case.

Petitioner St. James School has no parent corporation and issues no stock. St. James School is a canonical entity and part of the canonical parish of St. James in the Roman Catholic Archdiocese of Los Angeles; civilly, St. James School is treated as an unincorporated association under the corporate laws of the State of California. The Archdiocese of Los Angeles operates in the civil forum through several religious corporations under the corporate laws of the State of California; civilly, the real property and related assets of St. James School and Parish are held by and operated through certain of those corporations.

RELATED PROCEEDINGS

There are no related proceedings.

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INTRODUCTION

In 2012, the Court decided *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, recognizing the ministerial exception, a bedrock First Amendment doctrine that bars civil courts from adjudicating employment-related cases brought by "ministerial" employees against their religious employers. 565 U.S. 171 (2012). The Court's decision was unanimous.

As we explained in the parallel petition pending before this Court in *Our Lady of Guadalupe School* v. *Morrissey-Berru*, No. 19-267, the lower courts applying the ministerial exception have, with remarkable consistency, focused on employees' religious functions to determine their ministerial status. Pet. at 18, *Our Lady of Guadalupe* (filed Aug. 28, 2019). Indeed, Justices Alito and Kagan identified this consistency as reflecting a "functional consensus" among the courts. *Hosanna-Tabor*, 565 U.S. at 203 (Alito, J., concurring). Under that consensus, religious functions are not the only analytical consideration, but they are the touchstone.

The Ninth Circuit, however, has decided to go its own way. In this case and in *Morrissey-Berru*, separate panels of the Ninth Circuit concluded that important religious functions could never be enough, by themselves, to prove up an employee's ministerial status.

Here, it was undisputed that Kristen Biel was responsible for "transmitting the [Catholic] faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 192. Biel, who was Catholic, testified that she spent 200 minutes each week teaching her students about the

Catholic faith. She taught them the significance of Lent and Easter; she instructed them on the sacraments like the Eucharist and Reconciliation; and she read them Scriptural accounts about Jesus. Twice a day, she prayed prayers like the Hail Mary and the Lord's Prayer with her students; every month she took them to a school mass and prayed with them there as well. Biel served as an embodiment of Catholic faith and worship both in her life and in all of the other academic subjects she taught. Yet, "although Biel taught religion," a divided panel concluded that was not enough because it did not include one of three other considerations that factored into *Hosanna-Tabor*'s analysis: religious title, training, or tax benefits. App 15a. Thus, since the panel majority believed "only one of the four *Hosanna-Tabor* considerations weighs in St. James's favor," it ruled that the ministerial exception did not apply. App. 15a.

Nine judges on the Ninth Circuit later dissented from this new approach, criticizing both the panel majority and the later decision in *Morrissey-Berru* which relied on it. App. 42a (R. Nelson, J., joined by Bybee, Callahan, Bea, M. Smith, Ikuta, Bennett, Bade, and Collins, JJ., dissenting from denial of rehearing en banc). The dissenting judges called for this Court to step in and correct the Ninth Circuit's anomalous standard, which they identified as splitting with numerous post-*Hosanna-Tabor* cases. And a few weeks later, the Seventh Circuit's *Sterlinski* v. *Catholic Bishop of Chicago* decision, written by Judge Easterbrook, confirmed that the Ninth Circuit had broken from the functional consensus. The split of authority is thus deep, acknowledged, and—absent this Court's intervention—irreconcilable. 934 F.3d 568 (7th Cir. 2019).

Moreover, as the *Biel* dissenters recognized, the stakes are high, not only for St. James and Our Lady, but also for the thousands of schools and other religious employers across the eleven states and territories of the Ninth Circuit. Under the Ninth Circuit's new "resemblance-to-Perich test," App. 50a (R. Nelson, J., dissenting), those religious institutions now must choose between giving up control of who passes on their faith to the school children in their charge or conforming themselves to the specific Lutheran religious employment practices upheld in *Hosanna-Tabor*. Either outcome would be deeply unfair to schools, parents, and students.

Without correction, the Ninth Circuit's rule promises to turn up the heat on church-state conflict across the western United States and leaves religious institutions subject to two starkly different First Amendment standards depending on the accident of geography. The question presented is thus one of nationwide importance that only this Court can resolve.

Finally, because the petition in *Our Lady* is already pending and presents the same question as this case, the Court may wish to grant the petition in *Our Lady* and hold this petition pending disposition of that appeal.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 911 F.3d 603 (9th Cir. 2018) and reproduced at App. 1a. The order denying the petition for rehearing en banc is reported at 926 F.3d 1238 (9th Cir. 2019) and reproduced at App. 40a. The district court's opinion

granting summary judgment to St. James School is unreported and is reproduced at App. 69a.

JURISDICTION

The court of appeals entered its judgment on December 17, 2018. The petition for en banc rehearing was denied on June 25, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY 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.

The relevant portions of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq*. (“ADA”), are reprinted in the Appendix. App. 75a.

STATEMENT OF THE CASE

I. Factual Background

A. Petitioner St. James School

St. James School is a Catholic parish school located in Torrance, California. The school is a ministry of, and is operated by, the parish of St. James under the jurisdiction of the Archdiocese of Los Angeles. The Archdiocese is a constituent entity of the Roman Catholic Church and is the largest archdiocese in the United States. It is headed by an Archbishop, currently Archbishop José H. Gomez.

St. James was founded in 1918. The first teachers were Sisters of the Order of St. Joseph of Carondelet, and at the time of this lawsuit nearly 100 years later,

the school was still led by a religious sister. The mission of St. James is to develop and promote a Catholic faith community that reflects both a Catholic philosophy of education and the doctrines, laws, and norms of the Catholic Church. App. 19a.

B. The role of teachers at St. James

Teachers have an important role in carrying out St. James's religious mission. Teachers are expected to "personally demonstrate [their] belief in God," to "delight in and enjoy our noble position as Catholic educators," and to "actively take part in worship-centered school events." App. 19a. Teachers must agree to perform "all" of their "duties and responsibilities" in a manner consistent with Catholic doctrine and educational philosophy. App. 19a. Teachers apply "the values of Christian charity, temperance, and tolerance" to all their interactions with others at the school, App. 97a, "guide the spiritual formation of the student[,]" and "help each child strengthen his/her personal relationship with God." App. 20a. Teachers are also expected to participate in St. James's liturgical activities, App. 19a, to begin and end each school day with prayer, App. 110a, to teach students specific prayers each month of the school year, App. 110a, and to prepare their students to be "active participants" in regularly-scheduled school-wide masses, App. 109a. In light of these responsibilities, St. James prefers to hire teachers that are practicing Catholics, App. 4a, and all teachers are required to "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church." App. 19a.

To ensure these expectations are met, they are written into each teacher employment contract, which

itself must be signed by the parish pastor and renewed annually. App. 98a, 101a. Teachers are also evaluated on whether their teaching "infus[es] 'Catholic values through all subject areas'" and whether their classrooms visibly reflect the "sacramental traditions of the Roman Catholic Church." App. 83a-84a, 106a.

C. Biel's role at St. James

Kristen Biel began teaching full-time at St. James in 2013. App. 4a. Although she had been a substitute teacher in the past, this was her first full-time teaching position. App. 4a.

Biel was Catholic, and she understood that, as a Catholic school, St. James had the goal of "promot[ing] and develop[ing] the Catholic faith" among its students. App. 92a. She also understood that, as a teacher at St. James, she was responsible for incorporating the Catholic faith into the curriculum. App. 92a.

Biel fulfilled this commitment in several ways. Most prominently, she taught religion classes four days a week. App. 82a. Biel was required to spend a minimum of 200 minutes each week teaching her students about the Catholic faith. App. 50a. In these classes, she taught her students about:

- the sacraments of the Catholic Church including the Eucharist and confession,
- the lives of Catholic Saints,
- Catholic prayers,
- Catholic social teaching,
- Gospel stories, and

- Catholic holy days like Lent and Easter.

App. 18a.

In addition to teaching religion classes, Biel displayed Catholic sacramental symbols throughout her classroom. App. 18a. She was also required to incorporate Catholic values and traditions in all the other subjects taught in her classroom. App. 19a.

Further, Biel modeled and practiced the Catholic faith by taking part in school-based religious worship. She testified that she prayed prayers like the Lord's Prayer and the Hail Mary with her students twice each day. App. 93a. She attended school masses with her students every month, where twice a year her students participated by presenting the Eucharistic gifts. App. 34a. Biel testified that, during these monthly masses, she also prayed with her students. App. 81a, 95a-96a.

To ensure her students properly understood the religious beliefs which she taught and modeled, Biel regularly gave her students religious tests. App. 83a. And to ensure that she was properly teaching Catholic beliefs, St. James regularly evaluated her teaching of the Catholic faith across all subjects. App. 32a. St. James also required her to attend the Los Angeles Religious Education Congress, a day-long conference for Catholic teachers that included training in how to incorporate God into their teaching. App. 30a.

D. St. James declines to renew Biel's contract

Two weeks into the 2013-14 school year, St. James's principal, Sister Mary Margaret Kreuper, noticed that Biel's classroom was disorganized and noisy. App. 85a. Thus, while Biel's first and only

formal performance review noted that, for instance, she was displaying Catholic symbols in her classroom, she was also counseled to improve her classroom management. App. 5a-7a.

Biel's classroom management did not improve. As the year went on, teachers and administrators at St. James observed that Biel's classroom was "chaotic" and "often out of control." App. 85a, 120a-121a, 112a. Books and papers were seen in the aisles and children "crawling on the floor." App. 114a. Janell O'Dowd, a teacher at St. James whose daughter was also a student in Biel's classroom, confirmed that Biel's classroom was "very loud, noisy," and that Biel's failure to correct her daughter's work made it difficult for her daughter to prepare for tests. App. 114a-115a. By January 2014, Biel was called into weekly meetings with school administrators about her classroom performance and told that it would be difficult to offer her a contract for the following school year. App. 85a-86a, 87a-89a.

Following Easter break in April 2014, Biel told Sister Mary Margaret that she had breast cancer and that May 22 would be her last day teaching so that she could pursue treatment. App. 88a-91a. Sister Mary Margaret expressed sympathy and noted that she, too, was being treated for breast cancer. App. 90a-91a. Biel remained employed at St. James through the end of her 2013-2014 contract. However, St. James decided not to renew Biel's contract for the 2014-2015 school year. App. 5a-7a.

II. The proceedings below

A. Biel's complaint

Biel filed charges with the EEOC in December 2014 and was issued a right-to-sue letter in March 2015. Biel then sued in federal district court, alleging that St. James's decision not to renew her contract violated the ADA. App. 5a-7a.

After discovery, St. James filed a motion for summary judgment. App. 5a-7a. The district court granted the motion, ruling that Biel's claim was barred by the First Amendment's ministerial exception. App. 5a-7a. It found that St. James was undisputedly a religious organization protected by the exception. App. 71a-73a. Thus, "the application of the ministerial exception turn[ed] on whether Biel was a 'minister.'" App. 71a.

The court found that she qualified because she "conveyed the Catholic Church's message by teaching religion to her students," "by administering and evaluating weekly tests from a Catholic textbook," and "by praying with the students twice each day." App. 73a. The court also observed that Biel herself "clearly sought to carry out St. James's Catholic mission by, for example, including Catholic teachings into all of her lessons and attending a conference to learn techniques for incorporating religious teachings into her lessons." App. 73a. The court noted that Biel's case did not "contain all of the hallmarks of ministry identified in *Hosanna-Tabor*," but concluded that *Hosanna-Tabor* "was not intended to represent the outer limits of the ministerial exception." App. 73a. The court ruled that Biel was a minister and granted summary judgment for St. James. App. 73a.

Biel appealed.

B. Ninth Circuit proceedings

On appeal, the EEOC appeared and presented oral argument as an *amicus curiae* supporting Biel, asserting among other things that courts since *Hosanna-Tabor* have applied the exception only to those employees in a "spiritual leadership role." *Biel* v. *St. James School*, No. 17-55180, Dkt. No. 25 at 24 (EEOC brief filed Sep. 27. 2017).

A divided panel of the Ninth Circuit reversed. App. 4a-5a. The panel majority held that Biel's religious duties were, taken alone, insufficient to invoke the ministerial exception, and that the exception was ordinarily applied to those with "religious leadership" roles while "Biel's role in Catholic religious education" was "limited to teaching religion from a book." App. 13a, 14a.

Judge D. Michael Fisher, sitting by designation, dissented, opining that "Biel's duties as the fifth grade teacher and religion teacher are strikingly similar to those in *Hosanna-Tabor*," and that the panel majority's conclusions were also in clear conflict with a recent decision of the Seventh Circuit. App. 32a (citing *Grussgott* v. *Milwaukee Jewish Day School, Inc.*, 882 F.3d 655, 661 (7th Cir.), *cert. denied*, 139 S. Ct. 456 (2018)). Judge Fisher further warned that the majority's approach, such as downplaying religious doctrinal instruction as merely "teaching * * * from a book," improperly "invites the very analysis the ministerial exception demands we avoid" and causes judicial "entanglement in the affairs of religious organizations." App. 13a, 34a-35a.

St. James filed a petition for rehearing en banc. While that petition was still pending, a different panel of the Ninth Circuit followed *Biel*'s analysis to rule against Our Lady of Guadalupe School, a Catholic school in a neighboring parish that was also being sued by a fifth-grade teacher. *Morrissey-Berru* v. *Our Lady of Guadalupe School*, 769 F. App'x 460 (9th Cir. 2019). The panel agreed that the teacher's "significant" religious duties included that she had "committed to incorporate Catholic values and teachings into her curriculum," and that she "led her students in daily prayer, was in charge of the liturgy planning for a monthly Mass, and directed and produced a performance by her student's during the School's Easter celebration every year." *Id.* at 461. But, in the panel's view, all of this was insufficient because *Biel* instructs that "an employee's duties alone are not dispositive." *Ibid.* Our Lady of Guadalupe School filed a petition for a writ of certiorari in this Court on August 28, 2019. See No. 19-267, *Our Lady of Guadalupe School* v. *Morrissey-Berru*.

On June 25, 2019, the Ninth Circuit denied the petition for rehearing en banc. Nine judges dissented, stating that *Biel*'s analysis "poses grave consequences for religious minorities" and "conflicts with *Hosanna-Tabor*, decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles." App. 42a (R. Nelson, J., dissenting). The dissent noted that the panel decision had already been relied on in *Morrissey-Berru* to cut back on the ministerial exception's protections, and observed that "[i]n each successive case, we have excised the ministerial exception, slicing through constitutional muscle and now cutting deep into core

constitutional bone." App. 44a (citing *Morrissey-Berru,* 769 F. App'x at 460).

On June 7, 2019, during the pendency of the en banc petition, Biel passed away. On July 3 the panel substituted Darryl Biel, as personal representative of Biel's estate, as the appellant. App. 69a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit and the California Court of Appeal are in a square, deep, and acknowledged split with the "functional consensus" approach to ministerial exception analysis adopted by seven other federal circuits and seven state courts of last resort.

The Ninth Circuit's rule "embraces the narrowest construction" of the Religion Clauses' protection for religious autonomy, which "splits from the consensus of our sister circuits" and "decisions from state supreme courts" that "[an] employee's ministerial function should be the key focus." App. 42a (R. Nelson, J., dissenting). Under the Ninth Circuit's standard, a religious organization's employee can hold a ministerial role only if he has a religious title, training, or tax status, regardless of the religiously important functions of his position. That rigid approach, now also adopted by a California intermediate appellate court, conflicts with this Court's decision in *Hosanna-Tabor* and splits with the precedent of the Second, Third, Fourth, Fifth, Sixth, Seventh, and D.C. Circuits and courts of last resort in Connecticut, Kentucky, Maryland, Massachusetts, New Jersey, Wisconsin, and the District of Columbia.

A. Prior to *Hosanna-Tabor*, the lower courts consistently focused on function in determining ministerial status.

The ministerial exception was first applied in *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir. 1972). The Fifth Circuit held that "the application of the provisions of Title VII to the employment relationship existing between * * * a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter * * *." *Id.* at 560.

In the four decades between the ministerial exception's inception in 1972 and the Court's first application of it in 2012 (in *Hosanna-Tabor*), the overwhelming majority of Circuits and state supreme courts "ha[d] concluded that the focus should be on the 'function of the position'" in "evaluating whether a particular employee is subject to the ministerial exception." *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006) (quoting *Rayburn* v. *Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (Wilkinson, J.), and collecting cases from the D.C., Fourth, Fifth, and Seventh Circuits). See also *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) (identifying function-focused analysis as the "general rule"); *EEOC* v. *Catholic Univ. of America*, 83 F.3d 455, 463 (D.C. Cir. 1996) (employee was minister where her "primary functions serve [the religious employer's] spiritual and pastoral mission"); *Dayner* v. *Archdiocese of Hartford*, 23 A.3d 1192, 1204 (Conn. 2011) (courts must "objectively examine an employee's actual job function, not her title, in determining" ministerial status), overruled on other grounds in *Hosanna-Tabor*,

565 U.S. at 195 n.4; *Coulee Catholic School* v. *Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 881 n.16 (Wis. 2009) ("The focus * * * should be on the function of the position, not the title or a categorization of job duties"); *Pardue* v. *Center City Consortium School of Archdiocese of Washington, Inc.*, 875 A.2d 669, 675 (D.C. 2005) (inquiry focuses on "function of the position" and "not on categorical notions of who is or is not a 'minister'"); *Archdiocese of Washington* v. *Moersen*, 925 A.2d 659, 672 (Md. 2007) (emphasizing "the function of the position"); *Alicea* v. *New Brunswick Theological Seminary*, 608 A.2d 218, 222 (N.J. 1992) (ministerial exception protects decisions "regarding employees who perform ministerial functions").

B. In *Hosanna-Tabor*, this Court acted consistently with the "functional consensus" identified by Justices Alito and Kagan as the governing ministerial exception standard in the lower courts.

In *Hosanna-Tabor*, the Court addressed the ministerial exception for the first time, confirming that the First Amendment protects the relationship between religious ministries and their ministers from government interference. See *Hosanna-Tabor*, 565 U.S. at 187-188 & n.2 (collecting cases). This protection is rooted in both Religion Clauses: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id*. at 184.

The ministerial exception is a component of the Religion Clauses' broader religious autonomy protections, which trace their roots back over 140

years of Supreme Court precedent, *Hosanna-Tabor*, 565 U.S. at 185-186 (citing *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727 (1872)), and before that to Magna Carta, *id.* at 182. These protections benefit both church and state by preventing government entanglement in internal religious affairs. Together, the Religion Clauses ensure religious groups' "independence from secular control or manipulation" by reserving to them the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 186 (quoting *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

Hosanna-Tabor affirmed that this independence includes the selection of ministers. As the Court explained, the Religion Clauses ensure "that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical, *Kedroff*, 344 U.S. at 119—is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194-195 (internal quotation marks omitted). Even over "undoubtedly important" societal interests, such as employment discrimination statutes, "the First Amendment has struck the balance" in favor of allowing each religious group autonomy to "be free to choose those who will guide it on its way." *Id.* at 196; accord *id.* at 201 (Alito, J., concurring) ("A religious body's control over [ministers] is an essential component of its freedom to speak in its own voice[.]").

For its first foray into the ministerial exception, this Court declined to "adopt a rigid formula" to determine ministerial status. *Hosanna-Tabor,* 565 U.S. at 190. Rather, it was sufficient to resolve the

case at hand that "all the circumstances" of respondent Cheryl Perich's employment as a fourth-grade teacher at a Lutheran school showed that she was a minister. *Ibid*. The Court identified four "considerations" supporting its conclusion: Perich's (1) "formal title," (2) "the substance reflected in that title," (3) her "use of th[e] title," and (4) "the important religious functions she performed." *Id.* at 192. These considerations were enough to achieve the ministerial exception's core purpose: protecting "religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. The Court left other questions for another day, holding that "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise." *Ibid.*

Justice Thomas concurred, cautioning against misbegotten "[j]udicial attempts to fashion a civil definition of 'minister'" through a "bright-line test or multi-factor analysis" that would be insensitive to our nation's robust "religious landscape." *Hosanna-Tabor,* 565 U.S. at 197 (Thomas, J., concurring). Likewise, and in light of that religious diversity, Justices Alito and Kagan warned that "the important issue of religious autonomy" would be harmed if courts made the "mistake" of focusing on such religiously variable factors as an employee's title. *Id.* at 198 (Alito, J., concurring). Rather, the Justices emphasized that the Court's unanimous decision was consistent with the pre-existing "functional consensus" in the lower courts that the focus of ministerial exception analysis should be "on the function performed by persons who work for religious bodies." *Id*. at 198, 203 (Alito, J., concurring). And under that consensus, "religious authorities must be free to determine who is qualified to serve in

positions of substantial religious importance," such as "those who are entrusted with teaching and conveying the tenets of the faith." *Id.* at 200 (Alito, J., concurring).

C. After *Hosanna-Tabor* and before this case, the lower courts consistently focused on function to determine ministerial status.

After *Hosanna-Tabor* was decided, the Second, Third, Fifth, and Sixth Circuits, along with Massachusetts and Kentucky, continued to follow the "functional consensus" identified by Justices Alito and Kagan.

The Fifth Circuit decided the first post-*Hosanna-Tabor* ministerial exception appeal. In *Cannata* v. *Catholic Diocese of Austin*, Judge Dennis, joined by Judges Davis and Haynes, explained that "[a]pplication of the exception * * * does not depend on a finding that [the employee] satisfies the same considerations that motivated the [Supreme] Court to find that Perich was a minister." 700 F.3d 169, 177 (5th Cir. 2012). Rather, it was "enough" to conclude that an employee "played an integral role" in worship services and thereby "furthered the mission of the church and helped convey its message." *Ibid.* That is, the employee was a minister "because [he] performed an important *function* during the service." *Id.* at 180 (emphasis added).

The Second Circuit took the same tack. In *Fratello* v. *Archdiocese of New York*, Judge Sack, joined by Judges Lohier and Woods, explained that "'courts should focus' primarily 'on the *function*[*s*] performed by persons who work for religious bodies.'" 863 F.3d 190, 205 (2d Cir. 2017) (quoting *Hosanna-Tabor*, 565

U.S. at 198 (Alito, J., concurring)) (emphasis added). The court stressed that this kind of objective approach was necessary to avoid judicial entanglement in deciding religious questions:

> Judges are not well positioned to determine whether ministerial employment decisions rest on practical and secular considerations or fundamentally different ones that may lead to results that, though perhaps difficult for a person not intimately familiar with the religion to understand, are perfectly sensible—and perhaps even necessary—in the eyes of the faithful. In the Abrahamic religious traditions, for instance, a stammering Moses was chosen to lead the people, and a scrawny David to slay a giant.

Id. at 203.

In *Lee* v. *Sixth Mount Zion Baptist Church*, the Third Circuit likewise focused on functions, with Judges Shwartz, Rendell, and Roth confirming that "the ministerial exception 'applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual *functions*.'" 903 F.3d 113, 122 n.7 (3d Cir. 2018) (quoting *Petruska*, 462 F.3d at 299) (emphasis added).

And Judge Batchelder explained for the Sixth Circuit that "the ministerial exception *clearly* applies" where (a) the religious group "identifies an individual as a minister" in "good-faith"—which the court understood as the basic equivalent of the "title" consideration—and (b) the individual engages in important religious functions. *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir.

2015) (emphasis added). Given the presence of both a good-faith ministerial designation and "important religious functions," *Conlon* found that it did not need to reach the question of whether function alone would demonstrate ministerial status. *Ibid.*

State supreme courts applying *Hosanna-Tabor* also joined the "functional consensus." The Massachusetts Supreme Judicial Court was first, confirming that function alone can suffice to prove ministerial status in certain cases. *Temple Emanuel of Newton* v. *Massachusetts Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012). In that case, "[a]ll that [wa]s plain from the record [wa]s that [the plaintiff] taught religious subjects at a school that functioned solely as a religious school[.]" *Id.* at 486. The court said there was no evidence with respect to the other three *Hosanna-Tabor* considerations, but nevertheless held that the ministerial exception barred the plaintiff's claim. *Ibid.*

The Kentucky Supreme Court later agreed that in considering the totality of the circumstances, courts should give "more" focus to the "actual acts or functions conducted by the employee," and avoid the "danger of hyper-focusing" on considerations such as title. *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597, 613 & n.61 (Ky. 2014).

D. The Ninth Circuit rejected the functional consensus, first in this case and then in *Morrissey-Berru*.

This chorus of agreement among the lower courts was brought to a screeching halt by the two-judge majority in this case. App. 4a-5a. The panel majority held that Biel's religious duties were insufficient alone

to invoke the ministerial exception, and that the exception was ordinarily applied to those with "religious leadership" roles while "Biel's role in Catholic religious education" was "limited to teaching religion from a book." App. 13a. The panel majority also parted ways with *Grussgott*. *Grussgott*, like *Hosanna-Tabor*, found that an elementary-level teacher who taught religion was a minister. 882 F.3d at 662. The panel majority expressly questioned the validity of the Seventh Circuit's unanimous panel decision before trying to distinguish it based on some specific training that Grussgott had received. App. 12a-14a. Judge D. Michael Fisher, sitting by designation, dissented, opining that "Biel's duties as the fifth grade teacher and religion teacher are strikingly similar to those in *Hosanna-Tabor*," and that "this case is not distinguishable from *Grussgott*[.]" App. 29a (Fisher, J., dissenting).

Five months later, while the petition for en banc review of this case was still pending, the Ninth Circuit applied *Biel* in *Morrissey-Berru*. The court reversed the district court's grant of summary judgment to Our Lady of Guadalupe School, finding it legally insufficient that the teacher in that case, Agnes Morrissey-Berru, had "significant religious responsibilities as a teacher at the School." 769 Fed. App'x 460, 461 (9th Cir. 2019). The court squarely acknowledged that Morrisey Berru:

> committed to incorporate Catholic values and teachings into her curriculum, as evinced by several of the employment agreements she signed, led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by

> her students during the School's Easter celebration every year.

Ibid. (noting further that she had taken a "course on the history of the Catholic church"). But all of that was legally inadequate, the court explained, because the Ninth Circuit rule provides that "an employee's duties are not dispositive under *Hosanna-Tabor*'s framework." *Ibid.*

Two months after the ruling in *Morrissey-Berru*, nine judges dissented from denial of rehearing en banc in this case. They explained that review was urgently necessary because the Ninth Circuit's new rule not only "conflicts with *Hosanna-Tabor*, decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles," but it also "poses grave consequences for religious minorities * * * whose practices don't perfectly resemble the Lutheran tradition at issue in *Hosanna-Tabor*." App. 42a-43a (R. Nelson, J., dissenting). They explained that the rule conflicts with *Hosanna-Tabor* because it puts this Court's flexible analysis into a "resemblance-to-Perich" straitjacket that "[i]gnor[es] the warnings of Justices Alito and Kagan (and Justice Thomas)" against making matters that "relate to [an employee's] title" dispositive. App. 50a, 54a. Similarly, the rule "diverged from the function-focused approach taken by our court previously, our sister courts, and numerous state supreme courts," instead "embrac[ing] the narrowest reading of the ministerial exception." App. 53a; see also App. 64a (noting that other Circuits "pay closer attention to function, particularly in religious educational settings," and citing to *Grussgott*, *Fratello*, and *Conlon*).

The dissenting judges warned that the panel's narrow interpretation "threatens the autonomy of minority groups" that do not use Lutheran-sounding titles but for whom religious education is a "'critical means of propagating the faith, instructing the rising generation, and instilling a sense of religious identity.'" App. 43a-44a (quoting religious minorities' amicus brief). "Indeed," the dissenting judges explained, "requiring a religious group to adopt a formal title or hold out its ministers in a specific way" is blatantly unfaithful to First Amendment values: it "inherently violates the Establishment Clause" and "is the very encroachment into religious autonomy the Free Exercise Clause prohibits." App. 55a.

A California appellate court recently applied the reasoning in this case in *Su* v. *Stephen Wise Temple*, 32 Cal. App. 5th 1159 (2019), rehearing denied, Apr. 2, 2019, review denied, June 19, 2019. There, the court acknowledged that the Temple's preschool teachers "play an important role in the life of the Temple" and "in transmitting Jewish religion and practice to the next generation," because they are "responsible for implementing the school's Judaic curriculum by teaching Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services." *Id*. at 1168. But, tracking the Ninth Circuit's new rule, the court denied the ministerial exception to the Temple because the clear showing of religious function failed absent proof of religious title or training. *Ibid*.[1]

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[1] The California Court of Appeal is holding the appeal in abeyance while the Temple prepares to seek certiorari. Order, *Su* v. *Stephen Wise Temple*, No. B275246 (Cal. Ct. App., 2d Dist.

E. The Seventh Circuit has recognized the split with the Ninth Circuit.

In *Sterlinski* v. *Catholic Bishop of Chicago*, the Seventh Circuit reaffirmed the functional consensus, sharply rejected the Ninth Circuit's new rule, and recognized the extant split of authority. See 934 F.3d at 570-571. Writing for a unanimous panel, Judge Easterbrook explained that the Ninth Circuit's approach "asks how much like Perich a given plaintiff is, rather than whether the employee served a religious function." *Id.* at 570; see also App. 50a (R. Nelson, J., dissenting) (new Ninth Circuit standard is a "resemblance-to-Perich test"). Judge Easterbrook noted that the dissenting judges in *Biel* "disagreed with that approach—as do we." *Sterlinski*, 934 F.3d at 570. Instead, the Seventh Circuit had already "adopted a different approach" in *Grussgott*, and "[m]any judges, not just our panel in *Grussgott* (and the nine dissenters in *Biel*)" rejected a Perich-comparison analysis in favor of maintaining the focus on religious functions. *Ibid.* (citing *Fratello* and *Cannata* as supporting examples).

Sterlinski identifies that last point as the place where the Ninth Circuit parts ways from all others. Keeping the focus on whether an "employee served a religious function" advances the "two goals" of the ministerial exception: protecting "a religious body's 'right to shape its own faith and mission through its appointments,'" and prohibiting "'government involvement in such ecclesiastical decisions.'" *Sterlinski*, 934 F.3d at 570 (quoting *Hosanna-Tabor*,

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June 25, 2019) (recalling and staying remittitur pending the filing and disposition of petition for certiorari).

565 U.S. at 188-189). And where religious functions are fairly shown, civil judges cannot turn to other considerations in an effort to second-guess how "vital" the functions are "to advance [the] faith." *Ibid.* It was "precisely to avoid such judicial entanglement in, and second-guessing of, religious matters that the Justices established the rule of *Hosanna-Tabor*." *Id.* at 570-571 (also noting that the Ninth Circuit's rule impermissibly "embraced" requiring "independent judicial resolution of ecclesiastical issues").

F. Only this Court can resolve the split.

As *Sterlinski* and the *Biel* dissenters recognize, the Ninth Circuit's rigid formula is at war with the more sensitive approach of this Court and every other Circuit and state supreme court to decide the issue. Thumbing its nose at the functional consensus, the Ninth Circuit's approach flatly finds that it is *never* enough to show an employee carried out core religious functions such as "teaching and conveying the tenets of the faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). Rather, at least one of the other three specific *Hosanna-Tabor* considerations must obtain. That strict "function-plus-one" test is inconsistent both with this Court's explicit refusal to adopt a "rigid formula" and with its command that the purpose of the exception is to serve "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 190, 196. As the Second Circuit explained, "*Hosanna-Tabor* instructs only as to what we *might* take into account as relevant, including the four considerations on which it relied; it neither limits the inquiry to those considerations nor requires their

application in every case." *Fratello*, 863 F.3d at 204-205 (emphasis in original).

* * *

Tallying the precedents puts the Ninth Circuit and the California Court of Appeal at odds with seven other Circuits and seven state supreme courts over the importance of function to ministerial exception analysis. Given the failed en banc vote here, there is no prospect that the split on this important First Amendment issue will be resolved without this Court's intervention.

II. The scope of the ministerial exception is a vital and recurring question of nationwide importance for thousands of religious organizations and individuals.

Review is especially warranted because of the sweeping practical significance and nationwide importance of the First Amendment question presented. That question is not only frequently recurring and vital to the daily operations of religious organizations, but getting it right is crucial in protecting church-state relations.

1. One reason the issue is of nationwide importance is its frequency of occurrence. Conflicts over the scope of the ministerial exception arise regularly in the lower courts. As shown above, lower appellate courts have repeatedly had occasion to apply the ministerial exception since this Court's 2012 decision in *Hosanna-Tabor*. If anything, the number of conflicts is increasing: in 2018, for the first time since at least 2011, litigation over clergy firings became one of the

top five annual reasons that houses of worship end up in court.[2]

One reason for this increase may be that this Court left many of the exact contours of the ministerial exception for a later day. See *Hosanna-Tabor*, 565 U.S. at 196. Lower courts have sometimes found this "limited direction" difficult, noting that *Hosanna-Tabor* "is not without its Delphic qualities." *Fratello*, 863 F.3d at 204-205; see also J. Gregory Grisham and Daniel Blomberg, *The Ministerial Exception After* Hosanna-Tabor: *Firmly Founded, Increasingly Refined*, 20 Federalist Soc'y Rev. 80, 84 (2019) (survey of post-*Hosanna-Tabor* rulings finding that "courts have sometimes struggled analytically to determine what to do with the Supreme Court's four 'considerations' for determining ministerial status"). But, until the Ninth Circuit's detour, that confusion had not resulted in a deep and acknowledged split requiring review.

2. Another reason that the scope of the ministerial exception is of nationwide importance is the sheer number and variety of religious groups that are affected. A robust ministerial exception is a crucial protection for religious organizations of all sorts.

For example, the ministerial exception protects religious groups of many different faith traditions.

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[2] Compare *The Top 5 Reasons Churches Went to Court in 2018*, Church Law & Tax Report (July 31, 2019), (showing the top five reasons from 2014 to 2018, listing "clergy removal" as in the top five for 2018), with *The Top 5 Reasons Churches went to Court in 2015*, Church Law & Tax Report (November/December 2016) (showing top five reasons from 2011 to 2015, none of which included clergy removal).

See, *e.g.*, *Hosanna-Tabor* (Lutheran); *Grussgott* (pluralistic Jewish); *Conlon* (non-denominational Protestant); *Temple Emanuel* (Conservative Jewish); *Fratello* (Catholic); *El-Farra* v. *Sayyed*, 226 S.W.3d 792, 795-796 (Ark. 2006) (Muslim); *Sixth Mount Zion* (Missionary Baptist); *Kirby* (Disciples of Christ); *Su* (Reform Jewish); *Rayburn* (Seventh-day Adventist); *Alicea* (Reformed Christian); *Puri* v. *Khalsa*, 844 F.3d 1152 (9th Cir. 2017) (Sikh).

And it protects many different kinds of religious employers beyond houses of worship. See, *e.g.*, *Yin* v. *Columbia Int'l Univ.*, 335 F. Supp. 3d 803 (D.S.C. 2018) (religious university); *Shaliehsabou* v. *Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004) (nursing home); *Penn* v. *New York Methodist Hospital*, 884 F.3d 416 (2d Cir.), *cert. denied*, 139 S. Ct. 424 (2018) (hospital); *Grussgott* (day school); *Conlon* (campus student organization). As a heuristic for the large number of institutions affected, over three-quarters of the nation's PK-12 students attending private schools do so at religiously-affiliated institutions, meaning one in thirteen American schoolchildren attends a religious school. See Council for American Private Education, *FAQs About Private Schools*, "Schools and Students."

The need to resolve the conflict is particularly pressing for the large number of religious organizations and schools—not to mention parents and schoolchildren—within the Ninth Circuit. As a result of the Ninth Circuit's rule, and its subsequent adoption in *Su*, "thousands" of Catholic, Jewish, and other religious schools in the Ninth Circuit "now have less control over employing [their] elementary school teachers of religion than in any other area of the

country" and "less religious freedom than their Lutheran counterparts nationally." App. 67a. (R. Nelson, J., dissenting).

3. A third reason that the question presented is of nationwide importance is that properly calibrating the scope of the ministerial exception is vital to sensitive church-state relations. Courts have long warned that ministerial exception cases must be handled in a way that avoids "entanglement [that] might * * * result from a protracted legal process pitting church and state as adversaries." *Rayburn*, 772 F.2d at 1171. But as *Sterlinski* and the nine *Biel* dissenters explained, the Ninth Circuit's approach inevitably leads to "judicial resolution of ecclesiastical issues" that "subject[s] religious doctrine to discovery and, if necessary, jury trial." *Sterlinski*, 934 F.3d at 570-571; see also App. 42a (R. Nelson, J., dissenting). Even "the mere adjudication of such questions would pose grave problems for religious autonomy." *Hosanna-Tabor*, 565 U.S. at 205-206 (Alito, J., concurring). "It is not only the conclusions that may be reached by the [government agency] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979). Thus, this Court has long forbidden that sort of second-guessing: "church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York* v. *Cathedral Academy*, 434 U.S. 125, 133 (1977).

The Ninth Circuit's rule will also have perverse effects. It will interfere in religious governance by pressuring religious groups, "with an eye to avoiding

litigation or bureaucratic entanglement rather than upon * * * their own * * * doctrinal assessments," to slap religious-sounding (or at least religious-sounding to a *court*) titles onto positions that already include important religious functions. *Rayburn*, 772 F.2d at 1171; see also *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987) ("[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."). It would also "in effect penalize religious groups for allowing laypersons to participate in their ministries" and thus incentivize "bar[ring] laity from substantial 'roles in conveying the [group's] message and carrying out its mission.'" *Fratello*, 863 F.3d at 207 (quoting *Hosanna-Tabor*, 565 U.S. at 192).

Finally, left uncorrected, the Ninth Circuit's rule will impermissibly discriminate among religions. It will particularly discriminate against religious minority groups that do not use titles such as "minister" and thus would always be at a disadvantage. See *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). Similarly, it will enable religious discrimination by allowing some titles to be deemed religious ("rabbi") and others secular ("teacher"), based on common secular understandings rather than religious ones. *Larson* v. *Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"); see also App. 55a (R. Nelson, J., dissenting) ("a demand for ecclesiastical titles inherently violates the Establishment Clause"). Indeed, in this case, Biel argued that the title of "teacher" in a *Catholic* school

was nonreligious, but that "if Biel's position was in the Mormon faith," then "the title of 'teacher'" would have judicially cognizable "religious significance." See *Biel* v. *St. James School*, No. 17-55180, Dkt. No. 43 at 12 & n.2 (Appellant's reply brief filed Feb. 9, 2018).

* * *

The ministerial exception is a fundamental part of the architecture of church-state relations in this country. The Ninth Circuit's aberrant rulings have severely weakened this critical constitutional protection across a wide swath of the nation, while creating a deep and acknowledged split of authority that can be resolved only by this Court.

CONCLUSION

The Court should grant the petition. Since the petition in No. 19-267, *Our Lady of Guadalupe School* v. *Morrissey-Berru*, and this petition both present the same question and the petition in *Our Lady* is already pending, the Court may wish to grant the petition in *Our Lady* and hold this petition pending disposition of that appeal.

Respectfully submitted.

JACK S. SHOLKOFF
OGLETREE, DEAKINS,
NASH, SMOAK &
STEWART, P.C.
400 South Hope Street
Suite 1200
Los Angeles, CA 90071

MARGARET G. GRAF
ROMAN CATHOLIC
ARCHDIOCESE OF
LOS ANGELES
3424 Wilshire Boulevard
Los Angeles, CA 90010

ERIC C. RASSBACH
Counsel of Record
DANIEL H. BLOMBERG
DIANA M. VERM
ADÈLE AUXIER KEIM
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire
Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
erassbach@becketlaw.org

Counsel for Petitioner

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