No. ______

In the
Supreme Court of the United States

STEPHEN S. WISE TEMPLE,

Petitioner,

v.

JULIE SU, as Labor Commissioner, etc.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JEREMY B. ROSEN
FELIX SHAFIR
JOSHUA C. MCDANIEL
JACOB M. MCINTOSH
HORVITZ & LEVY LLP
3601 W. Olive Ave.
8th Floor
Burbank, CA 91505

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

September 17, 2019

QUESTION PRESENTED

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), this Court—agreeing with every court of appeals and disagreeing with the EEOC—first recognized the existence of a "ministerial exception" in the First Amendment. The Court held that a teacher at a Lutheran school qualified as a minister because of multiple factors, including that she transmitted the faith to the next generation. The Court warned against treating those multiple reinforcing factors as necessary, however, and Justices Alito and Kagan concurred to endorse the "functional approach" that was dominant in the lower courts before *Hosanna-Tabor*.

In this case, a California appellate court squarely rejected that functional approach and held that, under *Hosanna-Tabor*, teachers at a Jewish preschool do not qualify for the ministerial exception even though they "undeniably play an important role in Temple life" by "transmitting Jewish religion and practice to the next generation." That holding allows a state agency to proceed with an intrusive six-year-old employment suit against the Temple seeking hundreds of thousands of dollars in backpay and penalties, exacerbates an acknowledged split involving eight other federal and state courts, and unduly narrows the ministerial exception by misreading *Hosanna-Tabor*.

The question presented is:

Whether courts should apply a functional approach to the ministerial exception that does not punish religious institutions for employing non-adherents to transmit religious precepts to the next generation.

CORPORATE DISCLOSURE STATEMENT

Petitioner Stephen Wise Temple is a non-profit organization that has no parent corporation or stockholders.

STATEMENT OF RELATED PROCEEDINGS

Superior Court of California (Los Angeles County):

Su v. Stephen S. Wise Temple, No. BC520278 (Mar. 30, 2016)

Court of Appeal of California (Second Appellate District, Division Three):

Su v. Stephen S. Wise Temple, No. B275426 (Mar. 8, 2019), petition for reh'g denied, Apr. 2, 2019

Supreme Court of California:

Su v. Stephen S. Wise Temple, No. S255293 (June 19, 2019)

TABLE OF CONTENTS

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
STATEMENT OF RELATED PROCEEDINGS iii
TABLE OF AUTHORITIES vi
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 4
JURISDICTION 5
CONSTITUTIONAL PROVISION INVOLVED 5
STATEMENT OF THE CASE 5
A. Legal Background 5
B. Factual and Procedural Background 11
C. The Decision Below 15
REASONS FOR GRANTING THE PETITION 17
I. The Lower Courts Are Divided Over Whether To Employ A Functional Approach In Applying The Ministerial Exception 19
A. Five Courts of Appeals and Two State High Courts Have Adhered to the Functional Approach After *Hosanna-Tabor* 20
B. The Ninth Circuit and the Court Below Have Rejected the Functional Approach After *Hosanna-Tabor* 24
II. The Decision Below Is Profoundly Wrong 27
A. The Ministerial Exception Covers Teachers Entrusted With Teaching and Conveying Judaism to the Next Generation at a Jewish Preschool 27

B. The Court Below Misinterpreted *Hosanna-Tabor* and Violated Basic First Amendment Principles 30

III. The Question Presented Is Exceptionally Important, And This Is An Excellent Case To Resolve It 34

CONCLUSION 36

APPENDIX

Appendix A

Order, Supreme Court of California, *Su v. Temple*, No. S255293 (June 19, 2019) App-1

Appendix B

Order, Court of Appeal for the State of California, Second Appellate District, *Su v. Temple*, No. B275426 (Apr. 2, 2019).. App-2

Appendix C

Opinion, Court of Appeal for the State of California, Second Appellate District, *Su v. Temple*, No. B275426 (Mar. 8, 2019) App-3

Appendix D

Tentative Ruling on Motion for Summary Judgment, Superior Court of California, County of Los Angeles, *Su v. Temple*, No. BC520278 (Jan. 12, 2016)................... App-31

Appendix E

Ruling on Motion for Summary Judgment, Superior Court of California, County of Los Angeles, *Su v. Temple*, No. BC520278 (Mar. 30, 2016).. App-38

TABLE OF AUTHORITIES

Cases

Alcazar
v. Corp. of Catholic Archbishop of Seattle,
627 F.3d 1288 (9th Cir. 2010).................................. 6

Alicea
v. New Brunswick Theological Seminary,
608 A.2d 218 (N.J. 1992) 7

Archdiocese of Wash. v. Moersen,
925 A.2d 659 (Md. 2007).. 7

Biel v. St. James Sch.,
911 F.3d 603 (9th Cir. 2018)...................... 16, 24, 25

Biel v. St. James Sch.,
926 F.3d 1238 (9th Cir. 2019)................................ 27

Cannata v. Catholic Diocese of Austin,
700 F.3d 169 (5th Cir. 2012)........................... 21, 31

Colo. Christian Univ. v. Weaver,
534 F.3d 1245 (10th Cir. 2008).............................. 33

Conlon v. InterVarsity Christian Fellowship,
777 F.3d 829 (6th Cir. 2015)................................. 22

Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dept. of Workforce Dev.,
768 N.W.2d 868 (Wisc. 2009)................................... 7

Cutter v. Wilkinson,
544 U.S. 709 (2005).. 5

Dayner v. Archdiocese of Hartford,
23 A.3d 1192 (Conn. 2011) 7

EEOC v. Catholic Univ. of Am.,
83 F. 3d 455 (D.C. Cir. 1996)................................... 6

Fratello v. Archdiocese of N.Y.,
863 F.3d 190 (2d Cir. 2017) 22, 23, 31

Gonzalez
v. Roman Catholic Archbishop of Manila,
280 U.S. 1 (1929)... 32

Grussgott
v. Milwaukee Jewish Day Sch., Inc.,
882 F.3d 655 (7th Cir. 2018)...................... 17, 24, 31

Hernandez v. Catholic Bishop of Chi.,
320 F.3d 698 (7th Cir. 2003).................................... 6

Herx v. Diocese of Ft. Wayne-S. Bend Inc.,
48 F. Supp. 3d 1168 (N.D. Ind. 2014).................... 33

Hollins v. Methodist Healthcare, Inc.,
474 F.3d 223 (6th Cir. 2007).................................... 7

Hosanna-Tabor Evangelical Lutheran
Church & Sch. v. EEOC,
565 U.S. 171 (2012)....................................... *passim*

Kedroff v. St. Nicholas Cathedral of Russian
Orthodox Church in N. Am.,
344 U.S. 94 (1952)... 6, 27

Kirby v. Lexington Theological Seminary,
426 S.W.3d 597 (Ky. 2014) 21, 22

Larson v. Valente,
456 U.S. 228 (1982).. 31

Lee v. Sixth Mount Zion
Baptist Church of Pittsburgh,
903 F.3d 113 (3d Cir. 2018) 23

McClure v. Salvation Army,
460 F.2d 553 (5th Cir. 1972).................................... 6

Morrison v. Olson,
487 U.S. 654 (1988).. 4

Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460 (9th Cir. 2019) 25, 26

NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979)... 28

Pardue v. Ctr. City Consortium Sch. of Archdiocese of Wash., Inc., 875 A.2d 669 (D.C. 2005)... 7

Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006) 6

Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985)............................ 6, 30

Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008) 6

Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich, 426 U.S. 696 (1976)... 6

Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999).................................... 6

Sterlinski v. Catholic Bishop of Chi., 934 F.3d 568 (7th Cir. 2019)...................... 23, 26, 33

Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination, 975 N.E.2d 433 (Mass. 2012)............... 18, 20, 21, 29

Watson v. Jones, 80 U.S. 679 (1871).. 5

Constitutional Provision

U.S. Const. amend. I 27

Statutes

42 U.S.C. §2000e *et seq*. 6

Other Authority

Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 Records of the American Catholic Historical Society (1909) 35

PETITION FOR WRIT OF CERTIORARI

This case presents an important question of constitutional law that has split the lower courts and affects religious groups nationwide. Starting some 50 years ago, the lower courts recognized that the First Amendment's Religion Clauses bar the application of certain laws to claims concerning the employment relationship between a religious organization and its ministers. As those courts held, first principles under the First Amendment confirm that religious groups—not the government—should decide who will minister to the faithful. In refining this "ministerial exception" over the course of many decades, courts widely agreed that whether an employee qualifies as a minister turns not on formal title or ordination status, but on job function.

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), this Court recognized the ministerial exception for the first time. Multiple factors supported the application of the exception there, as the employee at issue not only performed a religious function, but had a religious title, received religious training, and considered herself a minister. But the Court warned against treating all those considerations as necessary; instead, having recognized the exception for the first time, the Court left defining its contours for another day. In a concurring opinion, however, Justices Alito and Kagan clarified that the Court's decision should not be read as upsetting the longstanding "functional approach" that prevailed in the lower courts, and that courts should continue to focus on job duties in ministerial-exception cases moving forward. The question

presented here is whether courts should do just that, or should instead treat some ministers differently based on the demands different religions have for those who teach religion.

Petitioner is a Jewish temple in Los Angeles that runs an on-site preschool. It is undisputed that the preschool fulfills a religious obligation for the Temple, and it is likewise undisputed that the preschool's teachers play an important role in accomplishing the Temple's religious objectives, including helping to transmit Judaism to future generations. Nonetheless, six years ago, California's Labor Commissioner filed suit against the Temple, asserting the right to regulate its employment relationships with its preschool teachers and alleging violations of state wage-and-hour laws vis-à-vis those teachers. The Temple moved for summary judgment, contending that the ministerial exception bars respondent's claims, and the trial court agreed. As the trial court concluded, dozens of undisputed facts confirm that the preschool teachers perform many religious functions, thereby rendering them ministers.

In a divided decision, the court below reversed. The majority conceded that the Temple's preschool teachers play an important role in Temple life and implement a curriculum with a substantial religious component. But the majority nevertheless held that they are not ministers covered by the ministerial exception. In its view, *Hosanna-Tabor* rejected the idea that employees of religious institutions may qualify as ministers based on the performance of an important religious function. Instead, the majority held, ministers must share some other characteristic

in common with the Lutheran school teacher in *Hosanna-Tabor*. The majority found it particularly problematic that the Temple does not require its teachers to be Jewish—even though Judaism itself imposes no such religious test. The California Supreme Court denied review, thus allowing the state to seek hundreds of thousands of dollars in backpay and penalties.

The decision below deepens a split of authority on a critical issue, as the court below expressly rejected the functional approach employed by five courts of appeals and two state high courts, and just as expressly aligned itself with the minority view of the Ninth Circuit rejecting that approach. The decision below is also dangerously wrong, as it limits the ministerial exception to religions that conform to a pre-existing stereotype of what religions should demand from their ministers. Indeed, in considering whether the Temple's preschool teachers are ministers, the court below performed precisely the analysis that *Hosanna-Tabor* instructed courts *not* to perform. While *Hosanna-Tabor* expressly disclaimed any intent to establish a rigid formula for deciding when employees qualify as ministers, the court below nonetheless formulaically walked through the four considerations *Hosanna-Tabor* emphasized, and faulted the Temple for assigning the duty of teaching Judaism to teachers who failed to more closely conform to the Lutheran school teacher in that case.

That approach is fundamentally misguided. There is no question that Judaism is not Lutheranism, but that is no reason to limit the ministerial exception to the latter. Nothing in *Hosanna-Tabor* endorses

such discrimination between religions, and the Religion Clauses positively prohibit it. The correct view, and the view demanded by principles of religious neutrality, is the functional approach endorsed by Justices Alito and Kagan in their concurrence.

This issue has squarely and intractably divided the lower courts, and this case presents an excellent vehicle to resolve that division of authority. The parties have stipulated to most of the relevant facts, and there is no dispute that the teachers function as conduits for teaching the faith. And like *Hosanna-Tabor*, this case involves a direct action by a government enforcement agency. That puts front and center foundational First Amendment concerns about government officials examining the functioning of religious entities and making ill-informed judgments about whether religious teachers are sufficiently religious. Moreover, the government agents here are seeking hundreds of thousands of dollars in backpay and penalties, thus making palpable the coercion to conform to the state's view of what makes a religion teacher sufficiently religious. In short, when it comes to the core concerns of the Religion Clauses, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). And given the well-developed division among the lower courts and the erroneous and discriminatory approach embraced by the decision below and the Ninth Circuit, the time has come for this Court to embrace the functional test for the ministerial exception.

OPINIONS BELOW

The California Court of Appeal's opinion is reported at 244 Cal. Rptr. 3d 546 and reproduced at

App.3-30. The trial court's final summary judgment ruling is not reported but is reproduced at App.38-41. The trial court's tentative summary judgment ruling, which the final summary judgment ruling incorporated, is available at 2016 WL 11588476 and reproduced at App.31-37.

JURISDICTION

The California Court of Appeal issued its opinion on March 8, 2019, and the California Supreme Court denied review on June 19, 2019. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

STATEMENT OF THE CASE

A. Legal Background

The First Amendment commands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Religion Clauses thus "require[] government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). Consistent with these principles, this Court long ago recognized that the government has no business meddling in ecclesiastical disputes or deciding matters of religious dogma. *See, e.g.*, *Watson v. Jones*, 80 U.S. 679, 727 (1871). As the Court explained, the First Amendment accords religious organizations the "power to decide for themselves, free from state

interference, matters of church government as well as those of faith and doctrine"—including the "[f]reedom to select the clergy." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952); *see also, e.g.*, *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 720, 724-25 (1976).

In the 1970s, after Congress started to enact antidiscrimination and other employment laws, *see, e.g.*, 42 U.S.C. §2000e *et seq.*, the courts of appeals—relying in part on the teachings of these cases—recognized the existence of a "ministerial exception" in the Religion Clauses of the First Amendment that bars certain claims concerning the employment relationship between a religious institution and its ministerial employees. *See, e.g.*, *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). In the decades thereafter, as the lower courts refined the ministerial exception, they widely agreed that the exception covered not merely ordained ministers, but any employee of a religious organization who performs a religious function. *See, e.g.*, *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) ("The 'ministerial exception' … does not depend upon ordination but upon the function of the position.").[1] Accordingly, "[a]s a general rule,"

---

[1] *See also, e.g.*, *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291-92 (9th Cir. 2010) (en banc); *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003); *Starkman v. Evans*, 198 F.3d 173, 175 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F. 3d 455, 461 (D.C. Cir. 1996); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1204-05 (Conn.

courts applied the ministerial exception when an employee's "'duties consist[ed] of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.'" *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007).

In 2012, this Court directly addressed the ministerial exception for the first time in *Hosanna-Tabor*. *See* 565 U.S. at 188. *Hosanna-Tabor* involved a teacher named Cheryl Perich, who had been employed as a teacher at an elementary school in Michigan that was a member of the Lutheran Church-Missouri Synod. *See id.* at 177-78. That particular denomination classified teachers as either "lay" or "called" teachers. *See id.* at 177. While Perich began her employment as the former, after undertaking significant religious training specific to the denomination, she became a "called" teacher. *See id.* at 178, 191. In addition to teaching "math, language arts, social studies, science, gym, art, and music," Perich "also taught a religion class four days a week, led the students in prayer and devotional exercises each day, [] attended a weekly school-wide chapel service[,] [and] … led the chapel service herself about twice a year." *Id.* at 178. Perich later became ill, and after the school terminated her employment, the EEOC (with Perich as intervenor) filed suit against

---

2011); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dept. of Workforce Dev.*, 768 N.W.2d 868, 881 (Wisc. 2009); *Pardue v. Ctr. City Consortium Sch. of Archdiocese of Wash., Inc.*, 875 A.2d 669, 675 (D.C. 2005); *Archdiocese of Wash. v. Moersen*, 925 A.2d 659, 668 (Md. 2007); *Alicea v. New Brunswick Theological Seminary*, 608 A.2d 218, 222 (N.J. 1992).

the school, alleging violations of the Americans with Disabilities Act (ADA). *See id.* at 178-79.

In its unanimous opinion, this Court started by agreeing with the lower courts that there is indeed a ministerial exception grounded in the First Amendment "that precludes application of [certain employment] legislation to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 188. As the Court explained, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision," as it "depriv[es] the church of control over the selection of those who will personify its beliefs." *Id.* Such interference, the Court held, violates both Religion Clauses: "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Id.* at 188. And "[a]ccording the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 188-89.

After recognizing the ministerial exception, the Court held that Perich qualified as a minister. In doing so, the Court declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. Instead, "in [its] first case involving the ministerial exception," the Court found it sufficient to conclude that the particular circumstances of Perich's employment plainly demonstrated that she was a minister. *Id.* The Court

offered four "considerations" pertinent to that conclusion: (1) "the formal title"—*i.e.*, "Minister of Religion, Commissioned"—"given Perich by the Church" after becoming a "called" teacher; (2) "the substance reflected in that title," such as that Perich took "eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher" to earn her title; (3) "her own use of that title"—*e.g.*, that Perich "accept[ed] the formal call" and identified herself as a minister on tax forms; and (4) "the important religious functions she performed for the Church." *Id.* at 191-92.

With respect to the final consideration, the Court noted that "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission":

> Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and—about twice a year—she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning.

Id. at 192. In short, the Court explained, "[a]s a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation." *Id.* The Court noted that it "express[ed] no view on whether someone with Perich's duties would be covered by the ministerial

exception in the absence of the other [three] considerations," *id.* at 193, for "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise," *id.* at 196.

Three Justices concurred in the Court's opinion. Justice Thomas wrote separately to explain that, in his view, courts must "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* (Thomas, J., concurring). Justice Alito, joined by Justice Kagan, also wrote separately to "clarify" that, notwithstanding the four considerations discussed in Court's opinion, "courts should focus on the function performed by persons who work for religious bodies" in determining whether they qualify as ministers. *Id.* at 198 (Alito, J., concurring). As Justice Alito explained, that approach best avoids potential discrimination among religions, for many religions (such as Judaism) do not refer to their ministers as "ministers" or emphasize formal ordination status. *Id.*

Justice Alito further explained that certain functions are so "essential to the independence of practically all religious groups" that any employee who performs them necessarily qualifies as a minister—*viz.*, "those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* at 200. Justice Alito also highlighted that, over many decades, the lower courts had reached a "consensus" that they should apply a

functional approach in ministerial-exception cases, and he cautioned that the Court's opinion "should not be read to upset this consensus." *Id.* at 203.

B. Factual and Procedural Background

1. Petitioner Stephen Wise Temple is a Reform Jewish synagogue in Los Angeles "whose mission is to promote the Jewish faith and serve and strengthen the Jewish community." App.4. The Temple fulfills that mission, *inter alia*, through its Early Childhood Center (ECC), an on-site preschool for children aged five and under. App.4; AA871[2]; *see also* App.5 ("The ECC is part of the Temple's religious and educational mission, and it fulfills a religious obligation of the Temple."). "The ECC exists to instill and foster a positive sense of Jewish identity and to develop in children favorable attitudes towards the values and practices of Judaism." App.5. In short, at the ECC, "Jewish Life is what it is all about." AA872.

The ECC employs approximately 40 teachers. App.4. Unlike some other religions, "Judaism does not require ordination for an individual to teach Judaism," and "[n]on-Jews may teach Jewish doctrine." AA887-88. Accordingly, while some ECC teachers are Jewish, others are not. App.5. All ECC teachers, however, "play an important role in the religious objectives of the Temple," including by "help[ing] to transmit Judaism and Jewish identity to future generations." AA887. That much is clear from the first requirement

---

[2] "AA" refers to the Appellant's Appendix filed with the California Court of Appeal. All facts in this petition pertaining to the Temple and the ECC—whether referenced in one of the lower-court opinions or elsewhere in the record—are undisputed.

listed in the "Teacher Job Description" for an ECC teacher: the "[d]evelopment and implementation of Judaic and secular curriculum." AA873; *see also* AA873-74 ("The introduction to Jewish life, religious rituals rituals and worship, and Judaic observances are part of the ECC's teachers' curriculum for preschoolers.").

In furtherance of its religious curriculum, "the ECC provides teachers with Judaic reading materials … to use for their classroom activities." AA874. Religious activities occur on a daily basis. For example, ECC teachers instruct their students in saying "*ha-motzi* (grace before meals) before meals and snacks." App.5; AA882. If "there are problems between children or other disputes," ECC teachers stress "*menschlicheit*"—*i.e.*, "Jewish religious standards for what is right and wrong." AA882. Moreover, ECC teachers introduce their students "to Jewish values such as *kehillah* (community), *hoda'ah* (gratitude) and *shalom* (peace and wholeness)." App.5.

ECC teachers engage in other religious practices too. Each week, for example, ECC teachers participate with their children in *Shabbat* services, the "most important ritual observance in Judaism." AA881; App.5. "In doing so, they are acting as conduits to the fulfilment of *mitzvot* (religious commandments." AA881. And throughout the school year, ECC teachers participate in "the celebration of Jewish holidays," App.5, including "*Pesah* (Passover), *Shavuot*, *Rosh Hashanah*, *Yom Kippur*, *Sukkot*, *Shemini Atzeret/Simchat Torah*, *Tu B'Shevat*, *Hanukkah*, and *Purim*," AA875. For each holiday,

ECC teachers lead their students in religious rituals unique to that holiday. *See* AA876-77, 879-80, 884. In addition, "[a]ll ECC teachers … teach religious concepts, music, singing, and dance." App.5.

To be sure, ECC teachers also engage in activities common to any preschool—*e.g.*, "indoor and outdoor play"; "promot[ing] reading readiness, writing readiness, and math readiness"; developing "social skills"; and "assist[ing] with toileting, meals, and snacks." App.4. But those "secular" activities notwithstanding, App.4, it is undisputed that "ECC teachers are expected to further the Temple's mission and implement the ECC's Judaic curriculum," AA874.

2. In January 2013, California's Labor Commissioner (respondent) served a subpoena on the Temple in connection with allegations that the Temple failed to comply with state wage-and-hour laws with respect to ECC teachers. AA808. The Temple complied with the subpoena, producing six boxes of materials, but maintained that the ministerial exception precluded the application of those state employment laws to its ECC teachers. AA808. Respondent disagreed, deeming it "[e]specially significant … that these teachers are hired without decisive regard as to whether they are adherents to the Temple's faith." AA808. Respondent further questioned whether Judaism even qualifies as a religion: "Some would consider Jews to be a nationality. A person could be considered an atheist and still be considered Jewish." AA840.

In September 2013, respondent commenced this action, alleging that the Temple violated state wage-and-hour laws by failing to provide its teachers

adequate rest breaks, meal breaks, and overtime pay. App.6. The complaint sought more than $400,000 in "meal period premiums," more than $400,000 in "rest period premiums," more than $76,000 in "civil penalties," an unspecified amount for "overtime pay," an unspecified amount for "statutory penalties," "attorney's fees," "prejudgment interest," "costs of suit," and injunctive relief. AA21-22.

The Temple moved for summary judgment, again asserting that respondent's claims are barred by the ministerial exception. App.6-7. The trial court agreed. App.7. The court first concluded that the ministerial exception applies to wage-and-hour claims, as such claims "implicate the relationship between the religious institution and its clergy." App.34-35. The court next concluded that ECC teachers are ministers covered by the exception. App.36-37. In doing so, the court explained that, under *Hosanna-Tabor*, the ministerial exception extends beyond those who are "head[s] of a religious congregation," and it cited pre-*Hosanna-Tabor* precedent for the proposition that preschool teachers at a religious school may qualify as ministers based on their job "duties." App.35. Based on dozens of undisputed facts regarding the religious job duties of ECC teachers, the court concluded that no "reasonable trier of fact could … conclude that ECC teachers do not serve a ministerial function." App.37; *see also* App.38-39. "Although ECC teachers teach secular subjects," the court explained, "they also teach religion, spread the faith, and serve to further the purposes of the Temple." App.37. The court accordingly found the ministerial exception applicable.

C. The Decision Below

1. A divided three-judge panel of the California Court of Appeal reversed. App.4. While a two-judge majority assumed that the claims at issue would be barred by the ministerial exception if it applied, it concluded that ECC teachers are not ministers, thereby precluding the application of the ministerial exception. *See* App.14-15. The majority based that conclusion on its view that ECC teachers do not share enough of the considerations that this Court identified with respect to the Lutheran school teacher in *Hosanna-Tabor*.

The majority first found it highly relevant that, "[u]nlike Perich," "ECC teachers are not given religious titles, and they are not ordained or otherwise recognized as spiritual leaders." App.14. The majority also emphasized—repeatedly—that ECC "teachers are not required to adhere to the Temple's religious philosophy, to be Temple members, or, indeed, even to be Jewish." App.14; *see also* App.5 (same); App.16 ("many of the Temple's teachers are not members of the Temple's religious community or adherents to its faith"); App.17 ("many of the Temple's teachers are not practicing Jews"); App.4 ("its teachers are not required … to adhere to the Temple's theology"). The majority also found it important that, "in contrast to Perich," ECC teachers do not undergo "any formal Jewish education or training." App.14. And the majority highlighted that, "again in contrast to Perich," ECC teachers do not "h[o]ld themselves out as ministers." App.15.

The majority conceded that ECC teachers and Perich had one seemingly critical similarity: "They

both taught religion in the classroom." App.15. ECC teachers, the majority acknowledged, "have a role in transmitting Jewish religion and practice to the next generation"—*e.g.*, "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." App.15. Relying on a recent Ninth Circuit decision that found religious job duties insufficient to warrant the application of the ministerial exception, however, the majority declined to "read *Hosanna-Tabor* to suggest that the ministerial exception applies based on this factor alone." App.15-16 (citing *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018)). Accordingly, while the majority agreed that "ECC teachers undeniably play an important role in Temple life," it concluded that an important religious role is not enough to render the ministerial exception applicable. In so holding, the majority acknowledged that it was departing from the decisions of multiple other courts. *See* App.16-18.

One judge concurred only in the judgment on a ground "not considered by the majority opinion." App.20 (Edmon, J., concurring). In that judge's view, the ministerial exception simply did not apply to the wage-and-hour claims asserted by respondent. App.29; *see also* App.18 n.2 (majority noting that, "[g]iven our holding, it is unnecessary to decide whether the ministerial exception applies to California's wage-and-hour laws").

2. The Temple petitioned the Court of Appeal for rehearing, which the court denied. *See* App.2. The Temple then sought review before the California

Supreme Court, which that court denied as well. *See* App.1. Following the California Supreme Court's denial of review, the Court of Appeal recalled and stayed its mandate to allow the Temple to file this petition.

REASONS FOR GRANTING THE PETITION

This Court explained in *Hosanna-Tabor* that the "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" is "undoubtedly important." 565 U.S. at 196. That interest remains vitally important today, yet that interest is threatened by an open conflict in the lower courts. The decision below exacerbates that conflict, expressly embracing the minority approach by holding that a person who teaches religion to the next generation nonetheless is not a minister if the requirements for serving in that role do not conform to the model of certain organized religions. That conclusion is as wrong as it sounds, and nothing in the First Amendment or *Hosanna-Tabor* supports it.

Six federal court of appeals and two state high courts have weighed in on how to decide who is covered by the ministerial exception since this Court issued *Hosanna-Tabor*. The Second, Third, Fifth, Sixth, and Seventh Circuits, as well as the courts of last resort in Massachusetts and Kentucky, have all adopted a functional approach, agreeing that courts should focus on an employee's job duties in deciding whether an employee qualifies as a minister. Indeed, some of those courts have applied the ministerial exception in factual contexts materially identical to this case. *See, e.g.*, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 656-62 (7th Cir. 2018); *Temple Emanuel of*

Newton v. Massachusetts Commission Against Discrimination, 975 N.E.2d 433 (Mass. 2012). By contrast, the Ninth Circuit has twice recently rejected that functional approach and concluded that the performance of a religious function is not enough to qualify someone as a minister. The court below expressly aligned itself with the Ninth Circuit, while acknowledging that doing so puts it on the short end of a circuit split. That split in authority is thus deep and acknowledged—and here to stay absent this Court's review.

The decision below not only exacerbates that split, but exemplifies the problems with rejecting the functional approach. It is undisputed that the Temple's preschool teachers play an important role in furthering the Temple's religious mission by transmitting Jewish religion and practice to the next generation. The notion that those teachers are *not* ministers—and that the Temple does not have the freedom to appoint, dismiss, or take other employment-related actions with respect to them without state interference—is not just wrong, but dangerously so, as any requirement that employees must conform to some other religion's conception of a minister would raise profound First Amendment problems. This case proves the point. Unlike the denomination at issue in *Hosanna-Tabor*, the Temple does not refer to any of its teachers as "ministers" or have any comparable requirement that its teachers undergo particular religious training. And the court below refused to recognize them as ministers for precisely those reasons. The court below thus has effectively decreed that only ministers who resemble Lutheran ministers will be recognized as bona fide

ministers, no matter whether that view is consistent with the Temple's own religious beliefs. The Establishment Clause and Free Exercise Clause were designed to guard against just such a result.

This case is an excellent vehicle to resolve the entrenched split in authority. This case, like *Hosanna-Tabor*, features an enforcement action by the government. That puts front and center the core concerns of the Religion Clauses, which are supposed to prevent government officials from making judgments about the nature of ministers and whether Judaism fully qualifies as a religion. Moreover, the government seeks not only to intrude on religious matters, but to impose hundreds of thousands of dollars in backpay and penalties on a religious institution because it does not conform to the government's view of what qualifies as sufficiently religious. The issues here are critically important. The decision below, like the Ninth Circuit, takes an exception designed to avoid entanglement and Religion Clause difficulties and interprets it in a manner that commits the cardinal sin of discriminating amongst religions. This Court should put an end to that intolerable state of affairs and embrace a functional approach to the ministerial exception that preserves both neutrality among and autonomy for all religions.

I. The Lower Courts Are Divided Over Whether To Employ A Functional Approach In Applying The Ministerial Exception.

The basic question in this case is whether courts should focus on the *function* performed by an employee of a religious institution in assessing whether that

employee qualifies as a "minister" within the meaning of the First Amendment's ministerial exception—*i.e.*, the consensus approach before *Hosanna-Tabor*. *See* 565 U.S. at 203 (Alito, J. concurring). In addition to the court below, six courts of appeals and two state high courts have weighed in on that question since *Hosanna-Tabor*. With the exception of the court below and the Ninth Circuit, every court has embraced the functional approach, and the most recent decisions in this area have acknowledged the divide between the two camps. This recognized split of authority on an exceptionally important question of First Amendment law clearly warrants this Court's review.

A. Five Courts of Appeals and Two State High Courts Have Adhered to the Functional Approach After *Hosanna-Tabor*.

The first court to address the continuing validity of the functional approach after *Hosanna-Tabor* was the Massachusetts Supreme Judicial Court. In *Temple Emanuel of Newton v. Massachusetts Commission Against Discrimination*, the court considered whether the ministerial exception barred the application of state antidiscrimination laws to a Jewish temple's decision not to rehire a teacher in its Sunday and after-school religious school. *See* 75 N.E.2d at 434-35.

In answering that question, the court recounted the "various factors" identified in *Hosanna-Tabor* and acknowledged that some were absent in the case before it: The teacher "was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi," and the record was "silent as to the extent of her religious

training." *Id.* at 443. But it was undisputed that the teacher "taught religious subjects at a school that functioned solely as a religious school, whose mission was to reach Jewish children about Jewish learning, language, history, traditions, and prayer." *Id.* And the court found those religious job duties sufficient to render the ministerial exception applicable, emphasizing that the exception applies "regardless whether a religious teacher is called a minister or holds any title of clergy." *Id.*

The Fifth Circuit reached a similar conclusion in *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012). There, the court considered the application of the ministerial exception to a church music director. *See id.* at 170-71. In doing so, the court found it irrelevant that not all of the considerations present in *Hosanna-Tabor* were present, as "[a]pplication of the exception … does not depend on a finding that [the employee] satisfies the same considerations that motivated th[is] Court to find that Perich was a minister." *Id.* at 177. Instead, the court found it "enough to note that there is no genuine dispute that [the employee] played an integral role in the celebration of Mass and that by playing the piano during services, [the employee] furthered the mission of the church and helped convey its message to the congregants." *Id.*

The Kentucky Supreme Court reached the same conclusion in *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014), a case involving a professor at a theological seminary. While the court explained that the considerations discussed in *Hosanna-Tabor* offered a "suitable foundation" for

analysis, it found that "more discussion of the actual acts or functions conducted by the employee would be prudent." *Id.* at 613. Applying that functional approach, the court concluded that the professor qualified as a minister: "Kirby is not ordained, of course, but that is not dispositive. Given Kirby's extensive involvement in the Seminary's mission, religious ceremonies, and the subject matter of Kirby's teaching, it is clear that Kirby is a ministerial employee." *Id.* at 611.

Still other courts have followed suit. In *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015), the Sixth Circuit focused on job duties in considering the applicability of the ministerial exception to a "spiritual director" who "provid[ed] counsel and prayer" as part of an "evangelical campus mission." *See id.* at 831-32. The court concluded that the employee qualified as a minister, even though there was no evidence that she held herself out as a minister or received any rigorous religious training. *See id.* at 835. Instead, the fact that she performed "important religious functions" for her religious organization (and that her formal title included the word "spiritual") sufficed to bar her employment claims. *See id.*

The Second Circuit also endorsed the functional approach in *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017), which addressed whether a former principal at a Catholic school qualified as a minister. *See id.* at 192. The court explained that *Hosanna-Tabor* instructed courts to "assess a broad array of relevant 'considerations,'" *id.*, but "neither limits the inquiry to those considerations nor requires

their application in every case," *id.* at 205. As such, the court concluded that it "'should focus' primarily 'on the function[s] performed by persons who work for religious bodies." *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring)). Applying that functional approach, the court concluded that the principal qualified as a minister. "Although her formal title—'lay principal'—does not connote a religious role, the record makes clear that she served many religious functions to advance the School's Roman Catholic mission." *Id.* at 206.

The Third and Seventh Circuits have reached materially identical conclusions. In *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018), the Third Circuit concluded 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.'" *Id.* at 122 n.7. And just this past month, in *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568 (7th Cir. 2019), the Seventh Circuit concluded that an organist at a Catholic church qualified as a minister because "organ playing serves a religious function." *Id.* at 572. The court rejected the employee's suggestion that it could "second-guess[]" the "Roman Catholic Church['s] belie[f] that organ music is vital to its religious services, and that to advance its faith it needs the ability to select organists." *Id.* at 570.

In applying that functional approach, the Seventh Circuit relied on its prior decision in *Grussgott*, which addressed the applicability of the ministerial exception to a former Hebrew teacher. *See* 882 F.3d

at 656. There, the Seventh Circuit explained that "the same four considerations" addressed in *Hosanna-Tabor* "need not be present in every case involving the exception." *Id.* at 658. And in concluding that the teacher qualified as a minister, the court found it particularly relevant that "the school expected its Hebrew teachers to integrate religious teachings into their lessons" and that the teacher indeed "performed 'important religious functions' for the school"—*e.g.*, teaching students about "Jewish holidays, prayer, and the weekly Torah readings" and "practice[ing] the religion alongside her students by praying with them and performing certain rituals." *Id.* at 659-60. In short, the Seventh Circuit explained, "it is fair to say that … the importance of [the plaintiff's] role as a 'teacher of [ ] faith' to the next generation outweighed other considerations." *Id.* at 661. No fewer than six other courts of appeals and state high courts would agree.

B. The Ninth Circuit and the Court Below Have Rejected the Functional Approach After *Hosanna-Tabor*.

In stark contrast to these decisions, the Ninth Circuit and the California courts in this case have squarely refused to apply the functional approach in the wake of *Hosanna-Tabor*.

In *Biel v. St. James School*, the Ninth Circuit considered whether the ministerial exception covered a teacher at a Catholic school within the Archdiocese of Los Angeles. *See* 911 F.3d at 605. The teacher taught her students all subjects, including a religion class "thirty minutes a day, four days a week, using a workbook on the Catholic faith prescribed by the

school administration." *Id.* Despite these unequivocally religious job duties, a 2-1 majority concluded that the ministerial exception did not apply, reasoning that the teacher did not sufficiently resemble the Lutheran school teacher in *Hosanna-Tabor*. In particular, the court emphasized that the teacher "ha[d] none of Perich's credentials, training, or ministerial background"; that "there is nothing religious 'reflected' in [her] title"; and that she did not "consider[] herself a minister." *Id.* at 608-09. The majority acknowledged that Perich and the Catholic teacher did have one thing "in common: they both taught religion in the classroom." *Id.* at 609. But the majority did not "read *Hosanna-Tabor* to indicate that the ministerial exception applies based on this shared characteristic alone." *Id.*

Judge Fisher of the Third Circuit, sitting by designation, wrote a blistering dissent. As he explained, just like Perich, the teacher before them was "'entrusted with teaching and conveying the tenets of the faith to the next generation.'" *Id.* at 622 (Fisher, J., dissenting) (quoting *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J, concurring)). In his view, "[t]hose responsibilities render[ed] her the 'type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees.'" *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J, concurring)).

Biel is not an isolated phenomenon in the Ninth Circuit. The court doubled down on its rejection of the functional approach in *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App'x 460 (9th Cir. 2019), *pet. for cert. filed*, No. 19-267 (U.S. Aug. 28, 2019),

another case involving a Catholic school teacher. There too, the court conceded that the teacher "ha[d] significant religious responsibilities": "She committed to incorporate Catholic values and teachings into her curriculum, as evidenced 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." *Id.* at 461. Relying on *Biel*, however, the court concluded that "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework," and thus refused to apply the ministerial exception. *Id.*

The court below has now exacerbated this division of authority, as it has expressly departed from the majority approach, App.15 and instead aligned itself with the Ninth Circuit, App.16 ("our conclusion is consistent with the Ninth Circuit's recent decision in *Biel*"). Other courts, too, have acknowledged the growing divide. For example, in *Sterlinski*, the Seventh Circuit noted that it has "adopted a different approach" to ministerial-exception cases than the Ninth Circuit, and that it "disagreed" with the Ninth Circuit's conclusion in *Biel* that courts may engage in "judicial resolution of ecclesiastical issues" consistent with the Constitution. 934 F.3d at 570-71.

There is no prospect that this conflict will resolve itself. In this very case, the California Supreme Court signaled that it has no intention of correcting any departure from the "functional approach" consensus, *see* App.1, and the en banc Ninth Circuit (over the dissent of nine judges) has just recently done the

same, *see Biel v. St. James Sch.*, 926 F.3d 1238 (9th Cir. 2019). The net effect of this discord is that religious institutions in California and other states throughout the Ninth Circuit must live with the reality that civil courts may second-guess their judgments about who may minister the faith, while religious organizations in other states and in other circuits retain their traditional First Amendment "[f]reedom to select the clergy." *Kedroff*, 344 U.S. at 116. The need for this Court's intervention is clear.

II. The Decision Below Is Profoundly Wrong.

This Court's review is critical not just because of the conflict in the lower courts, but also because the decision below is egregiously and dangerously wrong. ECC teachers are undoubtedly ministers covered by the ministerial exception based on the undisputedly important religious functions that they perform. The court below reached a contrary conclusion largely because of its elementary misreading of *Hosanna-Tabor*, which predictably resulted in elementary violations of the First Amendment.

A. The Ministerial Exception Covers Teachers Entrusted With Teaching and Conveying Judaism to the Next Generation at a Jewish Preschool.

The First Amendment's Religion Clauses prohibit the government from effecting an "establishment of religion" and impeding "the free exercise thereof." U.S. Const. amend. I. As this Court's unanimous opinion in *Hosanna-Tabor* explained, the first of those Clauses bars the government from "determin[ing] which individuals will minister to the faithful," and the second "protects a religious group's right to shape

its own faith and mission through its appointments." 565 U.S. at 188-89. The notion that persons assigned the duty of teaching the faith to the next generation are *not* ministers, and that the government may therefore interfere in the employment relationship between a religious organization and such persons, raises obvious problems under both Clauses.

First, empowering the government to determine who will fill religious-teaching positions plainly violates the Establishment Clause, which the Framers intended to "ensure[] that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices." *Id.* at 184. Second, and relatedly, denying religious groups the freedom to determine for themselves who is best suited to convey their own views violates the Free Exercise Clause, which "prevents [the government] from interfering with the freedom of religious groups to select their own [ministers]." *Id.*

Justices Alito and Kagan recognized as much in their concurring opinion in *Hosanna-Tabor*. As they explained, although "[d]ifferent religions will have different views on exactly what qualifies as an important religious [function], … it is nonetheless possible to identify a general category of 'employees' whose functions" are so important that they necessarily qualify as ministers. *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). That category assuredly includes "those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.*; *see also NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979) (noting "the critical and unique role of the teacher in fulfilling the

mission" of religious schools). Justices Alito and Kagan are not alone in that assessment; numerous courts have reached the same conclusion, including in the context of Jewish schools. *See, e.g.*, *Temple Emanuel*, 975 N.E.2d at 442-43. Simply put, a functional approach to the ministerial exception confirms that persons who perform the function of teaching the faith to others are ministers.

That constitutionally compelled and common-sense proposition should have made this an easy case. The parties here may disagree about much, but they do agree on some points—53 of them, to be precise. *See* App.36; AA871-90. Those 53 undisputed facts reveal that "[t]he ECC is part of the Temple's religious and educational mission and fulfills a religious obligation of the Temple." AA871-72. And as both the trial and appellate courts acknowledged, "ECC teachers undeniably play an important role" in furthering that mission by "transmitting Jewish religion and practice to the next generation." App.8, 15, 18; *see also* App.41 ("The undisputed evidence shows that the ECC teachers perform[] many religious function[s]."). Specifically, ECC teachers implement a "religious curriculum" that "includes the celebration of Jewish holidays, weekly Shabbat observance, recitation of the *ha-motzi* (grace before meals) before meals and snacks, and an introduction to Jewish values such as *kehillah* (community), *hoda'ah* (gratitude) and *shalom* (peace and wholeness)." App.5. They also "participate in weekly Shabbat services and teach religious concepts, music, singing, and dance." App.5. Although ECC teachers also engage in "secular" activities with infants and toddlers, such as "toileting," App.4, that does not

diminish the religious functions they perform, *see Hosanna-Tabor*, 565 U.S. at 193-94; *id.* at 204 (Alito, J, concurring).

To be sure, the fact that teachers of faith, such as the ECC teachers in this case, qualify as ministers based on their religious job duties is not to say the other considerations addressed in *Hosanna-Tabor* are categorically irrelevant. Those factors may very well provide evidence that bears on one's ministerial status, just as they did in *Hosanna-Tabor*. But whether such evidence exists or not, the practical reality is that the ministerial exception "appl[ies] to any 'employee' [of a religious organization] who … serves as a … teacher of its faith." *Id.* at 199 (Alito, J. concurring). The reason why is simple. As Judge Wilkinson explained in the first case to discuss the "ministerial exception" *in haec verba*, "perpetuation of a church's existence may depend upon those whom it selects to … teach its message … both to its own membership and to the world at large." *Rayburn*, 772 F.2d at 1168. It simply cannot be correct that the government may control those selections.

B. The Court Below Misinterpreted *Hosanna-Tabor* and Violated Basic First Amendment Principles.

The court below arrived at the conclusion that a religious function is insufficient to warrant application of the ministerial exception primarily because of its mistaken reading of *Hosanna-Tabor*. According to the majority below, *Hosanna-Tabor* forecloses the argument that employees of a religious institution who are responsible for religious instruction may qualify as ministers based on that

consideration alone. *See* App.15 ("Although the ECC's teachers are responsible for some religious instruction, we do not read *Hosanna-Tabor* to suggest that the ministerial exception applies based on this factor alone."). Instead, in its view, employees must have some other factor "in common" with the Lutheran school teacher in *Hosanna-Tabor*. App.14-15. But *Hosanna-Tabor* says no such thing. In fact, the Court explicitly rejected the idea that it was "adopt[ing] a rigid formula for deciding when an employee qualifies as a minister," and made clear that its analysis applied to Perich and no one else. *Hosanna-Tabor*, 565 U.S. at 190; *accord Grussgott*, 882 F.3d at 658; *Fratello*, 863 F.3d at 204-05; *Cannata*, 700 F.3d at 176-77.

This Court's reluctance to embrace any set formula is understandable given the serious First Amendment problems a one-size-fits-all approach would present. For example, as Justices Alito and Kagan explained, many religious groups—*e.g.*, "Catholics, Jews, Muslims, Hindus, or Buddhists"—do not refer to their clergy as "ministers." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). Other groups have no concept of ordination—*i.e.*, the process that bestows a formal title—meaning that employees of those religious institutions will not use titles one way or another. *See id.* To declare by judicial fiat that all ministers (no matter the religion) must share a title-related characteristic in common with ordained ministers of the Lutheran Church-Missouri Synod thus would violate "[t]he clearest command of the Establishment Clause," namely, "that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982);

see also Hosanna-Tabor, 565 U.S. at 197 (Thomas, J., concurring) ("[U]ncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding.").

The court below committed just that fatal error—and then some. In concluding that ECC teachers are not ministers, the majority placed special emphasis on the fact "many of the Temple's teachers are not practicing Jews," App.17—a point it revisited over and over, *see* App.4, 5, 16, 17. That echoes the concern offered by respondent throughout this litigation, including when it first subpoenaed the Temple over six years ago and suggested that Judaism may not even be a faith. *See* AA840; AA808 (respondent finding it "[e]specially significant … that these teachers are hired without decisive regard as to whether they are adherents to the Temple's faith"). But whether non-practicing-Jews are capable of adequately teaching the Temple's faith is not a judgment for the California Labor Commissioner (or the California Court of Appeal) to make—especially considering that it is undisputed that "Judaism does not preclude a non-Jew from teaching the Jewish religion or Jewish holidays," and that "[n]on-Jews may teach Jewish doctrine." AA887.

After all, "[r]eligious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring); *see also, e.g.*, *Gonzalez v. Roman Catholic Archbishop of Manila,* 280 U.S. 1, 16 (1929)

("it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them"); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1263 (10th Cir. 2008) (McConnell, J.) ("It is not for the state to decide what Catholic—or evangelical, or Jewish—'policy' is on educational issues." (alterations omitted)). Religious organizations do not lose that freedom simply because they conclude that their faith may be taught by non-adherents. The ministerial exception exists "precisely to avoid such judicial entanglement in, and second-guessing of, religious matters." *Sterlinski*, 934 F.3d at 570.

It is little surprise, then, that the majority mustered barely any authority to support its contrary conclusion. The court relied primarily on the Ninth Circuit's decision in *Biel* and a district court decision from the Northern District of Indiana—*Herx v. Diocese of Ft. Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014). *See* App.17 ("The present case is analogous to *Biel* and *Herx*."). But *Biel* offers no cover, as it embraced the very same misreading of *Hosanna-Tabor*. *See* pp.24-25, *supra*. And *Herx* is even farther afield, as it involved a teacher who taught "junior high language arts" and performed no religious function whatsoever. 48 F. Supp. 3d at 1171; *cf. Hosanna-Tabor*, 565 U.S. at 204 (Alito, J, concurring) ("a purely secular teacher would not qualify for the 'ministerial' exception"). In short, there is precious little support for the decision below, and much to suggest that it is flatly incorrect.

III. The Question Presented Is Exceptionally Important, And This Is An Excellent Case To Resolve It.

As this Court recognized when it granted review in *Hosanna-Tabor*, the applicability of the ministerial exception is a question of exceptional importance, for it involves no less than whether a religious organization may decide who may teach its faith. And the stakes are particularly high here, as absent this Court's review, all manner of religious organizations throughout California and the rest of Ninth Circuit—indeed, any group whose religious beliefs and practices are different from those of the Lutheran denomination in *Hosanna-Tabor*—will be denied their constitutionally protected freedom to decide for themselves who will convey their rituals, observances, teachings, scriptures, and prayers without intrusive state interference.

This is a particularly appropriate case in which to resolve that clear split of authority, for the core concerns of the Religion Clauses are front and center. No less than an agency of the State of California itself has refused to acknowledge that the Temple's ECC teachers are ministers of the Temple's faith. That is so even though it is undisputed that ECC teachers "play an important role in the religious objectives of the Temple." AA887. The government thus seeks to treat petitioner's teachers differently from religious teachers at a Lutheran school—indeed, is threatening petitioner with hundreds of thousands of dollars in backpay and penalties—simply because the government does not seem to believe that teachers of religious can *really* play an important role in teaching

religion if they are not members of the faith that they teach.

That is precisely the kind of governmental interference that the Religious Clauses are supposed to prevent. If the "scrupulous policy of the Constitution in guarding against a political interference with religious affairs" means anything, *Hosanna-Tabor*, 565 U.S. at 184 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 Records of the American Catholic Historical Society 63-64 (1909)), surely it means that the government may not decide for itself which religion teachers are sufficiently religious. The Court should grant the petition and put an end to the Ninth Circuit's and California courts' claims to the power to do just that.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JEREMY B. ROSEN
FELIX SHAFIR
JOSHUA C. MCDANIEL
JACOB M. MCINTOSH
HORVITZ & LEVY LLP
3601 W. Olive Ave.
8th Floor
Burbank, CA 91505

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

September 17, 2019