No. _____

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES MORRISSEY-BERRU,

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

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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 Our Lady of Guadalupe School was the defendant-appellee below. Respondent Agnes Morrissey-Berru was the plaintiff-appellant below.

Petitioner Our Lady of Guadalupe School has no parent corporation and issues no stock. Our Lady of Guadalupe School is a canonical entity and part of the canonical parish of Our Lady of Guadalupe in the Roman Catholic Archdiocese of Los Angeles; civilly, Our Lady of Guadalupe 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 Our Lady of Guadalupe 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.

In deciding that the Lutheran schoolteacher plaintiff had a ministerial position, the *Hosanna-Tabor* Court described four "considerations" that supported its conclusion: (1) the schoolteacher's "formal title," (2) "the substance reflected in that title," (3) her "use of th[e] title," and (4) "the important religious functions she performed." 565 U.S. at 192. But these "considerations" were not exclusive elements or requirements of a new test. Instead, the Court expressly held that there was no need to "adopt a rigid formula" to determine ministerial status. *Id.* at 190.

Both before and after *Hosanna-Tabor*, the lower courts have with remarkable consistency put their primary focus on one of the four considerations—the "important religious functions" assessment—in deciding whether a particular position is ministerial or not. Indeed, seven federal Courts of Appeals and seven state supreme courts, in cases involving Catholic, Protestant, and Jewish employers and many different kinds of roles, have all concluded that the presence or absence of religious function is the touchstone of the ministerial exception inquiry. This is not an exclusive inquiry—there is no need for a "function-only" test—but function is paramount.

In the face of that united approach among its sister courts, the Ninth Circuit decided to flout the consensus. In this case and in *Biel* v. *St. James School*, 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. See App. 1a; 911 F.3d 603 (9th Cir. 2018). Here, it was undisputed that Respondent had "significant religious responsibilities as a teacher" at Our Lady of Guadalupe School. App. 3a. She taught daily religion classes covering core Catholic doctrine, the sacraments, and how to read the Bible; she led daily and spontaneous prayers with and for her students; she planned and participated with her students in liturgies and Easter celebrations; and she served as a model of Catholic faith and worship both in her life and in all of the other academic subjects she taught. Yet the panel concluded that these admittedly core religious functions were insufficient because "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework." App. 3a.

Nine judges on the Ninth Circuit dissented from the Ninth Circuit's new approach, criticizing both *Biel* and the decision below in *Morrissey-Berru* v. *Our Lady of Guadalupe School*, 769 F. App'x 460 (9th Cir. 2019) (App. 1a). Indeed, the dissenters concluded that "[t]he case for the ministerial exception in *Morrissey-Berru* is even stronger than in *Biel*." *Biel* v. *St. James School*, 926 F.3d 1238, 1251 (9th Cir. 2019) (R. Nelson, J., joined by Judges Bybee, Callahan, Bea, M. Smith, Ikuta, Bennett, Bade, and Collins, 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. *Id.* at 1248, 1251. And a few weeks later, the Seventh Circuit, in an opinion written by Judge Easterbrook, confirmed that the Ninth Circuit was going its own way. *Sterlinski* v. *Catholic Bishop of Chicago*, No. 18-2844, 2019 WL 3729495, at *2 (7th Cir. 2019) (describing split and specifically rejecting *Biel*'s reasoning). The split of authority is thus deep, acknowledged, and—absent this Court's intervention—irreconcilable.

Moreover, as the *Biel* dissenters recognized, the stakes are high, both for Our Lady of Guadalupe and 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," *Biel*, 926 F.3d at 1243 (R. Nelson, J., dissenting), those religious institutions now must choose between giving up control of who passes on their faith to the schoolchildren 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.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 769 F. App'x 460 (9th Cir. 2019) and reproduced at App. 1a.

The district court's opinion granting summary judgment to Our Lady of Guadalupe School is reported at 2017 WL 6527336 (C.D. Cal. 2017) and reproduced at App. 4a.

JURISDICTION

The court of appeals entered its judgment on April 30, 2019. Justice Kagan extended the time in which to file a petition for a writ of certiorari to August 28, 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 Age Discrimination in Employment Act, 29 U.S.C. 621, *et seq.* ("ADEA"), are reprinted in the Appendix. App. 10a.

STATEMENT OF THE CASE

I. Factual Background

A. Petitioner Our Lady of Guadalupe School

Our Lady of Guadalupe School ("Our Lady") is a Catholic parish school located in Hermosa Beach, California. The school is a ministry of, and is operated by, the parish of Our Lady of Guadalupe under the jurisdiction of the Archdiocese of Los Angeles. App. 12a-13a, 43a-44a. 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.

Our Lady was founded almost sixty years ago, in 1961, and was staffed by Carmelite Sisters for its first 13 years. App. 43a. While all children are welcome to enroll, Our Lady was established specifically to serve the educational needs of the children of the parish. App. 43a. The mission of Our Lady is to develop and promote a Catholic faith community that reflects both a Catholic philosophy of education and the doctrines and norms of the Catholic Church. App. 32a, 43a.

The parish pastor is the ex-officio chief administrative officer of Our Lady and is responsible to both carry out Archdiocesan policy and, where necessary, to set policy that effectuates the mission of the Catholic Church at the school. App. 14a, 44a.

B. The role of teachers at Our Lady

Our Lady's staff join with the pastor in "service to the Church" to "work together in a collaborative way to carry out the mission of the Church." App. 53a. For staff at Our Lady, "[m]odeling, teaching of and commitment to Catholic religious and moral values are considered essential job duties." App. 55a.

Teachers have a particularly important role. Teachers must agree to perform "all" of their "duties and responsibilities" in a manner consistent with Catholic doctrine and educational philosophy. App. 32a. Teachers must conduct their professional efforts in alignment with "the values of Christian charity, temperance, and tolerance," and in both their pro-

fessional and private life must "model and promote behavior in conformity to the teaching of the Roman Catholic Church in matters of faith and morals." App. 33a. Teachers are also expected to participate in Our Lady's liturgical activities, App. 33a, including faculty-wide prayer services, App. 87a. As part of this responsibility, Catholic teachers hired by Our Lady must be in good standing with the Church. App. 56a. And teachers who teach religion are required to be Catholic. App. 57a.

To ensure these expectations are met, they are written into each employment contract, which itself must be signed by the pastor and renewed annually. App. 36a, 42a. Teachers are also evaluated on whether their teaching "includes Catholic values infused through all subject areas" and whether their classrooms visibly reflect the "sacramental traditions of the Roman Catholic Church." App. 23a.

C. Respondent Morrissey-Berru's role at Our Lady

Respondent Agnes Morrissey-Berru began teaching full-time at Our Lady in 1999. App. 80a. She started as the sixth-grade teacher and, ten years later, transitioned to teaching the fifth grade. App. 80a.

She understood that Our Lady's mission was to impart Catholic faith and values to its students. App. 82a. She also understood that, as the only teacher for her fifth-grade class, she had a special role in teaching and modeling Catholic doctrine and values for her students. App. 82a-83a, 93a. She testified that she was "committed" to fulfilling that special role by "teaching children Catholic values" and providing a "faith-based education." App. 82a.

Morrissey-Berru fulfilled this commitment in several ways. Most prominently, she taught daily religion classes every year of her employment. App. 81a, 90a. Her religion classes "introduce[d] students to Catholicism" and "gave them a groundwork for their religious doctrine." App. 93a. In just her last year of teaching the religion class alone, she testified that she taught students:

- to "learn and express [the] belief that Jesus is the son of God and the Word made flesh";
- the Catholic doctrines of creation and original sin;
- the names, meanings, and signs of the seven Catholic sacraments: Baptism, Confirmation, the Eucharist, Penance (also known as Reconciliation), the Anointing of the Sick, Marriage, and Holy Orders;
- to locate, read, and understand passages from the Bible that relate to the sacraments;
- to celebrate the sacraments, including how to celebrate the sacrament of Reconciliation;
- to recognize the physical presence of Christ in the Eucharist;
- to recognize and understand the signs and symbols of the Church's liturgy: water, bread, wine, oil, and light;
- "to pray the Apostles' Creed and the Nicene Creed," including the "four marks of the church" embodied in the Nicene Creed (that there is "one, holy, catholic, and apostolic Church");
- the liturgical calendar, including the "Sacred Triduum" of Holy Thursday, Good Friday, and Easter Sunday;

- to identify the ways that the Church carries out the mission of Jesus.

App. 91a-94a; see also App. 16a-21a. Her instruction was not merely academic, but rather devotional: she taught the students Catholic doctrine through prayer, worship, and the reading of Scripture. App. 45a-51a.

Morrissey-Berru also modeled and practiced the Catholic faith with her students. She testified that she personally showed the "children how to go to mass, the parts of the mass, communion, prayer, and confession." App. 81a. She used her role as a teacher at Our Lady to demonstrate "the importance of prayer and worship." App. 96a. She prepared her students to proclaim readings from Scripture during the weekly school Masses and the monthly family Masses, and then took her students to attend and participate in those Masses. App. 82a-84a, 87a-88a. Her class was in charge of one Mass per month, and she helped plan the liturgy for that Mass. App. 40a, 83a-84a. She took her students to specific Holy Days of Obligation and other religious observances, such as Lenten Services, the Feast of Our Lady of Guadalupe, the Stations of the Cross, All Saints Day, and Christmas. App. 88a. She led daily prayer with the students at the beginning or end of class, and would also lead spontaneous prayer as appropriate, such as praying for a student's ill mother. App. 86a-87a. She included visible Catholic symbols in her classroom. App. 95a. And, as required by Our Lady's policies, she infused Catholic faith and values into all other academic subjects that she taught. App. 86a, 95a.

Beyond regular classroom and school religious observances and training, Morrissey-Berru also led

other important religious activities for her students. For instance, she annually directed her students in a play of the Passion of the Christ, depicting Christ's final hours and crucifixion. App. 69a. As a part of the play, she would explain the Scriptural significance of the Passion, would help students prepare dialogue from Scriptural passages, and would rehearse the play with them. App. 69a. The play was then performed before the entire school as a part of its celebration of Easter. App. 69a; see also *Our Lady of Guadalupe students perform holiday pageant*, Easy Reader News (Dec. 18, 2014), https://perma.cc/8B3N-DUYQ (reporting Feast of Our Lady of Guadalupe play directed by Morrissey-Berru and performed by her fifth-grade class in the parish sanctuary after the Mass). Morrissey-Berru also annually took her class to the Cathedral of Our Lady of the Angels to give them the opportunity to serve at the altar there. App. 95a-96a. She believed it was an "important event" and "a big honor" for the students. App. 96a.

To ensure her students properly understood the religious beliefs which she taught, Morrissey-Berru administered religious education tests. App. 87a. And to ensure that she was properly teaching Catholic beliefs, Our Lady regularly evaluated her teaching of the Catholic faith. App. 94a-95a. Our Lady also required her to take catechist courses to become a certified Catechist. App. 85a. The courses were provided by the Archdiocese of Los Angeles's religious education department. App. 85a.

D. Our Lady decides not to renew Morrissey-Berru's contract

The catechist certification requirement was first implemented in 2012, as a part of sweeping reforms at Our Lady to save it from closure. App. 59a-61a. The school's attendance had steadily dwindled to the point that the eighth-grade class in 2011 had only one graduate, and Our Lady remained afloat solely due to a heavy subsidy from the parish. App. 27a. A Catholic school accreditation team report in 2012 identified the reason for decline as negative parental perception about the school, which was attributed to factors such as a perceived lack of academic rigor and a need for catechetical training of teachers. App. 59a.

The parish brought in a new principal, April Beuder, to address these problems. App. 57a-59a. She immediately began requiring all faculty to obtain catechist certification based on guidelines set by the United States Conference of Catholic Bishops. App. 61a. The catechist courses trained teachers to "provide a Catholic education to students." App. 61a. Beuder also required teachers to implement a new reading program to address concerns about academic rigor. App. 27a-27a, 66a-67a. Morrissey-Berru failed to fully implement the program in the 2012-2013 school year. App. 69a-70a, 73a. Beuder offered her a new contract for the 2013-2014 school year, which was explicitly conditioned on fully implementing the program. App. 68a. But Morrissey-Berru again failed to meet expectations with the program, despite attempts to help her succeed. App. 28a, 73a. So Beuder created a part-time position for Morrissey-Berru that removed duties related to the program while allowing her to teach fifth-grade religion and fifth-through-seventh-

grade social studies for 2014-2015. App. 29a. That experiment was unsuccessful, in part due to budgetary issues, and so Beuder informed Morrissey-Berru in May 2015 that she would not offer her a new contract. App. 30a-31a.

II. The proceedings below

A. Morrissey-Berru's complaint

One month later, on June 2, 2015, Morrissey-Berru filed a charge with the Equal Employment Opportunity Commission, alleging, as relevant here, age discrimination in violation of the ADEA. She filed a complaint in federal district court in December 2016.

After discovery, Our Lady filed a motion for summary judgment in August 2017. The district court granted the motion, ruling that Morrissey-Berru's claim was barred by the First Amendment's ministerial exception. App. 4a. It found that Our Lady was undisputedly a religious organization protected by the exception, and that Morrissey-Berru's claim was of the kind prohibited by the exception. App. 7a. So the "main question" remaining was whether Morrissey-Berru was a "minister" for purposes of the exception. App. 7a. The court found that she was, because she "expressly admitted that her job duties involved conveying the church's message," and that she fulfilled those duties by "integrating Catholic values and teachings into all of her lessons," "leading the students in religious plays," and teaching "her students the tenets of the Catholic religion, how to pray, and * * * a host of other religious topics." App. 7a-8a. The court rejected as "irrelevant" Morrisey-Berru's argument that she "did not feel formally 'called' to the ministry," courts must "consider [her] actual duties, not whether

she personally felt called to the ministry." App. 8a (citing *Fratello* v. *Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017)).

Morrissey-Berru appealed.

B. Ninth Circuit proceedings

On appeal, Morrissey-Berru argued that her actual duties were not "determinative of whether or not the exception applied." Opening Br. 46, ECF No. 8. Rather, she asserted that the rule from *Hosanna-Tabor* required that she also have a religious title, be ordained, or hold herself out to the community as a minister—none of which, she claimed, were true of her. *Ibid*. Further, she argued that her duties were insufficiently religious to be "ministerial" because that designation pertained "only" to those who "perform a leadership role," whereas she merely "t[aught] religion out of a textbook." *Id.* at 47-48.

After the close of briefing in Morrissey-Berru's appeal, and before oral argument, a divided panel of the Ninth Circuit accepted very similar arguments in *Biel* v. *St. James School*. See 911 F.3d at 605. *Biel* was an appeal by another fifth-grade teacher, Kristen Biel, against another Archdiocese of Los Angeles elementary school in a neighboring parish. 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." *Id.* at 609-610. 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. *Id.* at 617-618 (citing *Grussgott* v. *Milwaukee Jewish Day School, Inc.*, 882 F.3d 655, 661 (7th Cir.), *cert. denied*, 139 S. Ct. 456 (2018)).

While a petition for rehearing en banc was still pending in *Biel*, a different panel of the Ninth Circuit followed *Biel*'s analysis to rule against Our Lady. App. 1a. The panel agreed that Morrissey-Berru'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." App. 3a. But, in the panel's view, all of this was insufficient because *Biel* instructs that "an employee's duties alone are not dispositive." App. 3a.

Two months later, on June 25, 2019, the Ninth Circuit denied the petition for rehearing en banc in *Biel*. 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." *Biel*, 926 F.3d at 1239-1240 (R. Nelson, J., dissenting). The dissent also criticized the decision in this appeal, stating that the argument "for the ministerial exception in *Morrissey-Berru* is even stronger than in *Biel*" given the undisputed and robust factual record of Morrissey-Berru's religious functions. *Id.* at 1251. "In each suc-

cessive case, we have excised the ministerial exception, slicing through constitutional muscle and now cutting deep into core constitutional bone." *Id.* at 1240.

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." *Biel*, 926 F.3d at 1239 (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*

Sch. v. *Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 881 n.16 (Wisc. 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 Sch. 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 multifactor 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. And under that consensus, "religious authorities must be free to determine who is qualified to serve in positions of substan-

tial religious importance," such as "those who are entrusted with teaching and conveying the tenets of the faith." *Id.* at 200.

C. After *Hosanna-Tabor* and before *Biel*, 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 at 205 (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 *Biel* 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 *Biel* v. *St. James School*. *Biel* was an appeal by another fifth-grade teacher, represented by the same counsel, against another Archdiocese of Los Angeles elementary school. See 911 F.3d at 605. 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." *Id.* at 609-610. The panel majority also parted ways with *Grussgott*. *Grussgott*, like *Hosanna-Tabor*, found that an elementary-level teacher who taught religion was a minster. 882 F.3d at 656. The *Biel* 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. 911 F.3d at 609. 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*[.]" 911 F.3d at 617-618 (Fisher, J., dissenting).

Five months later, while a petition for en banc review of *Biel* was still pending, the Ninth Circuit applied *Biel* here. The court reversed the district court's grant of summary judgment to Our Lady, finding it legally insufficient that Morrissey-Berru had "significant religious responsibilities as a teacher at the School." App. 3a. 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.

App. 3a (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." App. 3a.

Two months after the ruling in this appeal, nine judges dissented from denial of rehearing en banc in *Biel*. 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*." *Biel*, 926 F.3d at 1239-1240 (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. *Id.* at 1243, 1245. 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." *Id.* at 1244; see also *id.* at 1249 (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.'" 926 F.3d at 1240 (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." *Id.* at 1245.

A California appellate court recently adopted *Biel's* reasoning 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]

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 2019 WL 3729495, at *2. 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 *2; see also *Biel*, 926 F.3d at 1243 (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*, 2019 WL 3729495, at *2. 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

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

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.'" *Ibid.* (quoting *Hosanna-Tabor*, 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*." *Ibid.* (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.

* * *

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 in *Biel*, 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 increas-

ing: 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 has 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.

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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).

For example, the ministerial exception protects religious groups of many different faith traditions. 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," https://perma.cc/PG5M-TV7K.

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 reli-

gious 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." *Biel*, 926 F.3d at 1251 (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*, 2019 WL 3729495, at *2; see also *Biel*, 926 F.3d at 1239 (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 *Biel*, 926 F.3d at 1245 (R. Nelson,

J., dissenting) ("a demand for ecclesiastical titles inherently violates the Establishment Clause"). Indeed, in *Biel*, the plaintiff 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 Appellant's Reply Brief, *Biel* v. *St. James School*, 926 F.3d 1238 (9th Cir. 2019) (No. 17-55180) at 12 & n.2.

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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.

Respectfully submitted.

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AUGUST 2019