No. 17-55180

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTEN BIEL,
Plaintiff-Appellant,

v.

ST. JAMES SCHOOL,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
TERRY J. HATTER, DISTRICT JUDGE • CASE NO. 2:15-CV-04248-TJH-AS

AMICUS CURIAE BRIEF OF STEPHEN WISE TEMPLE IN SUPPORT OF THE PETITION FOR EN BANC REHEARING

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, amicus curiae Stephen Wise Temple certifies that it is a nonprofit organization with no corporate parents or stockholders.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Miscellaneous

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INTEREST OF AMICUS CURIAE

Stephen Wise Temple is a Reform Jewish synagogue in Los Angeles, California. Founded in 1964, the Temple's mission is to promote and preserve the Jewish faith and to serve and strengthen the Jewish community on behalf of its thousands of members. The Temple operates a preschool and an elementary school, which the Temple believes are essential to the Temple's goal of passing the Jewish faith on to the next generation and strengthening the faith of families in its congregation. The Temple believes it is vital to craft religious liberty precedent with all

religious traditions in mind and especially so in cases involving the application of the ministerial exception to teachers who perform the essential task of conveying the tenets of the faith.

STATEMENT OF COMPLIANCE WITH RULE 29(a)(4)(E)

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person except amicus curiae, their members, or their counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, a unanimous Supreme Court held that the First Amendment precludes applying employment discrimination laws to regulate "the employment relationship between a religious institution and its ministers." 565 U.S. 171, 188 (2012). This "ministerial exception" ensures that the authority to "select and control who will minister to the faithful" is "the church's alone." *Id.* at 194-95.

But who qualifies as a minister? In its first (and still only) ministerial exception case, the Supreme Court declined to "adopt a rigid

formula." *Id.* at 190. Instead, the Court concluded that the exception at the very least is "not limited to the head of a religious congregation" and covered the plaintiff, a Lutheran school teacher, "given all the circumstances of her employment." *Id.* This Court, too, declined to flesh out the standard in its first (and still only) en banc case considering the exception. *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc) ("We leave for another day the formulation of a general test because, under any reasonable construction of the ministerial exception, Rosas"—an unordained seminarian—"meets the definition of a minister.").

Although there likely never will (or should) be a one-size-fits-all test for determining who is a minister, state and federal courts are in agreement that the predominant consideration is whether the employee performs important religious functions. And core among those functions is the vital religious task of teaching the faith. As Justice Alito, joined by Justice Kagan, explained in their *Hosanna-Tabor* concurrence, this "functional consensus has held up over time" and was left undisturbed by the Court's unanimous opinion. *Hosanna-Tabor*, 565 U.S. at 203-04 (Alito, J., concurring).

The majority panel opinion in this case, however, breaks sharply with this forty-five-year consensus. As if applying the canon against surplusage to a statute or contract, the majority reasons that religious function alone cannot be enough because the discussion of other considerations in *Hosanna-Tabor* would otherwise have been dicta. That holding not only results in the very kind of rigid analysis (i.e., function is not enough, but function plus title might be) that the Supreme Court rejected, but also brings this Court into conflict with an unbroken line of federal and state cases, including from this Court, as well as the widely accepted concurring opinion of Justices Alito and Kagan.

This Court should grant en banc review to align itself with the consensus of other courts and to preserve the cherished right of religious institutions in this circuit to "choos[e] who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196 (unanimous opinion).

ARGUMENT

I. The panel majority's opinion upsets the longstanding consensus among courts that performance of important religious functions is the predominant consideration in deciding who is a minister for purposes of the ministerial exception.

In their concurring opinion, Justices Alito and Kagan wrote separately to explain that "while a ministerial title is undoubtedly relevant in applying the First Amendment rule at issue, such a title is neither necessary nor sufficient." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 202 (2012) (Alito, J., concurring). They recognized that in a nation that celebrates rich religious diversity, it would be a mistake to limit the ministerial exception's protection to those faiths that use religious titles, have a concept of ordination or callings, or require formal theological training. *See id.* at 198, 202. After all, in the Judeo-Christian traditions, "a stammering Moses was chosen to lead the people, and a scrawny David to slay a giant." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017).

Perhaps because of this need to account for diverse religious views, Justices Alito and Kagan explained, "*no circuit* has made ordination status or formal title determinative of the exception's applicability."

Hosanna-Tabor, 565 U.S. at 202 (Alito, J., concurring) (emphasis added). Instead, courts—including this Court—have "taken a functional approach," focusing primarily on "the function performed by persons who work for religious bodies." *Id.* at 198, 205. "The functional consensus has held up over time," they explained, and nothing in the "Court's opinion today should . . . be read to upset this consensus." *Id.* at 203-04.

Since *Hosanna-Tabor*, multiple courts—including three circuits—have followed the Supreme Court's lead by assessing the totality of the circumstances, but courts have continued to focus primarily on religious function, as Justices Alito and Kagan suggested. The Second Circuit, for example, noted that the Supreme Court's controlling opinion in *Hosanna-Tabor* provided "only limited direction"—instructing "only as to what we *might* take into account"—and then endorsed the concurring opinion of Justices Alito and Kagan, "not because we are bound to follow it—of course we are not—but because we find its analysis both persuasive and extremely helpful." *Fratello*, 863 F.3d at 204-05. The Second Circuit "agree[d]" with Justices Alito and Kagan that "'courts should focus' primarily 'on the function[s] performed by persons who work for religious bodies.'" *Id.* at 205 (citation omitted). Thus, although Fratello's title of lay

principal did "not connote a religious role," she was a minister because "the record ma[de] clear that she served many religious functions to advance the School's Roman Catholic mission." *Id.* at 206.

Other courts have taken a similar approach:

- The Seventh Circuit, in *Grussgott v. Milwaukee Jewish Day School, Inc.,* held that an elementary school Hebrew teacher was a minister, reasoning that "the importance of Grussgott's role as a 'teacher of [] faith' to the next generation outweighed other considerations" because "her job entailed many functions that simply would not be part of a secular teacher's job at a secular institution." 882 F.3d 655, 661 (7th Cir. 2018) (per curiam) (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)).
- The Fifth Circuit, in *Cannata v. Catholic Diocese of Austin*, found it was "enough" for purposes of the exception that a Catholic music director "played an integral role in the celebration of Mass and that by playing the piano during services, Cannata furthered the mission of the church and helped convey its message to the congregants." 700 F.3d 169, 177 (5th Cir. 2012) (citing *Hosanna-Tabor*, 565 U.S. at 190 (Alito, J., concurring)).

- The Supreme Judicial Court of Massachusetts, in *Temple Emanuel of Newton v. Massachusetts Commission Against Discrimination*, held that a teacher at a Jewish school was a minister even though "she was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi," and the record was "silent as to the extent of her religious training," because it was enough that she "taught religious subjects at a school "whose mission was to teach Jewish children about Jewish learning, language, history, traditions, and prayer." 975 N.E.2d 433, 443 (Mass. 2012).
- District courts have also focused on religious functions. *E.g.*, *Lishu Yin v. Columbia Int'l Univ.*, 335 F. Supp. 3d 803, 812 (D.S.C. 2018) ("In this analysis, a federal court must focus 'on "the function of the position" at issue . . . .'" (citation omitted)); *Ciurleo v. St. Regis Parish*, 214 F. Supp. 3d 647, 652 (E.D. Mich. 2016) ("[T]he paramount factor of religious function, highlighted in Justice Alito's opinion, provides the decisional pathway . . . ."); *Sterlinski v. Catholic Bishop of Chi.*, 203 F. Supp. 3d 908, 913 (N.D. Ill. 2016) ("In determining whether an employee qualifies as a minister, a court's focus is on the *function* of the plaintiff's position . . . .").

The panel majority's opinion departs from this long-running consensus. Despite acknowledging that Kristen Biel's role teaching "religion in the classroom" satisfies "the fourth consideration in *Hosanna-Tabor*" (slip op. 11), the panel majority nevertheless holds that such religious functions are not enough to establish that Biel was a minister, reasoning that it cannot base the exception on a "single aspect of the employee's role" (slip op. 14). That rationale puts this Court at odds with the cases discussed above—and creates a split within this circuit. *See Puri v. Khalsa*, 844 F.3d 1152, 1160 (9th Cir. 2017) (noting that the performance of "ecclesiastical duties" is the "most important[]" consideration and that an employee with religious functions "is likely to be covered by the exception, even if the employee devotes only a small portion of the workday to strictly religious duties").

The panel majority reaches this divergent result by misreading *Hosanna-Tabor*. Applying a rule against surplusage to the Supreme Court's opinion, the panel majority says that deeming religious function to be enough without evidence of religious title, substance behind title, or holding oneself out as a minister "would render most of the analysis in *Hosanna-Tabor* irrelevant." (Slip op. 14.) But the majority is wrong.

As Justices Alito and Kagan explained, although different religions have different views on what exactly qualifies as a religious position, there are some categories of employees "whose functions are essential to the independence of practically all religious groups," including "those who serve in positions of leadership, those who perform important functions in worship services" and "religious ceremonies and rituals," and "those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). When the employee does not fall into one of those categories, however, the fact that the employee has a religious title or satisfies some of the other considerations discussed in *Hosanna-Tabor* would be relevant to prove ministerial status. Indeed, that is why Justices Alito and Kagan *agreed* that a ministerial title "is undoubtedly relevant in applying the First Amendment rule at issue," *id.* at 202, even though the plaintiff's status as a minister "rest[ed] *not* on [her] ordination status or her formal title," *id.* at 206 (emphasis added). For this reason, the Court's discussion of other considerations in *Hosanna-Tabor* was hardly superfluous.

The Fourth Circuit's decision in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004), is instructive. There, a kosher food supervisor at a Jewish nursing home claimed that "his primary duties involved nothing more than inspecting incoming food and deliveries and ensuring the kosher preparation of food." *Id.* at 308. He also claimed that he was not ordained, and "apart from being an Orthodox Jew, no special training [wa]s required" to perform his job. *Id.* His job thus did not fall neatly into any of the categories listed by Justices Alito and Kagan: as a nursing home employee, he did not conduct worship services, lead a congregation, or convey the tenets of the Jewish faith. But even so, he had the religious title of "mashgiach," he held himself out as clergy, and he was "the primary human vessel through whom the Hebrew Home chose to assure that the Jewish dietary laws were followed." *Id.* Given all of those circumstances, the court concluded, he was a minister. *Id.* at 309.

Biel, by contrast, easily qualifies as one "entrusted with teaching and conveying the tenets of the faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). In fact, as the sole teacher for her fifth grade class, she is the primary human vessel through which

Catholic teachings and faith are conveyed to her pupils—a vital religious function.

The panel majority superficially agrees with Justices Alito and Kagan but implicitly rejects their central premise, reasoning that it would not be "faithful to *Hosanna-Tabor*" to say that "any school employee who teaches religion would fall within the ministerial exception." (Slip op. 14.) But the majority's reasoning is mistaken. It is precisely because Biel taught church doctrine to Catholic children that the school must have the freedom to remove her at its ecclesiastical will. "This conclusion rests not on . . . ordination status or . . . formal title, but rather on her functional status as 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." *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring).

II. The panel majority's opinion is contrary to *Hosanna-Tabor*.

A. The panel opinion turns *Hosanna-Tabor* into a rigid inquiry.

The Court's opinion in *Hosanna-Tabor* made clear that the ministerial determination is not conducted with a "rigid formula." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S.

171, 190 (2012); *see Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) ("Any attempt to calcify the particular considerations that motivated the Court in *Hosanna-Tabor* into a 'rigid formula' would not be appropriate."). Yet the panel majority does precisely that by ruling the ministerial exception cannot apply where "only one of the four characteristics" from *Hosanna-Tabor* is met. (Slip op. 11-12.)

By demanding something more than performance of religious duties and functions, the panel majority sets up a rule that places undue emphasis on factors such as ministerial title, ordination, and theological training—concepts that are adopted and practiced by some religious traditions but not by many others. The majority's rule thus works to the benefit of religious groups who use ministerial titles, ordain their teachers, and so on, and will tend to exclude minority religious groups who do not practice such beliefs.

This was not the Supreme Court's intent. While the Court's opinion relied on four factual considerations to make its determination, it made clear that this inquiry was merely "enough" for the Court's "first case involving the ministerial exception," *Hosanna-Tabor*, 565 U.S. at 190. Courts have thus understood that "*Hosanna-Tabor* instructs only as to

what we *might* take into account as relevant, including the four considerations on which it relied," but "it neither limits the inquiry to those considerations nor requires their application in every case." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 204-05 (2d Cir. 2017).

The panel majority reasons that it "would not be faithful to *Hosanna-Tabor*" to "base the exception on a single aspect of the employee's role." (Slip op. 14.) But to the contrary, the Supreme Court expressed "no view on whether someone with [plaintiff's religious] duties would be covered by the ministerial exception in the absence of the other [three] considerations." *Hosanna-Tabor*, 565 U.S. at 193. And courts after *Hosanna-Tabor* have consistently followed the function-centric approach suggested by Justice Alito's concurrence. To date, no court has adopted the panel majority's reasoning.

B. The panel opinion improperly discounts the religious functions of St. James's teachers.

In distinguishing *Hosanna-Tabor*, the panel majority minimizes the importance of Biel's religious functions. For instance, to demonstrate that "Biel's role in teaching religion was not equivalent" to the plaintiff in *Hosanna-Tabor*, the panel majority reasons that Biel was "limited to teaching religion from a book required by the school and incorporating

religious themes into her other lessons." (Slip op. 12.) The panel majority also reasons that, unlike the plaintiff in *Hosanna-Tabor*, who led the students in prayers, Biel only "gave students the opportunity to lead the prayers and joined in." (*Id.*)

But *Hosanna-Tabor* was not an invitation for courts to sit in judgment on the importance or religious significance of a religious employee's duties and functions. *See Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1293 (9th Cir. 2010) (en banc) (rejecting seminarian's argument that he was hired merely to perform maintenance on the church, because a "church may well assign secular duties to an aspiring member of the clergy, either to promote a spiritual value (such as diligence, obedience, or compassion) or to promote its religious mission in some material way"). Notably, the Supreme Court's opinion in *Hosanna-Tabor* never questioned or minimized the religious significance of the ministerial characteristics, duties, and functions asserted by the church—and for good reason.

As Judge Fisher's dissent explained, "courts may not evaluate the relative importance of a ministerial duty to a religion's overall mission or belief system. The very duties that Biel attempts to trivialize, e.g.

teaching Church doctrine and requiring participation and attentiveness during mass, could easily be considered essential to the faith." (Slip op. 33 (Fisher, J., dissenting).) Indeed, "the mere adjudication of such questions would pose grave problems for religious autonomy." *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., concurring). Submitting such questions to a civil factfinder "would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with [the] civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Id.* at 206.

By deciding that teaching from a religious textbook is insufficiently religious, and by preferring teachers who lead prayers rather than teachers who provide students with opportunities to lead, the panel majority substituted its own judgment on religious matters for that of St. James School. The First Amendment, however, forbids courts from doing so. *See id.* at 186 (unanimous opinion) (noting that the First Amendment ensures religious "independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"

(quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952))).

C. The panel opinion incorrectly reads a "pronounced religious leadership" requirement into the ministerial inquiry.

The panel majority reasons that the ministerial exception requires evidence of "pronounced religious leadership and guidance" (slip op. 13) and does not extend to "employees who do not serve a leadership role in the faith" (slip op. 15). The majority acknowledges that the exception is not limited to heads of religious congregations but nevertheless concludes that the category of ministerial employees must be narrowly drawn because the Framers drafted the First Amendment with a "focus on heads of congregations and other high-level religious leaders." (Slip op. 14-15.) The majority is mistaken.

To begin with, the plaintiff in *Hosanna-Tabor* was neither a head of congregation nor a high-level leader. Like Biel, she was a grade school teacher. *Hosanna-Tabor*, 565 U.S. at 178. Nor has any circuit—including this one—limited the ministerial exception to high-level religious leaders. In the first ministerial exception case, the Fifth Circuit held that a secretary in a regional public relations department was a minister in the

Salvation Army. *McClure v. Salvation Army*, 460 F.2d 553, 555-56 (5th Cir. 1972). This Court, sitting en banc, applied the exception to a seminarian who had no authority over a congregation but was instead "hired to do maintenance of the church and also assist[] with Mass." *Alcazar*, 627 F.3d at 1292 (citation omitted). Many other courts have also applied the exception to non-leadership and lower-level roles. *See, e.g.*, *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 428 (2d Cir. 2018) (hospital chaplain); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (communications manager for Catholic Archdiocese); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (pastoral care intern); *accord Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041, 1054-55 (2011) (preschool teacher). The panel majority's opinion thus creates a split of authority on this issue both within this circuit and with other circuits.

The panel majority also draws the wrong lesson from the First Amendment's historical backdrop. Citing a pair of examples from the Court's opinion in *Hosanna-Tabor*—historical episodes involving parish ministers and the Catholic Church's leadership in the territory of the

Louisiana Purchase—the panel majority concludes that the Founders must have been focused on "high-level religious leaders." (Slip op. 15.) But as *Hosanna-Tabor* explains, the founding generation sought not just to prevent government control of high-level religious leaders, but to escape all aspects of "life under the established Church of England." *Hosanna-Tabor*, 565 U.S. at 183.

The Founders' rejection of British-style establishment included repudiating the Crown's authority over lower-level positions within the Church of England. In colonial America, the government could control the selection of both the clergy and lower-level positions like "vestries, clerks, and sextons." *See* Sanford H. Cobb, The Rise of Religious Liberty in America: A History 125-26 (1902); *see also* Felix Makower, The Constitutional History and Constitution of the Church of England 348-51 (New York, MacMillan & Co. 1895) (listing the multiple "minor officers" of the Church and their duties).

The Founders specifically criticized the power that the King had over staffing the immense Church of England—including its many non-leadership positions. *See* Tench Coxe, *An American Citizen: An Examination of the Constitution of the United States* (1788), *reprinted in*

Friends of the Constitution: Writings of the "Other" Federalists, 1787-1788, at 459, 461 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) (criticizing the King's authority over the "many honorable and lucrative positions" within the Church as granting "an enormous influence to the crown"); The Federalist No. 69, at 360 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (criticizing the King's "disposal of an immense number of church preferments"). When the Founders sought to curb the government's power over religion, they formed a Constitution that ensured both "Clergy *and Lay Officers of all churches*" could be chosen "without any possible interference of the [federal] government." Coxe, *supra*, at 475 (emphasis added).

In short, neither case law nor the historical backdrop of the First Amendment supports the panel majority's narrowing of the ministerial exception. "Religious autonomy means that religious authorities must be free to determine who is qualified to serve" in any position "of substantial religious importance"—including not only "those who serve in positions of leadership" but also those, like Biel, "who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

CONCLUSION

The panel majority's decision creates a circuit split on a constitutional issue of exceptional importance and undermines the religious autonomy of faith groups throughout the circuit. This Court should grant en banc rehearing.

January 31, 2019

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UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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