No. B275426

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION 3

JULIE SU, CALIFORNIA STATE LABOR COMMISSIONER,
Plaintiff-Appellant,

v.

STEPHEN S. WISE TEMPLE
Defendant-Respondent.

On Appeal from the County of Los Angeles Superior Court,
Hon. Ernest M. Hiroshige, No. BC520278

Application for Leave to File Amicus Curiae Brief and Amicus Curiae Brief of The Church Of God In Christ and The Becket Fund for Religious Liberty in Support of Defendant-Respondent Stephen S. Wise Temple

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Under California Rules of Court, rule 8.200(c), the Church Of God In Christ and the Becket Fund for Religious Liberty request permission to file the attached amicus curiae brief in support of Defendant-Respondent Stephen S. Wise Temple.[1]

Church Of God In Christ, Inc. is a Pentecostal Christian

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[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. *See* Cal. Rules of Court, rule 8.200(c)(3).

church with more than 10,000 congregations in the United States and other congregations in 83 countries worldwide. The church is organized into jurisdictions who appoint and, in certain instances, remove ministers.

Becket is a non-profit, nonpartisan law firm dedicated to protecting religious liberty for all. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others.

Becket has frequently represented parties in ministerial exception cases, both as counsel for parties and as amicus curiae. For instance, Becket successfully represented the defendant church in the leading ministerial exception case, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC* (2012) 565 U.S. 171. *See also Fratello v. Archdiocese of N.Y.* (2d Cir. 2017) 863 F.3d 190, 205 (counsel for defendant); *Grussgott v. Milwaukee Jewish Day Sch., Inc.* (7th Cir. 2018) 882 F.3d 655 (amicus curiae); *Lee v. Sixth Mt. Zion Baptist Church* (3d Cir. argued July 12, 2018) No. 17-3086 (counsel for defendant).

Proposed amici seek to file the attached amicus curiae brief because they are concerned that the Commissioner's argument, if credited, would do grave damage to the ministerial exception by excluding teachers at religious schools from the class of employees falling within the scope of the exception, even where there is undisputed evidence that the teachers are tasked with inculcating their students with specific religious beliefs.

Accordingly, proposed amici request that this Court accept and file the attached amicus curiae brief.

Dated: July 13, 2018

Respectfully submitted,

/s/Eric Rassbach

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AMICUS CURIAE BRIEF

INTRODUCTION

Some ministerial exception cases will be difficult, but this is not one of them. There is no dispute here that the preschool teachers employed by Stephen S. Wise Temple—a Reform Jewish synagogue—are tasked with teaching the Jewish religion to young children. The State does not question that the Temple's teachers instruct young children on essential tenets of the Jewish faith, including religious holidays, scripture studies, Jewish culture, and principles of gratitude and prayer.

That is enough to decide this appeal. By carrying out this essential function for the Temple in furtherance of its mission, the preschool teachers qualify as ministers, and the ministerial exception prevents this court from interfering with the Temple's internal self-governance and decisions regarding its ministers. That non-interference principle extends to the wage-and-hour rules the Commissioner seeks to apply to the Temple's preschool teachers. And given the fact that further

factual development would itself constitute interference in religious matters and would in any case not change the ministerial nature of the Temple's employees, the court should not remand for further factual development.

In short, the Superior Court correctly held that, as a threshold matter of law, the Commissioner's claims were barred by the First Amendment. This court should affirm.

ARGUMENT

I. The ministerial exception turns primarily on the function and role of the employee.

Every ministerial exception case must begin with *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC* (2012) 565 U.S. 171, 195. In *Hosanna-Tabor*, the United States Supreme Court recognized the ministerial exception doctrine that the lower courts had uniformly embraced since 1972. *Id.* at 188.

Hosanna-Tabor concerned a teacher at a Lutheran elementary school in Michigan. She raised both federal and Michigan law disability discrimination claims against her employer, which was the church that operated the school. *Id.* at 179–80.

The Court rejected her claims as a threshold matter, holding that the First Amendment's Free Exercise and Establishment Clauses created a ministerial exception to the employment laws, and that the ministerial exception prevented adjudication of the religious schoolteacher plaintiff's claims. *Id.* at 196.

In reaching its decision, the Court laid out a method for deciding whether a particular employee was ministerial. The Court declined to adopt a "rigid formula" for determining ministerial status, instead lining out four "considerations" to guide the inquiry: the employee's title, the substance reflected in that title, the employee's use of that title, and the important religious functions performed for the employer. *Id.* at 190-92.

But not every case is just like *Hosanna-Tabor*. The difficulty comes in how to apply the four *Hosanna-Tabor* considerations to the different factual scenarios that have and will continue to come before the lower courts. Some cases will include some of the considerations but not others, and in some cases it will be hard to figure out how the different considerations interact with one another.

Justices Alito and Kagan point to a way out of this difficulty. In his concurring opinion, Justice Alito, joined by Justice Kagan, clarified that the ministerial exception analysis "should focus on the function performed by persons who work for religious bodies." *Id.* at 198 (Alito J., joined by Kagan J., concurring). By focusing the analysis on the function that an employee performs within her religious organization, courts can avoid excessive entanglement with decisions regarding church governance.[2] This approach is consistent with the historical development of the ministerial exception, *see, e.g., Rayburn v. General Conference of the Seventh-Day Adventists* (4th Cir. 1985) 772 F.2d 1164, 1168 ("The 'ministerial exception' . . . does not depend upon ordination *but upon the function of the position*." (citations omitted; emphasis added)), and has been widely accepted in the lower courts after *Hosanna-Tabor*. *See, e.g., Cannata v. Catholic Diocese of Austin* (5th Cir. 2012) 700 F.3d 169, 175; *Fratello v. Archdiocese of N.Y.*

[2] Amici use the term "church" to refer generally to houses of worship of all religious traditions.

(2d Cir. 2017) 863 F.3d 190, 205 ("Where, as here, the four considerations are relevant in a particular case, 'courts should focus' primarily 'on the function[s] performed by persons who work for religious bodies.'" (quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., joined by Kagan, J., concurring)). This Court should continue the longstanding practice of focusing on the function of the Temple's pre-school teachers, thereby preventing excessive government entanglement with the Temple's religious affairs.

A. Focusing on function and role best preserves church autonomy and prevents government entanglement.

The ministerial exception analysis should focus on the function and role of the employee within her religious organization so as to maintain "the independence of the spiritual lives of religious bodies in accordance with the dictates of the First Amendment." *EEOC v. Roman Catholic Diocese of Raleigh* (4th Cir. 2000) 213 F.3d 795, 800. While other factors are of course relevant to the court's analysis, placing too much weight on job titles, ordination status, personal perceptions or

opinions, or other extraneous factors may cause the court to engage in "judicial second-guessing of decision-making by religious organizations." *Scharon v. St. Luke's Episcopal Presbyterian Hosp.* (8th Cir. 1991) 929 F.2d 360, 363. Courts can generally avoid this problem, however, by focusing their ministerial exception analysis on the function that an employee serves within their religious organization.

While the court may consider factors such as an employee's title or ordination status, such factors are "neither necessary nor sufficient" to find that an individual is a minister within a particular religion. *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., joined by Kagan, J., concurring). To claim otherwise runs a serious risk of government entanglement with church affairs. A court may fail to apply the ministerial exception where the exception should apply if it relies too heavily on the presence (or absence) of an official title or ordination status. For religions that have official titles and pathways to ordination, such factors may certainly be considered relevant to the court's analysis. However, "most faiths do not employ the

term 'minister,' and some eschew the concept of formal ordination." *Id.* "[A]t the opposite end of the spectrum, some faiths consider the ministry to consist of all or a very large percentage of their members." *Id.*

If a court were to place too heavy an emphasis on an employee's official title or ordination status, many religions could never claim the ministerial exception because of their longstanding traditions of lay ministry or their lack of formally recognized titles. Still other religions could not receive the exception's protection because they are open to religious instruction from those outside their own religion.[3] This would, in effect, "penalize religious groups for allowing laypersons to participate in their ministries and thus create an incentive for religious organizations to bar laity from substantial 'role[s] in conveying the [organization's] message and carrying out its

[3] This applies specifically to the Temple, as "[t]he Temple's senior rabbi has declared Jewish law permits non-Jews to perform certain religious duties, such as teaching Jewish doctrine." Temple Br. 57.

mission.'" *Fratello*, 863 F.3d at 207 (quoting *Hosanna-Tabor*, 565 U.S. at 192).

Worse still, courts could erroneously withhold the exception for employees who are functionally ministers—employees who play a significant role in church leadership, worship services, religious rites or rituals, or "conveying the tenets of the faith to the next generation," *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., joined by Kagan, J., concurring)—but whose titles or ordination status belie their involvement with the church's mission. This would result in the government effectively interfering with, or impermissibly overseeing, church functions simply because the employee tasked with those functions was nominally not a minister. The government would become the ultimate arbiter of who was best suited to carry out a particular ministerial function, rather than leaving that decision to the church whose ministry is affected by the court's interference. This "depriv[es] the church of control over the selection

of those who will personify its beliefs" and improperly transfers that control to the government. *Hosanna-Tabor*, 565 U.S. at 188.

By focusing its analysis on the function or role that a particular employee carries out within their respective organization, rather than on the factors that the Commissioner seeks to emphasize, the Court can avoid this problem.

To be clear, focusing on the employee's function and role is not itself a "rigid formula." It does not mean that courts cannot consider the other *Hosanna-Tabor* considerations, nor does it mean that courts do not consider the circumstances of the employment relationship as a whole. The focus on function and role simply means that courts should focus primarily on what an employee *does* rather than on what he or she is *titled* or how she is *held out*. Rather than being formulaic, this focus merely recognizes that function and role are the best indicators of ministerial status under the *Hosanna-Tabor* framework.

B. Courts have historically focused on function and role.

Over the forty years since the ministerial exception was first recognized in 1972, courts have systematically agreed that a correct application of the exception focuses chiefly on the function or role of the employee. Before the Supreme Court's decision in *Hosanna-Tabor*, courts repeatedly held that any analysis of the applicability of ministerial exception "focuses on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister.'" *Roman Catholic Diocese of Raleigh*, 213 F.3d at 801 (citation omitted). After *Hosanna-Tabor*, those few courts who have heard cases concerning the ministerial exception have continued to focus "primarily 'on the function[s] performed by persons who work for religious bodies.'" *Fratello*, 863 F.3d at 205 (quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., joined by Kagan, J., concurring)). This longstanding consensus demonstrates that the correct application of the ministerial exception focuses on

the function and role of the employee.[4]

Prior to *Hosanna-Tabor*, there was a "functional consensus" among the lower courts that the ministerial exception applied to employees who serve in "roles of religious leadership" or whose duties require "serv[ing] as a teacher or messenger of [a group's] faith." *Hosanna-Tabor*, 565 U.S. at 200, 202-03 (Alito, J., joined by Kagan, J., concurring). The federal Circuits shared a common method of analysis which "focuse[d] on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister.'" *Roman Catholic Diocese of Raleigh*, 213 F.3d at 801; *accord Rayburn*, 772 F.2d at 1168 ("The 'ministerial exception' . . . does not depend upon ordination *but upon the function of the position*." (citations omitted; emphasis added)); *Rweyemamu v. Cote* (2d Cir. 2008) 520 F.3d 198; *Starkman v. Evans* (5th Cir. 1999) 198 F.3d 173, 176; *Alicea-Hernandez v. Catholic Bishop of Chicago* (7th Cir.

[4] Remarkably, the Commissioner fails to cite the leading *Fratello* decision authored by Judge Sack even once in her reply brief.

2003) 320 F.3d 698; *EEOC v. Catholic Univ. of Am.* (D.C. Cir. 1996) 83 F.3d 455.

Similarly, numerous state courts, including California Courts of Appeal, agreed that the exception must "recognize the significance of [an employee's] role" within an organization and not rely too heavily on the official title given to the employee. *Schmoll v. Chapman Univ.* (1999) 70 Cal.App.4th 1434, 1443-44. *See also Dayner v. Archdiocese of Hartford* (Conn. 2011) 23 A.3d 1192, 1204; *Pardue v. Ctr. City Consortium Sch. of Archdiocese of Washington, Inc.* (D.C. Super. Ct. July 29, 2003) No. CIV.A.02-5459, 2003 WL 21753776, at *3 ("The 'ministerial exception' . . . does not depend upon ordination but upon the function of the position." (quoting *Rayburn*, 772 F.2d at 1168)), *aff'd*, (D.C. 2005) 875 A.2d 669; *Montrose Christian Sch. Corp. v. Walsh* (Md. 2001) 770 A.2d 111, 127 (quoting same language from *Rayburn*); *Weishuhn v. Catholic Diocese* (Mich. Ct. App. 2008) 756 N.W.2d 483, 500 (noting that the ministerial exception's application depended

on the "functions" and "duties" of the employee); *Egan v. Hamline United Methodist Church* (Minn. Ct. App. 2004) 679 N.W.2d 350, 355 ("Whether an employee is covered by the ministerial exception or is secular depends upon 'the function of the position.'" (quoting *Assemany v. Archdiocese of Detroit* (Mich. Ct. App. 1988) 434 N.W.2d 233, 237)).

Contrary to the Commissioner's assertion, Commissioner Br. 31, subsequent decisions in the federal appellate courts across the country have confirmed that it is not essential to replicate each of the four *Hosanna-Tabor* considerations in order to apply the ministerial exception. Shortly after the Court decided *Hosanna-Tabor*, the Fifth Circuit applied the ministerial exception to a church accompanist—even though he did not hold himself out as a minister and had neither official title nor ordination— because "he played a role in furthering the mission of the church and conveying its message to its congregants." *Cannata v. Catholic Diocese of Austin* (5th Cir. 2012) 700 F.3d 169, 180. The Sixth Circuit followed suit in 2015, holding that the exception applied in a case where only two of

the *Hosanna-Tabor* considerations—"formal title and religious function"—were present. *Conlon v. Intervarsity Christian Fellowship/USA* (6th Cir. 2015) 777 F.3d 829, 835. In 2017, the Second Circuit ruled that *Hosanna-Tabor* "instructs only as to what we *might* take into account as relevant" and agreed with Justice Alito that "'courts should focus' primarily 'on the function[s] performed by persons who work for religious bodies.'" *Fratello*, 863 F.3d at 204-05 (emphasis in original; quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., joined by Kagan, J., concurring)). Using this functional approach, the court found that the exception applied to a lay principal of a religious school, despite her ostensibly lay title, because "she served many religious functions." *Id.* at 206. And, most recently, the Seventh Circuit applied the exception in a case where "at most two of the four *Hosanna-Tabor* factors [were] present." *Grussgott*, 882 F.3d at 661.

Federal district courts, as well as state courts, have also focused on function as the deciding factor in ministerial exception cases. *See, e.g., Ciurleo v. St. Regis Parish* (E.D. Mich.

2016) 214 F. Supp. 3d 647, 652 ("[T]his Court concludes that religious function alone can trigger the exception in appropriate circumstances."); *Sterlinski v. Catholic Bishop of Chicago* (N.D. Ill. 2016) 203 F. Supp. 3d 908, 913 ("In determining whether an employee qualifies as a minister, a court's focus is on the *function* of the plaintiff's position." (emphasis in original)). In a situation similar to the case before the Court, the Massachusetts Supreme Judicial Court was asked to apply the ministerial exception to a teacher at a Jewish school even though "she was not a rabbi, was not called a rabbi, . . . did not hold herself out as a rabbi," and had not been proven to have received "religious training." *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination* (Mass. 2012) 975 N.E.2d 433, 443. The court ultimately applied the exception simply because "she taught religious subjects at a school that functioned solely as a religious school" for children. *Id.* In each of these decisions, the respective court has applied the exception based primarily on a consideration of the function that

each individual played within their respective religious organization. That principle, generally agreed upon by pre-*Hosanna-Tabor* courts, has not been altered by *Hosanna-Tabor*.[5]

In short, the ministerial exception always applies in circumstances where an employee's function or role within a religious organization is one which it would not be appropriate for a court to interfere with under the First Amendment.

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[5] The Commissioner also tries to make hay out of this sentence in *Hosanna-Tabor*: "Nor, according to the Church, would the exception bar government enforcement of general laws restricting eligibility for employment, because the exception applies only to suits by or on behalf of ministers themselves." *Hosanna-Tabor*, 565 U.S. at 195-96. There are several reasons that the Commissioner's supposed exception to the ministerial exception for state wage-and-hour laws is wrong. First, the sentence the Commissioner relies on is dicta. Second, wage-and-hour laws do not "restrict[ ] eligibility for employment." Third, the Commissioner is obviously bringing this lawsuit "on behalf of" the Temple's ministerial employees. Fourth, even if this were a suit to protect a *generalized* state interest in enforcing laws that protect employees, it would still be brought "on behalf of ministers"; *Hosanna-Tabor* does not say the suit must be "on behalf of ***specific*** ministers," just "ministers." *Id.*

II. The Temple's preschool teachers qualify as ministerial employees.

Teachers at the Temple's preschool easily qualify as ministers based on the undisputed facts in the record. They perform a religious function by "conveying the [Temple's] message and carrying out its mission," *Hosanna-Tabor*, 565 U.S. at 192, through teaching "the tenets of the faith to the next generation." *Id.* at 200 (Alito, J., joined by Kagan, J., concurring).

The Temple's preschool has a primarily religious purpose,[6] and teachers at the school serve functions which actively promote and support that purpose. Teachers are entrusted with the "[d]evelopment and implementation of Judaic and secular

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[6] The preschool is operated by the Temple and carries out "the Temple's mission of passing the Jewish faith on to the next generation, thus fulfilling a religious obligation of the Temple." Temple Br. 13 (citing undisputed facts). Many religious schools have qualified for the ministerial exception's protections. *See, e.g., Hosanna-Tabor*, 565 U.S. at 177 (Lutheran school); *Henry v. Red Hill Evangelical Lutheran Church of Tustin* (Cal. Ct. App. 2011) 201 Cal.App.4th 1041, 1055 (Lutheran school); *Fratello*, 863 F.3d at 190 (Catholic school); *EEOC v. Roman Catholic Diocese of Raleigh* (4th Cir. 2000) 213 F.3d 795 (Catholic elementary school); *Grussgott*, 882 F.3d at 659 (Jewish school); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination* (Mass. 2012) 975 N.E.2d 433, (Jewish school).

curriculum." Temple Br. 15-16. They instruct children regarding Jewish religious holidays, principles of gratitude and prayer, Jewish religious rituals and worship, and various other Judaic observances. *Id.* at 16. Teachers also share Torah stories and morals with the children, particularly where such stories are pertinent to an upcoming Jewish holiday. *Id.* at 16–19. Each of these activities is designed to share the basic tenets of the Jewish faith with the next generation of children. *Cf. Grussgott*, 882 F.3d at 660 (noting that even teaching the history of Jewish holidays to children can be considered religious instruction and that it is the opinion of the religious organization, not the instructor, that matters on this issue). In short, the teachers are giving the children the "groundwork upon which the 'whole of religious doctrine' may later be built." *Henry v. Red Hill Evangelical Lutheran Church of Tustin* (2011) 201 Cal.App.4th 1041, 1055.

The Commissioner claims that religious instruction constitutes only 4-6% of the school day, thus making the ministerial exception inapplicable. Reply Br. 12. Aside from whether this

claim is true as a matter of fact, this approach utterly ignores the Supreme Court's injunction not to use a "stopwatch" when deciding who is a minister and who is not. *Hosanna-Tabor*, 565 U.S. at 193. The key is whether religious instruction is part of the preschool teachers' role.

The Commissioner also argues that, simply because the teachers are not required to be Jewish, they cannot be considered ministers. Commissioner Br. 36. But this invites the court to engage in an impermissible analysis of who should perform the ministerial function of "conveying the [Temple's] message and carrying out its mission," *Hosanna-Tabor*, 565 U.S. at 192, through teaching "the tenets of the faith to the next generation." *Id.* at 200 (Alito, J., joined by Kagan, J., concurring). Indeed, courts have repeatedly rejected various formulations of the Commissioner's arguments, holding that an employee's religion is not dispositive. *See, e.g.*, *Grussgott*, 882 F.3d at 659; *Henry*, 201 Cal.App.4th at 1046 (applying the exception to a teacher at a Lutheran school even though "teach-

ers were not required to be Lutheran–Henry is Catholic"); *Roman Catholic Diocese of Raleigh*, 213 F.3d at 803 ("Nor does the EEOC's contention that the occupants of the music ministry positions were not required to be Catholic diminish the spiritual significance of the music ministry role.").

That is fully in accord with the ministerial exception's purpose: to "protect the freedom of the church to select those who will carry out its religious mission." *EEOC v. Catholic University of Am.* (D.C. Cir. 1996) 83 F.3d 455, 462. Courts are simply not qualified to second-guess a church's choice of who will share their message with the faithful. *See Scharon*, 929 F.2d at 363. Since the Temple's preschool teachers perform the crucial religious function of teaching the precepts and practices of the Jewish faith, they are "ministers" within the definition of the ministerial exception.

III. The ministerial exception should be decided as a threshold matter.

In addition to explaining why its preschool teachers are ministerial employees, the Temple ably explains why the factual disputes raised by the Commissioner are immaterial.

Temple Br. 58-64. That is reason enough to reject the Commissioner's argument that the case should be sent back for further factual development. Reply Br. 43-44. In fact, the main case the Commissioner relies on for this point actually *rejects* the idea that extensive factual development is proper where there are enough undisputed facts to establish the applicability of the ministerial exception: "Even if we disregarded the school's version of facts altogether, Grussgott's own admissions about her job are enough to establish the ministerial exception as a matter of law." *Grussgott*, 882 F.3d at 662. Once there are enough undisputed facts to establish the applicability of the exception, the inquiry ought to end. Finding out more facts will not make the Temple's preschool teacher position any less ministerial.

However, there is another reason the Court should refrain from sending the case back to the Superior Court for additional fact development: the very process of unnecessary factual development is unconstitutionally entangling. Indeed,

the ministerial exception's protections are not just an immunity from liability, but also from unnecessary trial or litigation. *Heard v. Johnson* (D.C. 2002) 810 A.2d 871, 876–77 (the ministerial exception is a "claim of immunity from suit under the First Amendment" that is "effectively lost if a case is erroneously permitted to go to trial") (citation omitted). *See also NLRB v. Catholic Bishop of Chi.* (1979) 440 U.S. 490, 502 ("the very process of inquiry" can cause First Amendment violation).

For this reason, the Third and Tenth Circuits have analogized the ministerial exception to qualified immunity. *See Petruska v. Gannon Univ.* (3d Cir. 2006) 462 F.3d 294, 302; *Bryce v. Episcopal Church in the Diocese of Colorado* (10th Cir. 2002) 289 F.3d 648, 654; *see also* Mark E. Chopko, *Still a Threshold Question: Refining the Ministerial Exception Post-*Hosanna-Tabor (2012) 10 First Amend. L. Rev. 233, 293 n.355 (comparing ministerial exception to qualified immunity doctrine).

By resolving the ministerial exception "early in litigation, the courts avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. But cases that proceed unnecessarily transgress the structural separation of church and state, making "the discovery and trial process itself a [F]irst [A]mendment violation." *Dayner*, 23 A.3d at 1200; *accord Skrzypczak v. Roman Catholic Diocese of Tulsa* (10th Cir. 2010) 611 F.3d 1238, 1245 (quoting *McClure v. Salvation Army* (5th Cir. 1972) 460 F.2d 553, 560 (unnecessary discovery can "only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment")); *Kirby v. Lexington Theological Seminary* (Ky. 2014) 426 S.W.3d 597, 609 (unnecessarily subjecting religious institutions to discovery and trial creates "the possibility of constitutional injury"). The avoidance of such injury requires that the ministerial exception be "resolved expeditiously at the beginning of litigation." *Id.* (quoting Chopko, 10 First Amend. L. Rev. at 292-293).

Accordingly, the Commissioner cannot here defeat summary judgment by arguing that the applicability of the ministerial exception—a "pure question of law" that a court must decide "for itself," *Conlon v. InterVarsity Christian Fellowship* (6th Cir. 2015) 777 F.3d 829, 833—requires further factual development and eventually a jury trial. This Court should reject the Commissioner's efforts to "drag" both this Court and ultimately a jury "into a religious controversy." *Tomic v. Catholic Diocese of Peoria* (7th Cir. 2006) 442 F.3d 1036, 1042.

IV. The ministerial exception applies to wage-and-hour claims.

As the Temple rightly argues, Temple Br. 28–34, the ministerial exception applies to wage-and-hour claims just as it does to employment discrimination claims. In *Alcazar v. Corp. of Catholic Archbishop of Seattle*,[7] the Ninth Circuit confirmed that the ministerial exception applies "not only to the selection of ministers but more broadly to 'employment deci-

[7] (9th Cir. 2010) 598 F.3d 668, 673-74, *vacated in part, adopted in part*, (9th Cir. 2010) 627 F.3d 1288 (en banc).

sions regarding . . . ministers.'" 598 F.3d at 674 (quoting *Bollard v. Cal. Province of the Soc'y of Jesus* (9th Cir.1999) 196 F.3d 940, 947). This broad applicability to employment decisions regarding ministers extends to "the determination of a minister's salary." *Id.* (quoting *Bollard*, 196 F.3d at 947). Thus, the ministerial exception "disallows lawsuits," such as the suit at bar, "for damages based on 'lost or reduced pay.'" *Id.* (quoting *Elvig v. Calvin Presbyterian Church* (9th Cir. 2004) 375 F.3d 951, 964, 966).

The California Court of Appeal, Fourth District (Division 3), has followed the *Alcazar* approach, drawing no distinction between the "appointment" of ministers and "closely related issues" such as the determination of ministerial "salaries, assignments, working conditions and termination of employment," recognizing that both are important, "inherently religious function[s]." *Henry* 201 Cal.App.4th at 1053 (quoting *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 433).

The Commissioner's opening brief did not even mention *Alcazar*. In her reply, she makes what is apparently a brand new argument: *Alcazar* and similar cases supposedly don't apply because the services in question were not "made commercially available to the public." Reply Br. 36. One will struggle in vain to find a precedent making this distinction in the context of the ministerial exception. Indeed, the Commissioner's definition of "commercial activity" would swallow up every other religious school case, including *Hosanna-Tabor* itself.

The Commissioner says that the Temple's preschool is a "commercial enterprise" because (1) "The parents of students pay the ECC for the service of providing preschool educational services to their children" and (2) "the ECC is open to families of different faiths." Reply Br. 30. This distinction proves far too much, as those facts were equally present in *Hosanna-Tabor*, *Fratello*, and many other religious school ministerial exception cases. After all, most religious schools unsurprisingly charge parents tuition. And many religious schools (including for example Catholic parochial schools) are open to those of

different faiths. It is thus somewhat perverse for the Commissioner to urge the Court to penalize the Temple for being open and welcoming to non-Jews.[8]

The Commissioner also suggests that courts should determine whether the ministerial exception applies to wage-and-hour claims on a granular, case-by-case basis, by asking whether enforcement of the particular wage-and-hour regulation at issue would force the defendant religious employer to directly violate a recognized tenet of its particular faith. Commissioner Br. 37. But abandoning *Alcazar* and *Henry* and adopting the Commissioner's approach of looking for a direct religious conflict would run afoul of ministerial exception jurisprudence in two fundamental ways.

First, the ministerial exception does not turn on whether there is a religious reason for the adverse employment action in question. Requiring a religious reason "misses the point of

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[8] Indeed, such a rule—only religious groups that exclude others enjoy protection—would violate the Establishment Clause's ban on discrimination among religions. *See Larson v. Valente* (1982) 456 U.S. 228.

the ministerial exception. The purpose of the exception is not to safeguard a church's decision . . . only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194-95 (quotation omitted). Indeed, no religious reason *at all* is needed to justify application of the ministerial exception, much less one based on a conflict with religious principle.

Second, by focusing on whether the enforcement of wage-and-hour statutes would "require" the Temple to act contrary to particular "religious proscription[s]," Commissioner Br. 37, the Commissioner invites the Court to answer religious questions. Indeed, the Commissioner's approach would turn on determinations of what aspects of religious school governance "matter" to the doctrines and traditions of Reform Judaism. Take, for example, the somewhat bizarre contention that because the Labor Commission's meal period requirements "do not require consumption of food contrary to" Jewish dietary

laws, their enforcement against the Temple must not present a constitutional problem. Commissioner Br. 37. If the trial court had followed this line of reasoning, it would—*regardless* of the decision it ultimately reached—have become entangled in the substantive theological question of what Jewish dietary laws do and do not permit. Since courts cannot "determine ecclesiastical questions," this is simply impermissible. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969) 393 U.S. 440, 446.

The reality is that wage-and-hour regulations intrude upon the religious employment relationship just as much as the employment discrimination provisions in *Hosanna-Tabor*, *Alcazar*, and other leading ministerial exception cases. The intrusion requested by the Commissioner inevitably requires courts to answer religious questions and entangles church and state.[9]

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[9] The Commissioner also makes the outlandish claim that "the requirement for religious organizations to abide by wage and hour laws" was affirmed by the Tenth Circuit in the *Hobby Lobby* contraceptive mandate litigation. Reply Br. 29. *Hobby Lobby* dealt with the statutory "substantial burden"

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The Commissioner is seeking to have the government—and the courts of California—step in where civil authorities and civil courts normally fear to tread. But the case here could not be clearer: the Temple's preschool teachers instruct school-children in Jewish religious beliefs and practices, and thus this case fits squarely within the ministerial exception.

CONCLUSION

The Court should affirm the Superior Court.

Dated: July 13, 2018

Respectfully submitted,

/s/Eric Rassbach

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standard under the federal Religious Freedom Restoration Act, not the ministerial exception standard under the First Amendment. How RFRA is relevant, much less dispositive, with respect to the constitutional ministerial exception standards at issue in this case remains unclear.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.204(c)(1), 8.520(b)(1).)

The text of this brief consists of 5,017 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

Dated: July 13, 2018

/s/Eric Rassbach

PROOF OF SERVICE

WASHINGTON, DISTRICT OF COLUMBIA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the District of Columbia. My business address is 1200 New Hampshire Avenue NW, Suite 700, Washington, DC, 20036.

On July 13, 2018, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CHURCH OF GOD IN CHRIST AND THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF DEFENDANT-RESPONDENT STEPHEN S. WISE TEMPLE** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 13, 2018 at Washington, D.C.

/s/ *Megan Schilling*, Paralegal

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