Nos. 19-267 & 19-348

In The Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES MORRISSEY-BERRU,

Respondent.

ST. JAMES SCHOOL,

Petitioner,

v.

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

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF COLPA, AGUDATH ISRAEL OF AMERICA, AGUDAS HARABBONIM, NATIONAL COUNCIL OF YOUNG ISRAEL, ORTHODOX JEWISH CHAMBER OF COMMERCE, RABBINICAL ALLIANCE OF AMERICA, AND RABBINICAL COUNCIL OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") has spoken on behalf of America's Orthodox Jewish community for more than half a century. COLPA's first *amicus* brief in this Court was filed in 1967 in *Board of Education v. Allen*, 392 U.S. 236 (1968). Since that time, COLPA has filed more than 35 *amicus* briefs to convey to this Court the position of leading organizations representing Orthodox Jews in the United States. The following national Orthodox Jewish organizations join this *amicus* brief:

▪Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization that articulates and advances the position of the Orthodox Jewish community on a broad range of issues affecting religious rights and liberties in the United States.

▪Agudas Harabbonim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

▪National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue

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[1]Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. Petitioners have filed blanket consents to the filing of *amicus* briefs. Respondents have consented to the filing of this *amicus* brief.

branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

▪Orthodox Jewish Chamber of Commerce is a global umbrella of businesses of all sizes, bridging the highest echelons of the business and governmental worlds together stimulating economic opportunity and positively affecting public policy of governments around the world.

▪Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

▪Rabbinical Council of America ("RCA") is the largest Orthodox Jewish rabbinic membership organization in the United States comprised of nearly one thousand rabbis throughout the United States and other countries. The RCA supports the work of its member rabbis and serves as a voice for rabbinic and Jewish interests in the larger community.

SUMMARY OF ARGUMENT

We are confident that the parties and *amici* will amply demonstrate that the Ninth Circuit's ruling must be reversed because it conflicts with this Court's opinion in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012). We submit this *amicus* brief not only to join the chorus of defenders of religious liberty that support the petitioners, but also to elucidate, by reference to Jewish observance and history, the importance of unconditional and thorough commitment to the

principle declared in Chief Justice Roberts' *Hosanna-Tabor* opinion: "[I]t is impermissible for the government to contradict a church's determination of who can act as its minister." 575 U.S. at 185.

Because many different specialties are needed for total Jewish observance, the term "minister" encompasses an extensive breadth of religious functionaries in Judaism. Resolution of this case therefore shapes "the important issue of religious autonomy" (565 U.S. at 198; Alito and Kagan, JJ., concurring) – an issue that is critical to Jewish life in America. Full discussion of this subject could fill volumes, but we provide only brief vignettes to demonstrate the Jewish perspective on the issue before the Court.

History has taught that when the Jewish community is granted autonomy to develop and administer its own religious observance, as was done in Poland in the Sixteenth to Eighteenth centuries, it can prosper spiritually. When, however, government attempts to dictate or influence in any manner who a Jewish community's religious authorities will be or how they will perform, as Napoleon Bonaparte attempted to do in France, faith is suppressed.

Observance of traditional Judaism requires many specialists. Today's American rabbi is very different from the rabbis who led the Jewish communities centuries ago. The rabbis of the Talmud did not see the rabbinate as a profession; their livelihood came from other sources. In today's Jewish communities, teachers, cantors, kosher-food supervisors, and administrators of other religious

facilities carry out functions that are central in Jewish observance. All these "ministers" are appointed and supervised by their Jewish communities. Government does not designate them or participate in their selection. Jewish tradition, as mandated by the *Ethics of the Fathers*, directs that each observer of the Jewish faith choose his or her rabbi.

Even in the United States, the position now known as "rabbi" has had a significant evolution. In America's early years, cantors and unordained experts led their communities in observance of rituals of the Jewish faith. Teachers in Jewish schools performed essential duties for local Jewish communities.

A model of autonomy of Jewish spiritual life was the Council of Four Lands ("*Vaad Arba Aratzot*") that existed in Poland from 1560 to 1764. The Council was granted authority by law to provide not only for many secular needs of the Jewish community, but also to maintain teachers and other functionaries needed for Jewish religious observance.

This autonomy may be contrasted with the effort of Napoleon Bonaparte to prescribe an "Assembly of Notables" and a "Sanhedrin" in France in 1806. By participating actively in the selection of the Jews who would administer Jewish religious life in France Napoleon's government effectively suppressed authentic Jewish religious observance.

Decisions of American courts that substitute judges' appraisal of who qualifies as a "minister" for the judgment of religious authorities are like

Napoleon's governmentally sanctioned Assembly and Sanhedrin. They deny religion the freedom that the First Amendment guarantees. Three reported decisions of American courts after *Hosanna-Tabor* have concerned teachers at Jewish schools. Two were correctly decided in favor of applying the ministerial exception to the teachers. The most recent was erroneously decided because it applied the rationale that was used by the Ninth Circuit in this case. Even before the *Hosanna-Tabor* decision the Fourth Circuit correctly held that a kashruth supervisor at a Jewish nursing home qualified for a federal statutory ministerial exception.

ARGUMENT

I.

JUDAISM HAS MANY "MINISTERS"

Jewish religious observance calls on experts and scholars over a wide spectrum of subjects. The Hebrew Talmudic Encyclopedia ("*Encyclopedia Talmudit*"), is currently being compiled, written, and published in Israel at the rate of several volumes each year. It comprehensively covers Jewish traditional subjects, adhering to historic traditional texts and commentaries. Volume 15, col. 52 declares (our translation from the Hebrew) that a *chacham* – a wise man – is "appointed by the community to carry out specific functions such as judge, preacher, teacher, [and] religious authority on what is forbidden and permitted, unclean and clean, family purity, dietary rules, inspection of knives for kosher slaughter, repeal of vows, ..." Each of these enumerated functions is supported by a footnote reference to the Talmud or comparable authority. A

vibrant Jewish community can exist today only if it has a substantial complement of learned and experienced leaders who can supervise, administer, and teach its many rituals.

The status of a "rabbi" in contemporary American society is unlike its historic antecedent in Jewish history. "The rabbi of the Talmud was . . . completely different from the present-day holder of the title. The Talmudic rabbi was an interpreter and expounder of the Bible and Oral Law, and almost invariably had an occupation whence he derived his livelihood. It was only in the Middle Ages that the rabbi became – in addition to, or instead of, the interpreter and decisor of the law – the teacher, preacher, and spiritual head of the Jewish congregation or community . . . ." 17 *Encyclopaedia Judaica* 11 (2d ed. 2007).[2]

Teachers employed by schools, synagogues, and other Jewish community organizations in today's society fill a role that was, in Jewish history, a predecessor-model for the modern American rabbi. Cantors, kosher-food supervisors, and administrators of other ritual facilities carry out

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[2] This modern description repeats the substance of the entry in a 1907 encyclopedia. *See* 10 *Jewish Encyclopedia* 294 (1907): "The rabbi in the Talmudic period was unlike the modern official minister, who is elected by the congregation and who is paid a stipulated salary. The function of the rabbi of the Talmud was to teach the members of the community the Scriptures and the oral and traditional laws." The 1907 *Encyclopedia* is consistent with and quotes the account given by Sherira Gaon, a tenth century leader of the Jewish community who authored a famous *Iggeret* (epistle) which reviewed, *inter alia*, the functions and titles of rabbis.

duties that are essential today for full observance of the Jewish faith. The Jewish community selects them. Rabbis are not imposed or named by government. The lesson of Ethics of the Fathers (*Pirkei Avot*) persists. "*Provide* [literally "make"] *for yourself* a rabbi and acquire [literally "purchase"] for yourself a colleague." Ethics of the Fathers 1:6.(emphasis added)

II.

INDEPENDENCE AND AUTONOMY HAS MARKED THE AMERICAN JEWISH "MINISTRY"

In *Haven and Home: A History of the Jews in America* 66 (1985), an authoritative treatise, Abraham J. Karp, who was president of the American Jewish Historical Society, introduced his description of "The Rabbi in America" as follows: "America was a frontier society where religious experimentation could be bold, deviation from tradition radical. Many of the rabbis who came to America were caught up in the enthusiasm for the new and uncharted, and carved out careers of imaginative leadership." Professor Karp noted that in the Revolutionary period a cantor named Gershom Mendes Seixas expanded his role "beyond the precentor of the liturgy, adding occasional preaching and civic leadership closer to the role of the American Protestant clergy and the West European *rabbiner*." *Id.* at 67. A leading mid-Nineteenth Century leader of the American Jewish religious community was Isaac Leeser "who began life in America as a clerk, [and] had the grace never to call himself rabbi." *Id.*

Rabbis were not the only source of Jewish religious training in Nineteenth Century America. "In the forties and fifties many congregations or individuals opened schools for Jewish children which provided a full curriculum of general and Jewish subjects." *Id.* at 73. The first Jewish Sunday School was opened in Philadelphia in 1837 under the direction of Miss Rebecca Gratz and Isaac Leeser. *Id.* at 74. Although the local rabbi and Leeser came to visit, neither was a teacher at the school.

In July 1888 the first "Chief Rabbi of America," Rabbi Jacob Joseph, arrived in the United States from Russia. Professor Karp observed that "[o]ne of the chief reasons for engaging a chief rabbi was to bring order to the religious life of Lower East Side Jewry." *Id.* at 107. Shortly after his arrival in America, Rabbi Joseph announced "that inspectors have already been appointed in the poultry slaughter houses to test the knives and to have supervision of everything in their care." *Id.* at 107-108.

By 1917 "there were so many functionaries, 'reverends,' 'marriage performers,' who dabbled in religious matters for which they had neither the knowledge nor the authority," that a Board of Orthodox Rabbis was organized to establish "a procedure for the orderly supervision of *kashrut* and *gittin* (divorces)." *Id.* at 238-239. The 1917-1918 *Jewish Communal Register* reported that only 25 percent of 784 permanent synagogues in New York had rabbis. *Id.* at 239.

The religious duties carried out by the individuals appointed by the community for each of

these functions give that person a status equivalent to a "minister" in the Protestant clergy.

III.

THE POLISH JEWISH COMMUNITY WAS GIVEN RELIGIOUS AUTONOMY UNTIL 1764

In the mid-Sixteenth Century an autonomous governing body for the Jews of Poland was begun with "an *ad hoc* council of rabbis and community leaders that established itself as a governing body for Jewish Poland." Berel Wein, *Herald of Destiny: The Story of the Jews in the Medieval Era 750-1650* 289-290 (1993). "By the 1560's this council was institutionalized and recognized as an official autonomous legislature, court, and executive by the Jews and non-Jews of Poland. The council met at regular intervals . . . . The council came to be known as the 'Council of Four Lands' and it effectively ruled Polish Jewry until its dissolution by the Polish authorities in 1764." *Id.* at 290-291. "Its *pinkas* (record book) contains the story of Polish Jewry for two centuries . . . . It records for us the swing of power away from the rabbis to the lay communal leaders . . . . Only in Poland did the Jewish community have so much internal control over their society for such an extended period of time, and this factor aided in the unique development and life of Polish Jewry." *Id.* at 291.

Volume 5 *Encyclopaedia Judaica* 239 (2d ed. 2007), describes the Council of Four Lands as "the central institutions of Jewish self-government in Poland and Lithuania from the middle of the 16th century until 1764." Among the duties of the councils was "attend[ing] to the supply of teachers and the

fundamentals of Torah education . . . [and] giving their approval to the publication of books." *Id.* at 244.

Heinrich Graetz, a historian of Jewish life, evaluated the Council of Four Lands as follows (4 Heinrich Graetz, *History of the Jews* 643-644 (Jewish Publication Society 1949))(emphasis added):

> It gave the Polish communities extraordinary unity, firmness, and strength, and hence secured respect both from their members and outsiders. . . . Disputes in the communities, questions of taxation, *religious and social regulations*, the averting of threatened dangers, and help to brethren in distress, were the main points treated by the synods, and settled finally. . . . On this account, the synod of Polish Jews was respected even abroad . . . .

IV.

IN 1806 NAPOLEON IMPOSED GOVERNMENTAL CONTROL OVER FRENCH RELIGIOUS JEWRY

Napoleon Bonaparte was initially an advocate of equality for Jews. Under Napoleon, "the Jews of Western Europe had their legal disabilities lifted and were ushered into the Age of Reason and Enlightenment." Berel Wein, *Triumph of Survival: The Story of the Jews in the Modern Era 1650-1990* 71 (1990). In 1806, possibly as part of "grand plan to have them disappear entirely by means of total assimilation, intermarriage, and conversion," Napoleon convened a 111-member "Assembly of Jewish Notables" and a "Sanhedrin" of 71

governmentally chosen French Jews. Only 46 of the Sanhedrin's members were rabbis. *Id.* at 72.

Napoleon presented the Assembly and Sanhedrin with 12 questions regarding the social, political, and religious life of French Jewry. Question 7 was, "Who appoints the rabbis?" The answers to Napoleon's questions were formulated under the leadership of the chief rabbi of Strasbourg, a renowned Talmudic scholar who exercised great skill in order to avoid offending the emperor.

The Assembly's answer to Question 7 was:

> Since the revolution, the majority of the chiefs of families names the Rabbi, wherever there is a sufficient number of Jews to maintain one, after previous inquiries as to the morality and learning of the candidate. This mode of election is not, however, uniform. It varies according to place, and, to this day, whatever concerns the elections of Rabbis is still in a state of uncertainty.

Paul Mends-Flohr and Yehudah Reinharz, *The Jew In The Modern World* 130-131 (Oxford University Press 1995).

Pleased with the Assembly's answers, Napoleon decided to establish "an ecclesiastical organization to lead the Jews as French citizens of the Mosaic faith." 2 *Encyclopaedia Judaica* 601 (2d ed. 2007). In 1807 he dissolved the Assembly and the Sanhedrin. In March 1808, Napoleon issued regulations for the "ecclesiastical structure" of the Jewish religion. "Consistories" were created with the authority to

appoint rabbis, determine their salaries, regulate religious services, and maintain synagogues. *Id.*

Graetz's *History of the Jews* condemns "the wretched consistorial organization which *degraded the officials of the synagogue to the level of policemen,* and regulated the civil position of the Jews, or rather made encroachments on their hitherto favorable condition, although he repeatedly assured them that their equalization would suffer no restrictions." 5 Heinrich Graetz, *History of the Jews* 498 (Jewish Publication Society 1949) (emphasis added). The result, he says, was that "the Jews of France, the anchor of hope of their brethren in other countries, were once again humiliated and placed under exceptional legislation." *Id.* at 499.

V.

THE NINTH CIRCUIT'S STANDARD ENDANGERS THE RELIGIOUS AUTONOMY OF AMERICA'S JEWS

This brief historical background illustrates why this Court should reject the very limiting perspective of the Ninth Circuit as hostile to religious freedom in the United States. Petitioner had "significant religious responsibilities as a teacher," "committed to incorporate Catholic values and teachings into her curriculum," "led her students in daily prayer," and "was in charge of liturgy planning for a monthly Mass." Nonetheless, the Ninth Circuit refused to acknowledge that she is a "minister." An employee of a Jewish school or synagogue who performed any comparable Jewish religious functions would indisputably be well within the concept of "ministry" by historic Jewish standards.

The religious autonomy critical for future Jewish observance in the United States is best secured by application of the simple test articulated by Justice Thomas' concurring opinion in *Hosanna-Tabor*: "[T]he Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister." 565 U.S. at 196. In this case, as in *Hosanna-Tabor* and in any future litigation involving an employee of a Jewish synagogue, school, or community organization, it should be sufficient, as Justice Thomas suggested, if the employer "sincerely considers" the employee to be a "minister." *Id.* at 197.

To our knowledge, there have been three reported cases since *Hosanna-Tabor* concerning teachers employed by Jewish institutions. *Temple Emanuel of Newton v. Massachusetts Commission Against Discrimination*, 463 Mass. 472, 975 N.E.2d 433 (2012), correctly held that a teacher at a Jewish religious school who "was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi" was within the ministerial exception because "she taught religious subjects at a school that functioned solely as a religious school, whose mission was to teach Jewish children about Jewish learning, language, history, traditions, and prayer." 975 N.E.2d at 443.

In *Grussgott v. Milwaukee Jewish Day School, Inc.,* 882 F.3d 655 (7th Cir. 2018), the Seventh Circuit applied the "four-factor test" that it derived from the Court's opinions in *Hosanna-Tabor*. The court held that a Hebrew teacher in a Jewish day school was a "minister" for "ministerial exception" purposes even though she believed her religious

tasks were "voluntary." The court rejected the alternative approach of the Becket Fund's *amicus curiae* brief that any employee who performs religious functions could be deemed a "minister" if so characterized by his or her employer. In our view that "functional" test should control this issue rather than the four-part "totality of the circumstances" test.

The most recent reported decision concerning teachers in a Jewish religious entity is *Su v. Stephen S. Wise Temple*, 244 Cal. Rptr.3d 546, 32 Cal. App.5th 1159 (Ct. App., Second District 2019). The California Court of Appeal erroneously, in our view, reversed a decision that had held that a Reform temple's preschool teachers were within the "ministerial exception." The school's curriculum had both secular and religious content, and its teachers did not have to be Jewish or knowledgeable about Jewish belief and practice. The school asserted, however, that since it was a religious school that fulfilled the temple's religious obligation, and its teachers (a) taught about Jewish religious holidays, (b) participated in weekly Shabbat services, (c) taught Jewish prayers, and (d) transmitted Judaism to future generations, its teachers are "ministerial employees."

The California court mistakenly concluded that the Wise Temple teachers are not ministers because "they need not be religiously educated and they are not held out as ministers." 244 Cal. Rptr.3d at 554, 32 Cal. App. 5th at 1169. In reaching that result, the court relied partly on the Ninth Circuit's erroneous decision in *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018). We urge this Court to reject that

view because it conflicts with the principles of religious autonomy that are fundamental in American society.

In 2004, the Fourth Circuit ruled that claims made by a kashruth supervisor against a Jewish nursing home under the Fair Labor Standards Act were barred by the ministerial exception in the federal law. *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4thCir. 2004). That decision represents, in our view, the proper application of the rule that is now constitutionally mandatory after this Court's unanimous ruling in *Hosanna-Tabor*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed and this Court should hold that the First Amendment requires a court to defer to a religious organization's good-faith understanding of who qualifies as its minister.

Respectfully submitted,

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