NOS. 19-267, 19-348

In the
Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,
v.
AGNES DEIRDRE MORRISSEY-BERRU,
Respondent.

ST. JAMES SCHOOL,
Petitioner,
v.
DARRYL BIEL, as Personal Representative for the Estate of Kristen Biel,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* STEPHEN WISE TEMPLE AND MILWAUKEE JEWISH DAY SCHOOL IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

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

Milwaukee Jewish Day School, Inc. is a non-governmental corporation, which is not publicly traded. The School does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. The School is a Wisconsin non-stock corporation that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF INTEREST[1]

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; to serve and strengthen the Jewish community on behalf of its thousands of members; and through the Jewish concept of *Tikkun Olam*, to make meaning and change the world through its many efforts to help those in the broader community who are in need. 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.

Milwaukee Jewish Day School is a private community day school dedicated to providing a pluralistic Jewish education to schoolchildren from 3K through eighth grade. The School welcomes all children and families who identify as Jewish, irrespective of denomination or temple affiliation. To that end, the School strives to create an atmosphere respectful of all expressions of Judaism and to develop within each student a positive Jewish identity. By educating Jewish children in the values and traditions of their Jewish heritage, the School seeks to help its

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

students develop an enduring commitment to the Jewish community and the community at large.

Amici have experienced firsthand how different applications of the ministerial exception can affect religious schools. Both amici have litigated the ministerial exception's applicability to teachers at their schools, leading to conflicting published decisions by the California Court of Appeal and the Seventh Circuit. Although these cases are now final, amici continue to believe the ministerial exception should be broadly construed to protect *all* religious traditions (including religious minorities), especially in cases where courts examine the ministerial exception's applicability to teachers who perform the essential task of conveying the tenets of the faith to the next generation.

SUMMARY OF ARGUMENT

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

should continue to focus on whether employees perform religious functions in ministerial-exception cases moving forward.

In the two decisions below, the Ninth Circuit held that teachers who perform important religious functions for religious schools did not qualify as "ministers" under the ministerial exception because they insufficiently resembled the "called" Lutheran school teacher in *Hosanna-Tabor*. In so holding, the Ninth Circuit not only performed the very type of formulaic analysis that *Hosanna-Tabor* instructed courts *not* to perform, but adopted a test that systematically excludes religious minorities.

Cases involving Jewish schools—including amici—show the religious discrimination minority faiths face depending on whether courts apply the type of formulaic standard embraced by the Ninth Circuit here. Teachers at amici's schools perform many important religious tasks: They pray alongside their students; they teach Jewish values, history, and traditions to the next generation of the Jewish faith; they share stories from the Torah; they lead sacred rituals; they participate in weekly Shabbat services; and much more.

In *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018), the Seventh Circuit properly held that the Milwaukee Jewish Day School's teacher was a minister. Although the court declined to look *only* to function, it ultimately concluded that the teacher's religious functions greatly outweighed the formalistic factors identified in *Hosanna-Tabor*.

Yet in *Su v. Stephen S. Wise Temple*, 244 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019), the California Court

of Appeal reached the opposite and incorrect conclusion. Following the Ninth Circuit's decision in *Biel*, the court held that the Stephen Wise Temple's preschool teachers' many religious functions were not enough to qualify them as ministers. The court reasoned that these teachers did not qualify as bona fide ministers because, unlike the Lutheran teacher in *Hosanna-Tabor*, the Temple's teachers had no ministerial title, had not received theological training, and did not hold themselves out as ministers. In short, the court faulted the Temple for assigning religious duties to teachers who did not more closely resemble the Lutheran school teacher in *Hosanna-Tabor*. As a result, the state of California was allowed to continue directly interfering in the relationship between the Temple and its ministers.

The Ninth Circuit's formulaic approach, adopted by *Su*, is flatly inconsistent with the First Amendment. By asking whether a religious group's ministers sufficiently resemble the Lutheran minister in *Hosanna-Tabor*, the Ninth Circuit sets a single denomination as the standard for First Amendment protection and puts religious minorities at a distinct disadvantage. Amici, for example, have no concept of "called teachers," do not confer formal titles on their teachers, and do not require their teachers to receive college-level theological training. Under the Ninth Circuit's and California Court of Appeal's approach, these doctrinal differences mean that courts can second-guess whether amici's teachers are truly ministers. As a result, amici will no longer be free to "choos[e] who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196.

The time has come for this Court to clarify that the First Amendment protects the autonomy of *all* religious groups to select and control those who perform important religious functions—no matter how closely a group's beliefs resemble those of another denomination. In doing so, the Court should not only reverse the Ninth Circuit decisions here but also affirmatively state that *Su* was wrongly decided. Unless the Court repudiates *Su* alongside the Ninth Circuit decisions here—whose standard *Su* adopted—religious minorities in California will be at risk of California courts continuing to apply the legally erroneous state court precedent.

ARGUMENT

I. Jewish Schools Depend On Teachers Who Perform Critical Religious Functions But Who Differ In Many Ways From The Lutheran "Called" Teacher In *Hosanna-Tabor*.

In *Hosanna-Tabor*, this Court held that the ministerial exception barred a discrimination claim brought on behalf of Cheryl Perich, a Lutheran school teacher, against her Lutheran church employer. 565 U.S. at 192. The Court did not, however, provide a clear test for who qualifies as a ministerial employee. *Id.* at 190. Instead, considering "all the circumstances of Perich's employment," the Court held that Perich was plainly a minister. *Id.* The Court offered four "considerations" that reinforced its conclusion: Perich's formal title as a "'Minister of Religion'"; her extensive education required to earn that title; her use of that title by accepting a formal call to ministry from

the congregation; and her important religious functions for the church. *Id.* at 191-92.

But the first three of those considerations were rooted in the unique practices of the Lutheran church. As Justice Alito's concurring opinion in *Hosanna-Tabor* (joined by Justice Kagan) explained, not all faiths share the same concept of a minister or ministerial attributes as those embraced by Lutherans. *See id. at* 198 (Alito, J., concurring).

For instance, many faiths have no concept of "called" teachers, do not require teachers to receive college-level theological training, and do not grant the formal title of "Minister of Religion" to a teacher. Thus, schools from other faith traditions often rely on teachers who instruct children in religious practices and beliefs but who do not neatly fit the profile of the Lutheran school teacher in *Hosanna-Tabor*. *See, e.g.*, *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460 (9th Cir. 2019); *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433 (Mass. 2012).

Jewish schools are one such example. For many synagogues (particularly non-Orthodox synagogues), day schools are a critical means of transmitting the Jewish faith to the next generation. Fern Chertok et al., *The Impact of Day School: A Comparative Analysis of Jewish College Students* 35 (2007) (noting that "day schooling appears to significantly raise the salience of being Jewish for non-Orthodox students").

But Judaism differs from Lutheranism in its beliefs about who can teach the faith. In Judaism,

there is no concept of "called" teachers, nor any requirement of formal commissioning, ordination, or extensive theological training before someone can teach Jewish doctrine to children. To the contrary, Judaism encourages all adherents to promote faith to the next generation. *See Biel v. St. James Sch.*, 926 F.3d 1238, 1249 n.7 (9th Cir. 2019) (Nelson, J., dissenting from denial of en banc rehearing) (noting "a central Jewish prayer repeats the Biblical directive to '[t]ake to heart these instructions with which [God] charges you this day' and to '[i]mpress them upon your children'"). Jewish teachers are also unlikely to hold themselves out as "ministers" because that term is "rarely if ever used … by … Jews." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

Consider amici, for example. Stephen Wise Temple is a Reform Jewish synagogue that operates an on-site preschool for children aged five and under. At its preschool, the Temple relies on lay teachers to introduce the children to the Jewish religion and traditions through daily religious teaching, rituals, and activities. The teachers instruct their students about Jewish scripture, holidays, commandments, and religious observances; lead Seder rituals; recite Sukkot blessings; instruct the children in the *ha-motzi* blessing before every meal and snack; and play a role in weekly Shabbat services. They also develop and implement a uniquely Jewish curriculum that incorporates Jewish values like *kehillah* (community), *hoda'ah* (gratitude) and *shalom* (peace and wholeness) into all aspects of the class. When disputes arise, the teachers stress *menschlicheit*, Jewish religious standards for what is right and wrong. The preschool fulfills a significant religious obligation for the Temple

and the teachers are the primary conduit for instilling faith in the school's students. Judaism does not require ordination for an individual to teach Judaism, and non-Jews may teach Jewish doctrine. As a result, some of the Temple's preschool teachers are Jewish, and others are not. All teachers receive reading materials and guidance about Judaism from the Temple's rabbis and leaders, but they need not have extensive theological training due to the students' age.

Likewise, Milwaukee Jewish Day School also relies on lay teachers to pass the Jewish faith on to schoolchildren from 3K through eighth grade. The teachers teach Hebrew from an integrated Hebrew and Jewish Studies curriculum intended to develop Jewish knowledge and identity in the students. They are also expected to incorporate Jewish religious teachings into their curriculum and classroom and to instruct students about Jewish values, prayers, and holidays. The teachers guide their students in study of the Torah and practice the faith alongside the children by praying with them and performing Jewish rituals. But unlike the school teacher in *Hosanna-Tabor*, the teachers are not ordained or commissioned by a local congregation, there is no requirement that the teachers undergo high-level religious education, and their title is simply "grade school teacher." Like the Stephen Wise Temple, the school permits the hiring of teachers from all faiths to fill these teaching roles. Even so, they are integral to fulfilling the school's uniquely religious mission.

In sum, while amici's teachers may differ in many ways from the Lutheran school teacher in *Hosanna-Tabor*, they play no less critical a role in passing on

sacred beliefs and traditions to the next generation. Jewish schools should not have to act like Lutheran schools for the First Amendment to apply.

II. The Functional Approach Places Schools Of All Faiths On An Equal Constitutional Footing.

For decades, lower courts have applied the ministerial exception by asking whether a religious group's employee performs important religious functions. *See Hosanna-Tabor*, 565 U.S. at 203 (Alito, J., concurring) (explaining that, within a decade of the ministerial exception's inception, courts addressing the exception's applicability focused on employees' "religious function in conveying church doctrine"). This "functional consensus has held up over time." *Id.* "As a general rule," courts applied the exception when an employee's "'duties consist[ed] of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.'" *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007). In particular, courts recognized that a religious group's continued "existence may depend upon those whom it selects to … teach its message." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). For that reason, courts traditionally struck down "any restriction on the church's right to choose who will carry its spiritual message." *Petruska v. Gannon Univ.*, 462 F.3d 294, 306-07 (3rd Cir. 2006).

Embracing this functional approach, Justice Alito and Justice Kagan's concurring opinion in *Hosanna-Tabor* stressed that the ministerial exception should

apply to any employee who "serves as a messenger or teacher of its faith." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). Justices Alito and Kagan explained that "[b]ecause virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy presented" in ministerial exception cases. *Id.* at 198. Consequently, they emphasized that the Court's opinion in *Hosanna-Tabor* "should not be read to upset" the functional consensus. *Id.* at 204. After *Hosanna-Tabor*, most lower courts have heeded this view, continuing to focus on an employee's religious functions. *See, e.g.*, *Fratello*, 863 F.3d at 206 (applying ministerial exception to lay principal at Catholic school because "she served many religious functions"); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) (applying ministerial exception to music director who "performed an important function" by playing the piano during Mass); *Temple Emanuel*, 975 N.E.2d at 443 (applying ministerial exception to teacher at Jewish school because she taught religion to Jewish children).

In the two decisions below, however, the Ninth Circuit misread this Court's *Hosanna-Tabor* decision and adopted a formulaic rule that is dangerously out of step with the longstanding functional approach. In the Ninth Circuit's view, because "teaching religion was only one of the four characteristics" of *Hosanna-Tabor*'s Lutheran "called" teacher, relying on that "shared characteristic alone" would render *Hosanna-Tabor*'s other considerations "irrelevant dicta." *Biel*, 911 F.3d at 609. The Ninth Circuit thus believed that

the ministerial exception requires a greater "resemblance to *Hosanna-Tabor*" than "only one of the four" considerations from that case. *Id.* at 610; *accord Morrissey-Berru*, 769 F. App'x 460, 461 (9th Cir. 2019) (holding that "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework").

The Ninth Circuit's new approach, now embraced by the California Court of Appeal in *Su*, is deeply misguided. By requiring religious school teachers to resemble *Hosanna-Tabor*'s Lutheran "called" teacher, the Ninth Circuit sets a single denomination as the standard for constitutional protection under the ministerial exception and improperly charges courts with deciding how closely a faith's practices and internal structure mirror those of the Lutheran Church. Doing so gives preference to churches "within the Protestant Christian framework," *Biel*, 911 F.3d at 621 (Fisher, J., dissenting), and embarks courts "on a course of religious favoritism anathema to the First Amendment," *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 620 (2014) (Kagan, J., dissenting).

Unsurprisingly, Jewish schools have fared markedly worse under the Ninth Circuit's resemblance test. *Su* is a case in point. There, the California Labor Commissioner sued amicus Stephen Wise Temple, alleging wage-and-hour claims on behalf of teachers at the Temple's Jewish preschool. *Su*, 244 Cal. Rptr. 3d at 549. Following the functional approach, the trial court ruled that the claims were barred by the ministerial exception because dozens of undisputed facts confirmed that the teachers performed important religious functions. But the California Court of Appeal reversed in a published

decision. The court recognized that the teachers performed the key function of "transmitting Jewish religion and practice to the next generation" by "teaching Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services." *Id.* at 553. Even so, the court agreed with *Biel* that *Hosanna-Tabor* should not be read "to suggest that the ministerial exception applies based on this factor alone." *Id.* The court thus concluded that the Temple's preschool teachers were not ministers because they did not share the particular characteristics of the Lutheran teacher in *Hosanna-Tabor*. "Unlike Perich," the court reasoned, the Temple's "teachers are not given religious titles," "are not ordained or otherwise recognized as spiritual leaders," and need not undergo "any formal Jewish education or training." *Id.* at 552-53. The court also noted that some of the Temple's teachers, unlike Perich, were not adherents of the Temple's faith. *Id.* at 548, 552-54.

Courts focusing on religious functions, by contrast, have found similar Jewish school teachers to be ministers. In *Temple Emanuel*, the Massachusetts Supreme Judicial Court considered a Jewish temple's decision not to rehire a teacher in its Sunday and after-school religious school. *See* 975 N.E.2d at 434-35. Although the teacher "was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi," and the record was "silent as to the extent of her religious training," she performed important religious functions. *Id.* at 443. Her "teaching duties included teaching the Hebrew language, selected prayers, stories from the Torah, and the religious significance

of various Jewish holidays." *Id.* at 442. The court thus concluded that she was a minister, reasoning that "the State should not intrude on a religious group's decision as to who should (and should not) teach its religion to the children of its members." *Id.* at 443.

In *Grussgott*, the Seventh Circuit likewise applied the ministerial exception to a Hebrew teacher employed by amicus Milwaukee Jewish Day School. Although the court declined to look "*only* to the function of Grussgott's position," it determined that "the 'formalistic factors [we]re greatly outweighed by the duties and functions of [Grussgott's] position.'" *Grussgott*, 882 F.3d at 661; *see id.* (noting that "the importance of Grussgott's role as a 'teacher of [ ] faith' to the next generation outweighed other considerations"). Among other things, she "taught her students about Jewish holidays, prayer, and the weekly Torah readings," and "she practiced the religion alongside her students by praying with them and performing certain rituals." *Id.* at 660. Unlike the Ninth Circuit in *Biel*, the court declined to second-guess the religious importance of these duties, noting that it would be inappropriate for the government to "challeng[e] a religious institution's honest assertion that a particular practice is a tenet of its faith." *Id.* The court explained that such judicial "line-drawing" would not only be "incredibly difficult," but would impermissibly entangle the government with religion. *Id.*

These Jewish school cases highlight how the Ninth Circuit's analysis "poses grave consequences for religious minorities." *Biel*, 926 F.3d at 1239 (Nelson, J., dissenting from denial of rehearing en banc).

Under the Ninth Circuit's approach, the autonomy of Jewish synagogues and congregations of other minority faiths to choose the messengers and teachers of their faith may be set aside simply because their theological beliefs differ from those of the Lutheran Church.

Worse yet, the Ninth Circuit's resemblance test especially disfavors the weakest religious groups—those "whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). By requiring employees to share some characteristic with the *Hosanna-Tabor* Lutheran school teacher other than performance of religious functions, the Ninth Circuit systematically disfavors groups who lack the means to fund theological training, who do not have enough members to fill critical roles exclusively with adherents, and who perhaps do not employ religious titles in the same way some other mainstream religions do.

The functional approach, by contrast, places all religious groups on an equal footing. Instead of looking to the particular practices of one denomination, courts applying the functional approach ask whether the employee carries out functions "essential to the independence of practically all religious groups." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). These roles at a minimum include "those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* Once a religious school decides a teacher is qualified to be entrusted with this vital religious function, the ministerial exception should

apply to the employee. "The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith." *Id.* at 202.

Equal treatment of all faiths is a core requirement of both Religion Clauses. *See, e.g.*, *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."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'"). By giving all groups equal access to the ministerial exception's protection, no matter their beliefs or internal structures, the functional approach honors our Nation's centuries-old "respect and tolerance for differing views" and its ongoing "honest endeavor to achieve inclusivity and nondiscrimination." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089 (2019).

In violating these core principles, the Ninth Circuit strips minority religious groups of "authority to select and control who will minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 195. But as this Court recognized in *Hosanna-Tabor*, the First Amendment safeguards "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. That interest simply is not confined to groups whose teachers study at seminaries, have formal titles, or hold themselves out as religious leaders.

To the contrary, members of all religions place their faith into their teachers' hands, entrusting them

with the communication of their tenets and practices to adherents, the next generation, and the world. Indeed, a group's teachers are the very "embodiment of its message" and "its voice to the faithful." *Petruska*, 462 F.3d at 306; *see Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (noting that "both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers"). In short, when the government controls the hiring and firing of religious teachers, it interferes with the selection of those who will personify a faith's beliefs.

All faiths should have "the freedom to choose who is qualified to serve as a voice for their faith." *Hosanna-Tabor*, 565 U.S. at 200-01 (Alito, J., concurring). This Court should reverse the decisions below and hold that the ministerial exception applies to employees who perform important religious functions.

III. If The Court Reverses Here, It Should Specifically Disapprove Of The California Court of Appeal's Opinion In *Su*.

If this Court reverses the Ninth Circuit's decisions in *Biel* and *Morrissey-Berru*, it should also disapprove of the California Court of Appeal's opinion in *Su*. Stephen Wise Temple petitioned for writ of certiorari in that case; but after this Court called for a response from the California Labor Commissioner, the parties settled and the Temple dismissed its petition. The *Su* opinion, however, still remains on the books and is the only post-*Hosanna-Tabor* published decision in California to address the ministerial exception. As such, it is binding on all California trial courts. *See*

Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937, 940 (Cal. 1962) (noting that decisions of any California Court of Appeal are binding "upon all the superior courts of this state," and California superior courts therefore "must accept" the law declared by the California Court of Appeal absent conflicting California appellate decisions).

Su's holding is functionally identical to the cases here. *See* 244 Cal. Rptr. 3d at 553 ("Although the ECC's teachers are responsible for some religious instruction, we do not read *Hosanna-Tabor* to suggest that the ministerial exception applies based on this factor alone."); *id.* ("Our conclusion is consistent with the Ninth Circuit's recent decision in *Biel*."). If this Court does not specifically reject *Su*'s holding, the California Labor Commissioner will remain free to target religious schools in California that do not conform to the Lutheran Church and California courts may well continue to apply erroneous state precedent to those cases, threatening the autonomy of religious schools throughout the country's most populous state. This Court should thus disapprove of *Su* to protect the foundational freedoms of *all* religious groups in California.

CONCLUSION

The Court should reverse the two decisions below and disapprove of the California Court of Appeal's decision in *Su*.

Respectfully submitted,

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