No. 19-348

# In the Supreme Court of the United States

ST. JAMES SCHOOL,

*Petitioner,*

v.

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

*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF OF PETITIONER


JACK S. SHOLKOFF
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
400 South Hope Street
Suite 1200
Los Angeles, CA 90071

MARGARET G. GRAF
ROMAN CATHOLIC ARCHDIOCESE OF LOS ANGELES
3424 Wilshire Boulevard
Los Angeles, CA 90010

ERIC C. RASSBACH
*Counsel of Record*
DANIEL H. BLOMBERG
DIANA M. VERM
ADÈLE AUXIER KEIM
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
erassbach@becketlaw.org

*Counsel for Petitioner*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

## REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition adds no new reason to deny the petition in this appeal or the parallel petition in *Our Lady of Guadalupe* v. *Morrissey-Berru*. Respondent largely rehashes arguments she made at the Ninth Circuit and that the Respondent made in the brief in opposition in *Our Lady*.

Indeed, since the briefing concluded in *Our Lady*, two additional reasons to review the Ninth Circuit's rejection of the functional consensus have arisen: another federal district court has recognized the split and rejected the Ninth Circuit's position, and the parties in the *Stephen S. Wise Temple* v. *Su* appeal have settled. The first development is further indication of the split's depth and intractability. And the second development leaves religious groups in California state courts without recourse unless this Court acts.

This Court should therefore grant certiorari in *Our Lady* and hold this petition pending disposition of that appeal.

### I. The circuit split is square, deep, acknowledged, and intractable.

A square, deep, acknowledged, and intractable split exists among the lower courts. Pet. 12-24. Given the Ninth Circuit's refusal to address the issue en banc, there is no foreseeable path to a resolution of the split absent this Court's intervention.

The petition's description of the split has been borne out by intervening events. Since the petition was filed, another court has recognized the well-

developed split. In *Hutson* v. *Concord Christian School*, the court "reject[ed] the Ninth Circuit's approach" and agreed with the majority view reflected in decisions it identified from the Second, Fifth, Sixth, and Seventh Circuits "that the key factor in determining whether an employee is a 'minister' within the scope of the ministerial exception is the employee's function in the employer's religious mission." No. 3:18-CV-48, 2019 WL 5699235 at *9 (E.D. Tenn. Nov. 4, 2019), *appeal docketed*, No. 19-6286 (6th Cir. Nov. 14, 2019) (applying ministerial exception to bar employment discrimination claim by second-grade teacher whose contract was not renewed by Baptist school). And the *Stephen S. Wise Temple* case was settled, leaving the California Court of Appeal firmly on the Ninth Circuit side of the split. See *Stephen S. Wise Temple* v. *Su*, No. 19-371 (petition dismissed Nov. 15, 2019). That means that religious organizations in California state courts will be without recourse unless this Court acts.

Respondent offers no new reason to doubt the deepening split. To the contrary, Respondent notes the EEOC's role in creating the split, BIO 11-12, thus implicitly acknowledging the Ninth Circuit rule's eventual nationwide impact.

1. Respondent does not dispute that the Ninth Circuit's rule breaks from the "functional consensus," identified by Justices Alito and Kagan, which reflects broad judicial agreement that courts should focus "on the function performed by persons who work for religious bodies" to determine ministerial status. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 198, 203 (2012) (Alito, J., concurring); see also BIO 11, 34 (attacking "functional

consensus"). Nor does Respondent address pre-*Hosanna-Tabor* cases, or even mention the *Biel* en banc dissent's view that the new Ninth Circuit rule splits from the previous "widespread" function-focused standard. App. 49a (R. Nelson, J., dissenting). This split has now been recognized by thirteen judges from three different circuits. Pet. 22-25.

To escape the split, Respondent argues that *Hosanna-Tabor* somehow rejected the functional consensus, silently overturning decades of lower court caselaw. BIO 34. Laying aside that such a reading of *Hosanna-Tabor* is not credible—Justices Thomas, Alito, and Kagan's concurrences said that they understood *Hosanna-Tabor* to mean exactly the opposite, Pet. 16-17—it also does not advance her attempt to evade the split. Four other circuits and two state supreme courts have agreed with the concurring justices that *Hosanna-Tabor* left the functional consensus fully intact. Pet. 17-24.

2. Echoing the respondent in *Our Lady*, Respondent here argues that the functional consensus has been replaced by a "totality-of-the-circumstances" test. BIO 1, 30. But neither Petitioner nor any of the courts following the functional consensus have voiced any quibble with reviewing all of the relevant factual circumstances, including any of the four considerations in *Hosanna-Tabor*. Pet. 12-23. The question that has divided the lower courts is not the *scope* of what evidence a court should consider in deciding whether an employee is ministerial, but *how to weigh* that evidence. The Ninth Circuit says that the absence of a title, training, and tax status akin to the Lutheran teacher in *Hosanna-Tabor* is *always dispositive*, no matter what other facts are in evidence.

All the other circuits say that there is no such rigid requirement, and instead treat function as the most important consideration under *Hosanna-Tabor*. See Pet. 17-18, 23-24.

3. Respondent's discussion of the cases in the split likewise falls flat. Remarkably, it fails to even engage either the lengthy en banc dissent in *Biel* or the Second Circuit's decision in *Fratello* v. *Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017).

Respondent's attempts to distinguish the remaining caselaw all err. Respondent says that in *Sterlinski* v. *Catholic Bishop of Chicago*, the Seventh Circuit did not reject the Ninth Circuit's "Perich-comparison analysis" in favor of a functional approach. BIO 29-30 (citing 934 F.3d 568 (7th Cir. 2019)). But *Sterlinski* stated that (a) it sees the Ninth Circuit rule as "ask[ing] how much like Perich a given plaintiff is, rather than whether the employee served a religious function," and (b) the Seventh Circuit "disagreed with that approach," as did "[m]any judges" from other circuits. 934 F.3d at 570.

Next, Respondent mistakenly focuses on the Second Circuit's decision in *Penn* v. *New York Methodist Hospital*, 884 F.3d 416 (2d Cir. 2018). BIO 24-25. But *Penn* wasn't about who is a minist*er*; it was about what is a minist*ry*. And its brief discussion of ministerial status was consistent with *Fratello*'s focus on function. *Penn*, 884 F.3d at 424 (exception applies because, *inter alia*, Penn "provide[d] religious care").

Respondent also wrongly claims that *Lee* v. *Sixth Mount Zion Baptist Church* turned on religious title. BIO 23-25 (citing 903 F.3d 113 (3d Cir. 2018)). In fact,

the court merely affirmed its precedent that the definition covers anyone "who will perform particular spiritual functions." *Sixth Mount Zion*, 903 F.3d at 122 n.7 (quoting *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006)).

Respondent's attempt to align the Sixth Circuit with the Ninth Circuit likewise fails. *Conlon* v. *InterVarsity Christian Fellowship* found that ministerial status was "clearly" established by just two considerations: religious function and a good-faith identification of the employee having a ministerial role. Pet.18-19 (citing 777 F.3d 829 (6th Cir. 2015)). Unlike the Ninth Circuit, *Conlon* did not rule that religious function alone could never be enough.[1]

Respondent's fleeting attempt to distinguish the Massachusetts and Kentucky supreme courts' decisions also falls short. BIO 25-26 (citing *Temple Emanuel of Newton* v. *Massachusetts Comm'n Against Discrimination*, 975 N.E.2d 433 (Mass. 2012); *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014)). Respondent neither identifies *any* specific consideration the courts relied on that was *not* function-related, nor contests *Kirby*'s explanation that courts should give "more" weight to function and less to indicia such as title. 426 S.W.3d at 613 & n.61.

Finally, Respondent's treatment of *Cannata* v. *Catholic Diocese of Austin* simply shows that the Fifth Circuit's ruling turned on the plaintiff's religious functions, including that he played an "integral role" "'in the celebration of Mass,'" "ch[]ose hymns,"

---

[1] Courts applying *Conlon* have found that "religious function alone can trigger the [ministerial] exception." See, *e.g.*, *Ciurleo* v. *St. Regis Parish*, 214 F. Supp. 3d 647, 651-652 (E.D. Mich. 2016).

"'furthered the mission of the church," and "helped convey its message to the congregants.'" BIO 21-22 (quoting 700 F.3d 169, 177-180 (5th Cir. 2012)).

4. Respondent concedes the crucial facts of this case: that she taught religion, incorporated Catholic beliefs into her lessons, prayed with her students, and regularly took her students to Mass. BIO i-ii, 6-7. She also does not contest that she taught her students Catholic doctrine, including through worship and prayer; took her students to monthly school Mass, where twice a year her students presented the Eucharistic gifts; and prayed with her students twice a day, including with theologically significant prayers such as the Hail Mary and the Our Father. Pet. 6-7. Those facts are more than enough to show that she performed a vital role in conveying Petitioner's faith to the next generation.

To escape this conclusion, Respondent attempts to minimize her religious job duties. For instance, she emphasizes that her religious instruction consisted of "reading from a pre-selected workbook" and that the school's Masses took place in a "multi-purpose room." BIO 7. But courts cannot determine that admittedly deeply religious instruction or core religious worship becomes less "spiritual" if it comes from a text or is held in certain structures—especially here, where the Catholic faith reveres a holy text and holds that God was long worshiped in a tent. See Exodus 33:7-11.

Similarly, Respondent claims that she taught religion for only "approximately 120 minutes" each week. BIO 7. But Respondent made a binding concession below that "she was required to dedicate a minimum of 200 minutes every week to the subject of Religion." App. 82a. Further, she also conceded below

that her religious teaching duties extended beyond just her religion class and "included incorporating the Catholic faith into the students' every day curriculum." App. 82a. She cannot attempt to claw those admissions back now.

## II. The scope of the ministerial exception is a vital and recurring question of nationwide importance.

The ministerial exception is a crucial First Amendment protection for a wide variety of faith traditions, but under the current circuit split, the First Amendment means different things in different places. Pet. 25-30. Respondent downplays the issue, arguing that no split exists and that, far from being concerned about the important issue of First Amendment principles, St. James is merely unhappy with the outcome. BIO 34-35.

But the importance of the Ninth Circuit's new rule cannot be gainsaid. The largest federal circuit has adopted a new substantive rule of First Amendment law and twice applied it against the largest archdiocese in the country in a sensitive church-state context. The most populous state in the country has already followed suit. And the underlying new rule came at the request of the EEOC—which has been attempting to narrow *Hosanna-Tabor* nationwide—precisely because of the "importance of clarifying the scope of the ministerial exception." EEOC Br. at 1, *Biel* v. *St. James Sch.*, (No. 17-55180) (filed Sep. 27, 2017).

Left undisturbed, the Ninth Circuit decision will harm religious education. The decision forces religious schools in the Ninth Circuit to decide who their ministers are based on title and training, which—

depending on the religion—may not necessarily reflect the importance of a religious role. In the Ninth Circuit, a teacher's title could change her status without changing her function in "conveying the Church's message and carrying out its mission" of teaching children the faith. *Hosanna-Tabor*, 565 U.S. at 192.

The Ninth Circuit's favoritism for the Lutheran beliefs and practices in *Hosanna-Tabor* particularly threatens religious minorities who do not use ministerial titles. See Uddin Br. at 9-10. The Ninth Circuit rule pressures minority groups to start "checking the box" with majoritarian religious nomenclature. See Church of God in Christ & Orthodox Union Br. 16, 23.

The Ninth Circuit decision also threatens the ability of parents and religious communities to pass on their faith to the next generation. Seventh-day Adventists Br. 9 (citing data showing that religious education influences children's faith). Again, this is particularly problematic for minority groups, whose beliefs are less likely to be reflected in popular culture. *Id*. at 10 (citing study on the importance of Jewish day schools to passing on the faith).

Moreover, forcing courts to second-guess the religious doctrine of schools and other religious organizations will significantly harm the church-state relationship envisioned by the Founders and protected in this Court's precedent. See Professors Br. 8-12 (noting that early separation of church and state in the colonies benefitted both polities).

The national importance of the Ninth Circuit's rule is further shown by the EEOC's role in creating the rule. The EEOC successfully argued below that

ministerial status should generally be limited to "ecclesiastical leaders" and that "religious duties, without more" are insufficient to make that showing since "the first three factors" in *Hosanna-Tabor* are "particularly critical." EEOC C.A. Br. at 8, 13, 22; see also *Biel* C.A. Oral Arg. at 17:28-17:40, 20:30-20:55, https://bit.ly/2WwwWmN; (exception applies only with "a role * * * of leadership within the church" or a showing of "at least two factors"). Notably, this tracks the EEOC's unsuccessful arguments in *Hosanna-Tabor*. EEOC Br. at 51, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553) (ministerial exception limited to those with an "exclusively" religious role, such as "clergy," "chaplain[s]," and "spiritual leaders"). And it is the same argument that Respondent repeatedly raises here. BIO 2, 5-6, 13, 18, 23. Without correction by this Court, the EEOC can enforce its narrow view of the ministerial exception and press courts to do the same across the country.

## CONCLUSION

The Court should grant the petition. Since the petition in No. 19-267, *Our Lady of Guadalupe School* v. *Morrissey-Berru*, and this petition both present the same question and the petition in *Our Lady* is the better vehicle, the Court should grant the petition in *Our Lady* and hold this petition pending disposition of that appeal.

Respectfully submitted.

JACK S. SHOLKOFF
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
400 South Hope Street
Suite 1200
Los Angeles, CA 90071

MARGARET G. GRAF
ROMAN CATHOLIC ARCHDIOCESE OF LOS ANGELES
3424 Wilshire Boulevard
Los Angeles, CA 90010

ERIC C. RASSBACH
*Counsel of Record*
DANIEL H. BLOMBERG
DIANA M. VERM
ADÈLE AUXIER KEIM
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
erassbach@becketlaw.org

*Counsel for Petitioner*

NOVEMBER 2019