No. 18-____

In the Supreme Court of the United States

MIRIAM GRUSSGOTT,

Petitioner,

–v–

MILWAUKEE JEWISH DAY SCHOOL, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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MAY 14, 2018

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QUESTIONS PRESENTED

1. Does the definition of "religious institution" in the two prong test for "ministerial exception" in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 132 S.Ct. 694, 709, 181 L.Ed. 2d 650 (2012) (hereinafter "*Hosanna*") require that the "religious institution" be "faith-based" and have at its head to hire and fire either a certified, ordained or lay "minister" and/or a hierarchy of such ministers, or is it sufficient for the "religious institution" to be an institution administered in hiring and firing by totally lay people with absolutely no ministerial certification, formal or informal, and with no hierarchy whatsoever of ministers, as in *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (2018) (hereinafter "*Grussgott*", which the Seventh Circuit has held in this case?

2. Does the "ministerial exception" require a) religious "experience" as opposed to religious "training", as held by the Seventh Circuit in *Grussgott* and contrasted in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (2004); b) religious teaching and job descriptions that are "tasked" *Hosanna-Tabor* at 132 S.Ct. 694, 708, as opposed to "volunteered"; and c) teaching with a cultural, historical perspective, which was held to be ministerial under the "ministerial exception" as the Seventh Circuit held in this case *Grussgott*, as opposed to "faith-based" teaching, leading and supervising, under the Sixth Circuit in *Alyee T. Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829 (6th Cir. 2015)

and the Fourth Circuit under *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (2004).

3. Is the MJDS policy of non-discrimination on of its staff a waiver of any right to claim the ministerial exception? *Grussgott* at 657-658. This case presents an opportunity for the Supreme Court of the United States to rule on the "waiver" argument which was elucidated by the Sixth Circuit Court in *Alyee T. Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 836-838 (6th Cir. 2015), citing to *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007), decided after *Hosanna-Tabor*. It appears the *Conlon* court reads the Supreme court to not allow the waiver because "such action interferes with the internal governance of the church" *citing Hossana* at 705. In the present case, of course, the non-discrimination clauses cannot be construed under "church internal governances" because none of the governing supervisors of the secular like school resemble church hierarchies since they are clearly not ministers who govern the school. Even under the Sixth Circuit court above, it appears that there is still the questions of whether the First Amendment claims can be asserted as a defense against state claims.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION 2

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. MJDS Is Not a Religious Institution Entitled to the Protections of the First Amendment in Barring the State from Dictating Who It Hires and Fires Under the A.D.A. Because It Has Lay People Administering the School, None of Its Leaders Are Clergy or Qualified to Be Clergy and Does Not Have an 'Ecclesiastical Hierarchy' or Authority at Its Head, Required by the Supreme Court Holding in *Hosanna-Tabor* 7

B. Even If MJDS Were to Qualify as a Religious Institution Which It Clearly Is Not, Plaintiff's Employment Contract, Job Description Was Voluntary Not "Tasked" Duties Which Qualify as "Religious" Under the "Ministerial Exception" 15

TABLE OF CONTENTS – Continued

Page

C. The Court in Failing to Recognize That MJDS'S Policy of No Religion Discrimination Shows That It Does Not Expect Its Employees to Adhere to a Common Religious Practice or to Engage in a Course of Conduct That Is Consistent with Any Specific Religious Practice; Additionally, MJDS Should Be Estopped from Asserting the Affirmative Defense of the 'Ministerial Exception' Under the First Amendment Because It Guarantees Its Employees That It Will Not Discriminate Against Them on the Basis of Disability 18

REASONS FOR GRANTING THE PETITION 21

CONCLUSION 24

APPENDIX TABLE OF CONTENTS

Opinion of the Seventh Circuit (February 13, 2018) 1a

Order of the District Court for the Eastern District of Wisconsin (May 30, 2017) 15a

Milwaukee Jewish Day School Staff Policies and Procedures, 2014-15 ..... 33a

Miriam Grussgott Resume 39a

TABLE OF AUTHORITIES

Page

CASES

Alyee T. Conlon v. Intervarsity Christian Fellowship/USA, 777 F.3d 829 (6th Cir. 2015) ..... passim

Ciurleo v. St. Regis Parish, 214 F.Supp.3d 647 (2016) 14

Fratello v. Archdiocese of New York, 863 F.3d 190 (2nd Cir. 2017) 14, 15

Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007) ..... ii, 6, 15, 20

Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012) ..... passim

Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952) 7, 8

Servian Eastern Orthodox Diocese for United States and Canada v. Milivojevich, 426 U.S. 696, 96 S.Ct. 2372 (1976) 8

Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 363 F.3d 299 (4th Cir. 2004) ..... i, ii, 12, 13

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... passim

TABLE OF AUTHORITIES—Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1

JUDICIAL RULES

Sup. Ct. R. 10(c) 21, 22

PETITION FOR A WRIT OF CERTIORARI

Petitioner Miriam Grussgott petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion addressing the three questions presented (App.1a-6a) is reported at 882 F.3d 655 (2018). The district court's opinion granting summary judgment to Respondents (App.7a-22a) is unreported.

JURISDICTION

The Court of Appeals entered judgment on February 13, 2018. (App.1a.) Petitioner filed a timely petition for writ of certiorari on May 14, 2018. This Court gave Petitioner an additional 60 days to refile a corrected petition. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

- **U.S. Const. amend. I**

This case involves the First Amendment which provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

INTRODUCTION

Fundamental to the holding of *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 132 S.Ct. 694, 709, 181 L.Ed.2d 650 (2012) (hereinafter *Hosanna-Tabor*), is to determine: 1) whether a plaintiff's A.D.A. claim is to be dismissed in favor of the First Amendment right of freedom of religion; 2) whether the employer is a religious institution which enjoys the First Amendment right of freedom of religion; and 3) if the employer is such an institution, whether the plaintiff fits under the "ministerial exception" in that the employee is a "minister", a with a role distinct from that of most of its members. 132 S.Ct. at 191.

In the present case, the courts below determined: 1) that Respondent Milwaukee Jewish Day School (hereinafter 'MJDS') is a religious institution that can enjoy an unfettered right to fire whomever it wishes without regard to the protections of the A.D.A.,

and 2) that the teacher assigned to teach only Hebrew by contract of 2014-2015 at that private school fell into the "ministerial exception" under the *Hosanna-Tabor* review. The issues to be presented for review are therefore: 1) whether a non-denominational 'Jewish' Day School with a lay Head of School who has the ability to hire and fire all teachers (App.33a-36a) and a Policy Manual that fails to use the word 'G-d', 'faith' or 'religion', but rather describes itself in terms of 'Jewish values' and 'Jewish culture' (App.33a-38a) is a religious institution which should enjoy the protections of the First Amendment; and 2) whether a teacher who has graduated only from state funded secular college and secular graduate school, *i.e.*, Brooklyn College and McGill (App.39a), without any religious formal study or affiliations whatsoever, and who has no certifications as a 'minister' teaching under a new contract in 2014-2015 solely as a "Hebrew" teacher (finding of fact by the lower court "teaching Hebrew" —App.9a) without the requirement of staff meetings with the "Jewish studies" staff, teaching Hebrew language to second and third graders), qualifies as a minister under the scrutiny of *Hosanna* and therefore is barred from filing a discrimination claim under the A.D.A. Mrs. Grussgott had surgery for a brain tumor and was fired by the secular Head of School when she was mocked by a parent for her disability. (App.9a)

This case presents an ideal vehicle for the U.S. Supreme Court to resolve the questions presented on page i of this writ: 1) Can a private school without any "faith based" mission, no mention of 'G.d' or 'faith' in its Mission Statement and headed only by secular principals and board with a rabbi in only an advisory position, qualify as a "religious institution"?

2) Does a Hebrew language teacher have to be clearly "trained" in religion (as opposed to having life "experience" in private observance), "tasked" with teaching religion (as opposed to any volunteer behavior), and teach from a faith based perspective, rather than a historical or cultural perspective in order to qualify under the "ministerial exception", and finally, 3) Can a private school waive its right to claim any "ministerial exception" if it promises in its contract or policy manual interpreted as contract to not discriminate against race, creed, disability, etc.? None of these questions were answered by *Hosanna-Tabor*, and the broad interpretation by the Court of the Seventh Circuit in this case clearly conflicted with other Circuit courts in that this court, for the first time, defined as a "religious institution" a private school not headed by an informal or formal minister, and for the first time, considered a teacher's life "experience" rather than "religious training" in barring that teacher from proceeding with a disability discrimination claim when she was clearly not "tasked" with teaching faith. (App. 9a) Mrs. Grussgott was fired by the secular Head of School when she was mocked by a parent for her disability after she returned to work from brain surgery for a tumor. (App.9a)

STATEMENT OF THE CASE

In the last page of the court's decision, Judge Stadtmueller states: "Though this case is not as clear cut as *Hosanna-Tabor*, Defendant's constitutional rights must override Plaintiff's employment discrimination

concerns in a close case." App.31a. It is a close case because the courts below strains to favor the private school employer, the moving party in the summary judgment motion, over the employee Hebrew teacher, when any disputes in fact should be ruled in favor of the non-moving party. Clearly, the courts agree that Mrs. Grussgott is not a minister like Perich in *Hosanna-Tabor*. Rather, Ninth Circuit court agrees with the employer that plaintiff's functions (2014-2015 contract) (App.17a) of the role of Hebrew teacher and 'Jewish studies' teacher are intertwined, which is vigorously disputed by the plaintiff. When confronted with the undisputed fact that plaintiff actually taught only Hebrew in the 2014-2015 contract (App.17a) and was not even invited or required to be part of 'Jewish studies' meetings (App.9a; App.17a) an undisputed fact, but the Ninth Circuit strained to conclude that the very act of teaching of Hebrew language is 'intertwined' with Judaism, simply because the school administration said so after the fact. It is absurd to think that in today's world, Hebrew is any less religious than Latin (App.19a), and the court's analysis of Hebrew as a sacred language would mean that many Hebrew charter schools, actually supported by tax payer funds all over the U.S., would be suddenly declared an illegal entanglement of church and state, and some city and state supported colleges such as Brooklyn College, where plaintiff graduated for her education degree (App.39a), would cease being allowed to teach secular Hebrew and Judaica studies for the same reason.

Additionally, Respondent should be estopped from guaranteeing non-discrimination of its staff members (from discrimination based on religion or handicap or

disability) (App.23a) and then spending its donated dollars to fight to defend its former secular Head of School (now demoted to 'Head of Innovation') (App.33a; 34a; 36a) from bias in firing a teacher who was mocked by a parent after undergoing brain surgery (App.9a). This case presents an opportunity for the Supreme Court of the United States to rule on the "waiver" argument which was elucidated by the Sixth Circuit Court in *Alyee T. Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 836-838 (6th Cir. 2015), citing to *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007), decided after *Hosanna-tabor*. It appears the *Conlon* court reads the Supreme Court to not allow the waiver because "such action interferes with the internal governance of the church" *citing Hossana-Tabor* at 705. In the present case, of course, the non-discrimination clauses can not be construed under "church internal governances" because none of the governing supervisors of the secular like school resemble church hierarchies since they are clearly not ministers who govern the school. (App.33a; 34a; 36a) Specifically it appears that there is still the questions of whether the First Amendment claims can be asserted as a defense against state claims. *Conlon* at 836. Neither is there any decision regarding "non-Title VII employer obligations". *Id.* at 836

A. MJDS Is Not a Religious Institution Entitled to the Protections of the First Amendment in Barring the State from Dictating Who It Hires and Fires Under the A.D.A. Because It Has Lay People Administering the School, None of Its Leaders Are Clergy or Qualified to Be Clergy and Does Not Have an 'Ecclesiastical Hierarchy' or Authority at Its Head, Required by the Supreme Court Holding in *Hosanna-Tabor*

In its Appellee answering briefs, including the brief of amicus curiae, neither party, Appellee or its supporter, have proven, as part of its burden of proof in a summary judgment motion, that Defendant, Milwaukee Jewish Day School, Inc. (hereinafter Appellee or Defendant or "MJDS"), is a religious institution entitled to First Amendment rights under the holding of *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 132 S.Ct. 694, 709, 181 L.Ed.2d 650 (2012), (hereinafter *Hosanna-Tabor*).

Under the holding of *Hosanna-Tabor*, the institution that seeks protection under the First Amendment must qualify as a religious institution. The First Amendment protects "the (religious institution's) power to decide for themselves, free of state interference, matters of church government as well as those of faith and doctrine." *Id.* at 565 U.S. 186, 132 S.Ct. 704, citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952). The First Amendment also seeks to protect, under the *Hosanna-Tabor* reasoning, "the free exercise of an ecclesiastical right, the Church's choice of its

hierarchy." *Id.* at 565 U.S. 187, 132 S.Ct. 705, citing *Kedroff* at 119, 73 S.Ct. 143.

The Supreme Court in *Hosanna-Tabor* also cites *Servian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372 (1976) for the proposition that First Amendment principles protect the decisions of church leaders where "the Church had removed Milivojevich as bishop of the American-Canaciam Diocese because of his defiance of church hierarchy". *Hosanna-Tabor* at 565 U.S. 187. Reversing the lower court's judgment that his removal failed to comply with church laws and regulations", the Supreme Court explained that the First Amendment permits "hierarchical religious organization to establish their own rules and regulations for internal discipline and government." *Id.* The emphasis throughout the Supreme Court's decision in *Hosanna-Tabor* is employment relationship between a religious institution and its ministers. (emphasis supplied). *Id.* at 188.

It is clear that the majority decision in *Hosanna-Tabor* is looking for a stricter interpretation of what constitutes a religious institution because the Courts spend much time discussing that these organizations have a hierarchy and at their head they have ministers. *Hosanna-Tabor* at 187-90. Clearly the 7th circuit court below is citing only to a concurring opinion of one justice in *Hosanna-Tabor* when it states "nor is there any requirement . . . that a religious institution employ "ordained clergy" at the head of an "ecclesiastical hierarchy." *Grussgott*, at 658. However, based on the majority decision in *Hosanna-Tabor*, the court felt

that it was important to define a religious institution as one that has a hierarchy or minister at its head.

In the present case, MJDS does not qualify for the protections of the First Amendment from interference of the State's discrimination laws because defendant has not shown a Church run institution, an "ecclesiastical right" or a "Church's choice of its hierarchy" because MJDS is run by secular administrators, rather than rabbi's, a board of rabbi's or clergy staff. The only Rabbi is in an advisory capacity and has no supervisory, "line and staff" responsibilities. App.22a-23a. The "resident rabbi" in an advisory capacity is the only staff member who has a clergy degree and he has no power to "hire and fire". App.22a-23a states in relevant part:

> "The final decision on any question regarding interpretation of MJDS's policies and procedures rests with the Administration and the Board of Directors. No person other that the Head of School has authority to make any agreement for employment . . . JDS has right to terminate your employment. Terms and conditions of employment with MJDS may be modified at the sole discretion of the Head of School, with or without notice."

It is undisputed that the head of MJDS who fired plaintiff appellant had absolutely no background in Jewish religion or even culture or history, and became head of the technical computer department when he was demoted shortly after he used his sole discretion under the MJDS Policy Manual to terminate plaintiff who was a Hebrew language teacher in 2014-2015. (App.33a; 34a; 36a)

This is not a matter of whether MJDS is an "Orthodox" Jewish organization or not; this is not a matter of whether Orthodox observant Jews and leaders are included in its hierarchy or student body. *Grussgott* at 656-658. If the head of the MJDS hierarchy was ordained clergy, a female Reform rabbi or a Board headed by ordained Conservative or Reform Jewish clergy for instance, it would most likely qualify as a religious organization or religious institution entitled to First Amendment rights. Clearly, no minister or certified professional in the area of religion has the ability to hire and fire a teacher, Hebrew or not. Even the Board is composed of secular people with no background in Judaism, because if the board were composed of such an individual MJDS lawyers would have made this clear. In fact, this is not the case and Defendant had not made the case that there is any "ecclesiastical" organization whatsoever, and it is their burden to do so in a summary judgment motion.

Rather, Respondent has admitted that MJDS is run by secular administrators who have no qualifications as clergy of any sect of Judaism whatsoever, who do not have any "ecclesiastical" degrees, nor is there any "ecclesiastical" hierarchy, because there is no Jewish clergy who run the school and the only rabbi is an "advisory capacity" at the whim of the "Head of School" Mr. Brian King, who has no qualifications as clergy, and is not supervised by a clergy type Board or "ecclesiastical" hierarchy. (App.33a; 34a; 36a) Nor do defendant's lawyers make any argument or show any proof that MJDS is a "parsonage" or has any tax breaks as a "parsonage".

Clearly, defendant's lawyers can not and do not make the argument that MJDS is run like a Church with clergy at the top; therefore, MJDS is a secular school, not unlike other private unaffiliated schools, with accommodations for Kosher observance and prayer meetings, but having no religious hierarchy and no ecclesiastical decisions, since its head is not clergy and it is not governed by an ecclesiastical hierarchy.

It is MJDS' burden of proof to show the hierarchy of its Board of Directors, if such a Board exists. Clearly it does not exist and is not composed of members of the clergy and ecclesiastical hierarchy required by *Hosanna-Tabor* to qualify as a religious institution. If it did exist, its lawyers would show such a Board's composition as clergy and consisting of ecclesiastical hierarchy. In this case, MJDS operates with 'smoke and mirrors' to confuse the court of its secular governing bodies and personnel, not religious. As U.S. District Court Judge Statdmueller warned below: "a religious organization could abuse this deference (to the free exercise of religion cause of the First Amendment) by claiming that certain apparently secular activities are actually religious" (App.20a) Such is the case herein.

In sum, MJDS does not have a "minister" at its head. Nor did they when plaintiff was fired. They had a rabbi in an advisory capacity on staff; Mr. King, an individual in "IT" and computers was the head of the school. Mr. King was the only one who was able to hire and fire according to the policy manual. No one else had the power to hire and fire. At no time did the rabbi who held an advisory position have the authority to hire and fire. Therefore, MJDS did not have a hierarchy with a "minister" at its head

and therefore can not be considered religious institution for this reason.

The court in *Hosanna-Tabor* does not define or discuss what is a religious institution. It did not create a test or formula to be followed. In fact, all the cases that follow *Hosanna-Tabor* are dealt on a case by case basis using a fact intensive analysis regarding what defines a religious institution. However, the problem is that *Hosanna-Tabor* and all the cases that follow *Hosanna-Tabor*, involve clear cut religious institutions with hierarchies. The cases involve churches, parishes, dioceses and the like. *Hosanna-Tabor* at 186-187. There does not even need to be a fact intensive analysis in those cases because it is clear that the organizations are religious. The court in *Hosanna -Tabor* did not deal with the question of what defines a minister in cases where the defendant is not clearly a church, parish, diocese or synagogue.

There are only two Circuit cases in which the courts have dealt with the definition of a religious institution, the first prong of the 'ministerial exception' test: *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004) and *Alyee T. Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829 (6th Cir. 2015). It is in both of these cases where these two circuit courts of appeal have held the Respondent was a religious institution for purposes of the ministerial exception, even though it was not clearly a church, parish, parsonage, etc. In *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004) (hereinafter "Hebrew Home") the court held that a Jewish nursing home was considered a religious institution. However, that case can be

easily distinguished from the present case. In MJDS in the current case is a non profit, non-religious, tax paying institution, unlike the nursing home. (App. 35a). Additionally, the main issue in *Hebrew Home* was that the plaintiff Shaliehsabou was a kosher supervisor at the nursing home. However, he himself had a bachelor in rabbinical studies from a well-known parsonage college and also took parsonage tax relief on his federal tax returns, both factors clearly missing in *Grussgott*, where plaintiff had only secular teaching degrees from secular colleges, Brooklyn College (a state funded University) and McGill University (also secular and state funded) (App.39a), and never held any certificate of religious teaching and never took a deduction in her tax return for parsonage. (App.25a). But more importantly, *Hebrew Home* did not hire plaintiff (Rabbi) Shaliehsabou; rather, he was recommended by the Va'ad, a board of rabbi's who supervise kosher food in restaurants and kosher markets, and may have other religious duties as well. Not only did they recommend plaintiff (Rabbi) Shaliehsabou, but the Va'ad Board of Rabbi's also supervised him and had concurrent jurisdiction to hire and fire him or any other 'mashgiach' or 'supervisor' of kosher food. *Id.* at 302-303. In the present case, the day school does not keep mandatory kosher nor do they serve kosher food. Keeping kosher is voluntary and those in the school can bring in non kosher food. App.35a; 36a.

Even though the *Hebrew Home* or *Shaliehsabou* case can be distinguished from the present case, it is not a Supreme Court case. The ruling Supreme Court case on ministerial exception, *Hosanna-Tabor*, does not set out a formula for defining a religious institution.

Therefore, it is crucial that the Supreme Court decide this issue as to what defines a religious institution when it is not obviously a church, parish, parsonage, diocese, etc. or has a hierarchy of priests, clergy etc.

In the decision below, in 7th circuit *Grussgott* case, *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (2018), the defendant cites to cases for the proposition that MJDS is a religious institution for purposes of applying the ministerial exception. The defendants cite to *Alyee T. Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 836-838 (6th Cir. 2015), where the plaintiff was a spiritual director. Even though the court said that the defendant IVCF was not a church, it still held that it was a religious institution because it was a Christian organization whose purpose was to "advance the understanding and practice of Christianity in colleges and universities". *Conlon*, at 834. In this case, however, MJDS did not advance the practice of Judaism because their focus is on values and not religion. The school policy manual (there is no mission statement at all) uses the word "values" and does not mention Judaism at all. The second case the defendant cites is *Ciurleo v. St. Regis Parish*, 214 F.Supp.3d 647 (2016) whose plaintiff was a Catholic elementary school teacher. In that case it is clear that St. Regis Parish is a religious institution for the purposes of the ministerial exception and therefore does not help in defining a religious institution when the institution is not obviously religious.

The next case cited by defendants in the 7th circuit court case, *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2nd Cir. 2017), the defendant is obviously a religious institution as well. The Archdiocese "is a

constituent entity of the Roman Catholic Church . . . let by an Archbishop". *Fratello* at 192.

The last case the defendants cite in is *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) in which the plaintiff was an employee of the hospital's Clinical Pastoral Education program. The court held that the Methodist Hospital was a religious institution for purposes of the ministerial exception even though the hospital was not a traditional religious organization such as a church, diocese or synagogue or an entity operated by a traditional religious organization. The court held that the exception has been applied to claims "against religiously affiliated schools, corporations and hospitals by courts. *Hollins* at 225. However, the present case can be distinguished because, as stated previously, it is not a religiously affiliated school. It is a non profit organization whose policy manual does not mention religion at all, does not mention Judaism at all, but focuses on "values" that they promote. App.33a-38a.

B. Even If MJDS Were to Qualify as a Religious Institution Which It Clearly Is Not, Plaintiff's Employment Contract, Job Description Was Voluntary Not "Tasked" Duties Which Qualify as "Religious" Under the "Ministerial Exception"

In order to qualify for the "ministerial exception", plaintiff must be "tasked" with religious duties. These can not be volunteered or a matter of personal preference. In *Hosanna-Tabor*, the court considered it to be important that the plaintiff was "expressly charged" with "leading others to Christian maturity". *Hosanna-Tabor*, at 192. The Supreme Court emphasized the "Perich's job duties reflected a role in con-

veying the Church's message and carrying out its mission" and "teaching faithfully the Word of G-d, its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." *Hosanna-Tabor* at 132 S.Ct. 694, 708. Additionally, Perich was required to do the following:

> Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and about twice a year she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible . . . Perich also led her fourth graders in a brief devotional exercise . . . As a source of religious instruction . . . *Hosanna-Tabor* at 708.

In the present case, Respondent has not presented one iota of evidence of plaintiff's "job duties" as delineated by MJDS nor any activities which MJDS "expressly charged". The four exhibits attached to the Brian King affidavit are not job descriptions, not contracts of employment, not "duties expressly charged" to plaintiff, but rather e-mails from others attesting to substitute group teaching tasks when one of the teachers or the advisory rabbi are away. Plaintiff agrees as "o.k." to one of them, but there is nothing required or expressly charged for plaintiff to do. App.24a-25a. Additionally, there is significant ambiguity in both these vague e-mails as whether these tasks are religious or secular, since plaintiff continues to state that she taught Jewish studies in the first contractual year from a "cultural and historical" perspective, not a

religious one. This is consistent with her education at Brooklyn College and McGill University, both secular colleges. App.39a. Clearly, defendant has failed to show undisputed facts that plaintiff had job duties or was expressly charged by MJDS with religious teaching tasks. She clearly did not teach religion, she clearly did not lead religious services, and she clearly was not charged with either of these tasks by her job description or her employment contract which defendant has purposely left out of its Appendix. Interestingly, the e-mails as exhibits to Mr. King's certification come from colleagues, not administrators and not from him as the Head of School assigned to "charge" teachers with tasks. App.33a-36a.

The 7th circuit case preceding this case, *Grussgott v. Milwaukee Jewish Day School Inc.*, 882 F.3d 655 (2018) challenges this distinction between "tasked" or "expressly charged" and voluntary duties. It discusses how MJDS expected the plaintiff to follow its expressly religious mission and to teach a Tal Am Hebrew curriculum. *Grussgott* at 660-661. As previously discussed, MJDS did not have a religious mission. It does not have any mission statement at all, and it's policy manual discusses only "values" not anything religious. Secondly, plaintiff did not admit that she taught the Tal Am curriculum as a religious curriculum. App.25a, 28a-29a. The Hebrew language portion was all she taught and it was language based, not religious. *Grussgott* continues by saying that the school expected her to play an important role in "transmitting the [Jewish] faith to the next generation." *Grussgott* at 661. However, the policy manual never used the word "faith" so plaintiff could therefore not have an "important role in transmitting the Jewish faith to

the next generation." App.33a-36a. We also disagree with the allegation in *Grussgott* that the plaintiff concedes that she taught her students about prayer, Torah portions, and Jewish holidays. She did not admit to that and the record does not support that. In general, MJDS did not charge Mrs. Grussgott with teaching faithfully the Word of God or the Sacred Scriptures. Any, if at all, of her activities in the regard were purely voluntary and not included in the MJDS curriculum. This issue should be decided by the Supreme Court of the U.S. as it appears to conflict with the *Hosanna-Tabor* examples of what constitutes church like functions in the ministerial exception evaluations.

C. The Court in Failing to Recognize That MJDS'S Policy of No Religion Discrimination Shows That It Does Not Expect Its Employees to Adhere to a Common Religious Practice or to Engage in a Course of Conduct That Is Consistent with Any Specific Religious Practice; Additionally, MJDS Should Be Estopped from Asserting the Affirmative Defense of the 'Ministerial Exception' Under the First Amendment Because It Guarantees Its Employees That It Will Not Discriminate Against Them on the Basis of Disability

A religious institution is allowed to discriminate on matters of faith and is allowed to hold its employees to a mode of conduct that would otherwise violate Title VII and other important Federal and State anti-discrimination statutes. Central to that right is that ability to refuse to hire people who do not share the faith values of the institution and to terminate their employment when the values of the

employee change, so that they are no longer consistent with the religious mission of the institution, but also covered by the penumbras of this idea is a general exemption from anti-discrimination laws for members of the clergy, who can be fired for being too old or of the wrong faith or gender or many other forms of discrimination that otherwise violate of the law. That such employees exist in Jewish School is beyond the question and that the Milwaukee Jewish Day School has such employees (such as, perhaps, the employee known as the "Rabbi in Residence") seems quite possible. The central question in this matter is simple: Is Miriam Grussgott such an employee? The answer is no. There is no evidence in Mrs. Grussgott's employment agreement or any other correspondence that indicate that she is entitled to the ministerial exemption.

On the contrary, there is an important indication that such an expectation is provided at all by the school. The Milwaukee Jewish Day School Staff Policies and Procedures for the year 2014-2015 makes it clear that the MJDS has a policy of non-discrimination on the matters by its staff. *Grussgott* at 657-658. The school states simply and directly on page 7 of that document:

> DISCRIMINATION AND HARASSMENT
>
> MJDS, in its Employment and Personnel Policies and Practices, will not Discriminate Against Any Individual Because of Race, Creed, Religion, Color, Sex, Age, Handicap, National Origin, Ancestry, Veteran Status Or Sexual Orientation, Except When Physical

Limitations are Occupational Impediments to Performance of the Job

The crucial word in MJDS's policy of non-discrimination is "religion." MJDS makes it clear in the paragraph that it does not expect its employees to adhere to a common religious practice or to engage in a course of conduct that is consistent with any specific religious practice. *Id.* MJDS would be violating its own policies if it discriminated based on religion, which means that no one who this policy applies to can be subject to the ministerial exemption. *Id.*

Of course, it is possible that specific employees have specific provisions in their contract to the contrary. But the Plaintiff here is not such an employee. MJDS cannot have a "Jewish mission" that is religious at the same time that it prohibits discrimination against all employees on the basis of religion and protects those employees who choose to practice their Christianity, Islam, Irreligion, Hinduism, Buddhism, Wiccan or Satanism. *Grussgott* at 657.

Additionally, MJDS should be estopped from claiming the ministerial exception under the First Amendment—exercise of religion—when it announces that it will not discriminate on the basis of disability (*i.e.*, handicap).

Again, this case presents an opportunity for the Supreme Court of the United States to rule on the "waiver" argument which was elucidated by the Sixth Circuit Court in *Alyee T. Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 836-838 (6th Cir. 2015), citing to *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007), *Conlon* decided after *Hosanna-tabor.* It appears the *Conlon* court reads

the Supreme court to not allow the waiver because "such action interferes with the internal governance of the church" *citing Hosanna-Tabor* at 705. In the present case, of course, the non-discrimination clauses can not be construed under "church internal governances" because none of the governing supervisors of the secular like school resemble church hierarchies since they are clearly not ministers who govern the school. App.33a-36a. Specifically it appears that there is still the questions of whether the First Amendment claims can be asserted as a defense against state claims. Neither is there any decision regarding "non-Title VII employer obligations". *Conlon* at 836

REASONS FOR GRANTING THE PETITION

According to Rule 10(c) a writ of certiorari can only be granted for a compelling reason such as "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." In the present case, the Supreme Court has not, but should, resolve the question of whether the ministerial exception should apply in cases where there is 1) no religious head or religious hierarchy, 2) no "tasked" religious instruction, and 3) where the teaching was strictly from a cultural and/or historical perspective rather than religious. The seventh circuit court in *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (2018) agreed that there was, in fact, no

religious head and no religious hierarchy at MJDS, but the ministerial exception was still applied. We respectfully request that the United States Supreme Court, as per Rule 10(c) settle the issue of whether the ministerial exception applies to institutions that do not have a religious hierarchy or even a minister at its head in charge of hiring and firing.

There are hundreds of schools with 'religious' designations, Catholic, Lutheran, Jewish and others, and dozens of religiously affiliated colleges, such as Notre Dame, Southern Methodist, not to mention religiously affiliated hospitals and nursing homes, to which the ministerial exception has and can be applied. There are also thousands of afternoon and evening 'Hebrew' schools. The Seventh Circuit in *Grussgott* gave the broadest definition of 'religious institution' and 'ministerial exception', including the school MJDS in the definition, where it was clear there was no ordained minister or any kind of minister in a supervisory role. Clearly, Mr. King, head of school of MJDS, had all his degrees in I.T. (technical applications), and the rabbi on staff was only in an advisory position.

In balancing the First Amendment right of Respondent in the free exercise clause of religion with Petitioner's right to the protections against anti-discrimination in the American With Disabilities Act and other such federal statutes, the definition of 'religious institution' cannot be so broad as to include schools and institutions that are not 'faith based' and are controlled and supervised by persons qualified in fields that have no religious basis whatsoever. By allowing the broadest definition of 'religious institution'

in *Grussgott* to stand, the highest court in the land may be affecting the anti-discrimination rights of at least 100,000 employees of these alleged religious affiliated institutions, schools, colleges and hospitals, and creating a dangerous precedent which could be abused, as warned by the District Judge in this case.

Additionally, we are respectfully requesting that the Supreme Court of the U.S., distinguish the 'ministerial exception' to disqualify teachers as 'ministers' when they teach cultural or historical perspectives of religion, not unlike teaching classes about religion in state supported colleges and tax funded charter schools. Any voluntary personal observances in such cases should be distinguished from 'tasked' religious instruction.

We are respectfully requesting that the U.S. Supreme Court grant the writ of certiorari in this case to determine the important distinctions raised in the present case that affect hundreds of thousands of employed American citizens who rely on anti-discrimination statutes to have and keep a livelihood.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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