

No. _____

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Applicant,

v.

AGNES DEIRDRE MORRISSEY-BERRU,

Respondent.

APPLICATION TO THE HON. JUSTICE ELENA KAGAN FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), Our Lady of Guadalupe School moves for an extension of time of 30 days, to and including August 28, 2019, for the filing of a petition for a writ of certiorari. Unless an extension is granted, Our Lady of Guadalupe School's deadline for the filing of the petition will be July 29, 2019.

In support of this request, Our Lady of Guadalupe states as follows:

1. The Court of Appeals issued its opinion on April 30, 2019 (Exhibit 1). This Court has jurisdiction over the judgment under 28 U.S.C. § 1254(1).
2. This case involves an exceptionally important legal question concerning the protection provided by the First Amendment's Religion Clauses for religious organizations' selection of their ministers. That question is the subject of a sharp split in legal authority. The Ninth Circuit panel decision below splits with fourteen other federal courts of appeals and state supreme courts on how to determine who qualifies

as a “minister.” The panel decision also conflicts this Court’s decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), and particularly sharply with the “functional consensus” of existing caselaw identified and explained by Justices Alito and Kagan in their concurrence, *id.* at 203-04.

3. The panel decision instead followed a divided opinion of the Ninth Circuit, *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018). Recently, on June 25, 2019, nine judges dissented from the Ninth Circuit’s denial of a petition for rehearing en banc in *Biel*, stating that the *Biel* panel majority’s analysis “poses grave consequences for religious minorities” and “conflicts with *Hosanna-Tabor*, decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles.” See *Biel v. St. James School*, 926 F.3d 1238, 1239-40 (9th Cir. 2019). The dissent also addresses the panel opinion in this matter. *Id.* at 1250-51.

4. Our Lady of Guadalupe retained undersigned counsel after the April 30 decision. Like St. James School in *Biel*, Our Lady of Guadalupe School is a ministry of the Archdiocese of Los Angeles. Undersigned counsel now represents both schools, and a petition for certiorari on behalf of St. James School will also be forthcoming.

5. Since April 30, undersigned counsel have been heavily engaged in other matters, including filing a petition for a writ of certiorari to the Idaho Supreme Court in *Ricks v. State of Idaho Contractors Board*, No. 19-66; filing an opening brief in *Business Leaders in Christ v. University of Iowa*, No. 19-1696 (8th Cir.); completing briefing on summary judgment in *InterVarsity Christian Fellowship/USA v. University of Iowa*, No. 18-cv-00080 (S.D. Iowa); preparing for oral argument in *California v. The*

Little Sisters of the Poor, Nos. 18-15144; 18-15166; 18-15255 (9th Cir.); briefing a motion to intervene and an opposition to a motion for preliminary injunction in *State of New York v. United States Department of Health and Human Services*, No. 19-cv-4676 (S.D.N.Y.); and participating in oral argument on cross motions to dismiss and for partial summary judgment in *InterVarsity Christian Fellowship/USA v. Wayne State University*, No. 19-cv-10375 (E.D. Mich.). Counsel are also involved in drafting a petition for a writ of certiorari to the Third Circuit in *Fulton v. City of Philadelphia*, No. 18-2574 (3d Cir.), and filing a reply brief to the Eighth Circuit in *Business Leaders in Christ*, both of which are due before the current deadline to file Our Lady of Guadalupe's petition for certiorari.

6. Our Lady of Guadalupe thus requests a modest extension for counsel to prepare a petition that fully addresses the important issues raised by the decision below and frames those issues in a manner that will be most helpful to the Court.

WHEREFORE, for the foregoing reasons, Our Lady of Guadalupe respectfully requests that an extension of time to and including August 28, 2019, be granted for filing its brief in support of its petition for review.

Respectfully submitted,

/s/ Eric C. Rassbach

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EXHIBIT 1

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 30 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

AGNES DEIRDRE MORRISSEY-BERRU,
an individual,

Plaintiff-Appellant,

v.

OUR LADY OF GUADALUPE SCHOOL,
a California non-profit corporation,

Defendant-Appellee.

No. 17-56624

D.C. No.

2:16-cv-09353-SVW-AFM

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted April 11, 2019
Pasadena, California

Before: RAWLINSON and MURGUIA, Circuit Judges, and GILSTRAP,**
District Judge.

Agnes Deirdre Morrissey-Berru brought a claim under the Age
Discrimination in Employment Act (“ADEA”) against her former employer, Our

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable James Rodney Gilstrap, United States District Judge
for the Eastern District of Texas, sitting by designation.

Lady of Guadalupe School (the “School”). The only issue reached by this Court is whether the district court properly granted summary judgment in favor of the School on the basis that Morrissey-Berru was a “minister” for purposes of the ministerial exception. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.¹

This Court reviews a grant of summary judgment *de novo* and views the evidence in the light most favorable to the non-moving party. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court recognized the ministerial exception for the first time, 565 U.S. 171, 188 (2012), and considered the following four factors in analyzing whether the exception applied: (1) whether the employer held the employee out as a minister by bestowing a formal religious title; (2) whether the employee’s title reflected ministerial substance and training; (3) whether the employee held herself out as a minister; and (4) whether the employee’s job duties included “important religious functions,” *id.* at 191–92. *Hosanna* expressly declined to adopt “a rigid formula for deciding when an employee qualifies as a minister,” and instead considered “all the circumstances of [the employee’s] employment.” *Id.* at 190.

¹ We assume the parties’ familiarity with the facts and procedural history of this case.

Considering the totality of the circumstances in this case, we conclude that the district court erred in concluding that Morrissey-Berru was a “minister” for purposes of the ministerial exception. Unlike the employee in *Hosanna-Tabor*, Morrissey-Berru’s formal title of “Teacher” was secular. Aside from taking a single course on the history of the Catholic church, Morrissey-Berru did not have any religious credential, training, or ministerial background. Morrissey-Berru also did not hold herself out to the public as a religious leader or minister.

Morrissey-Berru did have significant religious responsibilities as a teacher at the School. She committed to incorporate Catholic values and teachings into her curriculum, as evidenced by several of the employment agreements she signed, led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School’s Easter celebration every year. However, an employee’s duties alone are not dispositive under *Hosanna-Tabor*’s framework. *See Biel v. St. James Sch.*, 911 F.3d 603, 609 (9th Cir. 2018). Therefore, on balance, we conclude that the ministerial exception does not bar Morrissey-Berru’s ADEA claim.² *See id.* at 608–11 (holding that the ministerial exception did not apply under similar circumstances).

² As the district court indicated, Morrissey-Berru’s ADEA claim, based on her demotion, appears to be time barred. However, we leave it to the district court to resolve this issue in the first instance on remand.

REVERSED.