Nos. 19-267 & 19-348

IN THE

Supreme Court of the United States

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

ST. JAMES SCHOOL,
Petitioner,
v.
DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KRISTEN BIEL,
Respondent.

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

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether the First Amendment's religion clauses prevent civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT............................2

ARGUMENT 2

I. THE FIRST AMENDMENT'S RELIGION CLAUSES PREVENT CIVIL COURTS FROM ADJUDICATING EMPLOYMENT-DISCRIMINATION CLAIMS BROUGHT BY AN EMPLOYEE AGAINST HER RELIGIOUS EMPLOYER, WHEN THE EMPLOYEE CARRIES OUT IMPORTANT RELIGIOUS FUNCTIONS 3

A. The "Ministerial Exception" Is Grounded in the First Amendment Religion Clauses and Has Been Applied by Courts for Decades 3

B. This Court Affirmed the Ministerial Exception in *Hosanna-Tabor* and Set Forth Nonrigid Guidelines in Applying It. 6

TABLE OF CONTENTS (cont.)

C. Both Biel and Morrissey Are “Ministers” According to *Hosanna-Tabor* and Their Employment Discrimination Claims Must Be Barred..9

1. Kristen Biel Was a Minister Within the *Hosanna-Tabor* Meaning............9

2. Agnes Morrissey-Berru Was a Minister Within *Hosanna-Tabor* Meaning 11

II. THE EEOC’S INTERFERENCE WITH NINTH CIRCUIT PRECENDENT EVIDENCES A DANGEROUS VIOLATION OF THE SEPARATION OF POWERS..14

CONCLUSION..18

TABLE OF AUTHORITIES

CASES

Alcazar v. Corp. of the Catholic Archdiocese of Seattle, 627 F.3d 1288 (9th Cir. 2010) 6

Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. 2003) 5

Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) 3

Biel v. St. James School, 911 F.3d 603 (9th Cir. 2018) 7, 10, 12, 16

Biel v. St. James School, 2017 U.S. Dist. LEXIS 220747 (W.D. Cal. 2017) 10

Conlon v. Intervarsity Christian Fellowship/USA, 777 F.3d 829 (6th Cir. 2015) 17

Cannata v. Catholic Diocese of Austin, 700 F.3d 169 (5th Cir. 2012) 8

City of Arlington v. FCC, 596 U.S. 290 (2013).........15

Curl v. Beltsville Adventist Sch., 2016 U.S. Dist. LEXIS 108372 (D. Md. 2016) 17

EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996) 5

EEOC v. Pacific Press Publishing Ass'n,
676 F.2d 1272 (9th Cir. 1982) 5

EEOC v. R.G., 884 F.3d 560 (6th Cir. 2018) 7

EEOC v. Roman Catholic Diocese,
213 F.3d 795 (4th Cir. 2000) 5

Elvig v. Calvin Presbyterian Church,
375 F.3d 951 (9th Cir. 2004) 6

Everson v. Bd. of Education, 330 U.S. 1 (1947) 3

Fratello v. Archdiocese of New York,
863 F.3d 190 (2d Cir. 2017) 7, 8

Ginalski v. Diocese of Gary, 2016 U.S. Dist. LEXIS
168014 (N.D. Ind. 2016) 18

Grussgott v. Milwaukee Jewish Day School, Inc.,
882 F.3d 655 (7th Cir. 2018) 18

Grussgott v. Milwaukee Jewish Day Sch. Inc.,
260 F. Supp. 3d 1052 (E.D. Wis. 2017) 18

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016) 15

Hollins v. Methodist Healthcare, Inc.,
474 F.3d 223 (6th Cir. 2007) 5

*Hosanna-Tabor Evangelical Lutheran
Church and School v. EEOC*,
565 U.S. 171 (2012) ....*passim*

Hutson v. Concord Christian Sch., LLC, 2019 U.S. Dist. LEXIS 190839 (E.D. Tenn. 2019) 7

Kendroff v. Saint Nicholas Cathedral of Russian Orthodox Church of N. Am., 344 U.S. 94 (1952) 4

Kingdomware Techs, Inc. v. U.S., 136 S. Ct. 1969 (2016) 16

Lynch v. Donnelly, 465 U.S. 668 (1984) 3

McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) 2, 4

Morrissey-Berru v. Our Lady of Guadalupe School, 769 Fed. Appx. 460 (9th Cir. 2019)...7, 13

Morrissey-Berru v. Our Lady of Guadalupe School, 2017 U.S. Dist. LEXIS 217504 (C.D. Cal. 2017)..12

Perez v. Mort. Bankers Ass'n, 135 S. Ct. 1199 (2015) 15

Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006) 5

Puri v. Khalsa, 844 F.3d 1152 (9th Cir. 2017) 11

Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.3d 1164 (4th Cir. 1985) 5

Rogers v. Salvation Army, 2105 U.S. Dist. LEXIS 61112 (E.D. Mich. 2015) 17

Stern v. Marshall, 564 U.S. 462 (2011) 15

Van Orden v. Perry, 545 U.S. 677 (2005) 3

Walz v. Tax Com. of New York, 397 U.S. 664 (1970)...3

STATUTES, RULES, AND REGULATIONS

42 U.S.C. § 2000e-4, *et seq.* 15

42 U.S.C. § 12101, *et seq.* 15

OTHER AUTHORITIES

EEOC's *Amicus* Brief in Support of Plaintiff/Appellant, *Biel v. St. James School*, No. 17-55180, Docket No. 25 (9th Cir. Sept. 27, 2017) 16

The Federalist No. 78 (C. Rossiter ed. 1961) (A. Hamilton)..15

Stephen Breyer, Symposium: Festschrift in Honor of Paul R. Verkuil: The Executive Branch, Administrative Action, and Comparative Expertise, 32 Cardozo L. Rev. 2189 (2011)........15

U.S. Equal Employment Opportunity
Commission, “About EEOC,” found at
https://www.eeoc.gov/eeoc/ 14, 15

INTEREST OF THE *AMICUS CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit, educational foundation that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and has appeared as an *amicus curiae* in this Court on a number of occasions.

Judicial Watch seeks to participate as *amicus curiae* for two reasons. First, Judicial Watch believes this is an important opportunity for the Court to clarify its holding in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) ("*Hosanna-Tabor*") and instruct the lower courts on how to apply the ministerial exception. Second, this case highlights dangerous overreach of the administrative state and a threat to Americans' religious liberties. As discussed herein, this case involved improper interference of a federal agency, the Equal Employment Opportunity Commission ("EEOC"), in these important religious freedom cases.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amicus* certifies that Petitioners have given blanket consent to the filing of *amicus* briefs and Respondents granted consent in writing. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In 2012 this Court issued a unanimous decision confirming a "ministerial exception" to employment discrimination claims against religious employers and their "ministers" and established guidelines on how to apply the exception. *Hosanna-Tabor*, 565 U.S. 171 (2012). The Court made very clear that the guidelines established were not to be adopted as "a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. Unfortunately, many if not most lower courts have applied the specific four factors used by the Court in *Hosanna-Tabor* as exactly that: a rigid test. Despite this misapplication, most of the same courts have rightfully focused on the "function factor" and correctly applied the general principle this Court articulated. However, in a departure from nearly all other federal and state courts, and even from its own precedent, the Ninth Circuit misconstrues *Hosanna-Tabor* in both *Biel v. St. James School* and *Morrissey-Berru v. Our Lady of Guadalupe School* and whittles away First Amendment religious liberties.

ARGUMENT

The "ministerial exception" has been recognized as an exception to employment discrimination lawsuits and applied by courts since the Fifth Circuit's holding in *McClure v. Salvation Army*. 460 F.2d 553, 560-61 (5th Cir. 1972). In *Hosanna-Tabor* this Court affirmed the ministerial exception doctrine, its roots and application.

I. THE FIRST AMENDMENT'S RELIGION CLAUSES PREVENT CIVIL COURTS FROM ADJUDICATING EMPLOYMENT-DISCRIMINATION CLAIMS BROUGHT BY AN EMPLOYEE AGAINST HER RELIGIOUS EMPLOYER WHEN THE EMPLOYEE CARRIES OUT IMPORTANT RELIGIOUS FUNCTIONS.

As citizens of the United States, our rights and responsibilities do not exist in a bubble. Frequently they come into direct contact and conflict with other citizens' rights. Such are the cases at issue here: a confrontation between the religious liberties guaranteed in the First Amendment Religion Clauses and employee protections against discrimination in Title VII of the Civil Rights Act ("Title VII"). Courts of law are tasked with weighing the respective rights and striking a balance. The ministerial exception is one such balancing act.

A. The "Ministerial Exception" Is Grounded in the First Amendment Religion Clauses and Has Been Applied by Courts for Decades.

The Court has on many occasions discussed in great depth the origin of our First Amendment Religion Clauses. *See e.g., Everson v. Bd. of Education*, 330 U.S. 1 (1947), *Walz v. Tax Com. of New York*, 397 U.S. 664 (1970), *Lynch v. Donnelly*, 465 U.S. 668 (1984), *Van Orden v. Perry*, 545 U.S. 677 (2005), *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019), These discussions remain by and large

the same regardless of the myriad of situations to which the Religion Clauses are applied. Employment disputes between religious employers and their employees are included in this myriad. In *Kendroff v. Saint Nicholas Cathedral of Russian Orthodox Church of North America*, 244 U.S. 94, 116 (1952), the Court explicitly found that in matters of "church government as well as those of faith and doctrine," religious organizations had the right to be free from governmental interference. Included in this guaranteed right to be free from governmental interference was the "freedom to select clergy." *Id.*

Lower courts began applying *Kendroff* to employment discrimination cases after the passage of Title VII. In *McClure v. Salvation Army*, the Fifth Circuit succinctly memorialized the Court's reasoning and held "Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister." *McClure*, 460 F.3d at 560-61. It is this language which is credited for coining the "ministerial exception." Subsequent to *McClure*, lower courts tackled the confrontation of rights in religious employment disputes much the same: Title VII cannot be applied to "claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor*, 565 U.S. at 188; *id* at n.2. Courts also applied the exception to a wide variety of religious employers and employees and did not restrict the exception to heads of religious congregations. *Hosanna-Tabor*, 565 U.S. at 664.

For example, in *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000), the plaintiff school music director and part-time music teacher at the Catholic elementary school was barred by the ministerial exception from bringing an employment discrimination lawsuit. The Fourth Circuit held that music was an integral aspect of religious worship and as such, the plaintiff's "primary duties consist of teaching, spreading the faith . . . or supervision or participation in religious ritual and worship." *Id*. at 803 (quoting *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.3d 1164, 1169 (4th Cir. 1985)). Plaintiff was considered by the court to be a "minister" for the purposes of the exception. *Id*. And in *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003), the Seventh Circuit held that the plaintiff, an Hispanic communications manager, "can functionally be classified as ministerial." The court looked at the plaintiff's duties and determined the plaintiff "served a ministerial function." *Id*. at 704.

While the circuits have not articulated one specific method of applying the *McClure* holding, lower courts generally looked to the "function of the position" rather than to titles or ordination. *See e.g., EEOC v. Catholic University of America*, 83 F.3d 455, 463 (D.C. Cir. 1996), *Petruska v. Gannon Univ.*, 462 F.3d 294, 304, n. 6 (3d Cir. 2006), *Rayburn*, 772 F.3d at 1168-69, *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007), *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1278 (9th Cir. 1982) (plaintiff's duties did not "fulfill the function of a minister").

The Ninth Circuit has followed this general application as well. *In Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010), the Ninth Circuit held the plaintiff seminarian was a "minister" within the meaning of ministerial exception because, unlike the secretary in *Pacific Press Publishing Ass'n*, the plaintiff's role went to the "heart of the church's function." And in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 959 (9th Cir. 2004), the Ninth Circuit held that the plaintiff employee was barred from pursuing claims which "necessarily involve an inquiry into the Church's decision to terminate her ministry." The Court rested its "function over ordination" decision on similar circuits which had focused their analysis primarily on the function served by the employee. *Id*. at n.3; *see also Hosanna-Tabor*, 565 U.S. at 204 (Alito, J. and Kagan, J., concurring and noting the Ninth Circuit's use of a "functional approach.")

B. This Court Affirmed the Ministerial Exception in *Hosanna-Tabor* and Set Forth Nonrigid Guidelines in Applying It.

Recognizing the lower courts' application of the ministerial exception, this Court affirmed the existence of such an exception and its grounding in the Religion Clauses in the unanimous *Hosanna-Tabor* decision. 565 U.S. at 664. The Court, analyzing "all of the circumstances of [plaintiff's] employment," concluded the plaintiff was a minister and her discrimination lawsuit was barred by the ministerial exception. *Id*. at 664. Prior to examining

the facts particular to the case, the Court very firmly held that "we are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* The Court then analyzed several factors pertinent to the case. At no point in the opinion did the Court state that subsequent cases involving the ministerial exception must examine the same factors. In fact, the clear language against requiring a "rigid formula" would contradict such a conclusion.

Unfortunately, much of the ministerial exception case law subsequent to *Hosanna-Tabor* has resulted in exactly what this Court cautioned against: a rigid formula. Courts have taken the four factors considered in *Hosanna-Tabor* and applied them as a test – despite several factors being factually irrelevant in many cases. *See e.g.*, *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018); *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 Fed. Appx. 460 (9th Cir. 2019); *EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018); *Hutson v. Concord Christian Sch., LLC*, 2019 U.S. Dist. LEXIS 190839 (E.D. Tenn. 2019). Employing the four factors recognized as relevant in *Hosanna-Tabor* to all cases creates an inequity among classes of religious employers. *See e.g., Hosanna-Tabor*, 565 U.S. at 202, n.3, n.4 (Alito, J. and Kagan, J., concurring); *Fratello v. Archdiocese of NY*, 863 F.3d 190, 207 (2d Cir. 2017).

Even circuits which followed this Court's lead in *Hosanna-Tabor* and expressed a desire to refrain from analyzing the facts of each case without the rigidity of particular factors, pay lip service to the four

factors. For example, in *Fratello v. Archdiocese of NY*, the Second Circuit expressly held that *Hosanna-Tabor* "instructs only as to what we might take into account as relevant, including the four considerations on which it relied; it neither limits the inquiry to those considerations nor requires their application in every case." *Fratello*, 863 F.3d at 204-05. Despite this language, the court analyzed the four *Hosanna-Tabor* factors. Determining that "the substance of the employee's responsibilities in their positions is far more important [than title]," the court concluded that the lay plaintiff principal at the Catholic school "performed several important religious functions as the School's principal." *Id*. at 206, 209 (internal citation omitted).

And in *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (6th Cir. 2012), the Sixth Circuit held that "application of the [ministerial] exception, however, does not depend on a finding that *Cannata* satisfies the same considerations that motivated the Court to find that [the plaintiff in *Hosanna-Tabor*] was a minister within the meaning of the exception." Notwithstanding this strong language against rigidity, the court considered the same four *Hosanna-Tabor* factors and concluded the plaintiff music director was a minister within the meaning of the exception. *Id*. at 180.

Amicus respectfully suggests, in addition to reversing the Ninth Circuit in both cases before it, the Court clarify its *Hosanna-Tabor* holding to reduce the misapplication of the ministerial exception. The Court can do so by explicitly stating that the four

factors used on *Hosanna-Tabor* are not required and are not exclusive. *Amicus* further suggests adopting the language used by Justices Alito and Kagan in their *Hosanna-Tabor* concurring opinion, specifically that, "courts should focus on the function performed by persons who work for religious bodies." 565 U.S. at 198 (Alito, J. and Kagan, J., concurring). This focus would avoid situations like the Ninth Circuit's forced application of factors that could never be satisfied because of a faith's particular doctrine.

C. Both Biel and Morrissey Are "Ministers" According to *Hosanna-Tabor* and Their Employment Discrimination Claims Must Be Barred.

Applying *Hosanna-Tabor* in its truest sense and rejecting a rigid test, it is clear that both Kristen Biel and Agnes Morrissey-Berru are ministers as used in the ministerial exception.

1. Kristen Biel Was a Minister Within the *Hosanna-Tabor* Meaning.

The parties have laid out the facts of this case in the manner most beneficial to their client. The important facts are not, however, in dispute and demonstrate the District Court's holding was correct. Biel was hired as a full-time teacher at St. James Catholic School. St. James School v. Biel, Docket No. 19-348, Petition for Writ of Certiorari ("St. James Petition") at 6. Biel taught the fifth grade and was responsible for teaching all subjects, including religion. *Biel v. St. James Sch.*, 2017 U.S. Dist.

LEXIS 220747, *2-3 (C.D. Cal., Jan. 24, 2017). Biel was responsible for engaging her class in daily prayers and attending school Masses. St. James Petition at 7. Biel's contract, signed by both the parish pastor and the school principal, also required Biel to incorporate the Catholic faith throughout the entire curriculum and in her classroom. St. James Petition at 6-7; *see also Biel*, 2017 U.S. Dist. LEXIS 220747 at 2-6.

The District Court found that the St. James School established a prima facie case that Biel was a minister because her job duties "demonstrate that her 'job duties reflected a role in conveying the Catholic Church's message and carrying out its mission." *Id*. at 6-7 (quoting *Hosanna-Tabor*, 565 U.S. at 192). In acknowledging that case did not contain "all of the hallmarks of ministry identified in *Hosanna-Tabor*," the District Court held that the primary inquiry was "whether the claims at issue may interfere with St. James' Catholic ability to choose who will convey its message." *Id*. at 7.

Disregarding this Court's refusal to impose a rigid test, the Ninth Circuit declared that Biel, under the "totality of the circumstances," was not a minister. *Biel*, 911 F.3d at 608-09. *Hosanna-Tabor* simply does not support this holding. The court applied each of the factors relevant in *Hosanna-Tabor*, and tried to jam Biel into each of them. Then, as it proved impossible to do so, the court concluded that absent multiple *Hosanna-Tabor* factors, no religious employer who fails to use the title "minister," will be protected by the ministerial exception. Thus, the Ninth Circuit

invents a new criterion for application of the ministerial exception: leadership. *See infra*, § II.

Biel's students received all their educational religious instruction from Biel. It was she who conveyed the teachings of the Catholic Church to her students – in religion class, infused in all the other classes, throughout her classroom, in prayer, at Mass, and through her contractual responsibility to model the faith. Biel was hired to "personify [St. James'] beliefs." *See Puri v. Khalsa*, 844 F.3d 1152, 1159 (9th Cir. 2017) (quoting *Hosanna-Tabor*). Biel clearly carried out important religious functions. As held by the District Court, this is a prima facie case of ministerial exception.

2. Agnes Morrissey-Berru Was a Minister Within *Hosanna-Tabor* Meaning.

As in the *Biel* case, the essential facts are not in dispute here and clearly demonstrate that the District Court correctly held Morrissey-Berru to be a minister for the purposes of the ministerial exception. Morrissey-Berru was hired as a full-time teacher for Our Lady of Guadalupe School. *Our Lady of Guadalupe School v. Morrissey-Berru*, ("Our Lady Petition") Docket No. 19-267, Petition For a Writ of Certiorari at 6. Morrissey-Berru first taught sixth grade and then fifth grade and was responsible for teaching all subjects, including religion. *Id*. at 6, 8. Morrissey-Berru was responsible for instructing and leading her class in daily prayers, attending school Masses, and preparing her students to read Scripture

at Mass. *Id*. at 8. Morrissey-Berru directed her students in the annual Passion Play and took her students on religiously inspired outings to serve at Masses. *Id*. at 8-9. Morrissey-Berru's contract, signed by the parish pastor, also required Morrissey-Berru to incorporate the Catholic faith throughout the entire curriculum and in her classroom. *Id*. at 5-6; *see also Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 2017 U.S. Dist. LEXIS 217504, *6 (C.D. Cal. 2017).

The District Court, applying *Hosanna-Tabor* as well as Ninth Circuit precedent in *Puri*, held Morrissey-Berru was a minister of Our Lady of Guadalupe School as she "clearly sought to carry out the School's mission." *Morrissey-Berru*, 2017 U.S. Dist. LEXIS 217504 at *6. The Court looked at Morrissey-Berru's "actual duties" and concluded the ministerial exception applied. *Id*. at 5-6.

Relying on its decision in *Biel v. St. James School*, the Ninth Circuit issued a summary three-page opinion reversing the District Court. Interestingly, the Ninth Circuit never addressed several factors it relied on in *Biel*. For example, in *Biel* the Ninth Circuit states that many of the cases relied on by St. James School are inapposite because "the plaintiffs in those cases had responsibilities that involved pronounced religious leadership and guidance." *Biel*, 911 F.3d at 610. The court then lists several examples of cases where the employees fit such criteria. *Id*. at n.4. Included in those examples were overseeing daily prayers and planning Masses (*Fratello*), actively participating in the sacrament and having

independent authority to oversee religious activities (*Cannata*). *Id*. These responsibilities are clearly present in the *Morrissey-Berru* case. As a lay teacher Morrissey-Berru oversaw daily prayer and the planning of her class Mass as well as preparing her studentS to read the Scripture during the Mass. Morrissey-Berru also exercised independent authority in the realm of infusing the Catholic faith in the classroom, directing the Passion Play, and organizing and attending extracurricular religious outings. Yet the Ninth Circuit ignores all these previously important responsibilities and rests instead on a laconic reversal.

In addition to ignoring its own analysis in *Biel*, the Ninth Circuit's reversal failed again to employ the meaning of *Hosanna-Tabor*. The court paid lip service to this Court's rejection of a rigid test and then proceeded to apply the four factors as a rigid test and hold that while Morrissey-Berru "did have significant religious responsibilities as a teacher . . . an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework." *Morrissey-Berru*, 769 Fed. Appx. 460. This is not supported by *Hosanna-Tabor* and, in fact, contradicts it.

Morrissey-Berru was responsible for the religious instruction of her students. This came in the form of religion classes and infusing the faith into other classes, the classroom, and during extracurricular activities. She further conveyed the teachings of the Catholic Church to her students through attending Masses, planning for class Masses and preparing her students to read Scripture. Morrissey-Berru

extended her religious instruction to directing the annual Passion Play. Given the magnitude of her religious duties as a lay teacher, Morrissey clearly "performed an important role in transmitting the [Catholic] faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 192. Morrissey-Berru carried out important religious functions. For the purposes of the ministerial exception, Morrissey-Berru was a minister in accordance with this Court's precedent.

The Ninth Circuit's decisions in both *Biel v. St. James Sch.* and *Morrissey-Berru v. Our Lady of Guadalupe Sch.* should be reversed and the Court's *Hosanna-Tabor* holding clarified to expressly instruct lower courts to focus on the religious function and duties of the employee.

II. THE EEOC'S INTERFERENCE WITH NINTH CIRCUIT PRECENDENT EVIDENCES A DANGEROUS VIOLATION OF THE SEPARATION OF POWERS.

While it is clear that many lower courts have misapplied the *Hosanna-Tabor* holding, the Ninth Circuit's misapplication causes greater concern as it permitted a federal agency to affect its precedent. The EEOC is a federal agency with the stated responsibility of "enforcing federal laws that make it illegal to discriminate against a job applicant or an employee" for particular criteria like age, race, and gender. *See* U.S. Equal Employment Opportunity Commission, "About EEOC," found at https://www.eeoc.gov/eeoc/. The EEOC "has the

authority to investigate charges of discrimination against employers" and "provides leadership and guidance to federal agencies on all aspects of the federal government's equal employment opportunity program." *Id.* The EEOC's source of authority is congressional. 42 U.S.C. § 2000e-4. Its proper responsibility is to enforce the law. *See* 42 U.S.C. 12101, *et seq*.

This Court has expressed concern over the accumulation of power by federal agencies and the role of the courts to maintain checks and balances. *See e.g., Perez v. Mort. Bankers Ass'n*, 135 S. Ct. 1199, 1210-1213 (2015) (Alito, J., Scalia, J., and Thomas, J., concurring); *City of Arlington v. FCC*, 596 U.S. 290, 327 (2013) (Roberts, J., dissenting); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-50 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* Stephen Breyer, Symposium: Festschrift in Honor of Paul R. Verkuil: The Executive Branch, Administrative Action, and Comparative Expertise, 32 Cardozo L. Rev. 2189, 2195 (2011) (referring to the possibility of agency "tunnel-vision"). To ensure a properly functioning government, each branch must exercise its own authority and responsibilities and none other. "In establishing the system of divided power in the Constitution, the Framers considered it essential that 'the judiciary remain [ ] truly distinct from both the legislature and the executive." *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (quoting The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton); *see also Perez*, 575 U.S. at 124-26 (explaining the separation of powers and danger of executive agencies' overreach). While the EEOC may have opinions, it

should not be an advocate for changes in law and certainly should not mislead courts on the state of the law. Moreover, courts should not be swayed by such efforts by another branch of government.

Any interpretative power the EEOC possesses is limited to statutory ambiguities within those statutes relevant to its congressionally mandated authority. *See e.g., Kingdomware Techs, Inc. v. U.S.*, 136 S. Ct. 1969, 1979 (2016) (explaining the conditions for *Chevron* deference). The ministerial exception is not rooted in statute. It is rooted in the First Amendment Religion Clauses and has been interpreted by the proper branch: the judiciary. While the EEOC may certainly offer its opinions on legal precedent, it does not possess the authority to change it. Courts which permit EEOC interference to impact legal precedent are violating the separation of powers.

In *Biel*, the Ninth Circuit effectively added a new criterion for applying the ministerial exception: serving in a leadership role. *Biel*, 911 F.3d at 611. Nowhere in *Hosanna-Tabor* did this Court hold that the ministerial exception did not apply to "employees who do not serve a leadership role in the faith." *Id*. This "leadership role" language is found in the EEOC's *Amicus* Brief in Support of Plaintiff/Appellant ("EEOC Brief") in the *Biel* appeal. *Biel v. St. James School,* No. 17-55180, Docket No. 25, (9th Cir. Sep't, 27, 2017). In its brief, the EEOC claimed:

> Since *Hosanna-Tabor* was decided courts have applied the ministerial exception to

> individuals who performed a leadership role in guiding the spiritual direction of a church, it's religious services, or a parochial school . . . . . [B]ut where an employee's duties did not involve a spiritual leadership role, courts both pre- and post-Hosanna-Tabor have declined to apply the ministerial exception.

Id. at 24.

As evidence of this claim, the EEOC cited two federal appellate cases and four federal district cases. *Id*. at 24-26. Contrary to the EEOC's claim, courts have applied the ministerial exception in a wide variety of cases without requiring a leadership factor. For example, in *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829 (6th Cir. 2015), the Sixth Circuit held that a spiritual director of an evangelical campus mission was a minister within the meaning of *Hosanna-Tabor*. *Conlon*, 777 F.3d at 835. In applying the four *Hosanna* factors, the Sixth Circuit specifically declined to require leadership as a factor in applying the ministerial exception. *Id*. at 835. *See also Rogers v. Salvation Army*, 2105 U.S. Dist. LEXIS 61112 (E.D. Mich. 2015) (exception applied to plaintiff who held position of spiritual advisor without any independent leadership role); *Curl v. Beltsville Adventist Sch.*, 2016 U.S. Dist. LEXIS 108372 (D. Md. 2016) (exception applied to plaintiff teacher whose duties included teaching religious music, prayer services, and secular responsibilities); *Ginalski v. Diocese of Gary*, 2016 U.S. Dist. LEXIS 168014 (N.D. Ind. 2016) (exception

applied to school principal whose "leadership" was equated with infusing Catholic theology into every aspect of duty); *Grussgott v. Milwaukee Jewish Day Sch. Inc.*, 260 F. Supp. 3d 1052 (E.D. Wis. 2017), aff'd *Grussgott v. Milwaukee Jewish Day Sch. Inc.*, 882 F.3d 655 (7th Cir. 2018) (exception applied to teacher at a Jewish school without any discussion of leadership).

The EEOC's contention is simply erroneous and an excellent example of why federal agencies should not advocate for a particular interpretation of law. Having a worthy goal (prevention of employment discrimination) does not negate the need for properly adhering to legal precedent. Violating the First Amendment and infringing upon the separation of powers does not make good law. The Ninth Circuit erred in its holdings and erred again by permitting the EEOC's influence to affect this important area of law.

CONCLUSION

Hosanna-Tabor affirmed the existence of the ministerial exception and provided guidelines for its application. Both Biel and Morrissey-Berru performed significant religious functions in their roles as teachers and under the *Hosanna-Tabor* guidelines, are ministers within the meaning of the ministerial exception. *Amicus* respectfully requests that the Court reverse the Ninth Circuit holdings in both *Biel* and *Morrissey-Berru*. Additionally, *amicus* respectfully requests that the Court clarify its

Hosanna-Tabor holding and affirm the language in Justice Alito and Justice Kagan's concurring opinion.

Respectfully submitted,

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