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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Ninth Circuit Court of Appeals correctly held—after an intensive, fact-specific inquiry into the circumstances of Respondent's employment with Petitioner—that a teacher at a private Catholic school was not a "minister" for purposes of the ministerial exception, where:

- the school neither required its teachers to be Catholic, nor required them to have any training, experience, or education in religion or in teaching the Catholic faith;
- the teacher at hand did not have any formal training, degrees, or certificates with regard to teaching the Catholic faith when she was hired by Petitioner;
- the school regarded its teachers as "lay" employees, and the school itself attributed a completely secular title of "teacher" to them;
- the teacher at hand neither considered herself a "minister," nor held herself out as one;
- although the teacher taught religion, it was only one of numerous subjects she taught to her students, the remainder of which were secular subjects;
- the teacher prayed alongside her students, but did not lead them in prayer;
- the teacher merely accompanied her students to monthly school mass, but did not lead any part of the mass or participate in presenting the Eucharist; and

- the teacher did not lead her students, the school, or the community in any other Catholic rituals or practices?

In other words, when employed by a private religious school, does a teacher's mere incorporation of religion and Catholic ideals into at least some aspect of the curriculum automatically render that teacher a "minister" for purposes of the ministerial exception, notwithstanding that *only one* of the four considerations enumerated by the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) weighs in favor of finding that teacher a "minister"?

Must all teachers employed by private religious schools be deemed "ministers" under the ministerial exception and—therefore barred from bringing employment discrimination claims—if they are required to incorporate religion into the school curriculum and attend monthly school mass with their students, even if they have a secular title, do not participate or lead mass or any other religious rituals, have no prior education or training in religion, and neither they nor the private school hold them out to the community as "ministers" or religious leaders?

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INTRODUCTION

The question presented in this case is not whether the Religious Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee who carried out some [minimal] religious functions; rather, the question is whether the Ninth Circuit erred in concluding that the late Kristen Biel[1] was not a "minister" for purposes of the ministerial exception based on the Ninth Circuit's totality-of-the-circumstances approach in analyzing Biel's employment with Petitioner. **The answer to that question is a resounding "*no*."**

In 2012, this Court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) and held that Cheryl Perich was a "minister" covered by the ministerial exception. *Id.* at 192. In deciding the issue, the Court found that there was no need "to adopt a rigid formula for deciding when an employee qualifies as a minister" because "given all the circumstances of

[1] After battling breast cancer for years, Kristen Biel sadly succumbed to the vicious disease on June 7, 2019. *See* Docket Entry 112. Kristen Biel is survived by her husband, Darryl Biel, and has been substituted by him in his capacity as the personal representative of her estate. Pet.App. 68a; Docket Entry 114. Unless otherwise noted in this Brief, reference to "Biel" is to Kristen Biel.

[Perich's] employment" – including considering formal title, substance reflected in that title, her own use of that title, and the important religious functions she performed for the religious organization – she was covered by the ministerial exception. *Id.* at 190-192.

Hosanna-Tabor validated the "ministerial exception" to employment discrimination suits because a church or religious group "must be free to choose those who will guide it on its way"; however, *Hosanna-Tabor* did not give religious organizations a green light to engage in unlawful discrimination against its *other* employees who hold no leadership role in the faith.

After *Hosanna-Tabor*, the lower courts – including the Ninth Circuit – have consistently interpreted the ministerial exception. *See, e.g.*, *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 174, 175-176 (5th Cir. 2012) (calling it a "totality-of-the-circumstances analysis"); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834-835 (6th Cir. 2015) (stating the *Hosanna-Tabor* Court did not "adopt a rigid formula for deciding when an employee qualifies as a minister"). The Ninth Circuit in *Puri v. Khalsa*, 844 F.3d 1152 (9th Cir. 2017), and more recently in the underlying matter, *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), recognized

there is not a rigid formula for deciding when an employee qualifies as a minister; instead, courts should analyze *all* of the circumstances of the employment, as the United States Supreme Court did in *Hosanna-Tabor* just seven years ago. *See Biel v. St. James School*, 911 F.3d at 607-609; *Puri v. Khalsa*, 844 F.3d at 1159-1162.

And, yet, despite this unity among the various circuit courts as to the approach for determining whether an employee is a "minister" under the ministerial exception, Petitioner requests this Court overrule *Hosanna-Tabor* and adopt – in essence – a "function-only" test. Petitioner argues that while this "is not an exclusive inquiry," courts should put their primary focus on the "important religious functions" of the position such that if the individual employee performs even a single religious function, that employee would be covered under the ministerial exception as a "minister." **Such a new and rigid test is *not* tenable.**

Accordingly, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

I. Kristen Biel's Employment With St. James School

Within a few years of obtaining her Bachelor of Arts degree in liberal studies and her teaching credential from California State University of Dominguez Hills, Kristen Biel ("Biel") began working for St. James School as a long-term substitute for one of the two first grade teachers that was on maternity leave. Pet. App. 4a; ER[2] 210-212, 215-216. In that role, Biel was a "team teacher," i.e., she taught first grade two days a week, while the other teacher taught the same class three days a week. ER 216. Biel concluded that long-term substitute position at the end of the 2012-2013 school year. ER 217.

A. Kristen Biel signed a faculty employment agreement with St. James School for the position of "Grade 5 TEACHER"

St. James School's principal at the time, Sister Mary Margaret, hired Biel as a full-time fifth-grade teacher for the 2013-2014 school year. Pet. App. 4a; ER 217. With regard to that position, in May 2013, Biel signed an employment contract titled "Faculty Employment Agreement - Elementary" which

[2] "ER" refers to the Ninth Circuit's excerpts of record in the underlying appeal (Appeal No. 17-55180), which are available at Docket Entry 21.

identified the position as "Grade 5 Teacher". Pet. App. 96a-105a; ER 218, 277-281.

St. James School did *not* hold Biel out to the community as a minister or religious leader, such as by suggesting that she had any special expertise in Church doctrine, values, or pedagogy. Pet. App. 11a.

B. Kristen Biel had no significant degree of religious training prior to working at St. James School or before being offered the Grade 5 Teacher position

Biel was not required to undergo any religious training before beginning either of her teaching positions at St. James School; in fact, the only education she had obtained prior to her employment with St. James School was a Bachelor Degree in liberal studies and a teaching credential from California State University of Dominguez Hills, both obtained in 2009. Pet. App. 4a-5a; ER 210-212.

Even after Biel began working as a teacher at St. James School, the only religious education she received was a one-day training that lasted "four or five hours" and which took place after Biel was already working as a full-time teacher. Pet. App. 4a-5a; ER 230-232, 234. At that one-day conference, teachers took education classes mostly, which included some classes where they were taught things like "[d]ifferent technique on teaching and

incorporating God" and "[o]ther classes showed [the teachers] how to do art and make little pictures or things like that." Pet. App. 4a-5a; ER 232-234.

C. St. James School does *not* limit its teaching positions only to those who are Catholic

Although Biel herself was Catholic, and although St. James preferred to hire Catholic teachers, being Catholic was not actually a requirement for teaching positions at St. James School. Pet. App. 4a.

D. During her employment with St. James School, Kristen Biel did not hold herself out as any sort of "minister" or religious leader of the church

Biel always held herself out as a teacher, and nothing more. Pet. App. 12a. She did not describe herself as "called" to minister the faith or any other similar religious representation; rather, she described her position merely as a full-time "fifth grade teacher." Pet. App. 12a; ER 217.

E. Kristen Biel's job duties as a 5th Grade Teacher did not reflect those of a "minister" or a religious church leader

As a full-time teacher, Biel taught numerous subjects as part of the regular curriculum, and one of those subjects was religion. Pet. App. 5a; ER 588. Biel was directed to teach a certain number of minutes per week for various subjects. ER 735.

Biel testified that she taught religion to her fifth graders for about thirty minutes on four out of the five school days a week, totaling approximately 120 minutes of religion education each week. Pet. App. 5a; ER 224-225. The religion curriculum entailed reading from a pre-selected workbook required for the religion curriculum at St. James School, called "Coming to God's Life", and answering questions from the workbook. Pet. App. 5a, 13a; ER 225, 666, 677-682. Biel was required to follow—and did follow—the instructions in the workbook when teaching her class the religion curriculum. Pet. App. 13a; ER 225-226.

Aside from teaching out of the mandated religion workbook, Biel also accompanied her students to mass once a month, which was not held in the church, but in a multi-purpose room at the school. Pet. App. 5a, 13a; ER 227. The school mass was conducted either by a Catholic priest or was led by Sister Mary Margaret or Sister Lana. ER 228. Biel did not lead mass; her sole role during the school masses was "[t]o make sure the kids were quiet and in their seats." Pet. App. 5a, 13a; ER 228-229.

Even Biel's students had very limited participation with the school masses. *Id.* Only twice a year, Biel's students would present the Eucharist at the school mass, although it was on a volunteer

basis. *Id.* Biel testified that the students were already trained on "bringing the gifts" (i.e., the Eucharist), and she did not think she ever did rehearsal with them since most of them knew how to present the Eucharist already. *Id.*

F. After her class was observed in November 2013, Kristen Biel received an overall positive performance review

In November 2013, St. James School's principal performed an observational review of Biel's classroom teaching. Pet. App. 6a; ER 234, 447-448, 499-501. Biel earned an overall "good review". Pet. App. 6a; ER 447-450, 500.

G. In mid-April 2014, Kristen Biel learned she had breast cancer in and informed St. James School right after the diagnosis

During Easter vacation that school year (on or around April 20, 2014), Biel learned that she had breast cancer. Pet. App. 6a; ER 258. Biel informed the principal that she had been diagnosed with breast cancer the following week, upon returning to school from Easter break. Pet. App. 6a; ER 259.

Around late April or early May 2014, Biel notified the principal that her doctor wanted her to start her first chemotherapy treatment on May 27th, that he recommended she not work full time while

undergoing chemotherapy treatment, and that her last day would be May 22nd. ER 259-261, 464-466.

H. Biel did not learn that St. James School was not renewing her employment contract until she followed up with the principal about the status of her employment in June 2014

According to the terms of the Faculty Employment Agreement signed by Biel in May 2013, St. James School must provide notice on or before May 15 at the end of the school year as to whether it intends to offer her a new employment contract for the following school year. Pet. App. 100a-101a; ER 441, 484. Biel only learned that St. James School would not be renewing her contract in June 2014, however, when she attended a meeting she had arranged to inquire about the status of her employment contract. ER 263-265. At that point, the principal told Biel that St. James School would not be renewing her employment contract because Biel "was not strict" and "it wouldn't be fair to the students to have two teachers in one school year." Pet. App. 6a-7a; ER 263-264, 265-266, 272.

The principal later testified that there would have been no burden on St. James School to have two teachers in the same year, and in fact, it had done so in prior years went teachers went on maternity leave. ER 475-476.

II. The Proceedings Below

A. In the United States District Court of the Central District of California

On June 5, 2015, Kristen Biel filed a civil complaint in the United States District Court, Central District of California, pursuant to 28 U.S.C. § 1331, based on Biel's allegations of violations of the laws of the United States of America. ER 853-862, 865. Specifically, Biel alleged that St. James School terminated Biel in violation of the Americans with Disabilities Act of 1990 ("ADA"), which prohibits employment discrimination based on disability. Pet. App. 7a; ER 853-862. *See* 42 U.S.C. § 12112(a).

Following discovery, St. James School filed a motion for summary judgment, arguing that Biel's ADA claims were barred by the First Amendment's ministerial exception to employment discrimination laws. Pet. App. 7a.

On January 17, 2017, the United States District Court, Central District of California, issued an order granting summary judgment for St. James School. ER 9-13. Specifically, the District Court ruled that "St. James has established a *prima facie* case that Biel acted as a messenger of St. James' faith. *See Hosanna-Tabor*, 132 S. Ct. at 708. Therefore, St. James established a *prima facie* case Biel was a

minister within[] the meaning of the ministerial exception." ER 13.

St. James School lodged a proposed judgment, which provided that St. James School recover its costs. ER 7-8. On January 24, 2017, the District Court entered an Amended Order and Judgment, reiterating its earlier order granting summary judgment, and further ordering and adjudging that "all parties shall bear their own costs." ER 1-6.

On February 10, 2017, Biel filed her Notice of Appeal to the Ninth Circuit Court of Appeals. ER 874 (Dist. Ct. Docket Entry 99).

B. In the Ninth Circuit Court of Appeals

On appeal, St. James School argued that functional consensus is the legal standard for analyzing whether an employee has the legal status of "minister." Answering Br. 19-23, Docket Entry 36. In response, Biel argued that the Ninth Circuit should follow this Court's approach in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) and conduct a complete, factual examination of Biel's employment with St. James School. Reply Br. 8-18, Docket Entry 43.

The Equal Employment Opportunity Commission submitted an Amicus Brief in support of Biel and for

reversal of the District Court's Amended Order and Judgment. Docket Entry 25.

Following robust oral argument, the Ninth Circuit ultimately issued a 2-to-1 decision. Pet. App. 1a-39a; *Biel v. St. James School,* 911 F.3d 603 (9th Cir. 2018). The majority opinion held that in "assessing the totality of Biel's role at St. James, the ministerial exception does not foreclose her claim." Pet. App. 4a.

In reaching its decision, the majority panel relied on *Hosanna-Tabor*, noting that "the Supreme Court expressly declined to adopt 'a rigid formula for deciding when an employee qualifies as a minister,' and instead considered 'all the circumstances of [the plaintiff's] employment.'" Pet. App. 8a (quoting *Hosanna-Tabor, supra,* 565 U.S. at 190). In examining Biel's employment with St. James School, the majority panel focused its analysis on the four major considerations discussed in *Hosanna-Tabor*, using them *not* as a rigid formula, but rather, to distinguish Biel's employment with that of Cheryl Perich, who was held to be a minister covered by the exception. Pet. App. 8a-13a. In so doing, it concluded:

1) Biel had no training, religious credentials, or ministerial background, that there was no religious component to her liberal studies degree or teaching credential, and that St.

James had no religious requirements for the position. Pet. App. 10a-11a.

2) Biel was not held out by St. James School as a minister, such as by suggesting to its community that she had special expertise in Catholic Church doctrine, values, or pedagogy beyond that of any practicing Catholic, and that St. James School gave her the secular title "Grade 5 Teacher" as opposed to a title that reflected anything religious about the position, such as being "Commissioned" or a "called" teacher.[3] Pet. App. 11a-12a.
3) Biel did not consider herself a minister or present herself as one to the community, but rather, she simply described herself as a teacher and claimed no benefits available only to ministers or other religious leaders. Pet. App. 12a.
4) Biel only had some resemblance to Perich with respect to the fourth consideration, i.e., they both taught religion in the classroom, teaching

[3] The majority also noted that it did not find, or mean to suggest, "that Biel's lack of a ministerial title is dispositive," or that it was making "ordination status or formal title determinative of the exception's applicability." Pet. App. 12a, fn. 3, citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 202 (2012) (Alito, J., concurring). But, like the Supreme Court in *Hosanna-Tabor*, the Ninth Circuit "look[s] to her title as shorthand for 'the substance reflected in that title.' *Id.* at 192." Pet. App. 12a, fn. 3.

> lessons on the faith and incorporating religious themes and symbols into the classroom environment and curriculum, as required by the school. Pet. App. 12a.

The majority explained that it did not read *Hosanna-Tabor* as indicating that the ministerial exception would apply based on only that one shared characteristic, because "[i]f it did, most of the analysis in *Hosanna-Tabor* would be irrelevant dicta, given that Perich's role in teaching religion was only one of the four characteristics the Court relied upon in reaching the conclusion that she fell within the ministerial exception." Pet. App. 12a. The Ninth Circuit further elaborated that "even Biel's role in teaching religion was not equivalent to Perich's" and

> the Supreme Court [in *Hosanna-Tabor*] emphasized the importance of assessing both the amount of time spent on religious functions and 'the nature of the religious functions performed.' 565 U.S. at 194; *see also id.* at 204 (Alito, J., concurring ("What matters is that [the individual] played an important role as an instrument of her church's religious message and as a leader of its worship activities.").

Pet. App. 12a-13a.

Here, Biel's role was limited to teaching Catholic religion from a workbook required by St. James

School, and incorporating religious themes into her lesson plans. Pet. App. 13a. By mode of comparison, Perich orchestrated her students' daily prayers, whereas "Biel's students themselves led the class in prayers." Pet. App. 13a. Biel's students were also given the opportunity to lead the prayers, and she joined in reciting the prayers, but she did not teach, lead, or plan the devotions herself. Pet. App. 13a. Moreover, whereas Perich had "crafted and led religious services for the school, Biel's responsibilities at St. James's monthly Mass were only 'to accompany her students,' and '[t]o make sure the kids were quiet and in their seats.' " Pet. App. 13a. In conclusion, the Ninth Circuit's majority held that "[t]hese tasks do not amount ot he kind of close guidance and involvement that Perich had in her students' spiritual lives." Pet. App. 13a.

The majority also noted:

> "We do not suggest that Biel's lack of a ministerial title is dispositive, nor do we 'ma[ke] ordination status or formal title determinative of the exception's applicability.' *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 202 (2012) (Alito, J., concurring). But, like the Supreme Court in *Hosanna-Tabor*, we look to her title as shorthand for 'the substance reflected in that title.' *Id.* at 192."

Pet. App. 12a, fn. 3.

The majority also juxtaposed Biel's employment with that of the Hebrew teacher in the Seventh Circuit's recent decision in *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018). Pet. App. 13a-15a. Just as it showed that Biel's employment was nowhere near analogous to that Perich's in *Hosanna-Tabor*, so too it showed that Biel's employment was far less ministerial than that of the plaintiff in *Grussgott*. Pet. App. 13a-15a.

Additionally, the majority pointed out how the post-*Hosanna-Tabor* cases relied upon by St. James School were not analogous to Biel's case. Pet. App. 14a. The majority explained:

> All of the plaintiffs in those cases had responsibilities that involved pronounced religious leadership and guidance. [Footnote omitted.] In contrast, although Biel taught religion, the other considerations that guided the reasoning in *Hosanna-Tabor* and its progeny are not present here. Biel did not have ministerial training or titles. And she neither presented herself as nor was presented by St. James as a minister. At most, only one of the four *Hosanna-Tabor* considerations weighs in St. James' favor. No federal court of appeals has applied the ministerial exception in a case that bears so little resemblance to *Hosanna-Tabor*. *See,*

> *e.g.*, *Grussgott*, 882 F.3d at 661 (applying exception where "two of the four *Hosanna-Tabor* factors are present"); *Conlon*, 777 F.3d at 835 (same). We decline St. James's invitation to be the first.

Pet. App. 14a-15a.

The Ninth Circuit majority also aptly noted that

> [a] contrary rule, under which any school employee who teaches religion would fall within the ministerial exception, would not be faithful to *Hosanna-Tabor* or its underlying constitutional and policy considerations. Such a rule would render most of the analysis in *Hosanna-Tabor* irrelevant. It would base the exception on a single aspect of the employee's role rather than on a holistic examination of her training, duties, title, and the extent to which she is tasked with transmitting religious ideas.

Pet. App. 15a.

The Ninth Circuit majority explained that "[s]uch a rule is also not needed to advance the Religion Clauses' purpose of leaving religious groups free to 'put their faith in the hands of their ministers.' " Pet. App. 15a.

> Although the Supreme Court held that "the ministerial exception is not limited to the head of a religious congregation," *id.* at 190,

> the focus on heads of congregations and other high-level religious leaders in the historical backdrop to the First Amendment supports the notion that, to comport with the Founders' intent, the exception need not extend to every employee whose job has a religious component.[Footnote omitted.]

Pet. App. 15a-16a.

Thus, while the First Amendment "insulates a religious organization's 'selection of those who will personify its beliefs[]' ", the Ninth Circuit reiterated that the First Amendment does *not* provide "carte blanche to disregard antidiscrimination laws when it comes to other employees who do not serve a leadership role in the faith." Pet. App. 16a. As such, the majority panel refused to read *Hosanna-Tabor* as exempting from federal employment law "all those who intermingle religious and secular duties but who do not 'preach [their employers'] beliefs, teach their faith, … carry out their mission … [and] guide [their religious organization] on its way.' 565 U.S. at 196."

Following the Ninth Circuit's published opinion, St. James School sought *en banc* review. The panel "voted unanimously to deny the petition for panel rehearing." Pet. App. 41a. The full court was advised of the petition for rehearing *en banc*, and following a vote on *en banc* rehearing, "[t]he matter failed to receive a majority of votes of non-recused active

judges in favor of en banc consideration." Pet. App. 42a. Accordingly, on June 25, 2019, the petition for rehearing and the petition for rehearing *en banc* were denied by the Ninth Circuit. *Id.*; *Biel v. St. James School,* 926 F.3d 1238 (9th Cir. 2019)

Thereafter, St. James School filed its instant Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

Petitioner fails to show a conflict between the Ninth Circuit Court of Appeals and those of this Court or any of the other federal circuit or state courts.

I. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012)

In 2012, this Court considered for the first time "whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 188 (2012). In *Hosanna-Tabor*, this Court examined Cheryl Perich's employment as a teacher at the Hosanna-Tabor Evangelical Lutheran School to determine whether she was qualified as a "minister" for purposes of the exception. *Id.* at 177-178. In considering the issue, this

Court unanimously declined "to adopt a rigid formula for deciding when an employee qualifies as a minister" and instead examined "all the circumstances of [Perich's] employment," including "the formal title given Perich by the Church, the substance reflected in that title, [Perich's] own use of that title, and the important religious functions [Perich] performed for the church." *Id.* at 190-192.

II. Supreme Court Review Is Unnecessary Because The Ninth Circuit Court Of Appeals' Approach Is Aligned With This Court, And It Likewise Does Not Split With Other Circuits Or State Courts

The Ninth Circuit's approach to the ministerial exception is consistent with other federal and state courts after *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012). In *Puri v. Khalsa*, 844 F.3d 1152 (9th Cir. 2017), the Ninth Circuit wrote that "the Supreme Court has made clear, there is no 'rigid formula for deciding when an employee qualifies as a minister' within the meaning of the ministerial exception;" however "[t]he Supreme Court has provided some guidance on the circumstances that might qualify an employee as a minister within the meaning of the ministerial exception." *Id.* at 1159-1160. After analyzing the pleadings in light of the considerations raised in *Hosanna-Tabor*, the Ninth Circuit Court of Appeals

in *Puri* held that "[a]bsent any allegation that board members have ecclesiastical duties or are held out to the community as religious leaders, and with scant pleadings on the religious requirements for the positions, we agree with the plaintiffs that it is not apparent on the face of the complaint that the disputed board positions are 'ministerial.'" *Id.* at 1160-1162.

Similarly, in *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012), the Fifth Circuit heard the case of Philip Cannata, the Music Director at St. John Neumann Catholic Church. *Id.* at 170-171. In holding that Cannata was a minister for purposes of the exception, the panel followed *Hosanna-Tabor* and "declined to adopt a 'rigid formula' for determining when an employee is a minister within the meaning of the ministerial exception," choosing instead to look to all the circumstances of employment. *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 174, 175-76 (5th Cir. 2012) (citing *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012) (calling it a "totality-of-the-circumstances analysis"). In that case, the Fifth Circuit found it sufficient to find Cannata a "minister" because of the "integral role" he played "in the celebration of Mass", as well as the fact that he "furthered the mission of the church and helped convey its message to the

congregants." *Id.* at 177. Additionally, the Fifth Circuit noted that "[b]ecause [Cannata] made unilateral, important decisions regarding the musical direction at Mass, the church considered him a minister." *Id.* at 178. Such independent decisions regarding the direction of Mass included Cannata choosing the hymns to be played at Mass each Sunday, and on top of that, Cannata himself "boasted of his role in building one of the best music programs in the diocese and training a 'large number' of cantors." *Id.* In considering the totality of Cannata's employment with the church as its musical director, including the integral role he played at Mass each week and the importance that even his secular duties played in furthering the mission and message of the church at Mass, the Fifth Circuit concluded that the ministerial exception applied to Cannata and barred his suit from proceeding further. *Id.* at 177-180.

In *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015), Judge Batchelder, joined by Judges Rogers and Beckwirth, found that while the *Hosanna-Tabor* Court did not "adopt a rigid formula for deciding when an employee qualifies as a minister," it could use the considerations raised in *Hosanna-Tabor* to guide its analysis of the circumstances of Alyce Conlon's employment with InterVarsity Christian Fellowship/USA as a "spiritual director" or "Spiritual

Formation Specialist." *Id.* at 834-835. The Sixth Circuit concluded that Conlon's title as "Spiritual Formation Specialist" or "spiritual director" was a sufficiently formal religious title, essentially equivalent to titles such as "pastor," "reverend," "priest," "bishop," or "rabbi," because "[t]he word 'spiritual] is such an identifying term" that conveys a religious meaning. *Id.* Conlon had "earned a certification in 'spiritual direction'", but the pleadings did not detail the extent or rigor required to obtain that certification, so the second factor was not demonstrated to be present. *Id.* at 835. The pleadings also did not suggest that Conlon publicly interacted with the community as an ambassador of the faith that rises to the leave of a leadership role within the church and community, and as a result, the third factor was not demonstrated. *Id.* The court noted that Conlon did perform important religious functions for the religious organization, and therefore, the fourth factor was present. *Id.* The Sixth Circuit thus concluded that "[t]wo of the four *Hosanna-Tabor* factors are clearly present in Conlon's former position" and that "where both factors—formal title and religious function—are present, the ministerial exception clearly applies." *Id.*

The Second and Third Circuits have similarly followed suit. *See Lee v. Sixth Mount Zion Baptist*

Church of Pittsburgh, 903 F.3d 113, 116-117 (3rd Cir. 2018) (employee-plaintiff was a former pastor of the Sixth Mount Zion Missionary Baptist Church—a position he obtained only after the Church's Deacon board recommended and voted him in as church pastor—and he was required by his employment contract to "lead the pastoral ministerial of the Church and…work with the Deacons and Church staff in achieving the Church's mission of proclaiming the Gospel to believers and unbelievers"); *Penn v. New York Methodist Hospital*, 884 F.3d 416, 420-421 (2nd Cir. 2018) (employee-plaintiff was a former Duty Chaplain of New York Methodist Hospital who admitted that he was "primarily responsible for ministry" and had previously "coordinated the distribution of Bibles, conducted an in-hospital memorial service for an employee who died, and 'maintained…active, on-going pastoral care to staff.'").

In both cases, it was undisputed that the ministerial exception applied in light of the title and role each of the employees had within their respective religious employers. *See Penn v. New York Methodist Hospital*, 884 F.3d at 424 (2nd Cir. 2018); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d at 119-120 (3rd Cir. 2018). And, with each case, because there was no doubt as to the application of the ministerial exception, a

complete analysis of all the circumstances of their employment was not required. In each instance, however, the Second and Third Circuits recognized *Hosanna-Tabor* as controlling in their individual interpretations of whether or not the ministerial exception applies. *See Penn v. New York Methodist Hospital*, 884 F.3d at 424 (2nd Cir. 2018) (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 190 (2012)); *Fratello v. Archdiocese of New York*, 869 F.3d 190, 204-205; *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d at 119-120 (3rd Cir. 2018).

State courts have also remained consistent in their approaches to the "ministerial exception." *See Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination,* 463 Mass. 472, 485 (Mass. 2012) (considering the various factors enumerated in *Hosanna-Tabor*, and stating that "[a]ll that is plain from the record is that she taught religious subjects at a school that functioned solely as a religious school, whose mission was to teach Jewish children about Jewish learning, language, history, traditions, and prayer", and because she taught solely religious subjects at a religious afterschool and Sunday school, the fact that she was not called a minister or did not detract from finding the ministerial exception applied); *Kirby v. Lexington Theological Seminary* (2014) 426 S.W.3d 597, 614

(considering the four factors from *Hosanna-Tabor*, but also attempting "to add substance to the four factors, hopefully providing guidance to trial courts" but ultimately reaffirming that "consideration of these factors, in light of the totality of the circumstances," is required to determine whether an employee is a "minister" for purposes of the ministerial exception; concluding employee satisfied "most of the factors listed above" because he "gave sermons on multiple occasions, served communion, taught classes on Christian doctrine, opened class with prayer each day, affirmatively promoted students' development in the ministry, and served as a representative—a literal embodiment—of the Seminary at events on multiple occasions", which included that he "conducted worship services, important religious ceremonies and rituals, and acted as a messenger of the Seminary's faith."); *Su v. Stephen S. Wise Temple*, 32 Cal.App.5th 1159, 1168 ("[c]onsidering all the relevant circumstances of the teachers' employment" and although the Temple's teachers were responsible for some religious instruction, the court did not read *Hosanna-Tabor* to suggest that the ministerial exception applies based on this fact alone, and stated "[t]o the contrary, it was central to *Hosanna-Tabor's* analysis that a minister is not merely a teacher of religious doctrine—significantly, he or she 'personif[ies]' a

church's (or synagogue's) beliefs and 'minister[s] to the faithful.' [Citation]").

Then, in the underlying appeal, the Ninth Circuit considered the ministerial exception in the employment context. *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018). Consistent with the holding in *Hosanna-Tabor*, the Ninth Circuit considered the totality of Biel's employment in reaching its conclusion as to whether the ministerial exception applied to Kristen Biel, a fifth grade teacher. In determining whether the ministerial exception applied, the Ninth Circuit first recognized that:

> In *Hosanna-Tabor*, the Supreme Court expressly declined to adopt 'a rigid formula for deciding when an employee qualifies as a minister' and instead considered 'all the circumstances of [the plaintiff's] employment.' 565 U.S. at 190, 132 S.Ct. 694. *Hosanna-Tabor* is the only case in which the Supreme Court has applied the ministerial exception, so its reasoning necessarily guides ours as we consider the circumstances here.

Id. at 607.

Then, much like the courts in *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015) and *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018), the Ninth

Circuit used the considerations raised in *Hosanna-Tabor* to guide its analysis of all of the circumstances of Biel's employment with St. James School. *Id.* at 607-609. Ultimately, in "assessing the totality of Biel's role at St. James," the panel in *Biel* held that "the ministerial exception [did] not foreclose her claim." *Id.* at 605.

After the Ninth Circuit decided the underlying appeal, the Seventh Circuit decided *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568 (7th Cir. 2019). Stanislaw Sterlinski was a part-time Polish employee who was demoted to a church organist in 2014, and thereafter brought suit alleging age discrimination and retaliation under the Age Discrimination in Employment Act. *Sterlinski v. Catholic Bishop of Chicago*, 319 F.Supp.3d 940, 941 (N.D.Ill. 2018). Saint Stanislaus Bishop & Martyr Parish moved to dismiss, arguing the ministerial exception barred all of Sterlinski's claims. *Id.* at 942. The district court granted summary judgment and dismissed the suit. *Id.* at 950.

On appeal, the Seventh Circuit affirmed the district court below and attempted to distinguish the approach taken by the Ninth Circuit in the underlying appeal (*Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018)) with their own. Compared to the Ninth Circuit, the Seventh Circuit "adopted a

different approach in *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018)." *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d at 570 ("*Sterlinski*").

The panel in *Grussgott*, however, utilized the same approach as the Ninth Circuit in determining whether the ministerial exception applies: a totality-of-the-circumstances test where all facts must be taken into account and weighed on a case-by-case basis. *Compare, Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 190 ("It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment"), *with Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) (stating "[w]e read the Supreme Court's decision to impose, in essence, a totality-of-the-circumstances test…all facts must be taken into account and weighed on a case-by-case basis") *and Biel v. St. James School*, 911 F.3d 603, 605 (9th Cir. 2018) ("We hold that, assessing the totality of Biel's role at St. James, the ministerial exception does not foreclose her claim.").

In fact, Petitioner's suggestion that the Ninth Circuit broke with the other Circuits in engaging in a "Perich-comparison analysis" is inconsistent with an

earlier opinion of the Seventh Circuit – *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018).

In *Grussgott*, the Seventh Circuit compared the role of Miriam Grussgott with that of Cheryl Perich to help guide it in answering the question of whether she was a minister under the "ministerial exception." *See, e.g., id.* at 659 (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 178, 191 (2012)) ("This ostensibly lay title is distinct from *Hosanna-Tabor*, in which the plaintiff was a "called teacher" (as opposed to a "lay teacher") who had been given the formal title of "Minister of Religion, Commissioned.").

III. The Ninth Circuit Court Of Appeals Correctly Concluded—Based On This Court's Precedent And Considering The Totality Of The Circumstances—That Kristen Biel Was Not A "Minister" For Purposes Of The Ministerial Exception

The Ninth Circuit in this matter properly applied the analysis from *Hosanna-Tabor*, a totality of the circumstances approach. Pet. App. 2a. In so doing, the Ninth Circuit analyzed whether the ministerial exception applied, by applying the four

considerations enumerated by the Supreme Court in *Hosanna-Tabor*:

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.*

Applying the circumstances of Biel's position, the Ninth Circuit went through each consideration:

1) St. James gave Biel the secular title "Grade 5 Teacher" and did not hold Biel out as a minister by suggesting to its community that she had special expertise in Church doctrine, values, or pedagogy beyond that of any practicing Catholic. Pet. App. 11a.
2) Biel had no training or ministerial background, and "[t]here was no religious component to her liberal studies degree or teaching credential." Pet. App. 10a-11. In addition, "St. James had no religious requirements for her position" and even after Biel began working as a full-time teacher, "her

training consisted of only a half-day conference whose religious substance was limited." *Id.* And, prior to Biel working for St. James School, she had taken on teaching work wherever she could find it: "tutoring companies, multiple public schools, another Catholic school, and even a Lutheran school." Pet. App. 11a.

3) "Nothing in the record indicates that Biel considered herself a minister or presented herself as one to the community. She described herself as a teacher and claimed no benefits available only to ministers." Pet. App. 12a.

4) Biel taught religion in the classroom, including teaching "lessons on the Catholic faith four days a week", and "incorporate[ing] religious themes and symbols into her overall classroom environment and curriculum, as the school required." Pet. App. 12a. But, notably, "Biel's role in Catholic religious education was limited to teaching religion from a book required by the school and incorporating religious themes into her other lessons." Pet. App. 13a. Biel also did not lead her students in prayer, but rather, "Biel's students themselves led the class in prayers." *Id.* Biel "did not teach, lead, or plan these devotions

> herself." *Id.* Biel likewise did not lead religious services or Mass; rather, "Biel's responsibilities at St. James's monthly Mass were only 'to accompany her students,' and '[t]o make sure the kids were quiet and in their seats.' " *Id.*

The Ninth Circuit interpreted the Supreme Court has having emphasized in *Hosanna-Tabor* "the importance of assessing both the amount of time spent on religious functions and 'the nature of the religious functions performed.' " Pet. App. 12a-13a, *citing Hosanna-Tabor*, 565 U.S. at 194; *see also id.*, at 204 (Alito, J., concurring) ("What matters is that [the individual] played an important role as an instrument of her church's religious message and as a leader of its worship activities."). The Ninth Circuit also refused to read *Hosanna-Tabor* as holding that the ministerial exception would apply based solely on the single consideration of the religious functions of the employee's position. Pet. App. 12a. It found that to do so would render most of the analysis in *Hosanna-Tabor* as "irrelevant dicta". *Id.*

The Ninth Circuit correctly concluded that Biel was not a "minister" for purposes of the ministerial exception, after conducting a thorough, fact-intensive analysis that was wholly faithful to the totality-of-

the-circumstances approach applied by this Supreme Court in *Hosanna-Tabor*. The Ninth Circuit also refused to the be first circuit court to apply the ministerial exception to a case where the employee's employment bore such scant resemblance to *Hosanna-Tabor*, and one in which only one of four considerations weighed in favor of applying the ministerial exception. Pet. App. 14a-15a.

IV. Unhappy with the Outcome in the Ninth Circuit, Petitioner Asks this Court to Effectively Adopt a *Different* Analysis than What This Court Applied Just Seven Years Ago in *Hosanna-Tabor*

Petitioner attempts to portray other Circuits and courts as having veered from this totality-of-the-circumstances approach that was discussed and applied in *Hosanna-Tabor*, and to instead adopt a "functional consensus" analysis. Petitioner is really asking that the Supreme Court overturn its holding in *Hosanna-Tabor*, overturn the totality-of-the-circumstances approach, and adopt a new test that simply asks whether the employee's duties involve any religious functions.

The Ninth Circuit has not split from other circuits in applying the totality-of-the-circumstances approach and analyzing various relevant considerations such as those enumerated in

Hosanna-Tabor. The only difference between the Ninth Circuit in the underlying case, and the other circuits, appears to be the *outcome* that was reached *based on the facts of the underlying case* and application of the facts specific to each particular employee's circumstances of employment. There is no reason for the Court to now reconsider its earlier holding in *Hosanna-Tabor*, a decision which only came out in 2012, and which has consistently been applied by the various circuits, and for this Court to suddenly adopt a more stringent, rigid test for determining if an employee is a "minister" for purposes of the ministerial exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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