

IN THE
Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES MORRISSEY-BERRU,

Respondent.

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

**BRIEF OF *AMICUS CURIAE* NATIONAL
CATHOLIC EDUCATIONAL ASSOCIATION IN
SUPPORT OF PETITIONER AND REVERSAL**

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	6
I. Catholic Schools—And Their Teachers— Are At The Core Of The Catholic Church’s Ministry	6
a. This Is Confirmed By The Origins And Premises Of Catholic Education	6
b. Our Lady Of Guadalupe And Ms. Morrissey-Berru Manifest The Catholic Educational Mission	10
II. The Ninth Circuit’s (and EEOC’s) Reasoning Requires Every Catholic School To Justify Its Theology And Organizatoin Before Civil Courts	11
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Biel v. St. James Sch.</i> , 926 F.3d 1238 (9th Cir. 2019).....	<i>passim</i>
<i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.</i> , 565 U.S. 171 (2012).....	<i>passim</i>
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000).....	2
<i>Sterlinski v. Catholic Bishop of Chicago</i> , No. 18-2844, 2019 U.S. App. LEXIS 23712 (7th Cir. 2019).....	3, 4, 11, 13
Other Authorities	
Betty Ann McNeil, <i>Historical Perspectives on Elizabeth Seton and Education: School is My Chief Business</i> , 9 JOURNAL OF CATHOLIC EDUCATION 284 (2006).....	7, 8, 9
Clarence Thomas, MY GRANDFATHER’S SON (2007).....	2
Congregation for Catholic Educ., <i>Educating Today and Tomorrow: A Renewing Passion</i> (2014).....	9

David Gonzalez, *For Sotomayor, Bronx School's Closing Prompts Heartache—and Memories*, N.Y. TIMES CITY ROOM BLOG, Jan. 25, 2013, <https://cityroom.blogs.nytimes.com/2013/01/25/for-sotomayor-bronx-schools-closing-prompts-heartache-and-memories/> 1, 2

Jamie F. Arthur, *The Call To Teach: Expectations for the Catholic Educator in Magisterial Teaching*, THE CARDINAL NEWMAN SOCIETY (June 2015).....9

NCEA, *United States Catholic Elementary and Secondary School 2014-2015: The Annual Statistical Report on Schools, Enrollment and Staffing* (2015).....9

Second Vatican Council, Declaration on Christian Education *Gravissimum Educationis* (1965)6

The Sacred Congregation for Catholic Education, *The Catholic School*, 1977..... 3, 6, 7

The Sacred Congregation for Catholic Education, *Lay Catholics in Schools: Witnesses to Faith*, 1982 1, 2, 3

INTEREST OF *AMICUS CURIAE*

The National Catholic Educational Association (NCEA) is a professional membership organization representing 150,000 Catholic educators serving almost 2 million students in Catholic elementary and secondary schools. NCEA’s mission statement says: “In service of the Gospel of Jesus Christ, NCEA strengthens Catholic school communities by providing professional development, formation, leadership, and advocacy.” NCEA is often called upon to provide leadership in shaping policies and actions that acknowledge and support the important role of Catholic schools in the United States. NCEA serves as a national voice for Catholic schools, which are ministries of the Catholic Church in America.¹

SUMMARY OF ARGUMENT

Catholic schools are distinct—entrusted by the Catholic Church with “[t]he integral formation of the human person.” The Sacred Congregation for Catholic Education, *Lay Catholics in Schools: Witnesses to Faith*, #17, 1982. The Court and its members know this well. Justice Sotomayor movingly recalled that her Catholic school teachers provided “a model of someone teaching you that being a good human being has value.” David

¹ Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby states that no counsel for a party wrote this brief in whole or in part, and no one other than *amicus curiae* or its counsel contributed money to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a) of the Rules of this Court, counsel for all parties received timely notice of the intent to file this brief and all parties have consented to its filing.

Gonzalez, *For Sotomayor, Bronx School's Closing Prompts Heartache—and Memories*, N.Y. TIMES CITY ROOM BLOG, Jan. 25, 2013, <https://cityroom.blogs.nytimes.com/2013/01/25/for-sotomayor-bronx-schools-closing-prompts-heartache-and-memories/> (quoting Justice Sotomayor). “The sisters” at the Catholic school Justice Thomas attended taught him that “God made all men equal, that blacks were inherently equal to whites, and that segregation was morally wrong.” Clarence Thomas, *MY GRANDFATHER’S SON* 14-15 (2007). Indeed, even legal doctrines “born of bigotry” toward Catholic schools are, themselves, implicit acknowledgments that Catholic education has long been considered distinct. *Cf. Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (“it was an open secret that ‘sectarian’ in the Establishment Clause’s ‘pervasively sectarian’ doctrine ‘was code for ‘Catholic’”) (internal citation omitted). Here, the distinct mission of Catholic schools makes a great difference—one that warrants review.

“Educator[s] in the school” are critical to the Catholic mission of integral formation—or as Catholic schools often term it, educating the “whole person.” *See* Sacred Congregation for Catholic Education, *Lay Catholics in Schools: Witnesses to Faith*, #17, 1982. As the Sacred Congregation explained in 1977:

The achievement of this specific aim of the Catholic school depends not so much on subject matter or methodology as on the people who work there. The extent to which the Christian message is

transmitted through education depends to a very great extent on the teachers. The integration of culture and faith is mediated by the other integration of faith and life in the person of the teacher. *The nobility of the task to which teachers are called demands that, in imitation of Christ, the only Teacher, they reveal the Christian message not only by word but also by every gesture of their behaviour. This is what makes the difference between a school whose education is permeated by the Christian spirit and one in which religion is only regarded as an academic subject like any other.*

The Sacred Congregation for Catholic Education, *The Catholic School*, #43, 1977 (emphasis added). It is the teachers, then, that form “strong and responsible individuals, who are capable of making free and correct choices, thus preparing young people to open themselves more and more to reality, and to form in themselves a clear idea of the meaning of life.” Sacred Congregation for Catholic Education, *Lay Catholics in Schools: Witnesses to Faith*, #17, 1982.

Precisely to account for diverse religious missions, like that of Catholic schools—while also avoiding “judicial entanglement in, and second-guessing of, religious matters”—the First Amendment’s “ministerial” exception focuses on a “minister’s” function *in that religion*, not on forms familiar to the zeitgeist. *Sterlinski v. Catholic Bishop of Chicago*, No. 18-2844, 2019 U.S. App.

LEXIS 23712, at *5-6 (7th Cir. 2019). Accordingly, this Court—in a unanimous opinion—refused to “adopt a rigid formula” to determine an employee’s status as a minister (thus making him or her unable to challenge his or her termination in civil court). *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190-94 (2012). Other potential indicators, like a “title,” or resolving whether an employee is “secular” or “religious” with a “stopwatch” that clocks the time spent on certain activities, are similarly not dispositive. *See id.* Rather, this Court unanimously held that “the nature of the religious functions performed” underlies whether an employee is a “minister.” *Id.* And, as Judge Easterbrook recently confirmed, “[m]any judges” on many courts have no difficulty following this function-focused path. *See Sterlinski*, 2019 U.S. App. LEXIS 23712, at *6 (collecting decisions from the Second, Fifth, and Seventh Circuits).

Nine Ninth Circuit judges did not want their Circuit to “split[] from the consensus”—but their Circuit did so anyway. *Biel v. St. James Sch.*, 926 F.3d 1238, 1247, 1251 (9th Cir. 2019) (R. Nelson, J., dissenting from denial of rehearing *en banc*, in the case upon which the Panel below principally relied). As they said, this case demonstrates “[t]he harmful effects” that follow from their Circuit contriving the “narrowest construction” of the ministerial exception that exists in the nation. *Id.* at 1239, 1250. Despite the Panel below *admitting* that “Morrissey-Berru did have significant religious responsibilities as a teacher at the school”—*and admitting further* that these responsibilities “evidenced” her “commit[ment]

to incorporate Catholic values and teachings into her curriculum”—she did not qualify as a “minister.” App. 3a. As a result, the Panel effectively told the Catholic Church that, no matter how much it “entrust[s]” individuals “with teaching and conveying the tenets of the faith to the next generation,” that will not make them ministers. *See Hosanna-Tabor*, 565 U.S. at 200 (Alito & Kagan, JJ., concurring) (stating that the *opposite* is true).

Indeed, the Panel’s desire for a certain title to exist before it would acknowledge ministerial status (“Morrissey-Berru’s formal title of ‘Teacher’ was secular[,]” so she is not likely a minister. (App. 2a))—produces a startling conclusion: Had *Ms. Morrissey-Berru* been *Sister Morrissey-Berru*, while having the very same teaching functions, the Panel would have deemed her a minister. Justices Alito and Kagan, however, specifically admonished this approach. *See Hosanna-Tabor*, 565 U.S. at 198 (Alito & Kagan, JJ., concurring) (“Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term ‘minister’ or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the functions performed by the persons who work there.”).

Absent review—and a repudiation of the Ninth Circuit’s underlying reasoning—“Catholic schools in this circuit now have less control over employing its elementary school teachers of religion than in any other area of the country. Given [the Ninth Circuit’s] broad coverage, this is not insignificant.” *Biel*, 926 F.3d at 1251 (R. Nelson, J.,

dissenting from denial of rehearing *en banc*). Indeed, the “importance of clarifying the scope of the ministerial exception” has a national reach—as the Equal Employment Opportunity Commission (“EEOC”) said when explaining its *amicus* participation in *Biel* supporting the Ninth Circuit’s narrow, novel construction. *See* EEOC Br. in Support of Plaintiff/Appellant at 1, *Biel v. St. James School*, No. 17-55180 (Dkt. Entry 25). The nation is thus in great need of the guidance and correction that only this Court can provide.

ARGUMENT

I. Catholic Schools—And Their Teachers—Are At The Core Of The Catholic Church’s Ministry

a. This Is Confirmed By The Origins And Premises Of Catholic Education

The Catholic Church founded schools “because she considers them as a privileged means of promoting the formation of the whole man, since the school is a centre in which a specific concept of the world, of man, and of history is developed and conveyed.” The Sacred Congregation for Catholic Education, *The Catholic School*, #8(5), 1977. Desiring to educate “the whole man” is premised on the view that “the knowledge the students gradually acquire of the world, life and man[,] is illumined by faith.” Second Vatican Council, Declaration on Christian Education *Gravissimum Educationis* § 8 (1965). To be sure, “[i]t would be wrong to consider subjects as mere adjuncts to faith or as a useful means of teaching apologetics.” The Sacred Congregation for Catholic Education, *The Catholic*

School, #39, 1977. Rather, the point of integral formation is the recognition that every subject “enable[s] the pupil to assimilate skills, knowledge, intellectual methods and moral and social attitudes” into a cohesive whole—“[t]heir aim is not merely the attainment of knowledge but the acquisition of values and the discovery of truth.” *Id.* In the Catholic faith, discovering “Truth itself” is discovering God. *See id.* at 41; *see also* JOHN 14:6 (“I am the way and the truth and the life. No one comes to the Father except through me.”).

Because Catholic school teachers are trained and committed to integrate natural formation (i.e., the study of the physical world and one’s physical, mental, and social development) with spiritual formation, they are distinct expositors of the Church’s mission. Indeed, the missionary nature of Catholic education corresponds with the fact that, for most of the past 400 years, Catholic schools in America have been founded and run by largely religious orders, sisters, brothers, and dioceses. As a reflection of their religious mission, “the establishment of parish free schools” came from 19th-century concerns of “Protestant domination of the public school system.” *See* Betty Ann McNeil, *Historical Perspectives on Elizabeth Seton and Education: School is My Chief Business*, 9 JOURNAL OF CATHOLIC EDUCATION 284, 286 (2006); *see also id.* at 287 (“The hierarchy desired to educate the laity in the faith and to combat the prevalence of secularism in the country.”). Importantly, however, these parochial schools were inspired by Catholic schools founded decades—and, in some cases, centuries—earlier by the laity and religious sisters, like Saint

Elizabeth Ann Seton. For example, “French explorers” “[c]ertainly” taught Native Americans alongside “the Spanish Franciscans,” *id.* at 285, and some Native American pupils taught by Jesuits would go on to become canonized saints (like Kateri Tekakwitha). *See id.* The efforts of “Miss Alice Lalor and her pious associates . . . developed into the distinguished Georgetown Visitation Academy, dating to 1799.” *Id.* at 286. Around the same time, “Elizabeth Seton and her Sisters of Charity began Saint Joseph’s Academy and Free School at Emmitsburg, Maryland, in 1810.” *Id.*

Regardless of *who* founded the Catholic school or the *title* of the Catholic school teacher—be it a lay person, a religious sister, brother, or a parish priest—the mission of integral formation remained constant, as it is a consistent part of the Catholic faith. Elizabeth Seton, who the Archbishop of Baltimore said “did more for the Church in America” by founding Catholic schools “than all of us bishops together,” *id.* at 287 (citation omitted), articulated that mission well. She impressed upon all children in every Catholic school founded by her religious order the harmony of faith and reason that Catholic school teachers are to reverberate in their teaching. She put the point vividly with the image of an artist:

If a painter should draw his lines without proposing any idea to himself, his work would be a blot; or should a sculptor give a number of strokes to his block without intention to shape it, what would he do but weary himself to no purpose, while the least of our actions may carry its grace with it, if we

turn it right. Every good action is a grain of seed for eternal life.

Id. at 297 (citation omitted).

In 1977, the Sacred Congregation for Catholic Education reiterated the integral formation mission partly to dispel any concern that the growing number of lay Catholics succeeding religious orders, sisters, and brothers as teachers would change the nature of the Catholic school mission, or the role of the teacher in effectuating it. See Jamie F. Arthur, *The Call To Teach: Expectations for the Catholic Educator in Magisterial Teaching*, at 1-2 THE CARDINAL NEWMAN SOCIETY (June 2015).² “The Congregation expanded on the distinctive characteristics of Catholic education in 1988,” publishing *The Religious Dimension of Education in a Catholic School*. *Id.* at 2. There, the Congregation reiterated that “[p]rime responsibility for creating this unique Christian school climate rests with the teachers.” *Id.* (citation omitted). Well into this century, the Church has confirmed that, if anything, the growth of lay Catholic school teachers *increases* the need for educators “who are inspired by the Gospel, who have been formed in Christian pedagogy, in tune with Catholic schools’ educational project.” Congregation for Catholic Educ., *Educating Today and Tomorrow: A Renewing Passion* (2014).

² As of 2015, only 2.8% of Catholic full-time professional staff are members either of the clergy or a religious order. See NCEA, *United States Catholic Elementary and Secondary School 2014-2015: The Annual Statistical Report on Schools, Enrollment and Staffing* (2015).

b. Our Lady Of Guadalupe And Ms. Morrissey-Berru Manifest The Catholic Educational Mission

“The case for the ministerial exception” here “is even stronger than in *Biel*,” the controlling Ninth Circuit precedent. *See Biel*, 926 F.3d at 1250 (R. Nelson, J., dissenting from denial of rehearing *en banc*). This is unsurprising, as Ms. Morrissey-Berru

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.

App. 3a. And, lest there be any doubt that these duties manifest religious ministry, Ms. Morrissey-Berru dispelled them when she assented to Our Lady of Guadalupe School’s Statement of Commitment to Core Values. There, she agreed that being a teacher at the school means working with the parish pastor “to carry out the mission of the Church.” App. 53a. She agreed to “recogniz[e] the special pastoral administrative roles [she] fulfill[s] in the service of the people of God” App. 52a. She further agreed that “[t]he essence of [her] work is service[,]” one “rooted in the gospel model of servant leadership.” *Id.* In both word and deed then, Ms. Morrissey-Berru manifested the mission that the Catholic faith understands its teachers as embodying.

II. The Ninth Circuit's (and EEOC's) Reasoning Requires Every Catholic School To Justify Its Theology And Organizaton Before Civil Courts

Despite Ms. Morrissey-Berru's ministry, the Ninth Circuit's reasoning will never hold that a Catholic school teacher is a "minister" under the First Amendment—unless two conditions are satisfied. First, the court decides that the teacher is "[l]ike the employee in *Hosanna-Tabor*." App. 2a. Second, the court finds that this similarity lies in the teacher's "formal title," "ministerial background," and how the teacher "hold[s] herself out to the public." App. 2a-3a. The first condition impermissibly subjects the religious liberty of Catholic schools to "their Lutheran counterparts." *Biel*, 926 F.3d at 1251 (R. Nelson, J., dissenting from denial of rehearing *en banc*); *see also id.* at 1243 (denigrating this as a "resemblance-to-Perich test"). The second condition favors form over substance—and filters those forms through "an independent [judicial] assessment, essentially disregarding what [the] employer (a Roman Catholic school) thought about its own organization and operations." *Sterlinski*, 2019 U.S. App. LEXIS 23712, at *5. The Free Exercise Clause prohibits this "very encroachment into religious autonomy . . . precisely because such a demand for ecclesiastical titles inherently violates the Establishment Clause." *Biel*, 926 F.3d at 1245 (R. Nelson, J., dissenting from denial of rehearing *en banc*).³ Accordingly, *Hosanna-*

³ In the district court, Ms. Morrissey-Berru advanced an equally-dubious understanding of the ministerial exception: It applies only when the employee "personally felt called to ministry." App. 8a. *Hosanna-Tabor* put no weight on this

Tabor discussed the role of an employee’s title simply to identify “the substance reflected in that title,” not because it is a dispositive issue. *See* 565 U.S. at 192; *see also id.* at 190 (rejecting a “formula” approach to the ministerial exception; the facts it identified “in this [the Court’s] first case involving the ministerial exception” were “enough” to decide that particular case).

There are good reasons why *Hosanna-Tabor* did not embrace this sort of probing into the religious reasons offered for the minister’s termination. Doing so

misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that *the authority to select and control who will minister to the faithful . . . is the church’s alone.*

565 U.S. at 194-95 (emphasis added). All three Justices who wrote separately—to concur in the Court’s opinion—reiterated this point. Justices Alito and Kagan explained what would happen if courts did not assess the ministerial determination from the

point—and for good reason. *See Biel*, 926 F.3d at 1247 (R. Nelson, J., dissenting from denial of rehearing *en banc*) (“Presumably, any plaintiff who wishes to avoid the application of the exception will emphasize why she did not consider herself a minister.”) (citing *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018) (“Grussgott’s opinion does not dictate what activities the school may genuinely consider to be religious.”)).

church's vantage point: "the mere adjudication of such questions would pose grave problems for religious autonomy[;]" requiring "witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Id.* at 205-06 (Alito & Kagan, JJ., concurring). Justice Thomas's concurrence was definitive: "[I]n my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 196 (Thomas, J., concurring). *Hosanna-Tabor* therefore teaches that a court must consider the role of a Catholic school teacher *in the Catholic faith, not as a civil court would have it.*

Rather than follow *Hosanna-Tabor*—or the "[m]any judges" in other circuits adhering to its functional focus, *see Sterlinski*, 2019 U.S. App. LEXIS 23712 at *6—the Ninth Circuit supplanted the Catholic Church's judgment of what is religiously significant in Catholic education with the Panel's judgment. The Panel thought it significant that "Morrissey-Berru's formal title of 'Teacher' was secular," that she "did not have" a "ministerial background," and that she did not "hold herself out to the public as a religious leader or minister." App. 2a-3a. But the Catholic Church has repeatedly emphasized that the growth of lay Catholic teachers—those who are succeeding roles previously held by religious orders, sisters, brothers, and clergy—does *not* change the nature and

responsibility of Catholic teachers. *See supra* p. 9. The Panel’s reasoning thereby suggests a disturbing conclusion: Had *Ms. Morrissey-Berru* been *Sister Morrissey-Berru*, she would have been a “minister,” even with her teaching responsibilities remaining exactly the same. In short, the Ninth Circuit has conditioned the religious liberty of Catholic schools on an incident of demographic change. *See supra* p. 9 n.2 (noting that the overwhelming majority of 21st century Catholic school teachers are not members of religious orders or clergy). The myopic focus on forms consciously disregards *Ms. Morrissey-Berru*’s “significant religious responsibilities” toward her students. App. 3a. Understanding the First Amendment in this way trivializes what the Catholic faith has consistently taught—and the recollections of Justices Sotomayor and Thomas confirm—is critical to instilling the Catholic faith in children: the quiet example of adults they respect.

Failing to grant review does not simply disregard the premises that have guided the Catholic Church’s 400-year old educational mission in America (as if that was acceptable). There are approximately 1,000 Catholic schools within the Ninth Circuit, and they serve hundreds-of-thousands of children. The EEOC, moreover, has already stated its agreement with the Ninth Circuit’s approach—giving every reason to conclude that it will be weaponized. *See supra* p. 6 (noting the EEOC’s *amicus* brief in *Biel* that defends the Ninth Circuit’s ultimate approach). Accordingly, absent this Court’s review, those schools may be hampered by costly litigation and subjective judicial inquiry that, everywhere else, the First Amendment forbids.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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September 2019