No. 17-55180

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kristen Biel,

Plaintiff-Appellant,

v.

St. James School,

Defendant-Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF AMICI CURIAE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., JEWISH COALITION FOR RELIGIOUS LIBERTY, AND SHAYKH HAMZA YUSUF IN SUPPORT OF REHEARING AND REHEARING EN BANC

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

None of the *amici* has a parent corporation, and no publicly held corporation owns 10% or more of any *amicus*'s stock.

February 1, 2019

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INTEREST OF *AMICI CURIAE*[1]

The General Conference of Seventh-day Adventists is the national administrative body for the Seventh-day Adventist Church, a Protestant Christian denomination with more than 20 million members. In the U.S., the Church has more than 1.2 million members; in California, nearly 200,000. The Church operates the largest Protestant school system in the world, with nearly 7,600 schools, over 80,000 teachers, and 1,545,000 students. The Church relies on Seventh-day Adventist educators to fulfill its mission of providing biblical preaching, teaching, and healing ministries.

The International Society for Krishna Consciousness, Inc. ("ISKCON") is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 600 ISKCON temples worldwide, including 50 in the U.S. As a religious community, ISKCON has primary schools in several states where the Vaishnava Hindu faith is taught alongside secular topics. Teachers who provide religious education in ISKCON schools must be qualified professionally, as well as by their knowledge of, and commitment to, the Vaishnava tradition.

The Jewish Coalition for Religious Liberty ("JCRL") is a non-denominational organization of Jewish communal and lay leaders, seeking to protect the ability of

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person or entity contributed money intended to fund preparing or submitting this brief.

all Americans to freely practice their faith. JCRL also aims to foster cooperation between Jewish and other faith communities in an American public square in which all supporters of freedom are free to flourish. JCRL is devoted to ensuring that First Amendment jurisprudence enables the flourishing of religious viewpoints and practices in the United States, including for communities of traditional faith.

Shaykh Hamza Yusuf is an American Islamic scholar and co-founder of Zaytuna College, the first Muslim liberal arts college in the United States which aims to educate and prepare morally committed professional, intellectual, and spiritual leaders who are grounded in the Islamic scholarly tradition and conversant with the cultural currents and critical ideas shaping modern society.

Amici have an acute interest in ensuring that religious organizations remain free to select those teachers and other employees in religious educational systems that "teach their faith" and "carry out their mission." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012). The autonomy of religious groups to govern themselves in such matters is a matter of fundamental religious liberty and is crucial to the ability of religious schools to carry out their missions. It is particularly important for minority religions like *amici*, for whom religious education is a critical means of propagating the faith, instructing the rising generation, and instilling a sense of religious identity. *Amici* urge the Court to grant

rehearing because the panel majority's cramped understanding of the ministerial exception minimizes the role of religious educators and impairs the missions of *amici* and other religious groups for whom religious education is central to their faith.

SUMMARY OF ARGUMENT

The panel majority adopted an unduly narrow understanding of the ministerial exception. It refused to apply the exception to a teacher at a Roman Catholic school whose responsibilities include providing regular religious instruction in the doctrine and practice of the Catholic Church, supervising daily prayers, accompanying students to religious services, and incorporating religious principles and teachings into the curriculum. This holding misconstrues the Supreme Court's decision in *Hosanna-Tabor*, sets this Circuit at odds with other circuits and state courts that have applied the ministerial exception to religious educators, and undermines the religious freedom guaranteed by the First Amendment. The case should be reheard en banc.

The ministerial exception guarantees the right of religious groups to select who will "preach their beliefs, teach their faith, and carry out their mission" without governmental interference. *Hosanna-Tabor*, 565 U.S. at 196. At its core, this right includes the liberty to choose who will "transmi[t] the … faith to the next generation." *Id.* at 192. For many religious groups, religious education is a critical means of communicating the faith, and "[w]hen it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters." *Id.* at 201

(Alito, J., concurring).[2] Because "both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers," and because the selection of religious teachers "is an essential component of [a religious body's] freedom to speak in its own voice," the Constitution "leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith." *Id.* at 201–02 (Alito, J., concurring).

The panel majority disagreed, concluding that *Hosanna-Tabor* forecloses a rule "under which any school employee who teaches religion would fall within the ministerial exception." Op. 14. It construed *Hosanna-Tabor* to require not only an important role in "transmitting religious ideas," but also additional factors such as a leadership position in the church, extensive religious training, or a sufficiently religious-sounding title. *Id.* This was a misreading of *Hosanna-Tabor*. The Supreme Court did not adopt a totality-of-the-circumstances test or hold that additional factors beyond performing "a role in conveying the Church's message and carrying out its mission," *Hosanna-Tabor*, 565 U.S. at 192, are necessary to invoke the ministerial exception. To the contrary, the Court "express[ed] no view on whether someone with

[2] Justice Alito's concurring opinion in *Hosanna-Tabor*, joined by Justice Kagan, is of course not binding authority. But it is fully consistent with the Court's opinion in *Hosanna-Tabor*, which Justices Alito and Kagan joined. We cite the concurrence because we, like the Second Circuit, "find its analysis both persuasive and extremely helpful." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 205 (2d Cir. 2017).

[the same] duties [as the plaintiff] would be covered by the ministerial exception in the absence of the other considerations [the Court] discussed." *Id*. at 193.

The panel majority further erred in concluding that applying the ministerial exception to religious teachers is "not needed to advance the Religion Clauses' purpose." Op. 14. From the Founding through the present day, the Religion Clauses have protected religious groups' internal affairs from state interference. The church—not the government—is sovereign when it comes to selecting those who will teach, lead, and carry out its mission. When the government oversteps this limitation, it not only violates the freedom of the church, but also entangles the state in religious questions, setting itself up as the arbiter of the sincerity and legitimacy of religious groups' decisions about who is qualified to teach and personify their faith.

ARGUMENT

I. The First Amendment Grants Religious Groups the Right to Choose, Without Governmental Interference, Who Will Teach Their Faith.

The Supreme Court has long held that courts may not question a religious group's determination of "questions of discipline, or of faith, or ecclesiastical rule." *Watson v. Jones*, 80 U.S. 679, 727 (1872). This rule is deeply rooted in the Free Exercise Clause, which guarantees religious groups autonomy "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox*

Church in N. Am., 344 U.S. 94, 116 (1952). It is also required by the Establishment Clause's prohibition on governmental interference "in essentially religious controversies." *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 709 (1976). In this way, the Religion Clauses work together to "protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J. concurring).

Applying these principles, the Supreme Court in *Hosanna-Tabor* ratified the longstanding consensus of the lower courts that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Id.* at 181. As the Court explained, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so," violates the Free Exercise Clause because it "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 188. It also violates the Establishment Clause by giving "the state the power to determine which individuals will minister to the faithful." *Id.* at 188–89. In short, "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184.

A. Religious teachers play a vital role in transmitting the faith to the rising generation.

The ministerial exception is especially critical for allowing religious groups to choose who will be entrusted with the "important role [of] transmitting the … faith to the next generation." *Id.* at 192. For many religions, the work of transmitting the faith occurs largely within their religiously affiliated schools, and the Supreme Court has "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979). After all, "both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). Allowing the state to decide who will teach the faith to a denomination's students would radically undermine each religious group's right under the Free Exercises Clause "to shape its own faith and mission through its appointments," and would violate the Establishment Clause by filtering religious instruction through the hands of a government-approved educator. *Id.* at 188–89.

Teachers at religiously affiliated schools play an important "role in conveying the Church's message and carrying out its mission." *Id.* at 192. Most obviously, their duties often include religious instruction and observance. Less visibly, but equally as important, they are responsible for promoting the spiritual and moral formation

of their students in accordance with the tenets of the faith. This responsibility pervades the school day, as teachers model faithful conduct, mete out discipline in accordance with the religious principles, encourage faith and spiritual growth, and teach "secular" subjects within a larger religious perspective. *See Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971) ("Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation."); *id*. ("Religious formation is not confined to formal courses … [or] a single subject area.").

The role of teachers in this regard is of particular importance to *amici* and other religious traditions for whom education is inextricable from their faiths. For example, Seventh-day Adventists trace the importance of education all the way back to the Garden of Eden. *See* Ellen G. White, *Education* 20 (1903) ("The system of education instituted at the beginning of the world was to be a model for man throughout all after-time…. The Garden of Eden was the schoolroom, nature was the lesson book, the Creator Himself was the instructor, and the parents of the human family were the students."). Education for Seventh-day Adventists has therefore always been explicitly religious, aimed at "restor[ing] human beings into the image of God as revealed by the Life of Jesus Christ" and focused on the development of "knowledge, skills, and understandings to serve God and humanity." *About Us*, Seventh-day Adventist Church, http://adventisteducation.org/abt.html (last visited Jan. 31, 2019). A faith-based education is in fact so important to Seventh-day Adventists

that they start at an early age through a program called Early Childhood Education and Care, which offers the "education of God's precious little ones" in "safe, nurturing environments that are aligned with the beliefs and values of the Seventh-day Adventist Church." *Early Childhood Education & Care*, Seventh-day Adventist Church. http://adventisteducation.org/ecec.html (last visited Jan. 31, 2019).

To fulfill this mission, the Seventh-day Adventist Church strives to run its schools in ways that honor God, by uniting doctrinal, moral, and secular teaching within a comprehensive Christian worldview. *See Clapper v. Chesapeake Conference of Seventh-day Adventists*, 166 F.3d 1208, at *1 (4th Cir. 1998) (Adventists operate their schools "for the purpose of transmitting to their children their own ideals, beliefs, attitudes, values, habits and customs" and because they "want their children to be loyal, conscientious Christians") (quoting Education Code § 1019). This approach has proven invaluable to strengthening the students' relationship with Christ and passing the faith to the next generation. In fact, the Church commissioned three studies of every student in its U.S. schools (called the Valuegenesis studies), which illuminate the role and effectiveness of Seventh-day Adventist schools in fostering faith. *See* V. Bailey Gillespie et al., *Valuegenesis Ten Years Later: A Study of Two Generations* (2004). Nearly three-fourths of students responded that attending a Seventh-day Adventist school helped develop their faith either "very much" (36%) or "somewhat" (38%). *Id.* at 302. Significantly, 53% of students attributed positive

development of their faith to their teacher's faith; 70% stated that prayer at school positively impacted their faith's development; and 63% recognized that Bible classes developed their faith. *Id.* These data confirm the critical role that religious education—and religious teachers—play in transmitting the faith.

The same is true in the Jewish tradition. Jews believe that they are under a biblical obligation to teach their children God's commandments. *Deuteronomy* 6:7 ("And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up."). This obligation can be delegated to a school. Maimonides, Mishne Torah, *Hilkhot Talmud Torah,* 1:3 ("And one is obligated to hire a tutor for his son to instruct him …."). Teachers at Jewish schools thus step into parents' shoes in fulfilling a biblical commandment.

Moreover, for Jews, education is seen as an essential link in the chain that links modern Jews to their ancestors who received the bible at Mount Sinai. *See, e.g.*, Bobby Vogel, *The Importance of Education*, The Rebbe.org (2002), https://www.chabad.org/therebbe/article_cdo/aid/1395114/jewish/The-Importance-of-Education.htm (quoting the Lubavitcher Rebbe, a major Jewish figure of the 20th century, as saying, "When you establish an educational institution, the achievement

goes on forever. … Though a person moves on from this physical world, the education that he received is passed on to the next generation, and from that generation to the next….").

Rabbi Jonathan Sacks, the former Chief Rabbi of the United Kingdom, argued that Jewish day school education is essential to the continuity of Judaism and the Jewish people. Without it, he argued, assimilation might cause the Jewish people to nearly disappear. *See* Jonathan Sacks, *Will We Have Jewish Grandchildren?: Jewish Continuity and How to Achieve It* (1994). Empirical research conducted at Brandeis University has shown that Jewish day school attendance strongly correlates with higher rates of interest in remaining Jewish, involvement in Jewish activities, attendance at religious services, and valuing a marriage partner who will maintain a Jewish home. *See* Fern Chertok et al., *What Difference Does Day School Make? The Impact of Day School: A Comparative Analysis of Jewish College Students* (2007).

Religious education is likewise critical in the Hindu tradition, which places special emphasis on modeling proper behavior for students. This standard was first established in the ancient Sanskrit religious text, the *Bhagavad-Gita*, the principle scripture of the Vaishnava faith: "Whatever action is performed by a great man, common men follow in his footsteps. And whatever standards he sets by exemplary acts, all the world pursues." So too in Islam. The fundamental element inherent in the concept of education in Islam is the inculcation of *adab* (*ta'dib*), a term that

encompasses a complex set of meanings that includes decency, comportment, decorum, etiquette, manners, morals, propriety, and humaneness.

B. Courts before and after *Hosanna-Tabor* have recognized that the ministerial exception covers religious educators.

Given the importance of religious education to the propagation of faith—and the "critical and unique role of the teacher in fulfilling the mission of a church-operated school," *Catholic Bishop*, 440 U.S. at 501—courts have long recognized that the ministerial exception covers religious educators. For example, in one case involving a Seventh-day Adventist elementary school teacher, the Fourth Circuit underscored the Adventists' infusion of theological beliefs into otherwise "secular" subjects, including the "teaching of the Bible's story of creation in science classes and the teaching of the influence of religion on the events of history in social studies classes." *Clapper*, 166 F.3d at *2. In another case involving a Hebrew instructor at a Jewish day school, the Seventh Circuit highlighted the fact that even in Hebrew language classes, the instructor "discussed Jewish values with her students, taught about prayers and Torah portions, and discussed Jewish holidays and symbolism."

Grussgott v. Milwaukee Jewish Day Sch., 882 F.3d 655, 656 (7th Cir. 2018) (per curiam), *cert. denied* 139 S. Ct. 456 (2018).[3]

This does not mean that every employee of a religious school is covered by the ministerial exception. Some employees—such as janitors, cafeteria workers, and "purely secular" teachers—whose duties do not include religious instruction or other religious functions may not qualify. *See Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring). But teachers who are responsible for religious instruction—even if they are *also* responsible for teaching "secular" subjects—do qualify. *See id.* Such a teacher is "not simply a public school teacher with an added obligation to teach religion." *Coulee Catholic Schs. v. Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 890 (Wis. 2009). Rather, she is "an important instrument in a faith-based organization's efforts to pass on its faith to the next generation." *Id.*

[3] *See also Fratello*, 863 F.3d 190 (school principal); *Curl v. Beltsville Adventist Sch.*, No. 15-3133, 2016 WL 4382686 (D. Md. 2016) (music teacher); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012) (music director); *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041 (2011) (preschool teacher); *Coulee Catholic Schs.*, 768 N.W.2d 868 (elementary school teacher); *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000) (music director and elementary school teacher).

II. The Panel Majority's Contrary Decision Misconstrues Both *Hosanna-Tabor* and the Purposes of the Religion Clauses.

The panel majority concluded that a 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." Op. 14. This conclusion misreads both *Hosanna-Tabor* and the First Amendment.

A. Recognizing that the ministerial exception covers all religious educators is fully consistent with *Hosanna-Tabor*.

Hosanna-Tabor did not purport to define the metes and bounds of the ministerial exception. Nor did it adopt any "test," whether a multifactor or totality-of-the circumstances test. Rather, noting that this was the Court's "first case involving the ministerial exception," the Court concluded that it was "enough" to hold that the exception covered the teacher in that case "given all the circumstances of her employment." 565 U.S. at 190. In other words, the Court concluded that *at least* where those circumstances exist, the ministerial exception applies.

The Court did not, however, hold or imply that each of the circumstances it discussed was necessary to its conclusion. Nor is there anything in the opinion suggesting that a teacher's performance of significant religious functions in the course of her employment is insufficient, by itself, to trigger the exception. On the contrary, the Court went out of its way to prevent this kind of misreading, explaining that it "express[ed] no view on whether someone with [the same] duties would be covered

by the ministerial exception in the absence of the other considerations [the Court] discussed." *Id.* at 193. The panel majority's contrary conclusion improperly transforms the Court's explicit expression of "no view" on whether religious duties alone can trigger the exception into a binding holding that they cannot. The Supreme Court left that issue for another day and case, and this Court cannot evade deciding the issue by ascribing to the Supreme Court a holding it expressly disclaimed.[4]

B. Shielding the selection of religious educators from governmental interference advances the Religion Clauses' purposes.

The panel majority's cursory discussion of the purpose of the Religion Clauses also missed the mark. That the historical events recounted in *Hosanna-Tabor* involved "heads of congregations and other high-level religious leaders," Op. 15, does not imply that the ministerial exception is limited to high-level leaders. The elementary school teacher in *Hosanna-Tabor* would not have met that test.

[4] The limited scope of the Court's holding is underscored by the fact that the three concurring justices—Justices Thomas, Alito, and Kagan—all joined the majority's opinion in full even though the rules they proposed for determining who qualifies as a "minister" do not require any multifactor or totality-of-the-circumstances analysis (and would plainly cover Ms. Biel). *See Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) (concluding that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister"); *id.* at 199 (Alito, J., concurring) (concluding that the ministerial exception "should apply to any 'employee' who … serves as a messenger or teacher of [the] faith"). Had these Justices understood the majority opinion to be inconsistent with their views, they would have concurred in the judgment only and not joined the Court's opinion.

Nor do the historical sources quoted by *Hosanna-Tabor* make any distinction between high- and low-level religious leaders or teachers. For example, in his letter to Bishop John Carroll, then-Secretary of State James Madison explained "that the selection of church '*functionaries*' was an 'entirely ecclesiastical' matter left to the Church's own judgment." *Hosanna-Tabor*, 565 U.S. at 184 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 *Records of the American Catholic Historical Society* 63 (1909)) (emphasis added).

As this suggests, when determining the scope of the ministerial exception, the focus should not be on the "level" of the employee within the organization, but rather on whether, in light of the functions performed by the employee, governmental interference in the employment relationship would undermine the Free Exercise Clause's guarantee of religious autonomy and the Establishment Clause's prohibition on excessive church-state entanglement. *See id.* at 188–89.

Given the importance of religious education to the propagation of the faith and the formation of believers, and the critical role that religious teachers play in fulfilling that mission, religious groups must be free to determine for themselves who will instruct their children in the faith. *See id.* at 200 (Alito, J., concurring). Instructive in this regard is President Thomas Jefferson's letter to the Ursuline Sisters of New Orleans, who operated a Catholic school for orphaned girls: "The prin-

ciples of the constitution of the United States … are a sure guarantee … your institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority." Quoted in 1 Anson Phelps Stokes, *Church and State in the United States* 678 (1950).

By minimizing the important role of religious educators like Biel "who do not serve a leadership role in the faith," Op. 15, but nevertheless provide religious instruction to children, the panel majority failed to afford the "special solicitude to the rights of religious organizations" guaranteed by the First Amendment. *Hosanna-Tabor*, 565 U.S. at 189. Left uncorrected, the decision will have destructive consequences. It will pressure religious schools to alter their employment practices to more closely resemble the circumstances in *Hosanna-Tabor*—a subtle coercion of religious belief and practice. And it will result in religious schools being compelled to hire or retain—or being penalized for failing to hire or retain—teachers who they believe are not suitable voices or models of their faith. *See id.* at 194.

Such governmental interference in the employment relationship of religious teachers also impermissibly entangles church and state. The panel majority's approach will require judges and juries to sit in judgment of the legitimacy and sincerity of a religious group's decisions regarding the religious qualifications and fitness of those they select to teach and model the faith to their children. Indeed, this case is an example of this kind of entanglement: on remand, the dispute will concern

whether Ms. Biel was terminated because of her poor performance of her teaching duties—which included regular religious instruction, supervision of twice-daily prayers, and incorporation of religious themes and symbols into her teaching—or because of her medical diagnosis. *See id*. at 206 (Alito, J., concurring) (adjudication of such questions "would require calling witnesses to testify about the importance and priority of the religious doctrine in question, which 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.").

In short, religious educators like Ms. Biel fall within the ministerial exception because they have a duty to teach and model the faith to their students, which makes them "the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees." *Id*. (Alito, J., concurring). The panel majority's contrary holding should not stand.

CONCLUSION

For these reasons, *amici* respectfully urge the Court to grant rehearing.

February 1, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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