No. 17-55180

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTEN BIEL

Plaintiff-Appellant,

v.

ST. JAMES SCHOOL

Defendant-Appellee.

Appeal from the United States District Court for the
Central District of California
No. 2:15-cv-04248 (Hon. Terry J. Hatter)

BRIEF OF *AMICI CURIAE* CHURCH OF GOD IN CHRIST, INC. AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 *amici curiae* Church Of God In Christ, Inc. and Union of Orthodox Jewish Congregations of America represent that they do not have any parent entities and do not issue stock.

/s/ Andrew G. I. Kilberg
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INTERESTS OF *AMICI CURIAE*

Amicus Church of God in Christ, Inc. ("COGIC") is a Pentecostal Christian church with more than 12,000 congregations in the United States and other congregations in over 100 countries worldwide, with a substantial presence in the states comprising the Ninth Circuit. Its local churches employ clergy and other employees who engage in religious teaching to congregants and their children.

Amicus Union of Orthodox Jewish Congregations of America ("Orthodox Union") represents nearly 1,000 synagogues in the United States and is the nation's largest Orthodox Jewish umbrella organization. Its member synagogues employ rabbis, cantors, and other employees who engage in religious teaching to congregants and their children. Orthodox Union also represents hundreds of Jewish non-public, parochial K-12 schools in the United States. These schools teach religious and secular studies in a holistic environment. They employ teachers, coaches, administrators, and others who engage in teaching through classroom instruction and role modeling.

Amici are committed to defending not only the right to direct their own religious teaching and governance free from state interference, but also the same rights of other churches, synagogues, mosques, and religious bodies. They believe that the ministerial exception is necessary to the religious vitality of our nation and inherent in the system of limited government guaranteed by the Constitution.

No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici* and their counsel, contributed money to its preparation or submission.

INTRODUCTION

For decades, courts have recognized that both Religion Clauses of the First Amendment to the Constitution—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—protect churches and other religious institutions from civil liability for certain employment decisions regarding ministers. This "ministerial exception," which is a specific application of the non-interference principle compelled by the Religion Clauses, generally forbids judicial involvement in "claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). Once it applies, the ministerial exception "completely bars judicial inquiry into protected employment decisions." *Puri v. Khalsa*, 844 F.3d 1152, 1164 (9th Cir. 2017).

The Supreme Court outlined a flexible framework in *Hosanna-Tabor* for determining who qualifies as a minister. As Justices Alito and Kagan explained in their concurrence, neither the Supreme Court nor any "circuit has made ordination status or formal title determinative of the exception's applicability." 565 U.S. at 202. Instead, following *Hosanna-Tabor*, courts—including this one—have applied an adaptable set of considerations, of which the employee's function within the religious organization is the predominant factor. *Id.* at 198, 202–04 ("[C]ourts should focus on the function performed by persons who work for religious bodies.")

(Alito, J., concurring); *see e.g.*, *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010) (en banc) (declining invitation to "adopt any particular test"). Nevertheless, the panel majority effectively subordinated that functional analysis to a rigid evaluation of employees' titles and credentials. That narrow view of who qualifies as a "minister" is unprecedented and inconsistent with the First Amendment.

The first section of this brief recounts the history underlying the non-interference principle and its application in the context of employment litigation—i.e., the ministerial exception. The second section argues that the panel improperly subordinated a functional analysis to a formulaic evaluation and that courts should defer to religious organizations' good-faith assertions that certain duties are religiously important.

ARGUMENT

I. The Ministerial Exception Guarantees Non-Interference In Church Hierarchy And Structure As A Matter Of Constitutional Law.

As both this Court and the Supreme Court have explained, "the ministerial exception derives from both the Free Exercise and Establishment Clauses of the First Amendment." *Alcazar*, 627 F.3d at 1291. The Religion Clauses prohibit governments from "interfer[ing] with the internal governance of the church, depriving the church of control over the selection of who will personify its beliefs."

Hosanna-Tabor, 565 U.S. at 188. This non-interference principle was developed in the American colonial period and is a staple of our Nation's jurisprudence.

A. Non-Interference Is A Central Feature Of Both Disestablishment And Free Exercise.

At the time of the Founding, "the central feature" of an establishment of religion was "control" by the government. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). In particular, "[t]he two principal means of government control over the church were laws governing doctrine and *the power to appoint prelates and clergy*." *Id.* at 2132 (emphasis added). In England, the Crown controlled the appointment of ministers. *E.g.*, An Act Restraining the Payments of Annates Etc. of 1534, *reprinted in The Tudor Constitution: Documents and Commentary* 358–60 (G.R. Elton ed. 1982). And in American colonies with Anglican establishments, "[m]inisters had to be . . . approved by the governor." McConnell, *Establishment*, *supra*, at 2138.

Governmental control over ministers was so central to an establishment that when the people of the States that had established churches later disestablished them, they invariably "adopted at the same time an express provision [in their respective constitutions] that all 'religious societies' have the 'exclusive' right to choose their own ministers." Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 829 (2012). This "history of disestablishment is persuasive

evidence that the freedom of all religious institutions to choose their clergy, *free of government interference*, was understood to be part and parcel of disestablishment." *Id.* (emphasis added).

The free exercise clauses in the new constitutions adopted by the States between 1776 and 1780 enshrined a similar understanding of non-interference. These clauses "allow[ed] churches and other religious institutions to define their own doctrine, membership, organization, and internal requirements without state interference." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1455, 1464–65 (1990). This understanding and background undoubtedly informed adoption of the Religion Clauses within the federal Constitution. *See Hosanna-Tabor*, 565 U.S. at 184.

Indeed, post-ratification history confirms that the Religion Clauses were understood to preclude government involvement in—or interference with—the selection and retention of ministers. Secretary of State James Madison declined a request from a Catholic bishop to advise "who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase." Madison responded that the "'scrupulous policy of the Constitution in guarding against a political interference with religious affairs,' . . . prevented the Government from rendering an opinion on the 'selection of ecclesiastical individuals.'" *Hosanna-Tabor*, 565 U.S. at 184 (quoting Letter from Secretary of

State James Madison to Bishop John Carroll (Nov. 20, 1806), *reprinted in* 20 *Records of the American Catholic Historical Society* 63–64 (1909)).

President Jefferson similarly observed that the Constitution prevents government "from intermeddling with religious institutions, their doctrines, discipline, or exercises." McConnell, *Free Exercise*, *supra*, at 1465 (quoting Letter from Thomas Jefferson to the Rev. Samuel Miller (Jan. 23, 1808), *reprinted in* 11 *The Works of Thomas Jefferson* 7, 7 (P. Ford ed. 1905)). And this included religious education. In 1804, President Jefferson assured the Ursuline Nuns, who operated a school for girls in New Orleans, that "the principles of the constitution and government of the United States are a sure guarantee . . . that your institution will be permitted to govern itself according to [its] own voluntary rules, without interference from the civil authority." Letter from Thomas Jefferson to Mother Superior Therese de St. Xavier Farjon (July 13, 1804), Louisiana Anthology, https://tinyurl.com/y7xckpje.

Against this backdrop, the ministerial exception reflects the "foundational premise that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law's corrective reach." Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 176 (2011).

B. The Non-Interference Principle Is Well Settled In Caselaw.

Courts have long recognized the non-interference principle. The Supreme Court first articulated it in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), which involved a dispute about which group properly controlled a Presbyterian church in Louisville, Kentucky. Based on a "broad and sound view of the relations of church and state under our system of laws," the Supreme Court deferred to the highest governing body of the Presbyterian church. *Id.* at 727. The Court explained that adjudicating matters of "church discipline, ecclesiastical government, or the conformity of members of the church to the standard of morals required of them" would infringe the freedom of religious bodies to direct their own affairs and inappropriately require civil courts "to inquire into . . . the whole subject of doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination." *Id.* at 733.

The Supreme Court applied the same principle in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), deriving it from the Religion Clauses. During the Cold War, New York passed a law transferring church property from one faction of the Russian Orthodox Church to another. The Court held the law unconstitutional because it "displace[d] one church administrator with another" and "pass[ed] the control of matters strictly ecclesiastical from one church authority to another." *Id.* at 119. "Freedom to select

the clergy," the Court explained, "must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." *Id.* at 116. Furthermore, meddling with "control" of churches "violates our rule of separation between church and state." *Id.* at 110. The Constitution preserves religious bodies' "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116; *see also Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929) ("[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."); *Serbian E. Orthodox Diocese for the U.S. & Canada v. Milivojevich*, 426 U.S. 696, 720 (1976) (condemning Illinois Supreme Court for reinstating former bishop of the Serbian Orthodox Church).

The Supreme Court reaffirmed the non-interference principle in *Hosanna-Tabor*. The Court explained that "[a]ccording the state the power to determine which individuals will minister to the faithful . . . violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions," and that "imposing an unwanted minister . . . infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." 565 U.S. at 188–89. Employment laws cannot be applied to removal of a ministerial employee, because "punishing a church" for that act "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. Over a decade before *Hosanna-Tabor*, this Court expressed a similar concern—rooted in both Religion Clauses—about governmental interference with religious bodies' choice of ministers. *See Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 945–46, 949 (9th Cir. 1999).

While the Supreme Court's articulation of the ministerial exception may be relatively new, the doctrine has an unassailable pedigree in the non-interference principle. Its importance cannot, and should not, be diminished by an overly formalistic reading of *Hosanna-Tabor* that ignores the historical development of the doctrine.

II. The Panel Erred In Its Determination That Plaintiff Was Not A Minister.

The panel majority elevated form over substance by devaluing the analysis of Plaintiff's religious functions and adopting Plaintiff's self-serving characterization of her job duties. Rehearing is necessary to correct both of these errors.

A. The Panel Majority Improperly Subordinated A Functional Analysis To Formulaic Criteria.

The Supreme Court outlined four "considerations" in *Hosanna-Tabor* that influenced its determination of ministerial status under the facts of that case: "the formal title given [the employee] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the

Church." 565 U.S. at 192. But *Hosanna-Tabor* "neither limits the inquiry to those considerations nor requires their application in every case." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 205 (2d Cir. 2017). Indeed, Justices Alito and Kagan wrote separately in *Hosanna-Tabor* specifically to explain that the "Court's opinion [ ] should not be read to upset th[e] consensus" among the courts of appeals that an employee's "religious function in conveying church doctrine" is more important than "ordination status or formal title." 565 U.S. at 202–04. "[I]t would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issues of religious autonomy that is presented in cases like this one." *Id.* at 198.

Function is crucial in part because many religious organizations and denominations, including Catholics, "eschew" the term "minister." *Id.* at 198, 202 (Alito, J., concurring). Some faiths—such as Jehovah's Witnesses—"consider all" adherents to be "ministers," while in Islam "every Muslim can perform the religious rites, so there is no class or profession of ordained clergy." *Id.* at 202 nn. 3–4 (quotation marks omitted). "Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). The "fear of liability" alone "may cause a religious group to conform

its beliefs and practices regarding 'ministers' to the prevailing secular understanding." *Id.* The ministerial exception should not be applied in a manner that could create incentives for minority religions to abandon religious precepts in order to survive.

Instead, the courts of appeal—including this Court—have accordingly emphasized the functional component of the ministerial analysis. In *Puri*, this Court stated that the "most important[ ]" consideration is whether the employee's responsibilities "reflect a role in conveying the Church's message and carrying out its mission." 844 F.3d at 1160 (quotation marks and alteration omitted).

Other circuits have taken a similar approach. In applying the ministerial exception to a suit brought by a principal of a Catholic school, the Second Circuit explained that "the most important consideration . . . is whether, and to what extent, the plaintiff performed important religious functions." *Fratello*, 863 F.3d at 208–09 (quotation marks omitted). The Fifth Circuit applied the ministerial exception to a church music director because he "played an integral role in the celebration of Mass and . . . furthered the mission of the church and helped convey its message." *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177, 179–80 (5th Cir. 2012). Likewise, the Seventh Circuit applied *Hosanna-Tabor* to a Hebrew teacher at a Jewish day school where the employee's "role as a teacher of faith to the next generation outweighed other considerations." *Grussgott v. Milwaukee Jewish Day*

Sch., Inc., 882 F.3d 655, 661 (7th Cir. 2018) (quotation marks and alteration omitted).

The panel majority in this case departed from *Puri* and the uniform approach of the other circuits. The majority laid heavy emphasis on Plaintiff's formal title, her minimal religious training and lack of religious "credentials," her employment history, and her own view of her job duties and responsibilities. *See Biel v. St. James Sch.*, 911 F.3d 603, 608–609 (9th Cir. 2018). But the majority minimized the express religious instruction she performed and ignored evidence of her "call[ing] to [p]romote the peace of Christ in the world," to "model[ ] the faith life," to "exemplify[ ] the teachings of Jesus Christ," "[t]o personally demonstrate our belief in God," and to "[i]ntegrat[e] Catholic thought and principles into secular subjects." *Id.* at 612–13 (Fisher, J., dissenting). If the majority had properly emphasized the functional component of *Hosanna-Tabor*, as this Court and other circuits have done, there is no question that it would have found that "her position . . . was pervaded by religious purpose." *Id.* at 621; *cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) ("recogniz[ing] the critical and unique role of the teacher in fulfilling the mission of a church-operated school").

In devaluing the functional analysis, the panel demoted a key religious function—teaching the faith—in contravention of *Hosanna-Tabor*. Although by no means the sole marker of ministerial status, "teaching and conveying the tenets of

the faith to the next generation" is one of a handful of "objective functions that are important for the autonomy of any religious group, regardless of its beliefs," much like "serv[ing] in positions of leadership" and "perform[ing] important functions in worship services and . . . religious ceremonies and rituals." *Hosanna-Tabor*, 565 U.S. at 199–200 (Alito, J., concurring). Teaching the faith to others, especially children, is vital to many religions' continued existence. And religious traditions often put heavy emphasis on teaching the faith to children. To give just one example, a central Jewish prayer repeats the Biblical directive to "[t]ake to heart these instructions with which [God] charges you this day" and to "[i]mpress them upon your children." *Worship Services: V'ahavta (Read)*, ReformJudaism.org, https://tinyurl.com/yddle9l6; *see also* Deut. 6:6–7.

Thus, because of the central importance of teaching in religious practice, the ministerial exception necessarily protects and empowers "the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher . . . of its faith." *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring); *see also id.* at 192 (noting importance of teacher's role in "lead[ing] others toward Christian maturity" (quotation marks omitted)); *Grussgott*, 882 F.3d at 660 (noting importance of teacher's role in "develop[ing] Jewish knowledge and identity" (quotation marks omitted)); *Fratello*, 863 F.3d at 209 (noting importance of principal's role in

"work[ing] closely with teachers" for accomplishing Catholic school's "religious education mission").

In determining whether a teacher's responsibilities and the substance of the teacher's role—the *function* the teacher performs—qualifies her as a minister, "[i]t makes no difference that [she] also taught secular subjects." *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring); *see also id.* at 193 (majority opinion) (chastising the Sixth Circuit for following the EEOC in "plac[ing] too much emphasis on [plaintiff's] performance of secular duties"). It is self-evident that merely teaching at a parochial school does not necessarily make one a minister, but Plaintiff here "played an important role as an instrument of her church's religious message and as a leader of its worship activities." *Id.* at 204 (Alito, J., concurring). "[S]trikingly similar" to the teacher in *Hosanna-Tabor*, she "was responsible for instructing her students on various areas of Catholic teachings," "prayed Catholic prayers with her students twice each day," "prepare[d] [her] students to be active participants at Mass," and "attended monthly school mass with her class." *Biel*, 911 F.3d at 618–19 (Fisher, J., dissenting) (quotation marks omitted). In the end, Plaintiff's function as a teacher of religion should have been more than enough to outweigh her title as a "Grade 5 Teacher," how she presented herself to the outside world, her lack of extensive religious training, and her own view of the religious importance of her job duties.

B. Courts Should Defer To A Religious Organization's Good-Faith Assertion That Duties Are Religiously Important.

The panel majority repeatedly adopted Plaintiff's own characterization of her job duties. But when confronted with both an employee's "argument that she performed her duties in a secular manner" and a religious organization's sincere assertion that those same duties are religiously important, courts should defer to the religious organization. *Biel*, 911 F.3d at 619–20 (Fisher, J., dissenting); *see also Grussgott*, 882 F.3d at 657 ("[I]t is sufficient that the school clearly intended for [the teacher's] role to be connected to the school's Jewish mission."); *id.* at 660 ("[The employee's] belief that she approached her teaching from a 'cultural' rather than a religious perspective does not cancel out the specifically religious duties she fulfilled."); *Cannata*, 700 F.3d at 179–80 ("[W]e may not second-guess whom the Catholic Church may consider a lay liturgical minister under canon law."); *cf. Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) ("[T]he Religion Clauses require civil courts . . . to defer to a religious organization's good-faith understanding of who qualifies as its minister.").

Deference preserves religious organizations' free exercise rights. Without a measure of deference, a religious body's "right to choose its ministers would be hollow," for "secular courts could second-guess the organization's sincere determination[s]" regarding its "theological tenets." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). "Determining that certain activities are in furtherance

of an organization's religious mission" is central to how "a religious community defines itself." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

Moreover, deference prevents courts from "wading into doctrinal waters" or adjudicating claims that "turn on an ecclesiastical inquiry." *Petruska v. Gannon Univ.*, 462 F.3d 294, 312 (3d Cir. 2006); *see also Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (interpretation of religious doctrine in a contract case would be tantamount to "secular courts taking on the additional role of religious courts"), *abrogated on other grounds by Hosanna-Tabor*, 565 U.S. at 195 n.4. In the context of determining who qualifies as a minister, courts cannot resolve "questions of the validity of religious beliefs"—of either church or plaintiff—or "choose between parties' competing religious visions." *Petruska*, 462 F.3d at 312 (quotation marks omitted). "First Amendment values are plainly jeopardized when . . . litigation is made [to] turn on the resolution by civil courts of controversies over religious doctrine and practice." *Milivojevich*, 426 U.S. at 709–10 (quotation marks omitted); *see also New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment[.]"); *Bollard*, 196 F.3d at 949 (The Establishment Clause guards against "a protracted legal process" which "inevitably" would result

in discovery and other mechanisms that "probe the mind of the church in the selection of its ministers." (quotation marks omitted)).

Doctrinal questions are also outside the competence of secular judges and juries; in the words of the Seventh Circuit, they are "issue[s] that [courts] cannot resolve intelligently." *Tomic*, 442 F.3d at 1042. This is not a question of "technical or intellectual capacity." Berg et al., *supra*, at 176. Rather, "matters of faith" may not be strictly "rational or measurable by objective criteria." *Milivojevich*, 426 U.S. at 714–15 & n.8; James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), National Archives, https://tinyurl.com/yb9qoojz ("[T]hat the Civil Magistrate is a competent Judge of Religious Truth . . . is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world.").

That lack of knowledge is especially acute in the United States because "[o]ur country's religious landscape includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Each denomination—even each congregation—may have "a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith." *Watson*, 80 U.S. (13 Wall.) at 729.

Thus, it is not only appropriate, it is necessary to defer to the religious organization's sincere assertion that an individual performs ministerial duties, at least where the basic underlying facts—such as the number of hours worked—are undisputed.

The panel here has asked the lower court to engage in precisely the type of impermissible doctrinal inquiry for which it is ill-equipped. If deference is not given to the school, and Plaintiff's suit is allowed to proceed, it is likely that "a civil factfinder [will] sit[ ] in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Biel*, 911 F.3d at 620 (Fisher, J., dissenting) (quoting *Hosanna-Tabor*, 565 U.S. at 206). For example, to determine whether Sister Mary Margaret's belief that Plaintiff's "'classroom management' was 'not strict'" was a valid reason for her termination, *id.* at 606 (majority op.), the district court may well have to wade into Catholic pedagogy and the Catholic philosophy of teaching. As Justices Alito and Kagan explained in their concurrence in *Hosanna-Tabor*, "[i]n order to probe the *real reason* for [plaintiff's] firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine." 565 U.S. at 205. The ministerial exception exists precisely to prevent such a result, casting a wide net to studiously avoid the very real danger of interference in religious affairs.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to grant the petition for panel rehearing and rehearing en banc.

Dated: February 1, 2019

Respectfully submitted,

/s/ Andrew G. I. Kilberg

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UNITED STATES COURT OF APPEALS
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I hereby certify that on this 1st day of February, 2019, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

Dated: February 1, 2019

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