No. 17-55180

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
No. 2:15-cv-04248-TJH

BRIEF FOR DOUGLAS LAYCOCK, MICHAEL W. MCCONNELL, THOMAS C. BERG, ROBERT F. COCHRAN, JR., CARL H. ESBECK, RICHARD W. GARNETT, PAUL HORWITZ, AND JOHN D. INAZU AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Professors Douglas Laycock, of University of Virginia School of Law; Michael W. McConnell, of Stanford Law School; Thomas C. Berg, of St. Thomas School of Law; Robert F. Cochran, Jr., of Pepperdine University School of Law; Carl H. Esbeck, of University of Missouri School of Law; Richard W. Garnett, of Notre Dame Law School; Paul Horwitz, of University of Alabama School of Law; and John D. Inazu, of Washington University in St. Louis, each hold a named endowed chair at their respective universities. Among the nation's leading scholars on the law of religious liberty, Amici write about the Religion Clauses of the First Amendment in general, and church autonomy and the ministerial exception in particular. Amici are further described in their motion for leave to file.

Substantially the same group of amici have submitted amicus briefs in the recent "ministerial exception" cases *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017), and *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018). Both Circuits agreed with the Amici's position and drew from Amici's brief and writings in the opinions.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4), Amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person or entity, other than Amici and their counsel, contributed money intended to fund the preparation or submission of this brief.

As explained in Amici's motion for leave to file, Amici's interest is to provide the Court with a historical perspective of the "ministerial exception" as it applies in this context and a broader doctrinal analysis of the exception. As previewed in this submission, this background makes clear that the exception must apply to employees who perform significant religious functions—including, as here, teachers at religious schools who are responsible for teaching the faith to their students. This context also shows that the panel erred when it divorced the considerations in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), from the context of the particular church's doctrine and practices that made those considerations relevant.

INTRODUCTION

This case presents "novel [and] particularly complex issues" warranting this Court's en banc rehearing. Cir. R. 29-2, advisory comm. note. The panel's decision is a departure from *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), and the history underpinning the ministerial exception jurisprudence, which establishes the importance of a religious organization's autonomy in selecting those who perform significant religious functions, including transmitting the organizations' beliefs. That is because those who transmit a religious organization's faith speak for that religion, and their selection is an inherently religious decision. In accord with the historical understandings, *Hosanna-Tabor* unanimously affirmed that the ministerial exception forbids the government from "interfer[ing] with the internal governance of the church" and "depriving the church of control over the selection of those who will personify its beliefs," and "teach [its] faith." *Id.* at 188, 196. And for the ministerial exception to protect every faith equally, the determination of who is a "minister" must focus on whether the employee performs important religious functions. *Id*. at 202-04 (Alito, J., concurring).

The panel's decision disregards this understanding of the ministerial exception. First, it transforms the flexible considerations *Hosanna-Tabor* used to determine that a teacher was a "minister" under one church's doctrine into a

mechanical check-every-box test that inevitably discriminates against other religions organized differently. Second, the panel erred in its analysis of each of the considerations of *Hosanna-Tabor*, minimizing the most important consideration and evidence in its support—the significance of Biel's religious functions. Both aspects of the panel's decision also conflict with other Circuits' decisions.

En banc review is warranted so this Court can properly address the scope of the "ministerial exception" in light of its historical and doctrinal foundations.

ARGUMENT

I. RELIGIOUS ORGANIZATIONS HAVE AUTONOMY TO SELECT THOSE WHO PERFORM SIGNIFICANT RELIGIOUS FUNCTIONS

A. As The Supreme Court Has Explicitly Recognized In *Hosanna-Tabor*, The First Amendment Protects The Autonomy Of Religious Organizations

In *Hosanna-Tabor*, the Supreme Court confirmed the forty years of precedent in lower courts, which recognized a ministerial exception giving religious organizations autonomy to evaluate and select their leaders and freedom from liability in connection with those decisions. 565 U.S. at 186-90. That is because a religious organization's selection of those who teach its faith is an inherently religious decision. Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 Harv. J. L. & Pub. Pol'y 839, 850-51 (2012). Indeed, as the Supreme Court has held, "[t]he exception . . . ensures that the authority to

select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194-95 (internal quotation marks & citation omitted). The Supreme Court has clarified that this exception arises from both the Establishment and the Free Exercise Clauses: "[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 188-89. Thus, these two clauses form "a two-way street, protecting the autonomy of organized religion and not just prohibiting governmental 'advancement' of religion." Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J. L. & Pub. Pol'y 821, 834 (2012).

Each opinion in *Hosanna-Tabor* recognized that "the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith." 565 U.S. at 196-97 (Thomas, J., concurring). "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so … 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, 195. This is why the ministerial

exception categorically precludes the imposition of liability, "bar[ring]" employment discrimination suits brought by those in religious groups who "preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. Thus, the scope of the ministerial exception must be sufficient to "protect[] the freedom of [each] religious group[] to engage in certain key religious activities … as well as the critical process of communicating the faith … in its own voice, both to its own members and to the outside world." *Id.* at 199, 201 (Alito, J., concurring).

B. History Confirms That A Religious Organization's Ability To Select Those Who Perform Significant Religious Functions, Such As Transmitting the Organization's Faith, Is An Essential Part Of The Protection Of Religious Freedom From Governmental Interference

This understanding of the ministerial exception is firmly grounded in history. The broad principle that government has no authority to interfere with a church's internal affairs—espoused by Founders such as James Madison and Thomas Jefferson—"has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines." Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 175 (2011). Fundamental to this autonomy is the church's right to "control … the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. And a teacher at a parochial school—a church-sponsored institution that serves as a "powerful vehicle for transmitting [a

church's] faith to the next generation," *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971)—exemplifies the church's values and is instrumental in promoting "the faith and mission of the church itself," *Hosanna-Tabor*, 565 U.S. at 190.

Accordingly, early American leaders refused to intervene in religious groups' internal governance. Both the Congress of the Confederation and Secretary of State James Madison refused to weigh in on the selection of Catholic Bishops in the new nation, viewing these decisions as "purely spiritual[]" and "entirely ecclesiastical." Carl H. Esbeck, *Religion During the American Revolution and the Early Republic*, in 1 LAW AND RELIGION, AN OVERVIEW 57, 72-73 (2013); McConnell, *supra*, at 830 (quoting Letter from James Madison to John Carroll (Nov. 20, 1806), in 20 THE RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY 63, 63-64 (1909)).

But the Founders understood that the First Amendment's principle of non-interference extends beyond the appointment of ordained clergy; it broadly forbids the government from interfering in matters relating "purely to the organization and polity of the church." 22 Annals of Cong. 983 (1811). In 1811, President Madison vetoed a bill incorporating the Protestant Episcopal Church in the District of Columbia, emphasizing that it "exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates … the article of the Constitution of the United States, which

declares, that 'Congress shall make no law respecting a religious establishment.'" *Id.* at 982-983. Madison explained:

> "The bill enacts into, and establishes by law, sundry *rules and proceedings relative purely to the organization and polity of the church incorporated*, and comprehending even the election and removal of the Minister of the same; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises."

Id. at 983 (emphasis added).

The Founders likewise understood this autonomy to extend to religious schools. In 1804, the Ursuline Nuns of New Orleans appealed to President Thomas Jefferson for assurance that the Louisiana Purchase—and the transfer of control over the city from Catholic France to the United States—would not undermine their legal rights. The nuns, considering themselves "bound by a solemn obligation to employ … their time in the education of youth," ran a school for orphaned girls. Sr. Therese de St. Xavier Farjon to Thomas Jefferson, 13 June 1804, *The Thomas Jefferson Papers, Series 1: General Correspondence, 1751-1827*, Library of Congress Manuscript Division, https://bit.ly/2WaJvU7. In response, Jefferson assured them that "[t]he principles of the [C]onstitution … are a sure guaranty to you that [your property and rights] will be preserved to you sacred and inviolate, *and that your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority*." Berg, *supra*, at 182 (quoting 1 Anson Phelps Stokes, *Church and State in the*

United States 678 (1950)). Thus, "Thomas Jefferson also saw church-state separation as guaranteeing the autonomy, independence, and freedom of religious organizations—not just churches but religious schools as well," as his "statement affirming institutional autonomy encompasses the freedom of a religious school to select its own leaders." *Id.* at 182-83.

"What these and other events confirm is that many early American leaders embraced the idea of a constitutionalized distinction between civil and religious authorities." Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious Freedom, and the Constitutional Structure*, 2011-2012 Cato Sup. Ct. Rev. 307, 313. "And they saw that this distinction implied, and enabled, a zone of autonomy in which churches and religious schools could freely select and remove their ministers and teachers." *Id.*

II. THE "MINISTERIAL EXCEPTION" IS BEST UNDERSTOOD AS COVERING POSITIONS WITH SIGNIFICANT RELIGIOUS FUNCTIONS, SUCH AS TRANSMITTING THE FAITH

A. The Panel's Mechanical Application Of A Four-Factor Test Disregards *Hosanna-Tabor* And Is In Conflict With Other Circuits

The ministerial exception "is not limited to the head of a religious congregation," and the Court refused "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Hosanna-Tabor*, 565 U.S. at 190. Instead, the Court sought to protect "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. For

Hosanna-Tabor's decision to apply as a general rule and not be limited to its facts—and to treat all faiths equally—the ministerial exception must cover all teachers (regardless of title) with significant religious responsibilities, even if their title does not reflect the substance of their role.

As Justice Alito explained in a concurring opinion, joined by Justice Kagan, even though lower courts have generally agreed on the functional contours of the "ministerial exception," the term "ministerial" is inapt because "most faiths do not employ the term 'minister,'" "some eschew the concept of formal ordination," and some "consider the ministry to consist of all or a very large percentage of their members." *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring). Instead, the exception "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, *or serves as a messenger or teacher of its faith*." *Id.* at 199 (emphasis added).

A teacher at a Catholic school who is explicitly tasked with teaching Catholic doctrine and practices to her students fits this description. Indeed, for Catholics, "[e]ducation has always been one of the most important missions of the Church." Slip Op., Dkt. No. 71, at 19, (Fisher, J., dissenting (sitting by designation)) (quoting the School's "Code of Ethics for Professional Educators in Catholic Schools"). The Supreme Court has likewise recognized that "[t]he various characteristics of [parochial] schools make them a powerful vehicle for

transmitting the Catholic faith to the next generation," *Lemon*, 403 U.S. at 616, and that teachers in religious schools play a "critical and unique role" in these schools' religious mission, *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979).

An interpretation of the ministerial exception that fails to recognize the "ministerial" role of those teaching religion in parochial schools, because they are simply called "teachers," discriminates against a church based on its structure and nomenclature—both matters of "internal governance of the church." *Hosanna-Tabor*, 565 U.S. at 188. But the Supreme Court held that the First Amendment prohibits discrimination among different faiths. *See generally, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

Furthermore, the panel's check-the-boxes application of four "factors" from *Hosanna-Tabor* makes the Ninth Circuit an outlier. Every other Circuit has followed the Supreme Court's instruction to avoid "adopt[ing] a rigid formula for deciding when an employee qualifies as a minister," *Hosanna-Tabor*, 565 U.S. at 190. *See, e.g., Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) ("[E]ven referring to them as 'factors' denotes the kind of formulaic inquiry that the Supreme Court has rejected."); *Fratello v. Archdiocese of New York*, 863 F.3d 190, 202, 204–05 (2d Cir. 2017) ("*Hosanna-Tabor* instructs

only as to what we *might* take into account as relevant, including the four considerations on which it relied; it neither limits the inquiry to those considerations nor requires their application in every case."); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) ("Any attempt to calcify the particular considerations that motivated the Court in *Hosanna-Tabor* into a 'rigid formula' would not be appropriate.").

B. The Panel's Rigid Formulation Undermines The Very Religious Autonomy That The Ministerial Exception Was Designed To Protect

The undisputed evidence in this case shows that: (1) The Catholic Church considers parochial education to be a fundamental part of its religious mission; (2) Biel played a role in this mission by teaching Catholic doctrine to her students four days a week; (3) She prayed with them twice a day, including uniquely Catholic prayers like the "Hail Mary," and took them to mass each month; (4) She was required to incorporate Catholic teaching into all subjects, and was evaluated on her ability to do so. The panel nonetheless concluded that Biel fell outside the ministerial exception. In effect, the government could—without implicating the First Amendment—choose someone to fill this role at the Catholic school or penalize the Catholic school for its choice.

The panel so held because Biel purportedly satisfied "only one of the four" factors from *Hosanna-Tabor*. The panel's error is two-fold.

1. The panel's formalistic analysis ignores the centrality of religious functions in determining who is a "minister"

The panel wrongly adopted the formalistic check-every-box approach, rather than viewing the Supreme Court's four considerations from *Hosanna-Tabor* as examples of what evidence illustrated *in that case* that the church had chosen the plaintiff to "preach [its] beliefs, teach [its] faith, and carry out [its] mission." 565 U.S. at 196. The panel's approach is contrary to *Hosanna-Tabor* and its progeny. *See* Part II(A).

Relatedly, under *Hosanna-Tabor*'s analysis focusing on the history of the ministerial exception (*see* Part I(B)), and *Hosanna-Tabor*'s progeny in appellate courts, a teacher's function of providing regular religious instruction should generally suffice to bring the teacher within the ministerial exception. *See, e.g.*, *Fratello*, 863 F.3d at 208-09 ("[T]he most important consideration in this case is whether, and to what extent, the plaintiff 'performed' 'important religious functions ... for [her religious organization].' *Hosanna-Tabor*, 565 U.S. at 192."); *Grussgott*, 882 F.3d at 661 ("[T]he importance of Grussgott's role as a 'teacher of [ ] faith' to the next generation outweighed other considerations. *See Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)."); *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 122 n.7 (3d Cir. 2018) ("the ministerial exception applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions" (internal quotation marks

omitted)); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015) (taking a broad view of what constitutes a religious title and then focusing predominantly on the employee's religious functions).

Hosanna-Tabor did not reach the outer limits of the test for "ministerial" status because it did not have to do so on the facts presented there. The Court addressed Perich's title, ordination, and religious training, not because they form the *sine qua non* of the ministerial exception, but because they showed so clearly under the doctrine and practices *of the Lutheran Church – Missouri Synod* that the Church chose Perich to "minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 189. The panel, however, confines *Hosanna-Tabor* to its facts. But for the Supreme Court's decision to be applicable as precedent across a variety of facts and faiths, the doctrine must be applied to cover all teachers at religious schools who have significant religious responsibilities.

Furthermore, the panel's approach cannot be reconciled with "[o]ur country's religious landscape" that "includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status." *Id.* at 197 (Thomas, J., concurring). It turns the First Amendment into a formalistic analysis that deprives religious bodies of autonomy to structure their internal governance according to their own doctrine and practice—the very purpose of the ministerial exception. *Id.* at 188-89. "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 function performed by persons who work for religious bodies." *Id.* at 198 (Alito, J., concurring).

2. The panel's analysis of the *Hosanna-Tabor* considerations led it to ignore the Catholic Church's own understanding of the religious significance of Catholic education

The panel erred in the actual analysis of the *Hosanna-Tabor* considerations. Most importantly here, in considering Biel's religious functions, the panel attempted to minimize the significance of Biel's responsibility to teach Catholic doctrine to her students four days per week and to "incorporate[] religious themes and symbols into her overall classroom environment and curriculum." Slip. Op. at 11. The panel concluded that this was the only factor where Biel and Perich "have anything in common," but ultimately dismissed it because she taught only from a book provided by the school. *Id.* Ironically, this suggests that a court could second-guess the school's conclusion that Biel was not teaching Catholic doctrine correctly, placing precisely the religious questions at issue that the ministerial exception is designed to avoid. This also ignores Biel's responsibility to figure out how to incorporate Catholic teaching into other subjects. *Compare with Fratello*, 863 F.3d at 209 (Fratello "convey[ed]" the School's Roman Catholic "message and

carr[ied] out its mission," and was evaluated on those activities (quoting *Hosanna-Tabor*, 565 U.S. at 192)). As the School's only fifth grade teacher, Biel was the primary provider of religious instruction to each fifth grade student at St. James. And at over three hours per week, Biel's instruction in Catholic doctrine and practices was probably more than the students were receiving from their priests—and certainly more than they received at weekly Mass. Yet the panel denied that Biel's role involved "religious leadership and guidance." Slip Op. at 13.

The panel likewise minimized the significance of her other religious duties because she merely "joined in" class prayers rather than "orchestrat[ing]" them, and merely "accompany[ied]" her students to Mass rather than planning or leading the devotions herself. But Biel was responsible for ensuring that her students knew how to pray in the Catholic tradition. Slip. Op. at 17 (Fisher, J., dissenting); *cf. Grussgott*, 882 F.3d at 660 (rejecting the distinction between leading prayer as opposed to teaching and practicing prayer with her students) ("[W]hether Grussgott had discretion in planning her lessons is irrelevant; it is sufficient that the school clearly intended for her role to be connected to the school's Jewish mission."). But if these duties are insufficiently "religious" to trigger the ministerial exception, a court could override a Catholic school's judgment that a teacher had failed in her responsibility to appropriately have prayer in her class. As the Seventh Circuit explained: "Even if [the teacher] did not know this, the

purpose of the ministerial exception is to allow religious employers the freedom to hire and fire those with the ability to shape the practice of their faith. Thus, it is the school's expectation—that [the teacher] would convey religious teachings to her students—that matters." *Id.* at 661.

Next, the panel concluded that Biel's title of "Grade 5 teacher" meant that the school did not hold her out as a minister. But in *Hosanna-Tabor*, the title was relevant not because it used the word "minister," but because of what "Minister of Religion, Commissioned" means to the Lutheran Church – Missouri Synod—an inherently religious question. *See* 565 U.S. at 191 (analyzing Perich's title by considering her religious *functions*: "tasked with performing that office 'according to the Word of God,'" reviewed by congregation according to her "skills of ministry"). At St. James Catholic School, a "Grade 5 teacher" is also tasked with teaching what the Catholic church believes to be the Word of God, and is reviewed for her ability to do so. Furthermore, the panel ignores Biel's *other* title at St. James, which even more clearly conveys her "ministerial" role: "Catholic school educator[] … called to Promote the peace of Christ in the world." Slip Op. at 19 (Fisher, J., dissenting) (quoting faculty handbook).

The panel further concluded that Biel had not received sufficient religious training to fall within the exception. But the amount of religious training required by a religious organization for those who will convey its message is a religious

question. And St. James Catholic School has concluded that the training Biel received was sufficient. *Compare with Fratello*, 863 F.3d at 208 ("[A]lthough … a 'lay principal' is not strictly required to meet any formal religious-education requirements, the substance reflected in that title as used by the defendants and conveyed to the plaintiff entails proficiency in religious leadership, which … is evidence in favor of applying the ministerial exception here."); *Cannata*, 700 F.3d at 178 (plaintiff's "lack of formal training in Catholic doctrine is immaterial").

In any event, the "substance" reflected in a title is less about "educational or practical [training] prerequisites" than it is about "how the religious organization understood an employee's role." Slip Op. at 27 (Fisher, J., dissenting). This is the Second Circuit's approach. *See Fratello*, 863 F.3d at 208 (Catholic principal's role required her to provide "Catholic leadership" by "embodying Christ-centered principles, encouraging the spiritual growth … of each and every student, exercising spiritual leadership to ensure a thriving Catholic school community, and exhibiting a willingness to promote Catholic education" (brackets and quotation marks omitted)).

Finally, the panel explained that Biel had not held herself out as a minister. Again, this focuses on what a "minister" meant to the Lutheran Church – Missouri Synod in *Hosanna-Tabor*. But, by accepting the position at St. James Catholic

School, Biel held herself out as one qualified to teach Catholic doctrine to her students as provided in the school's curriculum.

Thus, the *Hosanna-Tabor* considerations—when properly analyzed—confirm that St. James chose Biel as one who would "preach [its] beliefs, teach [its] faith, and carry out [its] mission." 565 U.S. at 196. Thus, St. James "must be free to choose those who will guide it on its way." *Id.*

CONCLUSION

For the reasons stated here and in Appellee's petition, this Court should grant the petition for rehearing *en banc*.

Dated: January 31, 2019

Respectfully submitted,

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