

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*

**BRIEF OF *AMICUS CURIAE* NATIONAL CATHOLIC EDUCATIONAL
ASSOCIATION SUPPORTING DEFENDANT-APPELLEE, REHEARING,
AND REHEARING EN BANC**

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The National Catholic Educational Association does not have a parent corporation and no publicly held corporation owns 10% or more stock in it.

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IDENTITY AND 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 states: “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

¹ Counsel for Plaintiff-Appellant has not responded to NCEA’s request for consent to file this brief, so NCEA has moved under FED. R. APP. P. 29 for leave to file this brief. The motion required by Rule 29(a)(3) accompanies this brief. Further, pursuant to Rule 29(E), counsel for *Amicus Curiae* certifies that no party or 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 the brief, and no person other than *Amicus Curiae* and its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

That was a message that doesn't always get taught when you're struggling to survive, that there are other people more needy than you and you have an obligation to think about them. . . . [Blessed Sacrament's teachers] taught me how to be a good person. In the kind of world we lived in, with the drug addiction and crime and sadness that permeates the community, you needed a model of someone teaching you that being a good human being has value.

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/> (quoting Justice Sonia Sotomayor).

We began the day's studies with the catechism and said the rosary in class each afternoon. We learned that God made us to know, love, and serve Him in this world, and to be happy with Him in the next. The sisters also taught us that God made all men equal, that blacks were inherently equal to whites, and that segregation was morally wrong. . . . Whatever our circumstances, the nuns treated us all with respect and insisted that we do our best

Clarence Thomas, MY GRANDFATHER'S SON 14-15 (2007).

Justice Sotomayor's and Justice Thomas's respective memories of their Catholic teachers evidence an important point: Catholic schools possess a distinct mission. This mission is “[t]he integral formation of the human person.” The Sacred Congregation for Catholic Education, *Lay Catholics in Schools: Witnesses*

to Faith, #17, 1982. The Catholic mission of integral formation does not neatly (and, in its view, artificially) separate the “secular” from the “religious.” Rather, integral formation “includes the development of *all* the human faculties of the students, together with preparation for professional life, formation of ethical and social awareness, becoming aware of the transcendental, and religious education.” *Id.* (emphasis added). In this mission, the “educator[s] in the school” are involved—forming “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.” *Id.* (emphasis added). In short, unlike the focus of other schools, the Catholic mission of integral formation is meant to educate, as Catholic schools often put it, “the whole person.”

It is precisely because religious missions, structures, and worldviews can differ from the spirit of the times—as the mission of Catholic schools differs from other schools—that the First Amendment’s “ministerial” exception focuses on a “minister’s” function *in that religion*, not on forms familiar to the zeitgeist. Rather than “adopt a rigid formula,” rely on a “title,” or resolve how “secular” or “religious” an employee is with a “stopwatch” that clocks the time spent on certain activities, the Supreme Court unanimously held that “the nature of the religious functions performed” underlies whether an employee is a “minister” and thus,

cannot challenge his or her termination in civil court. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190-94 (2012).

As an organization representing 150,000 Catholic educators, *Amicus* respectfully submits that the Panel’s determination that Ms. Biel is not a “minister” contradicts the Catholic Church “entrust[ing]” her “with teaching and conveying the tenets of the faith to the next generation.” *Id.* at 200 (Alito, J., concurring). As the only Fifth Grade teacher at St. James School, Ms. Biel bore particular responsibility for effectuating—and embodying—the integral formation that is distinct to Catholic schools. Yet, contrary to *Hosanna-Tabor*, the Panel emphasized forms (like Ms. Biel’s title as “teacher”), and it trivialized how the distinct Catholic mission of integral formation permeated everything Ms. Biel did as a teacher—from how she decorated the classroom, how she embodied the faith by taking her students to Mass and praying with them, and to how she taught every subject, even “secular” ones like math. (SER 5-6 (Vol. 1), 79-82 (Vol. 2)).

By supplanting the Catholic Church’s understanding of Catholic teachers for its own, the Panel produced a conclusion irreconcilable with four centuries of Catholic educational practice in America. On the Panel’s reasoning, had *Ms. Biel* been *Sister Biel*—with all of her teaching functions at St. James staying exactly the same—she would be a minister recognized by the First Amendment. This disparity downplays Ms. Biel’s function as a *Catholic* teacher, and makes forms

like her title dispositive, violating *Hosanna-Tabor*. Worse still, this reasoning reads the Catholic Church’s unique educational approach out of the First Amendment’s protection—an approach that, as Justices Sotomayor and Thomas attest, is life-changing. *Amicus* requests that the Court correct this exceptional error.

ARGUMENT

I. Catholic Schools And Their Teachers Are At The Core Of The Catholic Church’s Ministry. St. James And Ms. Biel Are No Exceptions.

a. 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.” Pope Paul VI, *Gravissimum Educationis* § 8 (Oct. 28, 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 a 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. The Sacred Congregation for Catholic Education put the point succinctly:

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).

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. Indeed, “the establishment of parish free schools” came from 19th-century concerns of “Protestant domination of the public school system.” Betty Ann McNeil, *Historical Perspectives on Elizabeth Seton and Education: School is My Chief Business*, 9 JOURNAL OF CATHOLIC EDUCATION 284, 286-87 (2006). “The hierarchy desired to educate the laity in the faith and to combat the prevalence of secularism in the country.” *Id.* at 287. Importantly, however, these parochial schools were inspired by Catholic schools founded decades—and, in some cases, centuries—earlier by the laity and religious orders, like Saint Elizabeth Ann Seton and her Sisters of Charity. As early as the 1600s, “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.* “Miss Alice Lalor and her pious associates” started a school that “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.*

These diverse examples illustrate a crucial pattern: 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. St. 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—emphasizing the harmony of faith and reason that Catholics understand to manifest in all educational subjects. 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 notion that the growing number of lay Catholics succeeding clergy and religious orders 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*, THE CARDINAL NEWMAN SOCIETY’S CATHOLIC EDUCATION REPORT at 1-2 (June 2015).² “The Congregation expanded on the distinctive characteristics of Catholic education in 1988 in *The Religious Dimension of Education in a Catholic School*, restating, ‘Prime responsibility for creating this unique Christian school climate rests with the teachers.’” *Id.* at 2 (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, [and] in tune with Catholic schools’ educational project.” Congregation for Catholic Educ., *Educating Today and Tomorrow: A Renewing Passion* 10 (2014).

b. St. James And Ms. Biel Manifest The Mission Of Catholic Education.

Here, neither St. James School nor Ms. Biel as Fifth Grade teacher is an exception to the overarching Catholic mission to educate the whole person. As the St. James website says, the parish’s mission is to “Love God, Love all People, *Make Disciples.*” St. James Catholic Church, <https://www.saintjames.church/> (last visited Jan. 31, 2019) (emphasis added); *see also* (SER 4-5 (Vol. 1), 68 (Vol. 2))

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

(explaining that St. James School is part of the parish’s overall mission to develop and grow the Catholic faith). Like those teachers—lay and religious alike—that came before her, Ms. Biel, a Catholic herself, understood that she “had to abide with the school’s mission in promoting and developing the Catholic faith within the school.” (ER 224 (Vol. 3)). Pursuant to that mission, she taught at least 200 minutes of religious instruction to her students every week (SER 5 (Vol. 1), 74-75 (Vol. 2))—including instruction on the significance of events within the Catholic liturgical calendar, Catholic saints, the Catholic Bible, and Catholic sacraments, all from a Catholic textbook. (SER 5 (Vol. 1), 71-72, 72-73, 100-104 (Vol.2)). Consistent as well with the distinct, Catholic mission of integral formation, Ms. Biel was required to incorporate the Catholic faith into all aspects of her instruction. This was a part of the St. James School Faculty Handbook (ER 478-479, 571 (Vol. 4)). In fact, her incorporating of “signs, sacrament[s], [and] traditions of the Roman Catholic Church in the classroom” was a specific part of her professional evaluation. (SER 5-6 (Vol. 1), 79-82 (Vol. 2)). The school also evaluated Ms. Biel’s incorporation of Catholic spiritual development as she taught her students mathematics—confirming the integration of both natural and spiritual formation. (SER 5-6 (Vol. 1), 79-82 (Vol. 2)).

All of this ministry complemented the Catholic prayers Ms. Biel prayed with her students and her participation with them in a monthly Mass. These prayers, the

“Our Father” and the “Hail Mary” (the latter being a distinctly Catholic prayer), make doctrinal claims about the nature of God, His power, and the role of Mary in the salvation of souls. Moreover, at Mass, Ms. Biel’s students would occasionally be tasked with presenting the bread and wine (the “gifts”) to the priest. (SER 73, 75-76 (Vol. 2)). This presentation allows the priest to facilitate what Catholics consider the “source and summit” of their religious life: communing with the body, blood, soul, and divinity of Jesus Christ. In all of these instances, Ms. Biel’s presence and how she conducted herself was part and parcel of her students’ Catholic education.

II. The Panel Decision Overlooked The Distinct Mission Of Catholic Teachers In Determining Ms. Biel’s Ministerial Status.

When Ms. Biel’s near-daily religious instruction of her Fifth Grade class is considered in light of the Catholic understanding of school teachers, there can be no doubt: Ms. Biel is a “minister” under the First Amendment. The Church “entrusted” her “with teaching and conveying the tenets of the faith to the next generation.” *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). And in doing so she fulfilled the distinct, Catholic-school mission to educate the whole person, manifesting the Catholic view that faith and reason are in harmony, natural and spiritual development should occur in sync, and a teacher serves as an embodiment of the faith for those under her authority. *See supra* pp. 5-9. Failing to conclude Ms. Biel is a “minister” belies what the Catholic Church has made

clear throughout the centuries: “The extent to which the Christian message is transmitted through education depends to a very great extent on the teachers.” The Sacred Congregation for Catholic Education, *The Catholic School*, #43, 1977. By virtue of the Panel’s reasoning, the Ninth Circuit has effectively told the Catholic Church that its centuries-old understanding of its own educational mission is mistaken.

The only way the Panel could avoid recognizing Ms. Biel’s ministerial status at St. James School is by committing a fundamental error prohibited by *Hosanna-Tabor*: Failing to evaluate the role of a Catholic school teacher *in the Catholic faith*.

The Supreme Court’s unanimous decision in *Hosanna-Tabor* confirms that, absent a sham, the court must credit *the religion’s* understanding of a role’s religious significance—not apply a court’s own understanding or someone else’s. *Hosanna-Tabor* rejected the invitation to probe whether the religious reasons offered for the minister’s termination was “pretextual,” because 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 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, J., 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) (emphasis added).

Rather than follow *Hosanna-Tabor*, the Panel supplanted the Catholic Church's judgment of what is religiously significant in Catholic education with the Panel's judgment. The Panel suggested that St. James School, if it really considered Ms. Biel a minister, should have held "Biel out as a minister by suggesting to its community that she had special expertise in Church doctrine, values, or pedagogy beyond that of any practicing Catholic." Op. 10. Of course, the Catholic understanding of education does not approach teachers this way. *See, e.g.,* The Sacred Congregation for Catholic Education, *The Catholic School*, #39, 1977 (explaining that "[i]t would be wrong to consider subjects as mere adjuncts to

faith or as a useful means of teaching apologetics,” but rather what makes Catholic education Catholic is the “aim” in teaching all subjects is not merely “the attainment of knowledge but the acquisition of values and the discovery of truth.”³

Further, the Panel drew a distinction between “teacher” and “ministers” that is at odds with both *Hosanna-Tabor* and the premises of Catholic education—one that, effectively, made Ms. Biel’s title dispositive. The Panel thought it significant that Ms. Biel “described herself as a teacher and claimed no benefits available only to ministers.” Op. 11. Yet as discussed above, 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 a Catholic teacher’s responsibilities. *See supra* pp. 8-9; *see also* The Sacred Congregation for Catholic Education, *Lay Catholics in Schools: Witnesses to Faith*, #17, 1982 (“every educator in the school” is involved in “[t]he integral formation of the human person”). Nevertheless, the Panel placed great weight on the fact that Ms. Biel was *just* a “teacher.” This emphasis permits a startling

³ To the Panel, Ms. Biel would have been more like a minister if her employment was like that of the employee in *Hosanna-Tabor*, i.e., not “at-will and on a yearlong renewable contract.” Op. 10. *Hosanna-Tabor*, however, never suggested that its facts were required to identify a minister. In fact, the decision rejected a “formula” approach to the ministerial exception, merely stating that the facts it identified “in this [the Court’s] first case involving the ministerial exception” were “enough” to find the exception applied. *See* 506 U.S. at 190.

conclusion: Had Ms. Biel been one of the religious sisters that made up the ranks of Catholic school teachers in earlier eras, *see supra* pp. 7-8, her title could have made her a “minister” on the Panel’s reasoning—even as her functions as a Fifth Grade teacher would be exactly the same. But, because Ms. Biel, like the overwhelming majority of Catholic school teachers in the 21st century, is not a member of a religious order, she is not a “minister,” even as the title does not at all alter her teaching responsibilities. That the Panel saw fit to condition St. James School’s First Amendment rights on incidents of demographic change in the ranks of Catholic school teachers casts doubt to its footnote-buried promise that Ms. Biel’s teacher title was not “dispositive.” *See* Op. 11 n.3. This formalistic approach to the ministerial exception cannot be reconciled with *Hosanna-Tabor*, which emphasized that minister’s title to identify “the substance reflected in that title,” not resolve the issue. *See* 565 U.S. at 192. Focusing on Ms. Biel’s “teacher” title here, at the expense of the “substance” of her teaching role in the Catholic faith, cheapens *Hosanna-Tabor* and the deep moral and religious philosophy that shapes the role of Catholic education. And, it reveals why the Panel’s error is of exceptional importance.

The Panel’s formulaic—as opposed to functional—approach to ministerial status puts the integral formation that has defined Catholic education for centuries outside the First Amendment’s protection. Even as it dwelled on her title, the

Panel made several efforts to downplay the substance of Ms. Biel’s religious influence and instruction—from characterizing her teaching as “limited to teaching religion from a book required by the school,” Op. 12, that she merely “joined in” student prayers, *id.*, and “her sole responsibility” at Mass “was to keep her class quiet and orderly,” *id.* at 4. But, as explained in detail above, the Catholic understanding of education does not have an “on/off” switch when it comes to God, and the Supreme Court rightly rejected a “stopwatch” approach to the ministerial exception. *See supra* pp. 3-4. Integrating natural and spiritual development is the hallmark of Catholic education, *see supra* pp. 5-9, and Ms. Biel was evaluated on her ability to achieve it, *see supra* p. 10. Moreover, Ms. Biel’s participation in her students’ growth in the tenets of the Catholic faith is, by itself, an act of ministry. The Catholic Church has consistently emphasized the role of teachers in embodying the faith for those children in their care because it is in the witness of teachers that children are inspired to be faithful witnesses themselves. By downplaying Ms. Biel’s presence in classroom prayers and at Mass, the Panel disregarded 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.

Imposing requirements on to the definition of “minister” in Catholic schools that are foreign to the Catholic Church’s understanding of its schools’ mission

cannot square with *Hosanna-Tabor*. Preserving such an error in this Court's precedent casts doubt on the premises that have guided the Catholic educational mission for roughly 400 years in America. *Amicus* respectfully submits that these reasons require rehearing.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for rehearing or rehearing en banc.

Respectfully submitted,

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Dated: February 1, 2019

STATEMENT OF RELATED CASES

I certify that I know of no other related cases pending in this court.

/s/William J. Haun
WILLIAM J. HAUN

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Circuit Rule 29-2(c)(1) because it contains 3,730 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/William J. Haun
WILLIAM J. HAUN

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2019, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/William J. Haun

WILLIAM J. HAUN