No. 18-2844

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STANISLAW STERLINSKI,

Plaintiff–Appellant,

v.

CATHOLIC BISHOP OF CHICAGO,

Defendant–Appellee.

On Appeal from the United States District Court for the
Northern District of Illinois
Case No. 1:16-cv-00596 – Judge Edmond E. Chang

Brief *Amici Curiae* of the Jewish Coalition for Religious Liberty and the Becket Fund for Religious Liberty in Support of Defendant-Appellee Catholic Bishop

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Amici Curiae the Jewish Coalition for Religious Liberty and the Becket Fund for Religious Liberty

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Amici have no parent corporations and issue no shares of stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Jewish Coalition for Religious Liberty ("Jewish Coalition") is an association of American Jews which aims to protect the ability of all Americans to practice their faith freely, to protect underrepresented Jewish beliefs particularly, and to foster cooperation between Jews and other faith communities. Its founders have worked on *amicus* briefs in the Supreme Court of the United States and lower federal courts, submitted op-eds to prominent media outlets, and established an extensive volunteer network to spur public statements and action on religious liberty issues by Jewish communal leadership. The Jewish Coalition has a strong interest in religious rights of particular importance to minority faiths, such as the ministerial exception, and recently submitted an *amicus* brief in support of *en banc* rehearing in *Biel v. St. James School*, No. 17-55180 (9th Cir. Feb. 1, 2019), a ministerial exception case on which Sterlinski relies heavily before this Court.

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting religious liberty for all. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros,

[1] Appellee has consented to the filing of this brief. Appellant did not consent. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than *amici curiae* contributed money to fund preparing or submitting the brief.

Sikhs, and Zoroastrians, among others. Becket regularly represents parties in court to protect their rights under the ministerial exception. For instance, Becket successfully represented the religious organization defendants in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017), and *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113 (3d Cir. 2018). Becket was also given leave to file an *amicus* brief before this Court in its most recent ministerial exception case, *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655, 661 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 456 (2018). Becket currently represents the defendant seeking *en banc* review in *Biel*.

As explained in *amici's* motion for leave to file, *amici* are interested in this case for three reasons. First, the case is just this Court's second opportunity to apply the ministerial exception since *Hosanna-Tabor*, and its first chance to do so in a case where the appellant is not *pro se*. This Court's conclusions will therefore be of great importance to religious communities throughout the Seventh Circuit, including communities represented or served by *amici*. Second, and relatedly, Sterlinski's arguments concern a sensitive area of ministerial exception doctrine: whether courts can second-guess sincere religious judgments regarding the significance of religious duties and roles. And third, how the Court answers that question could impact Becket's pending case in *Biel*, which raises a very similar issue.

SUMMARY OF THE ARGUMENT

How does a federal court decide who is right: the employee plaintiff who claims his duties are religiously insignificant within the context of his religion, or the religious employer defendant, who sincerely believes that the employee's duties are religiously significant? The correct answer turns out to be the simplest: it does not.

Sterlinski performed the music for Masses, weddings, and funerals at St. Stanislaus Bishop and Martyr Parish. His core argument on appeal to avoid application of the First Amendment's ministerial exception doctrine is that this Court should adopt his idiosyncratic theology of Catholic music: that, in Catholicism, musical worship performance is "musical" but "not religious in nature." Sterlinski Br. 14. That claim may reflect Sterlinski's sincere personal theology regarding music's role in Catholic ministry. But faced with "a religious institution's honest assertion that a particular practice is a tenet of its faith," the Court does not apply an ecclesiastical balancing test to the views of the parties. *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018). Instead, it defers to the religious institution's sincere understanding. To refuse to do so would "impermissibly entangle[ ] the government in religion" by purporting to tell that institution what it *actually* believes. *Id*. Here, the district court rightly refused Sterlinski's invitation to

allow a jury to second-guess the Catholic Church's sincere belief that performing religious music during the Mass is religiously significant.

Further, Sterlinski's theory and his dismissal of his own duties as "robotically play[ing] notes," Sterlinski Br. 10, fails to reckon with his role in services as a visible and audible representative of the church's ministry during its religious services. Courts to have considered the issue have found little difficulty in determining that a musician's role in religious services is that of "a representative of the church to the congregation," particularly given music's common use "to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty." *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 802-03 (4th Cir. 2000) (Wilkinson, C.J.). And if the state limits church authority over who may serve as "a visible (and audible) sign of the church's work through music," *id.* at 803, it is necessarily deciding—contrary to Supreme Court precedent—who will be "conveying the Church's message and carrying out its mission," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012). This Court should decline that invitation.

ARGUMENT

I. Sterlinski held a ministerial role.

For almost fifty years, the Supreme Court and federal courts of appeals have uniformly recognized that the First Amendment protects the relationship between religious ministries and their ministers from government interference. *See Hosanna-Tabor*, 565 U.S. at 187-88 & n.2 (collecting cases); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 186 n.2 (7th Cir. 1994) (recognizing the protection). In 2012, the Supreme Court unanimously ratified the courts of appeals' decisions and confirmed that the protection is rooted in both Religion Clauses: "The 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." *Hosanna-Tabor*, 565 U.S. at 184.

This "ministerial exception" is a component of the broader "internal-affairs doctrine," *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated in part by Hosanna-Tabor*, 565 U.S. 171, which traces its roots back over 100 years of Supreme Court precedent, *Hosanna-Tabor*, 565 U.S. at 185-86 (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872)), and is "best understood" as "marking a boundary between two separate polities, the secular and the religious." *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013). At its core, the doctrine prevents the government from using its "inherently

coercive" power for "evaluating or interpreting religious doctrine" or otherwise "decid[ing] religious questions," *Tomic*, 442 F.3d at 1039, 1042.

Here, the heart of Sterlinski's arguments on appeal all turn on some form of asking this Court to decide religious questions and ignore the obvious religious role that Sterlinski held. To accept either invitation "would significantly, and perniciously, rearrange the relationship between church and state." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

A. Under *Grussgott* and other church-state precedents, the Court must defer to the Church's sincere and factually undisputed understanding of the religious significance of Sterlinski's role.

Under this Court's well-established precedent, most recently reaffirmed in its *Grussgott* decision, courts cannot second-guess a church's sincere religious judgments about its internal affairs because doing so would "impermissibly entangle[ ]" the court in religious governance and require judges to answer theological questions. *Grussgott*, 882 F.3d at 660; *accord Hosanna-Tabor*, 565 U.S. at 194-95 (forbidding pretext inquiries). That rule applies to protect a religious group's honest judgments about the religious significance of a role that its employee holds. *Grussgott*, 882 F.3d at 660-61; *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., concurring).

But Sterlinski argues that this Court *must* second-guess the Bishop's sincere religious judgments and replace them with his own. Crucially, he does

not contest the Bishop's proof that he did in fact play music during the celebration of the Mass, nor does he dispute the sincerity of the Bishop's beliefs that his music was integral to the Mass. Rather, he asks this Court to substitute its judgment for the Church's regarding the religious *significance* of the role he played. For instance, he asks this Court to find that he performed no "religiously meaningful" duties, that his activities were "musical and not religious in nature," and that he merely "robotically played notes from sheet music." Sterlinski Br. 10, 14, 16.

To make that finding would require the very analysis that the ministerial exception demands this Court avoid. It would deprive the Catholic Bishop of Chicago of the right to freely make religious judgments about the performance of the Mass, entangle courts in internal religious affairs, and subject sensitive Religion Clause rights to intrusive investigations which are themselves violative of those rights.

That the ministerial exception is grounded in both the Free Exercise Clause and the Establishment Clause is significant, because it makes the ministerial exception equal parts personal right for the church and structural limitation on the state. The personal right "protects a religious group's right to shape its own faith and mission" free from government interference. *Hosanna-Tabor*, 565 U.S. at 188. And the "structural limitation" functions by "categorically prohibit[ing] federal and state governments from becoming involved in

religious leadership disputes." *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (quoting *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015)). Under this structural bar, "[a] federal court will not allow itself to get dragged into a religious controversy *even if* a religious organization wants it dragged in." *Tomic*, 442 F.3d at 1042 (emphasis added).

This Court applied these principles just last year in *Grussgott*. There, the plaintiff teacher sought to minimize the religious significance of her role in order to avoid the ministerial exception. For instance, she argued that her teaching of Hebrew at a Jewish day school was "historical, cultural, and secular, rather than religious," and further attempted to "draw[ ] a distinction between leading prayer, as opposed to 'teaching' and 'practicing' prayer with her students." 882 F.3d at 659-61.

This Court rejected her arguments. First, it found that the plaintiff's opinion about the purpose of her instruction "does not dictate what activities the school may genuinely consider to be religious." *Id.* at 660. While the plaintiff wanted to cordon off Jewish history from Jewish faith, this Court recognized that the school had the freedom to sincerely determine that "the history behind Jewish holidays is an important *part* of the religion." *Id.* (emphasis in original). Second, the Court also rejected the attempt to distinguish "leading prayer" from "'practicing' prayer," because that kind of

judicial line-drawing would "impermissibly entangle[ ] the government with religion." *Id.*; *accord McCarthy v. Fuller*, 714 F.3d 971, 974-76 (7th Cir. 2013) ("A secular court may not take sides on issues of religious doctrine").

Grussgott's analysis is supported by precedent from the Supreme Court and the Second, Third, Fourth, Fifth, and Sixth Circuits. For instance, the Supreme Court has long warned that judicial gainsaying of sincere religious judgments harms free exercise rights, *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981), and undermines Establishment Clause limitations on state power, *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) (noting "[t]he 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"). Indeed, the Supreme Court has forbidden even certain forms of governmental probing into internal church affairs, since "the very process of inquiry" can "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *see also Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 717-18 (1976) (a court's "detailed review of the evidence" regarding internal church procedures was itself "impermissible" under the First Amendment); *see also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) (it is "well established" that state power should not be lightly employed to "troll[ ] through a person's or institution's religious beliefs").

This point is so significant that all three opinions in *Hosanna-Tabor* address it. The majority opinion firmly rejected the EEOC's attempt to engage in pretext inquiries that would question the basis for firing a minister, unanimously holding that such an approach "misses the point" of the ministerial exception. 565 U.S. at 194-95. Justice Thomas likewise emphasized that allowing courts to "second-guess" sincere religious judgments would render the ministerial exception "hollow." *Id.* at 197. And Justices Alito and Kagan warned that "the mere adjudication of such questions would pose grave problems for religious autonomy" by requiring "witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of . . . how important that belief is to the church's overall mission." *Id.* at 205-06.

Other circuits have likewise emphasized that courts cannot second-guess sincere religious judgments about the religious significance of an employee's duties. For instance, the Third Circuit recently rejected a pastor's attempt to recast his duties as nonreligious because accepting such characterizations "would impermissibly entangle the court in religious governance and doctrine prohibited by the Establishment Clause." *Lee*, 903 F.3d at 121. And the Fourth Circuit rebuffed a mashgiach's attempt to downplay the religious significance of his functions in kosher food preparation, since rejecting his employer's judgment that those functions were "intrinsically religious" would "denigrate

the importance of keeping kosher to Orthodox Judaism." *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 308-09 (4th Cir. 2004). *See also Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017) (recognizing "judicial incompetence with respect to strictly ecclesiastical matters"); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 179-80 (5th Cir. 2012) (finding that "[t]he *Hosanna-Tabor* Court" forbid "permit[ting] the state to second-guess church doctrine" or "whom the Catholic Church may consider a lay liturgical minister under canon law"); *Conlon*, 777 F.3d at 836 (affirming categorical bar on government interference in religious disputes).

To be sure, rejecting Sterlinski's claim does not require accepting a church's insincere claims that the ministerial exception covers, for example, janitors. That would be an invalid "subterfuge." *Grussgott*, 882 F.3d at 660. But where, as here, the sincerity of a religious body's judgment about the importance of its employee's religious functions is unquestioned, courts cannot second-guess that judgment. This protection is particularly important to members of minority faiths, such as Jews, because judges are less likely to be familiar with the intricacies of their beliefs.

Sterlinski may believe that his "robotic" playing could be replicated at the Mass by a player piano or a laptop streaming from YouTube. But that does not mean he can ask juries whether he's right. The Religion Clauses forbid courts from allowing Sterlinski to "dictate what activities the [Bishop] may genuinely

consider to be religious." *Grussgott*, 882 F.3d at 660. To rule otherwise, "in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority." *Rayburn*, 772 F.2d at 1171. And the "harm of such a governmental intrusion into religious affairs would be irreparable." *McCarthy*, 714 F.3d at 974-76.

B. As a visible and audible representative of the Church in religious ceremonies, Sterlinski played a ministerial role.

Sterlinski's role was ministerial because he acted as a visible and audible representative of the Church. As one of the few members of the church charged with carrying out religious ceremonies in the sanctuary and in the presence of the congregants, Sterlinski "served as a representative of the church to the congregation." *Diocese of Raleigh*, 213 F.3d at 803. He "played a prominent role in worship services and helped to lead the congregation in song." *Id.* He was "thus a visible (and audible) sign of the church's work through music." *Id.*

Accordingly, courts have frequently found that music directors and music performers like Sterlinski are ministers for purposes of the ministerial exception. For example, the Fifth Circuit applied *Hosanna-Tabor* to find that "the person who leads the music during Mass is an integral part of Mass and 'a lay liturgical minister actively participating in the sacrament of the Eucharist.'" *Cannata*, 700 F.3d at 177. And before *Hosanna-Tabor*, in *Tomic v. Catholic Diocese of Peoria*, this Court held that "the music director of a Catholic

church and diocese is more like a clergyman than a math teacher" and that because "there is no one way to play music," the argument that "all" the plaintiff did was "play music" fell flat. 442 F.3d at 1040-41 (church music director and organist). *See also Starkman v. Evans*, 198 F.3d 173, 176-77 (5th Cir. 1999) (choir director); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 651-52 (10th Cir. 2002) (assistant music director); *Curl v. Beltsville Adventist Sch.*, No. GJH-15-3133, 2016 WL 4382686, at *10 (D. Md. Aug. 15, 2016) (music teacher); *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 354 (Minn. Ct. App. 2004) (church music director); *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174, 1181-82 (E.D. Wis. 2001) (church music and choir director); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. CIV.A. 05-CV-0404, 2005 WL 2455253, at *6, *9 (E.D. Pa. Oct. 5, 2005) (music director); *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233, 238 (Mich. Ct. App. 1988) (organist).

Indeed, as Judge Wilkinson pointed out in *Diocese of Raleigh*, "music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. . . . It serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty." 213 F.3d at 802. For many religious groups—including the Catholic Church—"religious music plays a highly important role in the spiritual mission of the church"; for some, "music

constitutes a form of prayer." *Starkman*, 198 F.3d at 176-77. The unique role of musical performance in religious ceremony thus cannot be subordinated by civil courts to the ministry of the word. As just one example, this Court was "astonished" by the argument "that music has in itself no religious significance—its only religious significance is in its words." *Tomic*, 442 F.3d at 1040. This Court rightly rejected that claim.

To decide otherwise—that one must have decision-making power over the conduct of the ceremony in order to be considered ministerial—would do injustice to religious groups of many different traditions. For example, the role of the Jewish synagogue's *chazzan*, or prayer leader/cantor, demonstrates how someone without any decision-making power at all can still be an essential religious ritual functionary. The Talmud lists moral, vocal and scholarly qualities that should characterize a cantor, and says that he must be favored by the congregation whom he represents. Babylonian Talmud, *Ta'anit* 16. Orthodox Jews still apply these principles to the relatively rigid role of the modern cantor, who recites words from a prayer book. The cantor is literally a "representative of the congregation" who must be a man (preferably an older one with a grown beard) who is "free from sins, without a bad reputation even from his youth, humble and desired by the people, ha[s] a pleasant and appealing voice, and regularly read[s] the Torah, Prophets, and (Biblical) Writings." *Shulchan Aruch* (Code of Jewish Law) 53:4-6. If no one can be found

who fits these criteria, then the congregation is to select the wisest and most pious of its members. *Id*. Indeed, during High Holiday liturgy, the Jewish cantor reads a formulaic prayer in which he acknowledges that his role is to stand before God as the representative of his people, even though what he does is recite the same words from a book as everyone else. *See* Nosson Scherman, ed., *The Complete Artscroll Machzor* 482-85 (New York: Mesorah, 2002).

Music—even music set to words written thousands of years ago and repeated ever since—thus plays a crucial role in the religious life of many congregations. Gregorian chant, the Psalms of David sung in the synagogue, or the Vedic hymns sung by priests at Hindu weddings are no less religiously significant, and are arguably *more* significant, due to their unchanging nature. Accordingly, those who perform such musical rites are ministers within the sense of *Hosanna-Tabor*.

CONCLUSION

Sterlinski was a church official who both visibly and audibly guided the church through worship services. And the undisputed record before this Court affirms what common sense suggests: The Bishop sincerely believed that, consistent with long-established Catholic doctrine, Sterlinski performed a religiously significant function. Thus, under controlling Seventh Circuit and Supreme Court case law, the ministerial exception both protects and prevents the judiciary from second-guessing the Bishop's religious judgment.

February 21, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Cir. Rule 29 because it contains 3,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 13-point typeface.

/s/ Daniel Blomberg
Daniel Blomberg

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users who will be served by the CM/ECF system.

February 21, 2019 /s/ *Daniel Blomberg*
Daniel Blomberg