No. _____

In the Supreme Court of the United States

ST. JAMES SCHOOL,

Petitioner,

v.

DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KRISTEN BIEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The First Amendment's Religion Clauses forbid government interference in a religious group's selection of its ministerial employees. The federal courts of appeals and state courts of last resort have long agreed that the key to determining ministerial status is whether an employee performed important religious functions. This Court's unanimous 2012 ruling in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC* was consistent with that existing analytical consensus, and other circuits and states since 2012 have continued to rely on it. Yet the Ninth Circuit has now twice ruled that, under *Hosanna-Tabor*, important religious functions alone can never suffice—those functions must always be accompanied by considerations such as a religious title or religious training in order to demonstrate ministerial status.

The question presented is:

Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner St. James School was the defendant-appellee below. Respondent Kristen Biel was the plaintiff-appellant below. Ms. Biel passed away on June 7, 2019 and her husband Darryl Biel, in his capacity as the personal representative of her estate, was substituted as the party to this case.

Petitioner St. James School has no parent corporation and issues no stock. St. James School is a canonical entity and part of the canonical parish of St. James in the Roman Catholic Archdiocese of Los Angeles; civilly, St. James School is treated as an unincorporated association under the corporate laws of the State of California. The Archdiocese of Los Angeles operates in the civil forum through several religious corporations under the corporate laws of the State of California; civilly, the real property and related assets of St. James School and Parish are held by and operated through certain of those corporations.

RELATED PROCEEDINGS

There are no related proceedings.

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INTRODUCTION

In 2012, the Court decided *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, recognizing the ministerial exception, a bedrock First Amendment doctrine that bars civil courts from adjudicating employment-related cases brought by "ministerial" employees against their religious employers. 565 U.S. 171 (2012). The Court's decision was unanimous.

As we explained in the parallel petition pending before this Court in *Our Lady of Guadalupe School* v. *Morrissey-Berru*, No. 19-267, the lower courts applying the ministerial exception have, with remarkable consistency, focused on employees' religious functions to determine their ministerial status. Pet. at 18, *Our Lady of Guadalupe* (filed Aug. 28, 2019). Indeed, Justices Alito and Kagan identified this consistency as reflecting a "functional consensus" among the courts. *Hosanna-Tabor*, 565 U.S. at 203 (Alito, J., concurring). Under that consensus, religious functions are not the only analytical consideration, but they are the touchstone.

The Ninth Circuit, however, has decided to go its own way. In this case and in *Morrissey-Berru*, separate panels of the Ninth Circuit concluded that important religious functions could never be enough, by themselves, to prove up an employee's ministerial status.

Here, it was undisputed that Kristen Biel was responsible for "transmitting the [Catholic] faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 192. Biel, who was Catholic, testified that she spent 200 minutes each week teaching her students about the

Catholic faith. She taught them the significance of Lent and Easter; she instructed them on the sacraments like the Eucharist and Reconciliation; and she read them Scriptural accounts about Jesus. Twice a day, she prayed prayers like the Hail Mary and the Lord's Prayer with her students; every month she took them to a school mass and prayed with them there as well. Biel served as an embodiment of Catholic faith and worship both in her life and in all of the other academic subjects she taught. Yet, "although Biel taught religion," a divided panel concluded that was not enough because it did not include one of three other considerations that factored into *Hosanna-Tabor*'s analysis: religious title, training, or tax benefits. App 15a. Thus, since the panel majority believed "only one of the four *Hosanna-Tabor* considerations weighs in St. James's favor," it ruled that the ministerial exception did not apply. App. 15a.

Nine judges on the Ninth Circuit later dissented from this new approach, criticizing both the panel majority and the later decision in *Morrissey-Berru* which relied on it. App. 42a (R. Nelson, J., joined by Bybee, Callahan, Bea, M. Smith, Ikuta, Bennett, Bade, and Collins, JJ., dissenting from denial of rehearing en banc). The dissenting judges called for this Court to step in and correct the Ninth Circuit's anomalous standard, which they identified as splitting with numerous post-*Hosanna-Tabor* cases. And a few weeks later, the Seventh Circuit's *Sterlinski* v. *Catholic Bishop of Chicago* decision, written by Judge Easterbrook, confirmed that the Ninth Circuit had broken from the functional consensus. The split of authority is thus deep, acknowledged, and—absent this Court's intervention—irreconcilable. 934 F.3d 568 (7th Cir. 2019).

Moreover, as the *Biel* dissenters recognized, the stakes are high, not only for St. James and Our Lady, but also for the thousands of schools and other religious employers across the eleven states and territories of the Ninth Circuit. Under the Ninth Circuit's new "resemblance-to-Perich test," App. 50a (R. Nelson, J., dissenting), those religious institutions now must choose between giving up control of who passes on their faith to the school children in their charge or conforming themselves to the specific Lutheran religious employment practices upheld in *Hosanna-Tabor*. Either outcome would be deeply unfair to schools, parents, and students.

Without correction, the Ninth Circuit's rule promises to turn up the heat on church-state conflict across the western United States and leaves religious institutions subject to two starkly different First Amendment standards depending on the accident of geography. The question presented is thus one of nationwide importance that only this Court can resolve.

Finally, because the petition in *Our Lady* is already pending and presents the same question as this case, the Court may wish to grant the petition in *Our Lady* and hold this petition pending disposition of that appeal.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 911 F.3d 603 (9th Cir. 2018) and reproduced at App. 1a. The order denying the petition for rehearing en banc is reported at 926 F.3d 1238 (9th Cir. 2019) and reproduced at App. 40a. The district court's opinion

granting summary judgment to St. James School is unreported and is reproduced at App. 69a.

JURISDICTION

The court of appeals entered its judgment on December 17, 2018. The petition for en banc rehearing was denied on June 25, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I.

The relevant portions of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* ("ADA"), are reprinted in the Appendix. App. 75a.

STATEMENT OF THE CASE

I. Factual Background

A. Petitioner St. James School

St. James School is a Catholic parish school located in Torrance, California. The school is a ministry of, and is operated by, the parish of St. James under the jurisdiction of the Archdiocese of Los Angeles. The Archdiocese is a constituent entity of the Roman Catholic Church and is the largest archdiocese in the United States. It is headed by an Archbishop, currently Archbishop José H. Gomez.

St. James was founded in 1918. The first teachers were Sisters of the Order of St. Joseph of Carondelet, and at the time of this lawsuit nearly 100 years later,

the school was still led by a religious sister. The mission of St. James is to develop and promote a Catholic faith community that reflects both a Catholic philosophy of education and the doctrines, laws, and norms of the Catholic Church. App. 19a.

B. The role of teachers at St. James

Teachers have an important role in carrying out St. James's religious mission. Teachers are expected to "personally demonstrate [their] belief in God," to "delight in and enjoy our noble position as Catholic educators," and to "actively take part in worship-centered school events." App. 19a. Teachers must agree to perform "all" of their "duties and responsibilities" in a manner consistent with Catholic doctrine and educational philosophy. App. 19a. Teachers apply "the values of Christian charity, temperance, and tolerance" to all their interactions with others at the school, App. 97a, "guide the spiritual formation of the student[,]" and "help each child strengthen his/her personal relationship with God." App. 20a. Teachers are also expected to participate in St. James's liturgical activities, App. 19a, to begin and end each school day with prayer, App. 110a, to teach students specific prayers each month of the school year, App. 110a, and to prepare their students to be "active participants" in regularly-scheduled school-wide masses, App. 109a. In light of these responsibilities, St. James prefers to hire teachers that are practicing Catholics, App. 4a, and all teachers are required to "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church." App. 19a.

To ensure these expectations are met, they are written into each teacher employment contract, which

itself must be signed by the parish pastor and renewed annually. App. 98a, 101a. Teachers are also evaluated on whether their teaching "infus[es] 'Catholic values through all subject areas'" and whether their classrooms visibly reflect the "sacramental traditions of the Roman Catholic Church." App. 83a-84a, 106a.

C. Biel's role at St. James

Kristen Biel began teaching full-time at St. James in 2013. App. 4a. Although she had been a substitute teacher in the past, this was her first full-time teaching position. App. 4a.

Biel was Catholic, and she understood that, as a Catholic school, St. James had the goal of "promot[ing] and develop[ing] the Catholic faith" among its students. App. 92a. She also understood that, as a teacher at St. James, she was responsible for incorporating the Catholic faith into the curriculum. App. 92a.

Biel fulfilled this commitment in several ways. Most prominently, she taught religion classes four days a week. App. 82a. Biel was required to spend a minimum of 200 minutes each week teaching her students about the Catholic faith. App. 50a. In these classes, she taught her students about:

- the sacraments of the Catholic Church including the Eucharist and confession,
- the lives of Catholic Saints,
- Catholic prayers,
- Catholic social teaching,
- Gospel stories, and

- Catholic holy days like Lent and Easter.

App. 18a.

In addition to teaching religion classes, Biel displayed Catholic sacramental symbols throughout her classroom. App. 18a. She was also required to incorporate Catholic values and traditions in all the other subjects taught in her classroom. App. 19a.

Further, Biel modeled and practiced the Catholic faith by taking part in school-based religious worship. She testified that she prayed prayers like the Lord's Prayer and the Hail Mary with her students twice each day. App. 93a. She attended school masses with her students every month, where twice a year her students participated by presenting the Eucharistic gifts. App. 34a. Biel testified that, during these monthly masses, she also prayed with her students. App. 81a, 95a-96a.

To ensure her students properly understood the religious beliefs which she taught and modeled, Biel regularly gave her students religious tests. App. 83a. And to ensure that she was properly teaching Catholic beliefs, St. James regularly evaluated her teaching of the Catholic faith across all subjects. App. 32a. St. James also required her to attend the Los Angeles Religious Education Congress, a day-long conference for Catholic teachers that included training in how to incorporate God into their teaching. App. 30a.

D. St. James declines to renew Biel's contract

Two weeks into the 2013-14 school year, St. James's principal, Sister Mary Margaret Kreuper, noticed that Biel's classroom was disorganized and noisy. App. 85a. Thus, while Biel's first and only

formal performance review noted that, for instance, she was displaying Catholic symbols in her classroom, she was also counseled to improve her classroom management. App. 5a-7a.

Biel's classroom management did not improve. As the year went on, teachers and administrators at St. James observed that Biel's classroom was "chaotic" and "often out of control." App. 85a, 120a-121a, 112a. Books and papers were seen in the aisles and children "crawling on the floor." App. 114a. Janell O'Dowd, a teacher at St. James whose daughter was also a student in Biel's classroom, confirmed that Biel's classroom was "very loud, noisy," and that Biel's failure to correct her daughter's work made it difficult for her daughter to prepare for tests. App. 114a-115a. By January 2014, Biel was called into weekly meetings with school administrators about her classroom performance and told that it would be difficult to offer her a contract for the following school year. App. 85a-86a, 87a-89a.

Following Easter break in April 2014, Biel told Sister Mary Margaret that she had breast cancer and that May 22 would be her last day teaching so that she could pursue treatment. App. 88a-91a. Sister Mary Margaret expressed sympathy and noted that she, too, was being treated for breast cancer. App. 90a-91a. Biel remained employed at St. James through the end of her 2013-2014 contract. However, St. James decided not to renew Biel's contract for the 2014-2015 school year. App. 5a-7a.

II. The proceedings below

A. Biel's complaint

Biel filed charges with the EEOC in December 2014 and was issued a right-to-sue letter in March 2015. Biel then sued in federal district court, alleging that St. James's decision not to renew her contract violated the ADA. App. 5a-7a.

After discovery, St. James filed a motion for summary judgment. App. 5a-7a. The district court granted the motion, ruling that Biel's claim was barred by the First Amendment's ministerial exception. App. 5a-7a. It found that St. James was undisputedly a religious organization protected by the exception. App. 71a-73a. Thus, "the application of the ministerial exception turn[ed] on whether Biel was a 'minister.'" App. 71a.

The court found that she qualified because she "conveyed the Catholic Church's message by teaching religion to her students," "by administering and evaluating weekly tests from a Catholic textbook," and "by praying with the students twice each day." App. 73a. The court also observed that Biel herself "clearly sought to carry out St. James's Catholic mission by, for example, including Catholic teachings into all of her lessons and attending a conference to learn techniques for incorporating religious teachings into her lessons." App. 73a. The court noted that Biel's case did not "contain all of the hallmarks of ministry identified in *Hosanna-Tabor*," but concluded that *Hosanna-Tabor* "was not intended to represent the outer limits of the ministerial exception." App. 73a. The court ruled that Biel was a minister and granted summary judgment for St. James. App. 73a.

Biel appealed.

B. Ninth Circuit proceedings

On appeal, the EEOC appeared and presented oral argument as an *amicus curiae* supporting Biel, asserting among other things that courts since *Hosanna-Tabor* have applied the exception only to those employees in a "spiritual leadership role." *Biel* v. *St. James School*, No. 17-55180, Dkt. No. 25 at 24 (EEOC brief filed Sep. 27. 2017).

A divided panel of the Ninth Circuit reversed. App. 4a-5a. The panel majority held that Biel's religious duties were, taken alone, insufficient to invoke the ministerial exception, and that the exception was ordinarily applied to those with "religious leadership" roles while "Biel's role in Catholic religious education" was "limited to teaching religion from a book." App. 13a, 14a.

Judge D. Michael Fisher, sitting by designation, dissented, opining that "Biel's duties as the fifth grade teacher and religion teacher are strikingly similar to those in *Hosanna-Tabor*," and that the panel majority's conclusions were also in clear conflict with a recent decision of the Seventh Circuit. App. 32a (citing *Grussgott* v. *Milwaukee Jewish Day School, Inc.*, 882 F.3d 655, 661 (7th Cir.), *cert. denied*, 139 S. Ct. 456 (2018)). Judge Fisher further warned that the majority's approach, such as downplaying religious doctrinal instruction as merely "teaching * * * from a book," improperly "invites the very analysis the ministerial exception demands we avoid" and causes judicial "entanglement in the affairs of religious organizations." App. 13a, 34a-35a.

St. James filed a petition for rehearing en banc. While that petition was still pending, a different panel of the Ninth Circuit followed *Biel*'s analysis to rule against Our Lady of Guadalupe School, a Catholic school in a neighboring parish that was also being sued by a fifth-grade teacher. *Morrissey-Berru* v. *Our Lady of Guadalupe School*, 769 F. App'x 460 (9th Cir. 2019). The panel agreed that the teacher's "significant" religious duties included that she had "committed to incorporate Catholic values and teachings into her curriculum," and that she "led her students in daily prayer, was in charge of the liturgy planning for a monthly Mass, and directed and produced a performance by her student's during the School's Easter celebration every year." *Id.* at 461. But, in the panel's view, all of this was insufficient because *Biel* instructs that "an employee's duties alone are not dispositive." *Ibid*. Our Lady of Guadalupe School filed a petition for a writ of certiorari in this Court on August 28, 2019. See No. 19-267, *Our Lady of Guadalupe School* v. *Morrissey-Berru*.

On June 25, 2019, the Ninth Circuit denied the petition for rehearing en banc. Nine judges dissented, stating that *Biel*'s analysis "poses grave consequences for religious minorities" and "conflicts with *Hosanna-Tabor*, decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles." App. 42a (R. Nelson, J., dissenting). The dissent noted that the panel decision had already been relied on in *Morrissey-Berru* to cut back on the ministerial exception's protections, and observed that "[i]n each successive case, we have excised the ministerial exception, slicing through constitutional muscle and now cutting deep into core

constitutional bone." App. 44a (citing *Morrissey-Berru,* 769 F. App'x at 460).

On June 7, 2019, during the pendency of the en banc petition, Biel passed away. On July 3 the panel substituted Darryl Biel, as personal representative of Biel's estate, as the appellant. App. 69a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit and the California Court of Appeal are in a square, deep, and acknowledged split with the "functional consensus" approach to ministerial exception analysis adopted by seven other federal circuits and seven state courts of last resort.

The Ninth Circuit's rule "embraces the narrowest construction" of the Religion Clauses' protection for religious autonomy, which "splits from the consensus of our sister circuits" and "decisions from state supreme courts" that "[an] employee's ministerial function should be the key focus." App. 42a (R. Nelson, J., dissenting). Under the Ninth Circuit's standard, a religious organization's employee can hold a ministerial role only if he has a religious title, training, or tax status, regardless of the religiously important functions of his position. That rigid approach, now also adopted by a California intermediate appellate court, conflicts with this Court's decision in *Hosanna-Tabor* and splits with the precedent of the Second, Third, Fourth, Fifth, Sixth, Seventh, and D.C. Circuits and courts of last resort in Connecticut, Kentucky, Maryland, Massachusetts, New Jersey, Wisconsin, and the District of Columbia.

A. Prior to *Hosanna-Tabor*, the lower courts consistently focused on function in determining ministerial status.

The ministerial exception was first applied in *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir. 1972). The Fifth Circuit held that "the application of the provisions of Title VII to the employment relationship existing between * * * a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter * * *." *Id.* at 560.

In the four decades between the ministerial exception's inception in 1972 and the Court's first application of it in 2012 (in *Hosanna-Tabor*), the overwhelming majority of Circuits and state supreme courts "ha[d] concluded that the focus should be on the 'function of the position'" in "evaluating whether a particular employee is subject to the ministerial exception." *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006) (quoting *Rayburn* v. *Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (Wilkinson, J.), and collecting cases from the D.C., Fourth, Fifth, and Seventh Circuits). See also *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) (identifying function-focused analysis as the "general rule"); *EEOC* v. *Catholic Univ. of America*, 83 F.3d 455, 463 (D.C. Cir. 1996) (employee was minister where her "primary functions serve [the religious employer's] spiritual and pastoral mission"); *Dayner* v. *Archdiocese of Hartford*, 23 A.3d 1192, 1204 (Conn. 2011) (courts must "objectively examine an employee's actual job function, not her title, in determining" ministerial status), overruled on other grounds in *Hosanna-Tabor*,

565 U.S. at 195 n.4; *Coulee Catholic School* v. *Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 881 n.16 (Wis. 2009) ("The focus * * * should be on the function of the position, not the title or a categorization of job duties"); *Pardue* v. *Center City Consortium School of Archdiocese of Washington, Inc.*, 875 A.2d 669, 675 (D.C. 2005) (inquiry focuses on "function of the position" and "not on categorical notions of who is or is not a 'minister'"); *Archdiocese of Washington* v. *Moersen*, 925 A.2d 659, 672 (Md. 2007) (emphasizing "the function of the position"); *Alicea* v. *New Brunswick Theological Seminary*, 608 A.2d 218, 222 (N.J. 1992) (ministerial exception protects decisions "regarding employees who perform ministerial functions").

B. In *Hosanna-Tabor*, this Court acted consistently with the "functional consensus" identified by Justices Alito and Kagan as the governing ministerial exception standard in the lower courts.

In *Hosanna-Tabor*, the Court addressed the ministerial exception for the first time, confirming that the First Amendment protects the relationship between religious ministries and their ministers from government interference. See *Hosanna-Tabor*, 565 U.S. at 187-188 & n.2 (collecting cases). This 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." *Id.* at 184.

The ministerial exception is a component of the Religion Clauses' broader religious autonomy protections, which trace their roots back over 140

years of Supreme Court precedent, *Hosanna-Tabor*, 565 U.S. at 185-186 (citing *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727 (1872)), and before that to Magna Carta, *id.* at 182. These protections benefit both church and state by preventing government entanglement in internal religious affairs. Together, the Religion Clauses ensure religious groups' "independence from secular control or manipulation" by reserving to them the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 186 (quoting *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

Hosanna-Tabor affirmed that this independence includes the selection of ministers. As the Court explained, the Religion Clauses ensure "that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical, *Kedroff*, 344 U.S. at 119—is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194-195 (internal quotation marks omitted). Even over "undoubtedly important" societal interests, such as employment discrimination statutes, "the First Amendment has struck the balance" in favor of allowing each religious group autonomy to "be free to choose those who will guide it on its way." *Id.* at 196; accord *id.* at 201 (Alito, J., concurring) ("A religious body's control over [ministers] is an essential component of its freedom to speak in its own voice[.]").

For its first foray into the ministerial exception, this Court declined to "adopt a rigid formula" to determine ministerial status. *Hosanna-Tabor,* 565 U.S. at 190. Rather, it was sufficient to resolve the

case at hand that "all the circumstances" of respondent Cheryl Perich's employment as a fourth-grade teacher at a Lutheran school showed that she was a minister. *Ibid.* The Court identified four "considerations" supporting its conclusion: Perich's (1) "formal title," (2) "the substance reflected in that title," (3) her "use of th[e] title," and (4) "the important religious functions she performed." *Id.* at 192. These considerations were enough to achieve the ministerial exception's core purpose: protecting "religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. The Court left other questions for another day, holding that "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise." *Ibid.*

Justice Thomas concurred, cautioning against misbegotten "[j]udicial attempts to fashion a civil definition of 'minister'" through a "bright-line test or multi-factor analysis" that would be insensitive to our nation's robust "religious landscape." *Hosanna-Tabor,* 565 U.S. at 197 (Thomas, J., concurring). Likewise, and in light of that religious diversity, Justices Alito and Kagan warned that "the important issue of religious autonomy" would be harmed if courts made the "mistake" of focusing on such religiously variable factors as an employee's title. *Id.* at 198 (Alito, J., concurring). Rather, the Justices emphasized that the Court's unanimous decision was consistent with the pre-existing "functional consensus" in the lower courts that the focus of ministerial exception analysis should be "on the function performed by persons who work for religious bodies." *Id.* at 198, 203 (Alito, J., concurring). And under that consensus, "religious authorities must be free to determine who is qualified to serve in

positions of substantial religious importance," such as "those who are entrusted with teaching and conveying the tenets of the faith." *Id.* at 200 (Alito, J., concurring).

C. After *Hosanna-Tabor* and before this case, the lower courts consistently focused on function to determine ministerial status.

After *Hosanna-Tabor* was decided, the Second, Third, Fifth, and Sixth Circuits, along with Massachusetts and Kentucky, continued to follow the "functional consensus" identified by Justices Alito and Kagan.

The Fifth Circuit decided the first post-*Hosanna-Tabor* ministerial exception appeal. In *Cannata* v. *Catholic Diocese of Austin*, Judge Dennis, joined by Judges Davis and Haynes, explained that "[a]pplication of the exception * * * does not depend on a finding that [the employee] satisfies the same considerations that motivated the [Supreme] Court to find that Perich was a minister." 700 F.3d 169, 177 (5th Cir. 2012). Rather, it was "enough" to conclude that an employee "played an integral role" in worship services and thereby "furthered the mission of the church and helped convey its message." *Ibid.* That is, the employee was a minister "because [he] performed an important *function* during the service." *Id.* at 180 (emphasis added).

The Second Circuit took the same tack. In *Fratello* v. *Archdiocese of New York*, Judge Sack, joined by Judges Lohier and Woods, explained that "'courts should focus' primarily 'on the *function*[*s*] performed by persons who work for religious bodies.'" 863 F.3d 190, 205 (2d Cir. 2017) (quoting *Hosanna-Tabor*, 565

U.S. at 198 (Alito, J., concurring)) (emphasis added). The court stressed that this kind of objective approach was necessary to avoid judicial entanglement in deciding religious questions:

> Judges are not well positioned to determine whether ministerial employment decisions rest on practical and secular considerations or fundamentally different ones that may lead to results that, though perhaps difficult for a person not intimately familiar with the religion to understand, are perfectly sensible—and perhaps even necessary—in the eyes of the faithful. In the Abrahamic religious traditions, for instance, a stammering Moses was chosen to lead the people, and a scrawny David to slay a giant.

Id. at 203.

In *Lee* v. *Sixth Mount Zion Baptist Church*, the Third Circuit likewise focused on functions, with Judges Shwartz, Rendell, and Roth confirming that "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*.'" 903 F.3d 113, 122 n.7 (3d Cir. 2018) (quoting *Petruska*, 462 F.3d at 299) (emphasis added).

And Judge Batchelder explained for the Sixth Circuit that "the ministerial exception *clearly* applies" where (a) the religious group "identifies an individual as a minister" in "good-faith"—which the court understood as the basic equivalent of the "title" consideration—and (b) the individual engages in important religious functions. *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir.

2015) (emphasis added). Given the presence of both a good-faith ministerial designation and "important religious functions," *Conlon* found that it did not need to reach the question of whether function alone would demonstrate ministerial status. *Ibid.*

State supreme courts applying *Hosanna-Tabor* also joined the "functional consensus." The Massachusetts Supreme Judicial Court was first, confirming that function alone can suffice to prove ministerial status in certain cases. *Temple Emanuel of Newton* v. *Massachusetts Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012). In that case, "[a]ll that [wa]s plain from the record [wa]s that [the plaintiff] taught religious subjects at a school that functioned solely as a religious school[.]" *Id.* at 486. The court said there was no evidence with respect to the other three *Hosanna-Tabor* considerations, but nevertheless held that the ministerial exception barred the plaintiff's claim. *Ibid.*

The Kentucky Supreme Court later agreed that in considering the totality of the circumstances, courts should give "more" focus to the "actual acts or functions conducted by the employee," and avoid the "danger of hyper-focusing" on considerations such as title. *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597, 613 & n.61 (Ky. 2014).

D. The Ninth Circuit rejected the functional consensus, first in this case and then in *Morrissey-Berru*.

This chorus of agreement among the lower courts was brought to a screeching halt by the two-judge majority in this case. App. 4a-5a. The panel majority held that Biel's religious duties were insufficient alone

to invoke the ministerial exception, and that the exception was ordinarily applied to those with "religious leadership" roles while "Biel's role in Catholic religious education" was "limited to teaching religion from a book." App. 13a. The panel majority also parted ways with *Grussgott*. *Grussgott*, like *Hosanna-Tabor*, found that an elementary-level teacher who taught religion was a minister. 882 F.3d at 662. The panel majority expressly questioned the validity of the Seventh Circuit's unanimous panel decision before trying to distinguish it based on some specific training that Grussgott had received. App. 12a-14a. Judge D. Michael Fisher, sitting by designation, dissented, opining that "Biel's duties as the fifth grade teacher and religion teacher are strikingly similar to those in *Hosanna-Tabor*," and that "this case is not distinguishable from *Grussgott*[.]" App. 29a (Fisher, J., dissenting).

Five months later, while the petition for en banc review of this case was still pending, the Ninth Circuit applied *Biel* in *Morrissey-Berru*. The court reversed the district court's grant of summary judgment to Our Lady of Guadalupe School, finding it legally insufficient that the teacher in that case, Agnes Morrissey-Berru, had "significant religious responsibilities as a teacher at the School." 769 Fed. App'x 460, 461 (9th Cir. 2019). The court squarely acknowledged that Morrisey Berru:

> committed to incorporate Catholic values and teachings into her curriculum, as evinced by several of the employment agreements she signed, led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by

> her students during the School's Easter celebration every year.

Ibid. (noting further that she had taken a "course on the history of the Catholic church"). But all of that was legally inadequate, the court explained, because the Ninth Circuit rule provides that "an employee's duties are not dispositive under *Hosanna-Tabor*'s framework." *Ibid.*

Two months after the ruling in *Morrissey-Berru*, nine judges dissented from denial of rehearing en banc in this case. They explained that review was urgently necessary because the Ninth Circuit's new rule not only "conflicts with *Hosanna-Tabor*, decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles," but it also "poses grave consequences for religious minorities * * * whose practices don't perfectly resemble the Lutheran tradition at issue in *Hosanna-Tabor*." App. 42a-43a (R. Nelson, J., dissenting). They explained that the rule conflicts with *Hosanna-Tabor* because it puts this Court's flexible analysis into a "resemblance-to-Perich" straitjacket that "[i]gnor[es] the warnings of Justices Alito and Kagan (and Justice Thomas)" against making matters that "relate to [an employee's] title" dispositive. App. 50a, 54a. Similarly, the rule "diverged from the function-focused approach taken by our court previously, our sister courts, and numerous state supreme courts," instead "embrac[ing] the narrowest reading of the ministerial exception." App. 53a; see also App. 64a (noting that other Circuits "pay closer attention to function, particularly in religious educational settings," and citing to *Grussgott*, *Fratello*, and *Conlon*).

The dissenting judges warned that the panel's narrow interpretation "threatens the autonomy of minority groups" that do not use Lutheran-sounding titles but for whom religious education is a "'critical means of propagating the faith, instructing the rising generation, and instilling a sense of religious identity.'" App. 43a-44a (quoting religious minorities' amicus brief). "Indeed," the dissenting judges explained, "requiring a religious group to adopt a formal title or hold out its ministers in a specific way" is blatantly unfaithful to First Amendment values: it "inherently violates the Establishment Clause" and "is the very encroachment into religious autonomy the Free Exercise Clause prohibits." App. 55a.

A California appellate court recently applied the reasoning in this case in *Su* v. *Stephen Wise Temple*, 32 Cal. App. 5th 1159 (2019), rehearing denied, Apr. 2, 2019, review denied, June 19, 2019. There, the court acknowledged that the Temple's preschool teachers "play an important role in the life of the Temple" and "in transmitting Jewish religion and practice to the next generation," because they are "responsible for implementing the school's Judaic curriculum by teaching Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services." *Id.* at 1168. But, tracking the Ninth Circuit's new rule, the court denied the ministerial exception to the Temple because the clear showing of religious function failed absent proof of religious title or training. *Ibid.*[1]

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[1] The California Court of Appeal is holding the appeal in abeyance while the Temple prepares to seek certiorari. Order, *Su* v. *Stephen Wise Temple*, No. B275246 (Cal. Ct. App., 2d Dist.

E. The Seventh Circuit has recognized the split with the Ninth Circuit.

In *Sterlinski* v. *Catholic Bishop of Chicago*, the Seventh Circuit reaffirmed the functional consensus, sharply rejected the Ninth Circuit's new rule, and recognized the extant split of authority. See 934 F.3d at 570-571. Writing for a unanimous panel, Judge Easterbrook explained that the Ninth Circuit's approach "asks how much like Perich a given plaintiff is, rather than whether the employee served a religious function." *Id.* at 570; see also App. 50a (R. Nelson, J., dissenting) (new Ninth Circuit standard is a "resemblance-to-Perich test"). Judge Easterbrook noted that the dissenting judges in *Biel* "disagreed with that approach—as do we." *Sterlinski*, 934 F.3d at 570. Instead, the Seventh Circuit had already "adopted a different approach" in *Grussgott*, and "[m]any judges, not just our panel in *Grussgott* (and the nine dissenters in *Biel*)" rejected a Perich-comparison analysis in favor of maintaining the focus on religious functions. *Ibid*. (citing *Fratello* and *Cannata* as supporting examples).

Sterlinski identifies that last point as the place where the Ninth Circuit parts ways from all others. Keeping the focus on whether an "employee served a religious function" advances the "two goals" of the ministerial exception: protecting "a religious body's 'right to shape its own faith and mission through its appointments,'" and prohibiting "'government involvement in such ecclesiastical decisions.'" *Sterlinski*, 934 F.3d at 570 (quoting *Hosanna-Tabor*,

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June 25, 2019) (recalling and staying remittitur pending the filing and disposition of petition for certiorari).

565 U.S. at 188-189). And where religious functions are fairly shown, civil judges cannot turn to other considerations in an effort to second-guess how "vital" the functions are "to advance [the] faith." *Ibid.* It was "precisely to avoid such judicial entanglement in, and second-guessing of, religious matters that the Justices established the rule of *Hosanna-Tabor*." *Id.* at 570-571 (also noting that the Ninth Circuit's rule impermissibly "embraced" requiring "independent judicial resolution of ecclesiastical issues").

F. Only this Court can resolve the split.

As *Sterlinski* and the *Biel* dissenters recognize, the Ninth Circuit's rigid formula is at war with the more sensitive approach of this Court and every other Circuit and state supreme court to decide the issue. Thumbing its nose at the functional consensus, the Ninth Circuit's approach flatly finds that it is *never* enough to show an employee carried out core religious functions such as "teaching and conveying the tenets of the faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). Rather, at least one of the other three specific *Hosanna-Tabor* considerations must obtain. That strict "function-plus-one" test is inconsistent both with this Court's explicit refusal to adopt a "rigid formula" and with its command that the purpose of the exception is to serve "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 190, 196. As the Second Circuit explained, "*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." *Fratello*, 863 F.3d at 204-205 (emphasis in original).

* * *

Tallying the precedents puts the Ninth Circuit and the California Court of Appeal at odds with seven other Circuits and seven state supreme courts over the importance of function to ministerial exception analysis. Given the failed en banc vote here, there is no prospect that the split on this important First Amendment issue will be resolved without this Court's intervention.

II. The scope of the ministerial exception is a vital and recurring question of nationwide importance for thousands of religious organizations and individuals.

Review is especially warranted because of the sweeping practical significance and nationwide importance of the First Amendment question presented. That question is not only frequently recurring and vital to the daily operations of religious organizations, but getting it right is crucial in protecting church-state relations.

1. One reason the issue is of nationwide importance is its frequency of occurrence. Conflicts over the scope of the ministerial exception arise regularly in the lower courts. As shown above, lower appellate courts have repeatedly had occasion to apply the ministerial exception since this Court's 2012 decision in *Hosanna-Tabor*. If anything, the number of conflicts is increasing: in 2018, for the first time since at least 2011, litigation over clergy firings became one of the

top five annual reasons that houses of worship end up in court.[2]

One reason for this increase may be that this Court left many of the exact contours of the ministerial exception for a later day. See *Hosanna-Tabor*, 565 U.S. at 196. Lower courts have sometimes found this "limited direction" difficult, noting that *Hosanna-Tabor* "is not without its Delphic qualities." *Fratello*, 863 F.3d at 204-205; see also J. Gregory Grisham and Daniel Blomberg, *The Ministerial Exception After* Hosanna-Tabor: *Firmly Founded, Increasingly Refined*, 20 Federalist Soc'y Rev. 80, 84 (2019) (survey of post-*Hosanna-Tabor* rulings finding that "courts have sometimes struggled analytically to determine what to do with the Supreme Court's four 'considerations' for determining ministerial status"). But, until the Ninth Circuit's detour, that confusion had not resulted in a deep and acknowledged split requiring review.

2. Another reason that the scope of the ministerial exception is of nationwide importance is the sheer number and variety of religious groups that are affected. A robust ministerial exception is a crucial protection for religious organizations of all sorts.

For example, the ministerial exception protects religious groups of many different faith traditions.

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[2] Compare *The Top 5 Reasons Churches Went to Court in 2018*, Church Law & Tax Report (July 31, 2019), (showing the top five reasons from 2014 to 2018, listing "clergy removal" as in the top five for 2018), with *The Top 5 Reasons Churches went to Court in 2015*, Church Law & Tax Report (November/December 2016) (showing top five reasons from 2011 to 2015, none of which included clergy removal).

See, *e.g.*, *Hosanna-Tabor* (Lutheran); *Grussgott* (pluralistic Jewish); *Conlon* (non-denominational Protestant); *Temple Emanuel* (Conservative Jewish); *Fratello* (Catholic); *El-Farra* v. *Sayyed*, 226 S.W.3d 792, 795-796 (Ark. 2006) (Muslim); *Sixth Mount Zion* (Missionary Baptist); *Kirby* (Disciples of Christ); *Su* (Reform Jewish); *Rayburn* (Seventh-day Adventist); *Alicea* (Reformed Christian); *Puri* v. *Khalsa*, 844 F.3d 1152 (9th Cir. 2017) (Sikh).

And it protects many different kinds of religious employers beyond houses of worship. See, *e.g.*, *Yin* v. *Columbia Int'l Univ.*, 335 F. Supp. 3d 803 (D.S.C. 2018) (religious university); *Shaliehsabou* v. *Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004) (nursing home); *Penn* v. *New York Methodist Hospital*, 884 F.3d 416 (2d Cir.), *cert. denied*, 139 S. Ct. 424 (2018) (hospital); *Grussgott* (day school); *Conlon* (campus student organization). As a heuristic for the large number of institutions affected, over three-quarters of the nation's PK-12 students attending private schools do so at religiously-affiliated institutions, meaning one in thirteen American schoolchildren attends a religious school. See Council for American Private Education, *FAQs About Private Schools*, "Schools and Students."

The need to resolve the conflict is particularly pressing for the large number of religious organizations and schools—not to mention parents and schoolchildren—within the Ninth Circuit. As a result of the Ninth Circuit's rule, and its subsequent adoption in *Su*, "thousands" of Catholic, Jewish, and other religious schools in the Ninth Circuit "now have less control over employing [their] elementary school teachers of religion than in any other area of the

country" and "less religious freedom than their Lutheran counterparts nationally." App. 67a. (R. Nelson, J., dissenting).

3. A third reason that the question presented is of nationwide importance is that properly calibrating the scope of the ministerial exception is vital to sensitive church-state relations. Courts have long warned that ministerial exception cases must be handled in a way that avoids "entanglement [that] might * * * result from a protracted legal process pitting church and state as adversaries." *Rayburn*, 772 F.2d at 1171. But as *Sterlinski* and the nine *Biel* dissenters explained, the Ninth Circuit's approach inevitably leads to "judicial resolution of ecclesiastical issues" that "subject[s] religious doctrine to discovery and, if necessary, jury trial." *Sterlinski*, 934 F.3d at 570-571; see also App. 42a (R. Nelson, J., dissenting). Even "the mere adjudication of such questions would pose grave problems for religious autonomy." *Hosanna-Tabor*, 565 U.S. at 205-206 (Alito, J., concurring). "It is not only the conclusions that may be reached by the [government agency] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979). Thus, this Court has long forbidden that sort of second-guessing: "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." *New York* v. *Cathedral Academy*, 434 U.S. 125, 133 (1977).

The Ninth Circuit's rule will also have perverse effects. It will interfere in religious governance by pressuring religious groups, "with an eye to avoiding

litigation or bureaucratic entanglement rather than upon * * * their own * * * doctrinal assessments," to slap religious-sounding (or at least religious-sounding to a *court*) titles onto positions that already include important religious functions. *Rayburn*, 772 F.2d at 1171; see also *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987) ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."). It would also "in effect penalize religious groups for allowing laypersons to participate in their ministries" and thus incentivize "bar[ring] laity from substantial 'roles in conveying the [group's] message and carrying out its mission.'" *Fratello*, 863 F.3d at 207 (quoting *Hosanna-Tabor*, 565 U.S. at 192).

Finally, left uncorrected, the Ninth Circuit's rule will impermissibly discriminate among religions. It will particularly discriminate against religious minority groups that do not use titles such as "minister" and thus would always be at a disadvantage. See *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). Similarly, it will enable religious discrimination by allowing some titles to be deemed religious ("rabbi") and others secular ("teacher"), based on common secular understandings rather than religious ones. *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"); see also App. 55a (R. Nelson, J., dissenting) ("a demand for ecclesiastical titles inherently violates the Establishment Clause"). Indeed, in this case, Biel argued that the title of "teacher" in a *Catholic* school

was nonreligious, but that "if Biel's position was in the Mormon faith," then "the title of 'teacher'" would have judicially cognizable "religious significance." See *Biel* v. *St. James School*, No. 17-55180, Dkt. No. 43 at 12 & n.2 (Appellant's reply brief filed Feb. 9, 2018).

* * *

The ministerial exception is a fundamental part of the architecture of church-state relations in this country. The Ninth Circuit's aberrant rulings have severely weakened this critical constitutional protection across a wide swath of the nation, while creating a deep and acknowledged split of authority that can be resolved only by this Court.

CONCLUSION

The Court should grant the petition. Since the petition in No. 19-267, *Our Lady of Guadalupe School* v. *Morrissey-Berru*, and this petition both present the same question and the petition in *Our Lady* is already pending, the Court may wish to grant the petition in *Our Lady* and hold this petition pending disposition of that appeal.

Respectfully submitted.

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SEPTEMBER 2019

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTEN BIEL, *Plaintiff-Appellants,* v. ST. JAMES SCHOOL, A CORP., a California non-profit corporation; DOES, 2-50, inclusive; ST. JAMES CATHOLIC SCHOOL, a California non-profit corporation; DOE 1, *Defendants-Appellees.*	No. 17-55180 D.C. No. 2:15-cv-04248-TJH-AS OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted July 11, 2018
Pasadena, California

Filed December 17, 2018

Before: D. Michael Fisher,* Paul J. Watford, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Friedland;
Dissent by Judge Fisher

* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by des-ignation.

SUMMARY**

Employment Discrimination

The panel reversed the district court's summary judgment in favor of the defendant and remanded in an employment discrimination action under the Americans with Disabilities Act.

Based on the totality-of-the-circumstances test articulated by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), the panel held that the First Amendment's ministerial exception to generally applicable employment laws did not bar a teacher's claim against the Catholic elementary school that terminated her employment. The panel concluded that she did not qualify as a minister for purposes of the exception. The panel considered whether the school held the teacher out as a minister, whether her title reflected ministerial substance and training, whether she held herself out as a minister, and whether her job duties included important religious functions.

Dissenting, Judge Fisher wrote that, considering all of the circumstances of the teacher's employment, she was a "minister" for the purposes of the ministerial exception because of the substance reflected in her title and the important religious functions she performed.

**This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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OPINION

FRIEDLAND, Circuit Judge:

Plaintiff Kristin Biel was fired from her fifth grade teaching position at St. James Catholic School after she told her employer that she had breast cancer and would need to miss work to undergo chemotherapy. She now appeals the district court's summary judgment ruling that her subsequent lawsuit against St. James under the Americans with Disabilities Act ("ADA") was barred by the First Amendment's "ministerial exception" to generally applicable employment laws. We hold that, assessing the totality of Biel's role at St. James, the ministerial exception does not foreclose her claim. We therefore reverse and remand for further proceedings.

I.

Biel received a bachelor's degree in liberal arts and a teaching credential from California State University, Dominguez Hills. After graduating in 2009, Biel worked at two tutoring companies and as a substitute teacher at several public and private schools. St. James, a Roman Catholic parish school within the Archdiocese of Los Angeles, hired Biel in March 2013 as a long-term substitute teacher. At the end of that school year, St. James's principal hired Biel as the school's full-time fifth grade teacher. Biel is herself Catholic, and St. James prefers to hire Catholic teachers, but being Catholic is not a requirement for teaching positions at St. James. Biel had no training in Catholic pedagogy at the time she was hired. Her only such training was during her tenure at St. James: a single half-day conference where topics ranged from

the incorporation of religious themes into lesson plans to techniques for teaching art classes.

Biel taught the fifth graders at St. James all their academic subjects. Among these was a standard religion curriculum that she taught for about thirty minutes a day, four days a week, using a workbook on the Catholic faith prescribed by the school administration. Biel also joined her students in twice-daily prayers but did not lead them; that responsibility fell to student prayer leaders. She likewise attended a school-wide monthly Mass where her sole responsibility was to keep her class quiet and orderly.

Biel's contract stated that she would work "within [St. James's] overriding commitment" to Church "doctrines, laws, and norms" and would "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church." St. James's mission statement provides that the school "work[s] to facilitate the development of confident, competent, and caring Catholic-Christian citizens prepared to be responsible members of their church[,] local[,] and global communities." According to the school's faculty handbook, teachers at St. James "participate in the Church's mission" of providing "quality Catholic education to . . . students, educating them in academic areas and in . . . Catholic faith and values."[1] The faculty handbook further instructs teachers to follow not only archdiocesan

[1] The dissent quotes extensively from the faculty handbook to support its arguments about the extent of Biel's religious role. It does so as if there is no dispute that the handbook imposed binding requirements on Biel's employment and provided an accurate depiction of her duties. But St. James did not rely on the faculty handbook in support of its motion for summary judgment, which might have been because the handbook's force and effect were contested—it is at least unclear what role, if any, the handbook

curricular guidelines but also California's public-school curricular requirements.

In November 2013, Biel received a positive teaching evaluation from St. James's principal, Sister Mary Margaret, measuring her performance in aspects both secular (*e.g.,* her lesson planning strategies) and religious (*e.g.,* displaying Church symbols in her classroom). The principal's written evaluation praised Biel's "very good" work promoting a safe and caring learning environment, noted that she adapted her teaching methods to accommodate her students' varied learning styles, and observed that she encouraged social development and responsibility. The principal also identified some areas for improvement: for instance, Biel's students had many items on their desks and two students were coloring in the pages of their books.

Less than six months after that evaluation—which was her first and only formal evaluation at St. James—Biel learned that she had breast cancer and informed the school administration that her condition required her to take time off to undergo surgery and chemotherapy. Sister Mary Margaret told Biel a few weeks later that she would not renew Biel's contract for the next academic year, citing her belief that Biel's "classroom management" was "not strict" and that "it

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played at the school and whether it actually reflected what teachers at the school were expected to do in practice. For example, Biel's employment agreement referenced "policies in the faculty handbook," but said that "the policies do not constitute a contractual agreement with [Biel]." At this stage of the proceedings, any factual uncertainties must be viewed in Biel's favor. *See Fresno Motors, LLC v. Mercedes Benz USA*, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014).

was not fair . . . to have two teachers for the children during the school year."

Biel sued St. James in the United States District Court for the Central District of California, alleging that her termination violated the ADA, which prohibits employment discrimination based on disability. *See* 42 U.S.C. § 12112(a). Following discovery, St. James moved for summary judgment, arguing that the First Amendment's ministerial exception to generally applicable employment laws barred Biel's ADA claims. The district court agreed and granted summary judgment for St. James.

II.

We review de novo a district court's grant of summary judgment. *Brunozzi v. Cable Commc'ns, Inc.*, 851 F.3d 990, 995 (9th Cir. 2017). We also apply de novo review to determinations of law as well as to mixed questions of law and fact that implicate the Religion Clauses. *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017).

III.

A.

Religious organizations enjoy a broad right to select their own leaders. The Supreme Court confirmed in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.* that, as part of that right, the First Amendment's Establishment and Free Exercise Clauses "bar the government from interfering with the decision of a religious group to fire one of its ministers." 565 U.S. 171, 181 (2012); *see also* U.S. Const. amend. I. The Court grounded this principle in a longstanding historical and jurisprudential concern

with "political interference" in "matters of church government as well as those of faith and doctrine." *Id.* at 184, 186 (citations omitted). When the ministerial exception applies, it categorically bars an employee's suit under otherwise generally applicable employment laws. *Puri v. Khalsa*, 844 F.3d 1152, 1164 (9th Cir. 2017). When the ministerial exception does not apply, "courts [may] decide disputes involving religious organizations," so long as they, in accordance with the Religion Clauses, proceed "'without resolving [any] underlying controversies over religious doctrine.'" *Id.* (quoting *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1248 (9th Cir. 1999)). These principles guide our analysis here.

Biel does not dispute that St. James, as a part of the Roman Catholic Archdiocese of Los Angeles, is the type of religious organization that could potentially invoke the ministerial exception as a defense. The disagreement here is over whether Biel's employment fell within the exception.

In *Hosanna-Tabor*, the Supreme Court expressly declined to adopt "a rigid formula for deciding when an employee qualifies as a minister," and instead considered "all the circumstances of [the plaintiff's] employment." 565 U.S. at 190. *Hosanna-Tabor* is the only case in which the Supreme Court has applied the ministerial exception, so its reasoning necessarily guides ours as we consider the circumstances here.

Hosanna-Tabor involved a former teacher at a Lutheran school, Cheryl Perich, who alleged that the school fired her in violation of the ADA after she was diagnosed with narcolepsy. *Id.* at 178-79. The Court focused on four major considerations to determine if

the ministerial exception applied: (1) whether the employer held the employee out as a minister, (2) whether the employee's title reflected ministerial substance and training, (3) whether the employee held herself out as a minister, and (4) whether the employee's job duties included "important religious functions." *Id.* at 192. Based on the totality of the circumstances, the Court concluded that Perich qualified as a minister for purposes of the ministerial exception.

First, the evangelical Lutheran church that operated the school in *Hosanna-Tabor* "held Perich out as a minister, with a role distinct from that of most of its members." *Id.* at 191. Its congregation granted her the title of "Minister of Religion, Commissioned" after electing her to that position. *Id.* In conjunction with that commission, the "congregation undertook to periodically review Perich's 'skills of ministry' . . . and to provide for her 'continuing education as a professional person in the ministry of the Gospel.'" *Id.*

Second, to be eligible to become a commissioned minister, Perich needed a substantial amount of religious training. She "had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher" and pass an oral examination by a Lutheran college faculty committee. *Id.* She also had to obtain the endorsement of her local Lutheran synod by submitting letters of recommendation, a personal statement, and "written answers to various ministry-related questions." *Id.* These training requirements took Perich six years to complete.

Because of her status as a commissioned minister, Perich was eligible for, and succeeded in obtaining, a special category of teaching position: that of a "called"

teacher. *Id.* at 177-78. In contrast to "lay" teachers who had one-year renewable terms, called teachers had open-ended contracts that "could be rescinded only for cause and by a supermajority vote of the congregation." *Id* at 177. The school hired lay teachers only when called teachers were unavailable, even though all teachers performed the same duties in the classroom. *Id.*

Third, Perich "held herself out as a minister of the Church." *Id.* at 191. She claimed a federal tax benefit reserved for employees "earning their compensation" in "the exercise of the ministry." *Id.* at 192. And she described herself as "feel[ing] that God [was] leading [her] to serve in the teaching ministry." *Id.*

Fourth, Perich had an "important role in transmitting the Lutheran faith to the next generation." *Id.* at 192. In addition to teaching her fourth grade students various secular and religious subjects, Perich led them in prayer three times a day. *Id.* Twice a year, she also led a school-wide chapel service at which she "cho[se] the liturgy, select[ed] the hymns, and deliver[ed] a short message based on verses from the Bible." *Id.*

Only after describing all of these aspects of Perich's position did the Supreme Court hold: "In light of these considerations—the formal title given Perich 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—we conclude that Perich was a minister covered by the ministerial exception." *Id.*

Biel, by contrast, has none of Perich's credentials, training, or ministerial background. There was no religious component to her liberal studies degree or

teaching credential. St. James had no religious requirements for her position. And, even after she began working there, her training consisted of only a half-day conference whose religious substance was limited. Unlike Perich, who joined the Lutheran teaching ministry as a calling, Biel appears to have taken on teaching work wherever she could find it: tutoring companies, multiple public schools, another Catholic school, and even a Lutheran school.

Nor did St. James hold 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. St. James gave her the title "Grade 5 Teacher." Her employment was at-will and on a yearlong renewable contract, unlike Perich's unlimited term that could only be ended by a supermajority vote of the congregation. The dissent's analysis of Biel's title focuses on her duties at the school—as opposed to her education, qualifications, and employment arrangement—and thus improperly collapses considerations that the Supreme Court treated separately.[2] Looking only to what the Court treated as relevant to evaluating a job title, there is nothing religious "reflected in" Biel's title. *Hosanna-Tabor*, 565 U.S. at 192. In contrast to Perich's "Minister of Religion, Commissioned," and "called" teacher titles, it

[2] The dissent also ascribes the title "Catholic school educator" to Biel, but nowhere in St. James's briefing or summary judgment paper has St. James ever suggested that this general description of its employees was part of Biel's title.

cannot be said that Grade 5 Teacher "conveys a religious—as opposed to secular—meaning."[3] *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834-35 (6th Cir. 2015).

Also in contrast to Perich, nothing in the record indicates that Biel considered herself a minister or presented herself as one to the community. She described herself as a teacher and claimed no benefits available only to ministers.

Only with respect to the fourth consideration in *Hosanna-Tabor* do Biel and Perich have anything in common: they both taught religion in the classroom. Biel taught lessons on the Catholic faith four days a week. She also incorporated religious themes and symbols into her overall classroom environment and curriculum, as the school required. We do not, however, read *Hosanna-Tabor* to indicate that the ministerial exception applies based on this shared characteristic alone. If it did, most of the analysis in *Hosanna-Tabor* would be irrelevant dicta, given that Perich's role in teaching religion was only one of the four characteristics the Court relied upon in reaching the conclusion that she fell within the ministerial exception.

And even Biel's role in teaching religion was not equivalent to Perich's. In *Hosanna-Tabor*, the Supreme Court emphasized the importance of assessing both the amount of time spent on religious functions

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[3] We do not suggest that Biel's lack of a ministerial title is dispositive, nor do we "ma[ke] ordination status or formal title determinative of the exception's applicability." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 202 (2012) (Alito, J., concurring). But, like the Supreme Court in *Hosanna-Tabor*, we look to her title as shorthand for "the substance reflected in that title." *Id.* at 192.

and "the nature of the religious functions performed." 565 U.S. at 194 (emphasis added); *see also id.* at 204 (Alito, J., concurring) ("What matters is that [the individual] played an important role as an instrument of her church's religious message and as a leader of its worship activities."). Biel's role in Catholic religious education was limited to teaching religion from a book required by the school and incorporating religious themes into her other lessons. Whereas Perich orchestrated her students' daily prayers, Biel's students themselves led the class in prayers. Biel gave students the opportunity to lead the prayers and joined in, but she did not teach, lead, or plan these devotions herself. Similarly, while Perich crafted and led religious services for the school, Biel's responsibilities at St. James's monthly Mass were only "to accompany her students," and "[t]o make sure the kids were quiet and in their seats." These tasks do not amount to the kind of close guidance and involvement that Perich had in her students' spiritual lives.

B.

St. James argues that we should reach a contrary conclusion in light of the Seventh Circuit's recent decision in *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018), which held that the ministerial exception barred a Hebrew teacher's employment discrimination suit against a Jewish primary school that fired her after she was diagnosed with a brain tumor. Even assuming *Grussgott* was correctly decided, which we are not sure it was, the plaintiff in *Grussgott* more closely resembled Perich than Biel does. Although the plaintiff in Grussgott lacked a formal religious title, she had obtained a certification

in a Jewish curricular program called Tal Am—a curriculum that involved integrating religious teachings into Hebrew lessons, as the Seventh Circuit noted in its analysis of the plaintiff's job title. *Id.* at 659. The plaintiff had also "tout[ed] significant religious teaching experience," which "was a critical factor in the school hiring her." *Id.* at 659. She also prayed and performed rituals with her students. *Id.* at 660. For the reasons discussed above, Biel's role was less ministerial than that of the plaintiff in *Grussgott*.

The other post-*Hosanna-Tabor* cases on which St. James relies are likewise not analogous to this one. All of the plaintiffs in those cases had responsibilities that involved pronounced religious leadership and guidance.[4] In contrast, although Biel taught religion, the other considerations that guided the reasoning in *Hosanna-Tabor* and its progeny are not present here. Biel did not have ministerial training or titles. And she neither presented herself as nor was presented by St.

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[4] *See, e.g., Fratello v. Archdiocese of New York*, 863 F.3d 190, 205-08 (2d Cir. 2017) (principal who oversaw daily prayers, supervised planning for Masses, delivered religious speeches, and was required to obtain catechist certification and demonstrate "proficiency" in religious areas); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835-36 (6th Cir. 2015) (certified "spiritual director" for an organization with the mission to evangelize students on college campuses whose duties included assisting others in finding "intimacy with God and growth in Christ-like character"); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177-78 (5th Cir. 2012) (Church music director who independently selected music for Mass, trained cantors, and was "a lay liturgical minister actively participating in the sacrament"); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 443-44 (Mass. 2012) (plaintiff who taught only religious subjects at a synagogue's religious school that convened only after the regular school day and on Sundays and did not provide any instruction in non-religious subjects).

James as a minister. At most, only one of the four *Hosanna-Tabor* considerations weighs in St. James's favor. No federal court of appeals has applied the ministerial exception in a case that bears so little resemblance to *Hosanna-Tabor*. *See, e.g., Grussgott*, 882 F.3d at 661 (applying exception where "two of the four *Hosanna-Tabor* factors are present"); Conlon, 777 F.3d at 835 (same). We decline St. James's invitation to be the first.

C.

A contrary rule, under which any school employee who teaches religion would fall within the ministerial exception, would not be faithful to *Hosanna-Tabor* or its underlying constitutional and policy considerations. Such a rule would render most of the analysis in *Hosanna-Tabor* irrelevant. It would base the exception on a single aspect of the employee's role rather than on a holistic examination of her training, duties, title, and the extent to which she is tasked with transmitting religious ideas.

Such a rule is also not needed to advance the Religion Clauses' purpose of leaving religious groups free to "put their faith in the hands of their ministers." *Hosanna-Tabor*, 565 U.S. at 188. As the Supreme Court recounted in *Hosanna-Tabor*, the historical episodes that motivated the adoption of the Religion Clauses included struggles over whether the choice of parish ministers would be made by local vestries or instead by the British monarch, the Bishop of London, or colonial governors. *Id.* at 183. The Court likewise cited First Amendment architect James Madison's opinion that the President ought to have no role in the appointment of the Catholic Church's leadership in the territory of the Louisiana Purchase. *Id.* at 184. Although

the Supreme Court held that "the ministerial exception is not limited to the head of a religious congregation," *id.* at 190, the focus on heads of congregations and other high-level religious leaders in the historical backdrop to the First Amendment supports the notion that, to comport with the Founders' intent, the exception need not extend to every employee whose job has a religious component.[5]

The First Amendment "insulates a religious organization's 'selection of those who will personify its beliefs.'" *Puri*, 844 F.3d at 1159 (quoting *Hosanna-Tabor*, 565 U.S. at 188). But it does not provide carte blanche to disregard antidiscrimination laws when it comes to other employees who do not serve a leadership role in the faith. We cannot read *Hosanna-Tabor* to exempt from federal employment law all those who intermingle religious and secular duties but who do not "preach

[5] Indeed, Congress has specified that nothing in the ADA or Title VII prohibits a religious organization from favoring members of a particular religion in its hiring decisions. *See* 42 U.S.C. § 12113(d)(1) (stating that the ADA "shall not prohibit a religious [organization] from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on . . . of its activities."); 42 U.S.C. § 2000e-1(a) (stating that Title VII "shall not apply to . . . a religious [organization] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities."). But Congress did not exempt religious organizations from the ADA's or Title VII's prohibitions on discriminating on the basis of disability, race, color, sex, or national origin. That choice, coupled with the presumption of constitutionality enjoyed by congressional legislation, makes us especially hesitant to invalidate unnecessarily vast swaths of federal law as applied to many employees of religious organizations. *See United States v. Watson*, 423 U.S. 411, 416 (1976) (recognizing that a "strong presumption of constitutionality [is] due to an Act of Congress" (quoting *United States v. Di Re*, 332 U.S. 581, 585 (1948)).

[their employers'] beliefs, teach their faith, . . . carry out their mission . . . [and] guide [their religious organization] on its way." 565 U.S. at 196.

IV.

For the foregoing reasons, we **REVERSE** the district court's grant of summary judgment to St. James and **REMAND**.[6]

FISHER, Circuit Judge, dissenting:

This appeal concerns whether Kristen Biel, a fifth grade teacher at a Roman Catholic elementary school, was a "minister" for the purposes of the ministerial exception. Contrary to the majority, I conclude that Biel was a minister. As a result, I would affirm the District Court's decision that Biel is barred from bringing an action against St. James under the Americans with Disabilities Act.

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[6] On remand, St. James may of course argue that it did not violate the ADA because its stated pedagogical and classroom management concerns—not Biel's medical condition—were the basis for its decision not to renew Biel's contract. *See Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1093 (9th Cir. 2001) (explaining that a nondiscriminatory and non-pretextual reason for termination is a defense to an ADA claim). Contrary to the dissent's implication, had St. James asserted a religious justification for terminating Biel, our holding would neither have commanded nor permitted the district court to assess the religious validity of that explanation, but rather only whether the proffered justification was the actual motivation for termination, or whether not wanting to accommodate Biel's disability was the motivation.

I

During Biel's one year of service as a full-time fifth grade teacher at St. James, her duties included teaching religion as well as secular subjects. She taught 30-minute religion classes four days a week. In her religion class, she used the curriculum from *Coming to God's Life*, a Catholic textbook chosen by the school principal, Sister Mary Margaret. Using that curriculum, Biel taught and tested the students in her religion class about the Catholic sacraments, the lives of Catholic Saints, Catholic prayers, Catholic social teaching, Gospel stories, and church holidays. In her secular classes, she was expected to incorporate Catholic teachings. She attended, as required by the school, a one day conference at the Los Angeles Religious Education Congress that covered methods of incorporating God into lessons.

To get a complete picture of Biel's role at St. James, we look at various documents concerning her employment, including her employment contract, performance review, and the faculty handbook.[1] Biel signed an employment contract with St. James which indicated that her title was "Grade 5 Teacher." By signing the contract, Biel indicated that she understood that St. James's mission was "to develop and promote a

[1] The faculty handbook is specifically referenced in Biel's employment contract: "You shall be familiar with, and comply with the School's personnel policies and procedures . . . including policies in the faculty handbook." The handbook provides insight into St. James's expectations for faculty at the school. Like Biel's performance review, the handbook is a reflection of the role St. James intended Biel to fill. Regardless of whether it imposed contractual obligations on Biel, it is helpful to our determination of whether the relationship between Biel and St. James was that of a minister and church or merely an employee-employer relationship.

Catholic School Faith Community within the philosophy of Catholic education as implemented at [St. James], and the doctrines, laws, and norms of the Catholic Church." The contract also imposed several requirements on Biel, mandating that she:

- perform "[a]ll duties and responsibilities . . . within [St. James's] overriding commitment [to developing the faith community],"
- "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church,"
- and "participate in School activities including School liturgical activities, as requested."

Sister Mary Margaret conducted an observational review of Biel's teaching performance during her first semester as the fifth grade teacher. Her review included a section evaluating "Catholic Identity Factors" in which she noted that there was "visible evidence of signs, sacramental [sic], traditions of the Roman Catholic Church in the classroom," and that the "[c]urriculum include[d] Catholic values infused through all subject areas."

In the Faculty/Staff Handbook, the school's mission statement was supplemented by nine "basic values" guiding the school faculty, including:

- Faith – "To personally demonstrate our belief in God . . . to actively take part in worship-centered school events"; and
- Joy – "To delight in and enjoy our noble position as Catholic educators. . . ."

The handbook also included the "Code of Ethics for Professional Educators in Catholic Schools" which explained that "[e]ducation has always been one of the most important missions of the Church. Its success depends upon the professional competence, quality, and commitment of the teacher who chooses to teach in a Catholic school." This Code of Ethics detailed various commitments that Catholic school teachers in the Archdiocese of Los Angeles were expected to fulfill. It explained that "Catholic school educators . . . are called to: Promote the peace of Christ in the world," and to:

> Seek and encourage persons who live a life consonant with gospel values and Catholic Church teachings [and] pursue the apostolate of teaching through the following:
>
> – modeling the faith life and witness to the Faith Community on the parish, diocesan, national, and world levels;
>
> – exemplifying the teachings of Jesus Christ by dealing with children and adults in true love and justice.

In a section titled "Statement of Principles," the handbook listed "religious development" as one of the five goals of a St. James Catholic education. To achieve this goal, "[the staff] guide the spiritual formation of the student . . . and hope to help each child strengthen his/her personal relationship with God." The handbook further explained that staff implement that goal by:

> Teaching the Gospel message and Catholic doctrine in such a way as to make them relevant to everyday life . . . Integrating Catholic thought

> and principles into secular subjects . . . Celebrating regularly scheduled Masses and seasonal prayer . . . Encouraging student participation in liturgical services . . . Providing opportunities for developing personal prayer and shared prayer in the classroom.

In April of her year as the fifth grade teacher, Biel was diagnosed with breast cancer. She informed Sister Mary Margaret of the diagnosis and that she would begin treatments in May. As described in the majority opinion, Sister Mary Margaret informed Biel that St. James would not renew her contract. Biel filed suit under the ADA, and St. James moved for summary judgment, relying on the ministerial exception. The District Court found the ministerial exception barred Biel's claims and granted the motion. Biel filed this appeal.

II

The ministerial exception is an affirmative defense that "precludes application" of employment discrimination laws, like the ADA, to "claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012). I agree with the majority, that the Supreme Court's holding and reasoning in *Hosanna-Tabor* guides our analysis here.

The ministerial exception flows from the First Amendment; "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.*

at 184. The exception bars discrimination claims because "the ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions." *Bollard v. Cal. Province of the Soc'y of Jesus,* 196 F.3d 940, 946 (9th Cir. 1999); see also *N.L.R.B. v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (In discussing jurisdiction over religious schools, the Court observed "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

The purpose of the exception is to "ensure[] 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 (citation omitted) (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)). Selection of such persons is a "core matter of ecclesiastical self-governance with which the state may not constitutionally interfere." *Bollard*, 196 F.3d at 946.[2]

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[2] The majority suggests that because the ADA and Title VII lack a religious organization exemption, courts must take care not to "invalidate unnecessarily vast swaths of federal law as applied to many employees of religious organizations." Maj. Op. at 15 n.5. However, the ministerial exception is grounded in the First Amendment and operates independently of any exception granted by Congress. In *Bollard*, we held that "[d]espite the lack of a statutory basis for the ministerial exception, and despite Congress' apparent intent to apply Title VII to religious organizations as to any other employer, courts have uniformly concluded that the Free Exercise and Establishment Clauses . . . require a narrowing construction" to prevent "constitutionally impermissible

The term "minister" is a term of art broader than the word's ordinary meaning. It "encompasses more than a church's ordained ministers." *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010). This is especially important because in our religiously diverse society, the ministerial exception recognized in *Hosanna-Tabor* must transcend the Protestant Christian concept of "ministers" to protect self-governance of all organizations of religious purpose. *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

In *Hosanna-Tabor*, the teacher was a minister within the Protestant Christian framework, serving at an Evangelical Lutheran church and school. Courts must take care to apply the principles from *Hosanna-Tabor* without discounting ministerial relationships in contexts that do not bear the obvious linguistic markers that were available for the Court's consideration in *Hosanna-Tabor*. The ministerial exception "insulates a religious organization's 'selection of those who will personify its beliefs'" regardless of whether they bear the standard markers of a minister. *Puri v. Khalsa*, 844 F.3d 1152, 1159 (9th Cir. 2017) (quoting *Hosanna-Tabor*, 565 U.S. at 188). The totality of the circumstances approach serves that end, and "[a]s the Supreme Court has made clear, there is no 'rigid formula for deciding when an employee qualifies as a minister.'" *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 190).

To determine whether Biel is a minister for purposes of the exception, I proceed in three parts. First,

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interference by the government." 196 F.3d at 945. We must apply the ministerial exception in this case "in order to reconcile the statute with the Constitution" regardless of whether the ADA contains an exception. *Id.* at 947.

I will summarize and examine the Supreme Court's analysis of the exception in Hosanna-Tabor. Second, I will consider how to weigh the four Hosanna-Tabor factors in the context of this case. Finally, I consider all of the circumstances of Biel's employment and conclude that the ministerial exception applies.

A. Analytical framework provided by the Supreme Court in Hosanna-Tabor

In *Hosanna-Tabor*, the Supreme Court concluded that a "called teacher" at a Lutheran elementary school was a minister for the purposes of the ministerial exception. 565 U.S. at 190. The Court evaluated "all the circumstances of her employment." *Id.* Within that totality of the circumstances approach, the Court considered four factors: "[1] the formal title given [to the teacher] by the Church," which the majority describes as whether the employer held out the employee as a minister, "[2] the substance reflected in that title, [3] her own use of that title, and [4] the important religious functions she performed for the Church." *Id.* at 192. These factors indicate the importance of fact-intensive analysis in the application of the ministerial exception.

Justice Alito, joined by Justice Kagan, concurred to clarify that the employee's function, rather than his or her title or ordination status, is the key. *Hosanna-Tabor,* 565 U.S. at 198 (Alito, J., concurring). He went on to write that the exception "should apply to any 'employee' who . . . serves as a messenger or teacher of [the organization's] faith." *Id.* at 199. He explained that "[r]eligious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance," which includes "those who are entrusted with teaching and

conveying the tenets of the faith to the next generation." *Id.* at 200. Finally, Justice Alito described the previous approach of the appellate courts, including this Court, as a functional approach looking more at the functions of individuals than at their titles, and concluded that "[t]he Court's opinion today should not be read to upset this consensus." *Id.* at 204.

Justice Thomas also concurred, explaining that, in his view, courts applying the ministerial exception must "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 196 (Thomas, J., concurring). Justice Thomas reasoned that a "religious organization's right to choose its ministers would be hollow. . . if secular courts could second-guess the organization's sincere determination that a given employee is a 'minister.'" *Id.* at 197. This approach, he maintained, best serves the goals of the Free Exercise and Establishment Clauses because it does not risk causing religious groups—especially those outside of the mainstream—"to conform [their] beliefs and practices regarding 'ministers' to the prevailing secular understanding" for fear of being denied the exception. *Id.* (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987)).

Since the publication of *Hosanna-Tabor*, we and other circuits have relied on a "totality-of-the-circumstances test." *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018), *cert. denied*, ___ S. Ct. ___ (2018); *see Puri*, 844 F.3d at 1160 (holding that, on the pleadings, the exception did not apply because of insufficient proof of religious duties, lack of presentation of the individuals as religious

leaders, and absence of religious substance in the positions); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015) (finding only two of the four factors applicable, but still holding that the "ministerial exception clearly applies"); *Fratello v. Archdiocese of New York*, 863 F.3d 190, 204-05 (2d Cir. 2017) ("*Hosanna-Tabor* . . . neither limits the inquiry to [the four factors it enumerates] nor requires their application in every case."). I will do the same here.

B. The Four Factors

i. Formal title

Biel argues that she is not a minister because nothing in her formal title, Grade 5 Teacher, reflects a ministerial role. "[A]n employee is more likely to be a minister if a religious organization holds the employee out as a minister by bestowing a formal religious title." *Puri*, 844 F.3d at 1160. In *Hosanna-Tabor*, this factor weighed in favor of applying the exception because the school employed both "lay" and "called" teachers, and the plaintiff was "called." 565 U.S. at 177-78. "When Hosanna-Tabor extended her a call, it issued her a 'diploma of vocation' according her the title 'Minister of Religion, Commissioned.'" *Id.* at 191. Here, Biel never received any diploma or commissioning from the parish comparable to the teacher in *Hosanna-Tabor*. Her title is apparently secular.

However, as the majority recognizes, a title is merely an expression of how an employer holds its employee out to the community. Part of St. James's expression of Biel's role in the school is her designation as a "Catholic school educator[]" in the school's Code of Ethics. The Code conveyed to the community that Catholic school educators such as Biel would, among

other things, "[p]romote the peace of Christ in the world." Biel's title is presumably both "Catholic school educator[]" and "Grade 5 Teacher," the former contextualizing the latter. St. James thus holds Biel out as a distinctively Catholic Grade 5 Teacher.

This first factor could therefore indicate that Biel was a minister. In fact, some of the "called" language that was important to determining that the teacher in *Hosanna-Tabor* was a minister is also present in the faculty handbook in this case. For instance, in the Code of Ethics, under "Commitment to the Community," the handbook reads "As Catholic school educators, we are *called* to . . . [p]romote the peace of Christ in the world." (emphasis added).

Although it seems strained to read Biel's title as "Grade 5 Teacher" without considering references in the handbook to St. James's teachers as "Catholic school educators," such a reading may be appropriate at this stage in order to draw reasonable inferences in Biel's favor. Therefore, in the *Hosanna-Tabor* analysis, I consider Biel's title to be secular. This factor therefore weighs against recognizing her as a minister. However, her title is not dispositive. *Id.* at 193 ("[A] title, by itself, does not automatically ensure coverage."); *id.* at 202 (Alito, J., concurring) (a ministerial title is "neither necessary nor sufficient.").

ii. Substance reflected in the title

In *Hosanna-Tabor*, this factor weighed in favor of applying the exception. The called teacher's title of "commissioned minister" reflected "a significant degree of religious training," including college-level theology, "followed by a formal process of commissioning."

Hosanna-Tabor, 565 U.S. at 191. In contrast, Biel received no religious commissioning and her formal education consisted of a university degree in liberal studies and a teaching certification. She was not required to be endorsed by the parish or to go through extensive training.

The majority focuses narrowly on educational and practical training for the second factor in the *Hosanna-Tabor* analysis. However, I do not understand this second factor to be limited to education and practical training. The substance reflected in a title is broader than mere educational or practical prerequisites. *See Grussgott*, 882 F.3d at 659-660. Considering other elements under the second factor facilitates the ministerial exception's application to different religions, including those that may not require formal training for ministers. It also complements Justice Thomas's emphasis on the religious organization's own sincere determination of who ministers the faith. *Hosanna-Tabor*, 565 U.S. at 196-97 (Thomas, J., concurring). If we expected all ministers to receive formal religious education, we would improperly restrict the exception.

Instead, I conclude that the substance underlying Biel's title at St. James consists of the school's expectation, to which Biel specifically consented in her employment contract, that she propagate and manifest the Catholic faith in all aspects of the role. Importantly, the substance of Biel's title of Grade 5 Teacher encompassed the role of religion teacher.

The approach of analyzing the second factor as reflective of how the religious organization understood an employee's role is also consistent with at least two of our sister Circuits' interpretations. In *Fratello*, the

Second Circuit ultimately concluded that a "lay principal" of a Catholic elementary school was a minister. 863 F.3d at 206, 210. In evaluating this title, the court observed that though the principal was "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." *Id.* at 208. Similarly, the Seventh Circuit in *Grussgott* held that the second factor weighed in favor of applying the exception to a Hebrew language teacher at a Jewish school, not only because of her religious training, but also because "the substance of [the teacher's] title as conveyed to her and as perceived by others entails the teaching of the Jewish religion to students." 882 F.3d at 659-60.

The majority distinguishes *Grussgott* based on the teacher's Tal Am certification, but in *Grussgott*, the Seventh Circuit specifically noted that there was nothing in the record indicating what the Tal Am certification entailed beyond completion of seminars. *Id.* at 659. Though the Seventh Circuit found that the teacher's Tal Am certification was not material to its analysis, the court nevertheless held that the teacher's curriculum and experience teaching religion "support[ed] the application of the ministerial exception" at the second factor. *Id.* at 660. Contrary to the majority's conclusion, this case is not distinguishable from *Grussgott* based on a certification that may or may not have indicated any significant degree of education or training. The Seventh Circuit's consideration of curriculum and teaching experience under the second *Hosanna-Tabor* factor supports the conclusion that this factor encompasses more than just training.

Even more explicitly than in *Grussgott*, the substance of Biel's title as the Grade 5 Teacher encompasses her responsibility for all facets of her pupils' education, which unquestionably includes religion class and imparting the substantive teachings of the Catholic faith. In addition to her role as the religion teacher, Biel agreed in her contract that she "understood that the mission of the School [was] to develop and promote a Catholic School Faith Community within the philosophy of Catholic education as implemented at the School, and the doctrines, laws and norms of the Catholic Church." The faculty handbook extensively prescribes how the faculty should model the Catholic faith and promote religious development. Additionally, Biel was required to attend a Catholic education conference, which focused on incorporating religion into lesson plans. Finally, her contract was approved by both St. James's principal, Sister Mary Margaret, and the pastor of the parish, and it clarified that her role as a fifth grade teacher included teaching religion, specifically the Catholic faith. Because all of these expectations were included in Biel's role and in the title given to her by St. James, I conclude that her title reflected significant religious substance. This factor therefore weighs in favor of applying the exception.

iii. Biel's own use of the title

"[A]n employee who holds herself out as a religious leader is more likely to be considered a minister." *Puri*, 844 F.3d at 1160. In *Hosanna-Tabor*, the teacher "held herself out as a minister of the Church" in several ways, including "accepting the formal call to religious service," "claim[ing] a special housing allowance on her taxes" available only to ministers, and indicating,

post-termination, "that she regarded herself as a minister at Hosanna-Tabor." 565 U.S. at 191-92. Here, although Biel taught her students the tenets of the Catholic faith, she did not present herself to the public as a minister. *See Conlon*, 777 F.3d at 835 (concluding that this factor was not present when the employee did not have a "public role of interacting with the community as an ambassador of the faith"). This factor therefore weighs against concluding that Biel was a minister.

iv. Important religious functions performed

In *Puri*, this Court emphasized that employees who have "a role in conveying the Church's message and carrying out its mission" are likely ministers "even if [they] devote[] only a small portion of the workday to strictly religious duties." *Puri,* 844 F.3d at 1160 (internal citation and alterations omitted). In *Hosanna-Tabor*, the teacher was responsible for "'leading others toward Christian maturity' and 'teaching faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church.'" 565 U.S. at 192 (alterations omitted) (quoting the record). The *Hosanna-Tabor* teacher taught religion four days a week, led her students in prayer three times a day, took students to school-wide chapel services once a week, and led that chapel service approximately twice a year. *Id.* Based on those duties, the Supreme Court concluded that "[a]s a source of religious instruction, [the teacher] performed an important role in transmitting the Lutheran faith to the next generation." *Id.* The Court indicated that it would be error to give too much weight to secular duties performed in addition to reli-

gious ones or to the fact that "others not formally recognized as ministers . . . perform the same functions." *Id.* at 193.

Biel's duties as the fifth grade teacher and religion teacher are strikingly similar to those in *Hosanna-Tabor*. She taught religion class four times a week based on the catechetical textbook Coming to God's Life. In that class, she was responsible for instructing her students on various areas of Catholic teachings, including Catholic sacraments, Catholic Saints, Catholic social teaching, and Catholic doctrine related to the Eucharist and the season of Lent. She prayed Catholic prayers with her students twice each day and attended monthly school mass with her class.[3] Additionally, she, like all teachers at St. James, was evaluated on incorporating "signs, sacramental [sic], [and] traditions of the Roman Catholic Church in the Classroom" and "infus[ing] [Catholic values] through all subject areas." "As a source of religious instruction, [she] performed an important role in transmitting the [Catholic] faith to the next generation." *Id.* at 192. For these reasons, this factor weighs heavily in favor of considering Biel to be a minister. Biel was "expected to

[3] The majority interprets Biel's testimony to be that she joined her students in prayer, but did not lead the fifth graders in prayer. However, the record indicates that Biel's prayer leaders led the class in prayer: "I had prayer leaders. The prayers that were said in the classroom were said mostly by the students. We had prayer leaders." The faculty handbook set the expectation that Biel would "[p]rovid[e] opportunities for developing personal prayer and shared prayer in the classroom." Under "Daily Prayer" in the "Staff Guidelines and Responsibilities" section of the faculty handbook, there is a school-wide policy of beginning and ending the day with prayer. To accept Biel's testimony that she merely joined the fifth graders in *their* prayers minimizes significant portions of the record.

model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church" according to her employment contract, and was subject to termination if she failed to meet that expectation.

This analysis comports with the approach of the Seventh Circuit which held that a Hebrew language teacher "performed 'important religious functions' for the school" when she "taught her students about Jewish holidays, prayer, and the weekly Torah readings . . . [and] practiced the religion alongside her students by praying with them and performing certain rituals." *Grussgott*, 882 F.3d at 660 (quoting *Hosanna-Tabor*, 565 U.S. at 192). The duties of the teacher in *Grussgott* are found in Biel's case as well. My conclusion on this factor is also consistent with the Sixth Circuit's approach in *Conlon*, which ruled that job duties such as "assist[ing] others to cultivate 'intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines'" constituted important religious functions. 777 F.3d at 835.

It is clear that Biel's job duties "reflected a role in conveying the Church's message and carrying out its mission." *Hosanna-Tabor*, 565 U.S. at 192. However, Biel argues that whatever her duties were, she executed them in a decidedly secular manner. She claims that her religious instruction was straight out of a textbook—just like with secular classes—and that her only job at mass was "to make sure the kids were quiet and in their seats." Appellant's Br. at 47. Her claim that she executed her duties in a secular manner directly conflicts with her contractual agreement to "integrate Catholic thought" into subjects, "celebrate regularly scheduled Masses . . . with students," and "encourage student participation in liturgical services." In

fact, under "Staff Guidelines and Responsibilities" in the handbook, teachers are specifically expected to do more than merely keep their elementary students quiet during mass—they are expected to prepare their students for mass: "Teachers prepare their students to be active participants at Mass, with particular emphasis on Mass responses." Biel indicated that her students participated in mass by presenting the gifts, i.e., the Eucharist. Biel's students were trained to present the gifts, and Biel was available to review the practice with them if necessary. Biel's role at mass was also to personally demonstrate her faith through active participation in "worship-centered school events." Biel's role as an "exemplar[] of practicing" Catholics would not make her a minister if that were her only religious function. *See E.E.O.C. v. Miss. College*, 626 F.2d 477, 485 (5th Cir. 1980). But because the determination of who is a minister is a totality of the circumstances test, I consider "all the circumstances of her employment" in the assessment of her role. *Hosanna-Tabor*, 565 U.S. at 190.

Biel's argument that she performed her duties in a secular manner invites the very analysis the ministerial exception demands we avoid. The courts may not evaluate the relative importance of a ministerial duty to a religion's overall mission or belief system. The very duties that Biel attempts to trivialize, e.g. teaching Church doctrine and requiring participation and attentiveness during mass, could easily be considered essential to the faith and its conveyance to the next generation, and she very well could have been terminated for failures in this area.

Consideration of her claims in federal court would require the evaluation of "the importance and priority

of the religious doctrine in question, with a civil fact-finder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring). We must avoid entangling the courts in this sort of analysis. In *Alcazar*, this Court cited a Seventh Circuit case that discussed the kind of government interference in religious affairs that the ministerial exception is designed to avoid. 627 F.3d at 1292 (citing *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006), *abrogated by Hosanna-Tabor*, 565 U.S. 171)). The *Tomic* court explained that if a suit were allowed to go forward between a minister and a church, the church would defend its adverse employment decision with a religious reason. The employee would argue that the religious reason was a farce, and the real reason was one prohibited by statute. In response the church would provide evidence of the religious reason, which the employee would dispute. The court would then have to "resolve a theological dispute" in the course of its adjudication of the claim. *Tomic*, 442 F.3d at 1040 (*citing DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171 (2d Cir. 1993)). The Religion Clauses do not permit such entanglement in the affairs of religious organizations.

The Seventh Circuit rejected a similar argument in *Grussgott* when the Hebrew teacher attempted to portray her role as teaching from a "culturally" Jewish perspective rather than a religious perspective. For example, the teacher attempted to distinguish between "leading prayer, as opposed to 'teaching' and 'practicing' prayer with her students." 882 F.3d at 660. Her argument did not prevail because a teacher's "opinion

does not dictate what activities the school may genuinely consider to be religious." *Id.* Similarly here, how Biel subjectively approached her duties is not relevant, let alone determinative.

C. Consideration of all the circumstances

Because the Supreme Court refused "to adopt a rigid formula," this Court should not treat the four Hosanna-Tabor factors as a strict test. Hosanna-Tabor, 565 U.S. at 190. Instead, the Court should take a step back and consider whether "all the circumstances of [Biel's] employment" require that her claims be barred by the ministerial exception. *Id.*

In reconciling the four factors with the totality of the circumstances approach, the Seventh Circuit reasoned that where two factors weighed in favor of the exception and two weighed against, "it would be overly formalistic" to simply "call [the] case a draw." *Grussgott*, 882 F.3d at 661.[4] I agree. *See also Conlon*, 777 F.3d at 835 (applying ministerial exception when two factors were present*); Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) ("Application of the exception . . . does not depend on a finding that [the employee] satisfies" the four factors.). The Seventh Circuit in *Grussgott* ultimately applied the ministerial exception because "[t]he school intended [the teacher] to take on a religious role, and in fact her job entailed many functions that simply would not be part of a secular teacher's job." 882 F.3d at 661. The court held that "it [was] fair to say that, under the totality of the circumstances in this particular case, the

[4] The Seventh Circuit described the Hebrew teacher's title and whether she held herself out as a minister as "formalistic factors . . . greatly outweighed by [her] duties and functions."

importance of [the teacher's] role as a 'teacher of faith' to the next generation outweighed other considerations." *Id.* (alteration omitted) (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)). So too here.

In considering the complete picture of Biel's employment, I am struck by the importance of her stewardship of the Catholic faith to the children in her class. Biel's Grade 5 Teacher title may not have explicitly announced her role in ministry, but the substance reflected in her title demonstrates that she was a Catholic school educator with a distinctly religious purpose. The religious purpose of Catholic school educators is not new to the federal courts. The Supreme Court has long "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Catholic Bishop*, 440 U.S. at 501 (discussing *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)). Biel expressly acknowledged this purpose in her contract, and committed herself to performing all "duties and responsibilities . . . within [the] overriding commitment" of St. James to "develop and promote a Catholic School Faith Community within the philosophy of Catholic education." Biel acknowledged that her continued employment was dependent upon her demonstrated ability to do so. Drawing all inferences in Biel's favor, it is still impossible to ignore that her position at St. James was pervaded by religious purpose.

Looking at each of the *Hosanna-Tabor* factors, and considering the evidence in its totality without adherence to a formulaic calculation, it appears that Biel was a minister, though perhaps not as obviously as the teacher in *Hosanna-Tabor*. However, the teacher in *Hosanna-Tabor* was within the Protestant Christian

framework, and therefore the terminology of her employment very neatly fit within the ministerial exception. We must not make the mistake of tethering the exception too close to the Protestant Christian concept of ministers. *See Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

The ministerial exception protects the relationship between a church and its ministers. It does not require a church to assert a religious reason for an employment decision. I fear that the majority's opinion will undermine this protection. The majority holds that "had St. James asserted a religious justification for terminating Biel, our holding would neither have commanded nor permitted the district court to assess the religious validity of that explanation, but rather only whether the proffered justification was the actual motivation for termination." Maj. Op. at 2 n.6. But the majority misses the point of the ministerial exception, which is to shield the relationship between a church and its ministers from the eyes of the court without requiring the church to provide a religious justification for an adverse employment decision. *Hosanna-Tabor*, 565 U.S. at 194-95 ("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.").

* * *

This case demonstrates that the First Amendment's guarantees are not without cost. The ADA protects some of the most vulnerable people in our society from discrimination. It is an incredibly important statutory protection. But "[t]he First Amendment, of

course, is a limitation on the power of Congress," and any exercise of statutory rights under the ADA requires the courts "to decide whether that [is] constitutionally permissible under the Religion Clauses of the First Amendment." *Catholic Bishop*, 440 U.S. at 499. We are necessarily bound by the Supreme Court's adoption of the ministerial exception, and its guarantee of noninterference in religious self-governance. If the exception is to provide sufficient protection for religious freedom, courts must give the exception a broad application. *Puri*, 844 F.3d at 1159.

In light of these considerations, *Hosanna-Tabor*, and all the circumstances of this case, I would conclude that the ministerial exception does apply to Biel in her capacity as the fifth grade teacher at St. James because of the substance reflected in her title and the important religious functions she performed. These factors outweigh her formal title and whether she held herself out as a minister. Ultimately, Biel was "entrusted with teaching and conveying the tenets of the faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). Those responsibilities render her the "type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees." *Id.* at 206.

III

For the above reasons, I respectfully dissent. I would affirm the ruling of the District Court.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTEN BIEL, *Plaintiff-Appellant,* v. ST. JAMES SCHOOL, A CORP., a California non-profit corporation; DOES, 2-50, inclusive; ST. JAMES CATHOLIC SCHOOL, a California non-profit corporation; DOE 1, *Defendants-Appellees.*	No. 17-55180 D.C. No. 2:15-cv-04248-TJH-AS ORDER

Filed June 25, 2019

Before: D. Michael Fisher,* Paul J. Watford, and Michelle T. Friedland, Circuit Judges.

Order;
Dissent by Judge R. Nelson

* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

SUMMARY**

Employment Discrimination

The panel denied a petition for panel rehearing and, on behalf of the court, a petition for rehearing en banc following the panel's opinion reversing the district court's summary judgment in an employment discrimination action under the Americans with Disabilities Act.

In its opinion, the panel held that the First Amendment's ministerial exception to generally applicable employment laws did not bar a teacher's claim against the Catholic elementary school that terminated her employment.

Dissenting from the denial of rehearing en banc, Judge R. Nelson, joined by Judges Bybee, Callahan, Bea, M. Smith, Ikuta, Bennett, Bade, and Collins, wrote that the panel's opinion embraced the narrowest construction of the ministerial exception, split from the consensus of other circuits that the employee's ministerial function should be the key focus, and conflicted with the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

ORDER

The panel has voted unanimously to deny the petition for panel rehearing. Judge Fisher recommends granting the petition for rehearing en banc.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

R. NELSON, Circuit Judge, with whom BYBEE, CALLAHAN, BEA, M. SMITH, IKUTA, BENNETT, BADE, and COLLINS, Circuit Judges, join, dissenting from the denial of rehearing en banc:

By declining to rehear this case en banc, our court embraces the narrowest construction of the First Amendment's "ministerial exception" and splits from the consensus of our sister circuits that the employee's ministerial function should be the key focus. The panel majority held that Kristen Biel, a fifth-grade teacher who taught religion and other classes at a Catholic school, was not a "minister" because the circumstances of her employment were not a carbon copy of the plaintiff's circumstances in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 196 (2012). *See Biel* v. *St. James Sch.*, 911 F.3d 603 (9th Cir. 2018). The panel majority's approach conflicts with *Hosanna-Tabor*, decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles. And it poses grave consequences for religious minorities (collectively, a substantial plurality of religious adherents in this circuit) whose practices

don't perfectly resemble the Lutheran tradition at issue in *Hosanna-Tabor*.

This is precisely the case warranting en banc review. We adopted the ministerial exception en banc prior to *Hosanna-Tabor*. *See Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010) (en banc). The ministerial exception "is undeniably an issue of exceptional importance" because its denial "portends serious consequences for one of the bedrock principles of our country's formation—religious freedom." *Bollard v. Cal. Province of the Soc'y of Jesus*, 211 F.3d 1331, 1333 (9th Cir. 2000) (Wardlaw, J., joined by Kozinski, O'Scannlain, and Kleinfeld, JJ., dissenting from denial of rehearing en banc).

Since then, the Supreme Court unanimously upheld the ministerial exception in *Hosanna-Tabor*, suggesting its application in a case like this. Three Justices—Thomas, Alito, and Kagan—filed or joined two separate concurrences specifically proposing legal tests under which the ministerial exception plainly applies here (and no Justice has proposed a test undermining its application here). And virtually all our sister courts—and state supreme courts—adopted the ministerial exception in similar cases.

In this case, five different amici—coalitions of religiously diverse organizations and law professors—urge this court to correct its legal error. As amici explain, the panel majority's approach trivializes the significant religious function performed by Catholic school teachers. This court's narrow construction of the exception threatens the autonomy of minority religious groups, like amici, "for whom religious education is a critical means of propagating the faith, in-

structing the rising generation, and instilling a sense of religious identity." Brief of Gen. Conference of Seventh-Day Adventists, Int'l Soc. for Krishna Consciousness, Inc., Jewish Coalition for Religious Liberty, and Shaykh Hamza Yusuf as Amici Curiae in Support of Rehearing and Rehearing En Banc at 2.

In light of all this, where does our court now stand on the ministerial exception? Despite a unanimous Supreme Court opinion upholding the exception, we are weaker, not stronger, in applying it. Not once, not twice, but three times now in the last two years, we have departed from the plain direction of the Supreme Court and reversed our district courts' faithful application of Supreme Court precedent. *See also Puri v. Khalsa*, 844 F.3d 1152 (9th Cir. 2017); *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, No. 17-56624, 2019 WL 1952853 (9th Cir. Apr. 30, 2019) (unpublished). And in each successive case, we have excised the ministerial exception, slicing through constitutional muscle and now cutting deep into core constitutional bone.

In turning a blind eye to St. James's religious liberties protected by both Religion Clauses, we exhibit the very hostility toward religion our Founders prohibited and the Supreme Court has repeatedly instructed us to avoid. Accordingly, I dissent.

I

The ministerial exception is well-entrenched in our constitutional framework. "The Supreme Court has long recognized religious organizations' broad right to control the selection of their own religious leaders." *Puri*, 844 F.3d at 1157. In 2012, a unanimous Supreme Court formally recognized a "ministe-

rial exception" "grounded in the First Amendment[] that precludes application of [employment-discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor*, 565 U.S. at 188. In doing so, the Court reaffirmed "that it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Id.* at 185.

A

I begin with the text. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The Establishment Clause and Free Exercise Clause have been said to "often exert conflicting pressures," *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005), but they speak in harmony to ensure dual protections for religious freedom.

A troubled history of religious persecution led a young United States to break from the familiarities of living under the established Church of England. *See Hosanna-Tabor*, 565 U.S. at 182-83 ("Seeking to escape the control of the national church, the Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship." (citations omitted)). Creating a Federal Government with powers "few and defined," *see* The Federalist No. 45 (James Madison), the Founders confirmed that the new government, unlike the English Crown, would have no role in filling ecclesiastical offices. *See Hosanna-Tabor*, 565 U.S. at 184.

To avoid entangling government and religion, our government is prohibited from deciding matters in-

herently ecclesiastical. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730-31 (1872). While the Establishment Clause expressly limits the government's power, the Free Exercise Clause also affirmatively protects religious institutions, which are "independen[t] from secular control or manipulation," as they have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). This includes the "[f]reedom to select the clergy." *Id.* By interfering with a religious institution's freedom to select those church personnel who promote its faith and mission, the government exceeds its delegated authority and infringes on that institution's right to free exercise of religion.

The Founders understood these First Amendment protections were so fundamental that enshrining them in the Constitution outweighed the ancillary costs. These costs, in some cases, are not insignificant. They include exemptions for religious organizations from some laws protecting society's most vulnerable from employment discrimination. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. For example, after the Salvation Army terminated one of its ministers, the employee sued, alleging a violation of Title VII. *See McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). The Fifth Circuit held the First Amendment barred the Title VII claim, reasoning that "[m]atters touching" "[t]he relationship between an organized church and its ministers . . . must necessarily be recognized as of prime ecclesiastical concern" because a church's "minister is the chief instrument by which [it] seeks to fulfill its

purpose." *Id.* at 558-59. In the decades since, every Circuit to address the issue, including this one,[1] unanimously recognized this "ministerial exception."

B

In *Hosanna-Tabor*, the Supreme Court followed the uniform approach of the Courts of Appeals and held the ministerial exception bars employment discrimination suits by the group's ministers. 565 U.S. at 190. The case involved an employment discrimination claim brought by Cheryl Perich, a former elementary teacher, against her employer, Hosanna-Tabor Evangelical Lutheran Church and School. *Id.* at 177-79. Perich was first employed as a "lay teacher" and later became a "called teacher." *Id.* at 178. She taught kindergarten for four years and fourth grade for one year, which involved teaching a variety of subjects, including religion. *Id.* Specifically, Perich "taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. [She] led the chapel service herself about twice a year." *Id.* After Perich was diagnosed with narcolepsy and terminated, the EEOC sued the school, and Perich intervened, alleging violations of the Americans with Disabilities Act ("ADA"), 104 Stat. 327, 42 U.S.C. § 12101 *et seq.* (1990). *Id.* at 180.

The Court held the ministerial exception "ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." *Id.* at 194-95 (internal

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[1] *See Werft* v. *Desert Sw. Annual Conference*, 377 F.3d 1099, 1101–04 (9th Cir. 2004).

citation omitted) (quoting *Kedroff*, 344 U.S. at 119). The Court explained:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By 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.

The Court unanimously held the ministerial exception barred Perich's suit. Although Perich was an elementary school teacher, the Court agreed with every Court of Appeals to have considered the question that the "exception is not limited to the head of a religious congregation." *Id.* at 190. However, the Court was "reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* Instead, it found that "all the circumstances of [Perich's] employment," supported "that the exception covers Perich." *Id.*

The Court discussed four "considerations" which supported its conclusion that Perich fell within the exception's scope: "the formal title given Perich 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." *Id.* at 192. Each of these separate considerations evidenced Perich's ministerial role, including that her "job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 192. Thus, "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" warranted application of the exception to Perich. *Id.* at 196.

While each of the four considerations confirmed Perich was a minister, the Court's discussion of them did not create a test for courts to use to decide whether an employee was a "minister" under the exception. The Court specifically reserved the ministerial exception's legal floor: "We express no view on whether *someone with Perich's duties* would be covered by the ministerial exception *in the absence of the other considerations we have discussed*." *Id.* at 193 (emphasis added).

Justice Alito, joined by Justice Kagan, however, did express a view on this issue: "[C]ourts should focus *on the function* performed by persons who work for religious bodies." *Id.* at 198 (Alito, J., concurring) (emphasis added).[2] This "functional consensus" was widespread before *Hosanna-Tabor* and has remained dominant afterward.[3] As such, nothing in the opinion

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[2] Justice Thomas went further, noting the Religion Clauses require courts "to defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 196 (Thomas, J., concurring).

[3] *See Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) (referring to function as the "general rule"), *ab-*

"should . . . be read to upset [the] consensus" among Courts of Appeals (including our own[4]) that took this "functional approach." *Id.* at 204. The concurrence also cautioned it would be a mistake, given the country's religious diversity, "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." *Id.* at 198.

II

The panel majority mistakes *Hosanna-Tabor* to create a resemblance-to-Perich test using the "four considerations" which the Supreme Court found evidenced Perich's ministerial role. Because Biel's circumstances resembled Perich's in only one of the four areas, the panel majority held erroneously that the exception did not apply.

Biel taught fifth grade at St. James Catholic School in Torrance. *Biel*, 911 F.3d at 605. She was responsible for teaching her students all academic subjects and religion, to which she was required to dedicate a minimum of 200 minutes each week. *Biel v. St. James Sch.*, No. 15-04248, 2017 WL 5973293, at *1 (C.D. Cal. Jan. 24, 2017). She taught religion at least four days per week, using a curriculum and textbook grounded in the Catholic Faith and in accordance with the Church's teaching. *Biel*, 911 F.3d at 605. Biel also supervised and joined her students

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rogated in part by Hosanna-Tabor, 565 U.S. at 195 n.4; *infra* Section IV.A.

[4] "The Ninth Circuit too has taken a functional approach, just recently reaffirming that 'the ministerial exception encompasses more than a church's ordained ministers.'" *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring) (quoting *Alcazar*, 627 F.3d at 1291).

during twice-daily prayer led by students and escorted them to a school-wide monthly mass. *Id.*

Biel's signed employment contract required her to work toward St. James's "overriding commitment" to the "doctrines, laws, and norms" of the Catholic Church, and to "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church." *Id.* It also stated the school's mission: "to develop and promote a Catholic School Faith Community within the philosophy of Catholic education as implemented at [St. James], and the doctrines, laws, and norms of the Catholic Church." *Id.* at 612 (Fisher, J., dissenting). The school's faculty handbook further required that teachers "participate in the Church's mission" of providing "quality Catholic education to . . . students, educating them in academic areas and in . . . Catholic faith and values." *Id.* at 605-06 (majority op.).

At Biel's only formal teaching evaluation, the school's principal, Sister Mary Margaret, measured Biel's performance in both secular and religious aspects. *Id.* at 606. The evaluation was positive, though noting areas for improvement. *Id.* Less than six months later, Biel learned she had breast cancer. *Id.* She told the school she would miss work to undergo surgery and chemotherapy. *Id.*

A few weeks later, Biel was informed her teaching contract would not be renewed for the next academic year. *Id.* Biel sued St. James, alleging her termination violated the ADA. The district court determined the ministerial exception applied and granted summary judgment in favor of St. James. *Biel*, 2017 WL 5973293, at *3.

Our court reversed in a 2-1 decision. *Biel*, 911 F.3d 603. The panel majority compared Biel's circumstances with Perich's under each of the four "considerations," but concluded the only similarity between Biel and Perich was that "they both taught religion in the classroom." *Id.* at 609. Contrasting Biel and Perich, the majority determined Biel had "none of Perich's credentials, training, or ministerial background," St. James did not "hold Biel out as a minister by suggesting to its community that she has special expertise in Church doctrine, values, or pedagogy beyond that of any practicing Catholic," *id.* at 608, and "nothing in the record indicates that Biel considered herself a minister or presented herself as one to the community," *id.* at 609.

Because, "[a]t most, only one of the four *Hosanna-Tabor* considerations weigh[ed] in St. James's favor," the panel majority held the ministerial exception did not apply. *Id.* at 610. The majority refused "to exempt from federal employment law all those who intermingle religious and secular duties but who do not 'preach [their employers'] beliefs, teach their faith, . . . carry out their mission . . . [and] guide [their religious organization] on its way.'" *Id.* at 611 (quoting *Hosanna-Tabor*, 565 U.S. at 196). The panel majority "decline[d] St. James's invitation to be the first" federal court of appeals to apply "the ministerial exception in a case that bears so little resemblance to *Hosanna-Tabor*." *Id.* at 610.

III

When considering the "totality of the circumstances," the panel majority converted the four considerations discussed by the Supreme Court into a comparative test: "*Only after* describing all of these aspects

of Perich's position did the Supreme Court hold . . . that Perich was a minister covered by the ministerial exception." *Id.* at 608 (emphasis added) (internal quotation marks omitted). Under the panel majority's test, a religious organization must show that its employee served a significant religious function *and* the presence of at least one additional "consideration" to receive protection under the ministerial exception.

But *Hosanna-Tabor* mandates no such requirement. It did not establish a test or set any legal floor that must be met for the exception to apply. It held only that the exception exists, applies to ADA claims, and covered Perich. *Hosanna-Tabor*, 565 U.S. at 190. The panel majority embraced the narrowest reading of the ministerial exception and diverged from the function-focused approach taken by our court previously, our sister courts, and numerous state supreme courts.

As our court recently observed, "The Supreme Court has provided *some guidance* on the circumstances that *might qualify an employee as a minister* within the meaning of the ministerial exception." *Puri*, 844 F.3d at 1160 (emphasis added). Other circuits agree. *See Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 456 (2018) ("Consequently, Grussgott's argument focuses on differentiating herself from the teacher in that case, and she is correct that her role is distinct from the called teacher's in *Hosanna-Tabor*. But the Supreme Court expressly declined to delineate a 'rigid formula' for deciding when an employee is a minister." (citing *Hosanna-Tabor*, 565 U.S. at 190)); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 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, 176-77 (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 . . . . Application of the exception . . . does not depend on a finding that [the employee] satisfies the same considerations that motivated the Court to find that Perich was a minister within the meaning of the exception.").

Ignoring the warnings of Justices Alito and Kagan (and Justice Thomas), the panel majority found that because three of the considerations—all of which relate to Biel's title—were not present, the exception did not apply. *See Biel*, 911 F.3d at 607-09. The only area in which it did find Biel and Perich similar was in the religious function each performed. Yet this similarity is particularly significant to religious groups whose beliefs and practices may render the other three considerations less relevant, or not relevant at all. Such is the case here.

Comparing Biel's title to Perich's, the panel majority reasoned, "it cannot be said that [Biel's title of] Grade 5 Teacher 'conveys a religious—as opposed to secular— meaning.'" *Biel*, 911 F.3d at 608-09 (quoting *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834-35 (6th Cir. 2015)). Unlike in *Biel*, Perich's title in *Hosanna-Tabor* was particularly relevant because, as the Court noted, the Sixth Circuit "failed to see any relevance in the fact that Perich was a commissioned minister." *Hosanna-Tabor*, 565

U.S. at 192-93. Clarifying that her title "by itself, does not automatically ensure coverage," the Court explained that "the fact that an employee has been ordained or commissioned as a minister is surely relevant." *Id.* at 193. In this discussion, the Court did not suggest that the lack of a title with religious significance suggests that an employee does *not* hold a ministerial role. *See Fratello*, 863 F.3d at 207 ("Nor would plainly secular titles (by themselves) prevent application of the ministerial exception. We think the substance of the employees' responsibilities in their positions is far more important."). Indeed, requiring a religious group to adopt a formal title or hold out its ministers in a specific way is the very encroachment into religious autonomy the Free Exercise Clause prohibits, precisely because such a demand for ecclesiastical titles inherently violates the Establishment Clause.

Requiring religious titles is particularly problematic when religious organizations do not bestow such titles on some (or any) of their ministers yet clearly understand the employee's role to carry religious significance. This is why "a recognized religious mission [which] underlie[s] the description of the employee's position" is also "surely relevant," just as an employee's title or ordination may be. *Hosanna-Tabor*, 565 U.S. at 193. Title may cut one way because "an employee is *more likely* to be a minister if a religious organization holds the employee out as a minister by bestowing a formal religious title." *Puri*, 844 F.3d at 1160 (emphasis added). Lack of a religious title does not suggest the opposite.

It's not surprising that Biel's title, as a Catholic school teacher, differed from Perich's title, as a Lu-

theran school teacher. "Minister," although commonly used in Protestant denominations, is "rarely if ever used in this way by *Catholics*, Jews, Muslims, Hindus, or Buddhists." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring) (emphasis added). Indeed, focus on Biel's title "trivialized how the distinct Catholic mission of integral formation permeated everything Ms. Biel did as a teacher" and "downplays Ms. Biel's function as a *Catholic* teacher." Brief for Nat'l Catholic Educ. Ass'n as Amicus Curiae in Support of Rehearing and Rehearing En Banc at 4.

Catholicism contains a rich history replete with evidence that its teachers play an essential role in its religious mission, yet it doesn't always embrace a formal title for such teachers as Hosanna-Tabor did with Perich. *See generally id.* at 5-9. Because of this, St. James thoroughly explained in its Motion for Summary Judgment why the role of the teacher comes with "duties and responsibilities" to be "performed within the School's overriding commitment to developing its faith" by incorporating "Catholic values and traditions throughout all subject areas, not just during the Religion course." St. James's Mot. For Summ. J. at 3-4, *Biel v. St. James Sch.*, No. 15-04248, ECF No. 65. Biel, as a teacher, played an "instrumental role in furthering and promoting the Catholic faith as part of her daily job duties." *Id.* at 13.

Nor is it surprising that a Catholic school's practices regarding ordination differ. As with title, religious training may be relevant, as it was in the Lutheran context. But other religious groups don't always require similar formal training yet clearly bestow ministerial roles. The concept of ordination—although recognized by some, and by some only as to

certain offices—"has no clear counterpart" in others.[5] *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). 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." Brief of Nat'l Catholic Educ. Ass'n as Amicus Curiae in Support of Rehearing and Rehearing En Banc at 14; *see also id.* at 8-9 & n.2 ("only 2.8% of Catholic full-time professional staff are either members of the clergy or religious orders"). These diverse religious practices are why Justices Alito and Kagan cautioned against emphasis on title.

Additionally, courts are ill-equipped to gauge the religious significance of titles or the sufficiency of training. Biel's title may appear to carry little or no religious significance to a court unfamiliar with the customs of Catholic education, but Biel's employment at St. James had significant religious substance. *See Biel*, 911 F.3d at 612-13, 616-18 (Fisher, J., dissenting) (documents, "including her employment contract, a performance review, and the faculty handbook," all supported applying the exception). Thus, when noting that Biel's title of "teacher" cannot be said to convey a religious meaning, the panel majority, just like the now-reversed Sixth Circuit in *Hosanna-Tabor*, overlooks the "recognized religious mission"

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[5] For example, 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." *Hosanna-Tabor*, 565 U.S. at 202 nn.3–4 (Alito, J., concurring) (citations omitted).

which "underlie[s] the description of the employee's position." *Hosanna-Tabor*, 565 U.S. at 193.

Furthermore, ignoring this history and these practices risks the very Establishment Clause violation the ministerial exception was intended to prevent. As Justice Thomas explains:

> Our country's religious landscape includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status. The question whether an employee is a minister is itself religious in nature, and the answer will vary widely. 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.

Id. at 197 (Thomas, J., concurring).

Other courts have rightly considered these differences. For example, the Massachusetts Supreme Judicial Court applied the ministerial exception to a teacher at a Jewish school, although "she was not a rabbi, was not called a rabbi, and did not hold herself out as a rabbi" on a record "silent as to the extent of her religious training." *Temple Emanuel of Newton v. Mass. Comm'n Against Discrim.*, 975 N.E.2d 433, 443 (Mass. 2012).

Finally, the panel majority also contrasted how Perich held herself out as a minister, noting "nothing in the record indicates that Biel considered herself a minister or presented herself as one to the community." *Biel*, 911 F.3d at 609. That Perich *held herself* out

as a minister merely evidenced her ministerial role; it did not institute a requirement that others must hold themselves out as ministers to qualify for the exception. That is one way in which an employee is "more likely to be considered a minister." *Puri*, 844 F.3d at 1160.

Biel's religious duties are far more relevant than whether she personally felt she was a minister. *See Grussgott*, 882 F.3d at 660 ("Grussgott's opinion does not dictate what activities the school may genuinely consider to be religious."). Presumably, any plaintiff who wishes to avoid the application of the exception will emphasize why she did not consider herself a minister.

In sum, as title, training, and how an employee holds herself out differ widely depending on tradition, courts have rightly focused on the fourth consideration—function.

IV

The panel majority rejected a function-focused approach embraced by all other circuits, including our own, before and after *Hosanna-Tabor*, in favor of its resemblance test. Despite Biel's religious function, the panel majority refused to apply the exception because it determined the other considerations were not present.[6] Biel's significant religious function, as a Catholic school teacher who teaches religion, demonstrates why the exception applies.

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[6] However, Judge Fisher in dissent persuasively found two of the "considerations" weighed in favor of the exception. *See Biel*, 911 F.3d at 616–20, 622 (concluding the ministerial exception applied because of substance reflected in her title and important religious functions she performs).

A

The panel majority mistakes *Hosanna-Tabor* to hold that the ministerial exception cannot apply based on important religious functions alone, despite the Court's express reservation of the question. *See Biel*, 911 F.3d at 609 (rejecting that the exception applies based on function and "[i]f it did, most of the analysis . . . would be irrelevant dicta"); *id.* at 610 ("the other considerations that guided the reasoning in *Hosanna-Tabor* and its progeny are not present here").

Our court should have adhered to circuit precedent and followed the lead of our sister circuits by focusing on "the function performed by persons who work for religious bodies." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). The majority's departure from the functional approach is even more surprising because the court has previously placed more emphasis on function post-*Hosanna-Tabor*.

> [A]n employee whose "job duties reflect a role in conveying the Church's message and carrying out its mission" is likely to be covered by the exception, even if the employee devotes only a small portion of the workday to strictly religious duties and spends the balance of her time performing secular functions.

Puri, 844 F.3d at 1160 (internal brackets omitted) (quoting *Hosanna-Tabor*, 565 U.S. at 192). Teachers, like Biel, at mission-driven schools, like St. James, convey the Church's message and carry out its mission. In this court, this renders the employee "likely to be covered by the exception." *Id.* By allowing the panel majority's decision to stand, we have allowed a

panel to contradict our precedent in a way that strips the exception of its core constitutional purpose.

After *Hosanna-Tabor*, other circuits have placed greater emphasis on an employee's function. *See Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 122 n.7 (3d Cir. 2018) ("[T]he 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); *Grussgott*, 882 F.3d at 661 (finding teacher fell within exception, noting school intended plaintiff to take on a religious role including functions not part of a teacher's job at a secular school); *Fratello*, 863 F.3d at 205 ("Where, as here, the four considerations are relevant in a particular case, 'courts should focus' primarily 'on the function[s] performed by persons who work for religious bodies.'" (quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring))); *Cannata*, 700 F.3d at 177 (applying the exception because plaintiff performed important "function" that "furthered the mission of the church and helped convey its message").

Similarly, state supreme courts have emphasized the importance of function. *See Temple Emanuel of Newton*, 975 N.E.2d at 443 (holding function alone sufficed to apply the exception); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 613 (Ky. 2014) (courts should focus on the "actual acts or functions conducted by the employee").

B

The ministerial exception protects the "interest of religious groups in choosing who will preach their be-

liefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196. It "insulates a religious organization's 'selection of those who will personify its beliefs.'" *Puri*, 844 F.3d at 1159 (quoting *Hosanna-Tabor*, 565 U.S. at 188). Justices Alito and Kagan found the ministerial 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*." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) (emphasis added). On many occasions, the Court has recognized the "critical and unique role of the teacher in fulfilling the mission of a church-operated school." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979); *see also Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971) ("Religious authority necessarily pervades [the Catholic] school system.").

Catholic school teachers certainly hold this special role. *See* Brief of Nat'l Catholic Educ. Ass'n as Amicus Curiae in Support of Rehearing and Rehearing En Banc at 5-9 (schools and teachers lay at the core of the church's ministry). According to the Vatican, 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." *Id*. at 5 (quoting The Sacred Congregation for Catholic Education, *The Catholic School* #8(5) (1977)). Teachers of religion at religious schools, regardless of title, training, or official ordination, effectuate this purpose and car-

ry out the Church's mission by ministering to students.[7]

At St. James, teachers "preach" and "teach" the school's Catholic beliefs and faith. By instructing new generations, teachers carry out the school's mission, precisely what a unanimous Supreme Court found relevant. *Hosanna-Tabor*, 565 U.S. at 192. Teachers personify the beliefs of the school and serve a crucial role in providing a holistic education to students. Biel's religious duties and function as a teacher at St. James show she was "entrusted with teaching and conveying the tenets of the [Catholic] faith to the next generation" and played a "substantial role in conveying the Church's message and carrying out its mission." *Id.* at 200, 204 (Alito, J., concurring) (internal quotation marks omitted). Employment decisions relating to those who serve this function is precisely what the ministerial exception is supposed to protect.

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[7] The religious nature of teachers is not unique to Catholicism. *See* Brief for Church of God in Christ, Inc. and Union of Orthodox Jewish Congregations of Am. as Amicus Curiae in Support of Rehearing and Rehearing En Banc at 1, 14 (parochial K–12 schools teach "religious and secular studies in a holistic environment"; 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" (quoting *Worship Services: V'ahavta (Read)*, ReformJudaism.org, https://tinyurl.com/yddle9l6)); Brief for Gen. Conference of Seventh-day Adventists, Int'l Soc'y for Krishna Consciousness, Inc., Jewish Coal. for Religious Liberty, and Shaykh Hamza Yusuf as Amicus Curiae in Support of Rehearing and Rehearing En Banc at 2 ("[R]eligious education is a critical means of propagating the faith, instructing the rising generation, and instilling a sense of religious identity" for minority religious groups like *amici*.).

Our sister circuits pay closer attention to function, particularly in religious educational settings like the one here. *See, e.g.*, *Grussgott*, 882 F.3d at 657 (Jewish Day School teacher's role fell within "ministerial exception as a matter of law," given "[h]er integral role in teaching her students about Judaism and the school's motivation in hiring her, in particular, demonstrate that her role furthered the school's religious mission"); *Fratello*, 863 F.3d at 208-09 (former principal at Catholic school was a minister, emphasizing "function" was "the most important consideration"); *Conlon*, 777 F.3d at 837 (finding spiritual director at Christian college educational group a minister).

Indeed, religious groups will have differing "views on exactly what qualifies as an important religious position, but it is nonetheless possible to identify a general category of 'employees' whose functions are essential to the independence of practically all religious groups." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). Among such groups are "those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* Biel was certainly entrusted with this duty.

The panel majority's minimized view of the religious significance of Biel's role as a teacher stands in stark contrast to this court's view of the role of teachers in secular contexts. This court recently expounded on the instrumental role of a high school football coach—a role "akin to being a teacher"—as his "multi-faceted" job "entailed both teaching and serving as a role model and moral exemplar," because of which he had a "duty to use his words and expressions to 'instill[ ] values.'" *Kennedy v. Bremerton Sch. Dist.*,

869 F.3d 813, 825-27 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019) (citations omitted). If true at a secular public school, how much more significant the role of an *elementary* school teacher at a *Catholic school* who teaches *religion on a daily basis*?

Religion teaches morals and instills values, and "[t]he various characteristics of the [parochial] schools make them a powerful vehicle for transmitting the Catholic faith to the next generation." *Lemon*, 403 U.S. at 616 (internal quotation marks omitted).[8] Teachers effectuate this purpose, and "[w]hen it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). This court's high view of the important role of teachers as role models for morality in a secular public school does not square with its view that teachers of religion at a religious school carry little religious significance.

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[8] Whatever the continuing value of the legal test in *Lemon*, the Supreme Court's recognition of the religious mission of parochial schools remains unchallenged. *See Am. Legion* v. *Am. Humanist Ass'n*, No.17-1717, slip op. at 12–16 (U.S. June 20, 2019) (plurality op. of Alito, J., joined by Roberts, C.J., Breyer, & Kavanaugh, JJ.) ("In many cases, this Court has either expressly declined to apply the test or has simply ignored it."); *id.*, slip op. at 1–4 (Kavanaugh, J., concurring) ("[T]he *Lemon* test is not good law and does not apply to Establishment Clause cases . . ."); *id.*, slip op. at 6–7 (Thomas, J., concurring in the judgment) ("I would . . . overrule the *Lemon* test in all contexts."); *id.*, slip op. at 6–9 (Gorsuch, J., concurring in the judgment) ("*Lemon* was a misadventure."); *see also Freedom From Religion Found., Inc.* v. *Chino Valley Unified Sch. Dist. Bd. of Educ.*, 910 F.3d 1297, 1305–07 (9th Cir. 2018) (R. Nelson, J., joined by Bybee, Callahan, Bea, & Ikuta, JJ., dissenting from denial of rehearing en banc).

C

Our court is now the first to issue an opinion narrowing the First Amendment's ministerial exception to apply only where an employee of a religious organization serves a significant religious function *and* either bestows upon an employee a religiously significant title (at least in a court's view), or requires the employee to have obtained religious training.

The harmful effects of this opinion have already emerged. In *Morrissey-Berru*, another panel of this court applied *Biel*'s rule to hold summarily in an unpublished opinion that a Catholic school teacher's "significant religious responsibilities" were insufficient. No. 17-56624, 2019 WL 1952853, at *1. Like *Biel*, *Morrissey-Berru* reversed a district court judge's decision finding the exception applied. The panel acknowledged that Morrissey-Berru

> committed to incorporate Catholic values and teachings into her curriculum, as evidenced by several of the employment agreements she signed, led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School's Easter celebration every year.

Id. But because *Biel* held that "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework," the panel concluded the exception did not bar Morrissey-Berru's claim. *Id.* The case for the ministerial exception in *Morrissey-Berru* is even stronger than in *Biel* given the Supreme Court's directive in *Hosanna-Tabor*. Absent further review of *Biel*, the implications are stark: Catholic schools in this circuit

now have less control over employing its elementary school teachers of religion than in any other area of the country. Given our court's broad coverage, this is not insignificant. Now thousands of Catholic schools in the West have less religious freedom than their Lutheran counterparts nationally. *See 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.").

V

In applying the ministerial exception, our court should look to the function performed by employees of religious bodies. Doing so would honor the foundational protections of the First Amendment and ensure *all* religious groups are afforded the same protection.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice of Docket Activity

The following transaction was entered on 07/03/2019 at 3:58:37 PM PDT and filed on 07/03/2019

Case Name: Darryl Biel v. St. James School

Case Number: 17-55180

[**ECF No.:** 114]

Docket Text:

Appellant Kristen Biel in 17-55180 substituted by Appellant Darryl Biel in 17-55180 [11354293] (OC)

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

KRISTEN BIEL, *Plaintiff,* v. ST. JAMES SCHOOL, *Defendant.*	CV 15-04248 TJH (ASx) Amended Order and Judgment

The Court has considered the St. James School's ["St. James"] motion for summary judgment, together with the moving and opposing papers.

This motion concerns whether Plaintiff Kristen Biel was a "minister" within the meaning of the "ministerial exception" to Title VII of the Civil Rights Act of 1964 , 42 U.S.C. § 2000e, *et seq.*, ["Title VII"] and is, therefore, barred from bringing the instant action under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq* ["ADA"].

St. James hired Biel in 2013 as a first grade substitute teacher. In June, 2013, Sister Mary Margaret, St. James's principal, hired Biel as a full-time fifth grade teacher — with the title of "teacher" — for the 2013–14 school year. Upon accepting the position, Biel signed an employment contract stating that St. James's mission is "to develop and promote a Catholic school faith community within the philosophy of Catholic education as implemented at St. James, and the doctrines, laws, and norms of the Catholic Church." Further, Biel agreed to perform "[a]ll duties and responsibilities . . . within St. James's overriding commitment to developing its faith." Under her employment contract, Biel was required to "model,

teach, and promote behavior in conformity to the teaching of the Roman Catholic Church."

In addition to teaching secular subjects, Biel taught a thirty-minute religion class to her students four days per week, and was required to dedicate a minimum of 200 minutes every week to the subject of religion. The religion course was grounded upon the norms and doctrines of the Catholic Faith, including the sacraments of the Catholic Church, social teachings according to the Catholic Church, and the overall Catholic way of life. For instance, Biel taught her students the significance of the Lent season, the Last Supper, Easter, the Eucharist, and Reconciliation. As a teaching guide for the religion course, Biel used a Catholic textbook, entitled "Coming to God's Life," from which Biel gave her students weekly tests. Further, Biel was required to pray with her students, and did so twice a day. Biel, also, incorporated the Catholic faith into the secular curriculum she taught. During her tenure at St. James, Biel attended a four-to five hour conference regarding ways to better incorporate God into lessons at the Los Angeles Religious Education Congress.

In April, 2014, Biel was diagnosed with cancer and informed Sister Mary Margaret. In June, 2014, Sister Mary Margaret informed Biel that St. James would not be renewing her contract for the 2014-2015 school year. In June, 2015, Biel filed this suit alleging six claims under the ADA. St. James, now, moves for summary judgment as to all six claims.

Discussion

In a motion for summary judgment, when the moving party has the burden of proof at trial, as St.

James has here on its affirmative defense, the moving party has the initial burden of establishing a *prima facie* case. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). If St. James satisfies its burden, the burden will shift to Biel to introduce evidence sufficient to raise a triable issue. *See Celotex Corp.*, 477 U.S. at 323. Each fact relied upon in this Order is undisputed.

St. James argued that Biel's claims — all brought under the ADA, and, consequently, Title VII — are barred under the ministerial exception. The ministerial exception bars Title VII claims where the employer is a religious institution and the employee is a "minister." *See Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 132 S. Ct. 694, 704 (2012) ["*Hosanna-Tabor*"]. The ministerial exception is an exception to Title VII "grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor*, 132 S. Ct. at 705 (footnote omitted). The ministerial exception "is intended to protect the relationship between a religious organization and its clergy from constitutionally impermissible interference by the government." *Werft* v. *Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1101 (9th Cir. 2004) (footnote and internal quotations omitted).

Here, there is no dispute that St. James, as a Catholic school, is a religious institution. Accordingly, the application of the ministerial exception turns on whether Biel was a "minister." *See Hosanna-Tabor*, 132 S. Ct. at 705.

Whether Biel is a minister depends on all the circumstances of Biel's employment, including her education before and during her tenure, her title, and her job duties. *See Hosanna-Tabor*, 132 S. Ct. at 707. "The paradigmatic application of the ministerial exception is to the employment of an ordained minister . . . [b]ut the ministerial exception encompasses more than a church's ordained ministers." *Alcazar v. Corporation of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (2010). The ministerial exception may apply "notwithstanding the assignment of some secular responsibilities." *Alcazar*, 627 F.3d at 1293.

In *Hosanna-Tabor*, the teacher at a religious school taught a forty-five minute religion class four days a week in addition to teaching math, language arts, social studies, science, gym, art, and music. *Hosanna-Tabor*, 132 S. Ct. at 700, 709. The teacher, also, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service, which she led about twice a year. *Hosanna-Tabor*, 132 S. Ct. at 700. Additionally, the teacher held the title of "called teacher," a reference to teachers at the school who had satisfied certain academic and other requirements, and were deemed by the school to have "been called to their vocation by God through a congregation." *Hosanna-Tabor*, 132 S. Ct. at 700. After taking disability leave, and subsequently losing her position at the school, the teacher sued the school under the ADA. *Hosanna-Tabor*, 132 S. Ct. at 700-01. Upon appeal to the Supreme Court, the Court held that the circumstances of the teacher's job — particularly the teacher's title, the teacher's efforts to hold herself out as a minister, and the teacher's job

duties — established that the teacher was a "minister" within the meaning of the ministerial exception. *Hosanna-Tabor*, 132 S. Ct. at 707-10. In so holding, the Court expressly rejected the notion that the teacher was not a minister because "her religious duties consumed only 45 minutes of each workday, and that the rest of her day was devoted to teaching secular subjects." *Hosanna-Tabor*, 132 S. Ct. at 709.

Here, St. James has established a *prima facie* case that Biel was a minister because her employment contract and job duties demonstrate that her "job duties reflected a role in conveying the Catholic Church's message and carrying out its mission." *See Hosanna-Tabor*, 132 S. Ct. at 708. Just as the plaintiff in *Hosanna-Tabor* taught religion and prayed with her students, Biel conveyed the Catholic Church's message by teaching religion to her students four times each week for thirty minutes, by administering and evaluating weekly tests from a Catholic textbook, "Coming to God's Life," and by praying with the students twice each day. *See Hosanna-Tabor*, 132 S. Ct. at 700, 708. Further, Biel clearly sought to carry out St. James's Catholic mission by, for example, including Catholic teachings into all of her lessons and attending a conference to learn techniques for incorporating religious teachings into her lessons.

Although this case does not contain all of the hallmarks of ministry identified in *Hosanna-Tabor*, it is clear that *Hosanna-Tabor* was not intended to represent the outer limits of the ministerial exception. *See Hosanna-Tabor*, 132 S. Ct. at 707. Instead, the question is whether the claims at issue may interfere with St. James's ability to choose who will convey its message. *See Bollard* v. *California Province of the*

Soc'y of Jesus, 196 F.3d 940, 946 (9th Cir. 1999). For the reasons discussed above, St. James has established a *prima facie* case that Biel acted as a messenger of St. James' faith. *See Hosanna-Tabor*, 132 S. Ct. at 708. Therefore, St. James established a *prima facie* case Biel was a minister within[ ] the meaning of the ministerial exception.

Further, because all facts relied upon in this Order are undisputed by the parties, Biel did not raise a triable issue of fact that would bar the granting of summary judgment. *See Celotex Corp.*, 477 U.S. at 323.

Therefore,

It is Ordered that the motion for summary judgment be, and hereby is, Granted.

It is Further Ordered, Adjudged, and Decreed that judgment be, and hereby is, Entered in favor of Defendant St. James School and against Plaintiff Kristen Biel.

It is Further Ordered, Adjudged, and Decreed that Plaintiff Kristen Biel shall take nothing and that all parties shall bear their own costs.

Date: January 24, 2017

/s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
Senior United States District Judge

42 U.S.C. § 12112 provides:

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes--

* * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

* * *

EXCERPTS FROM DEFENDANT'S RESPONSE TO PLAINTIFF'S SEPARATE STATEMENT OF UNCONTROVERTED AND CONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF HER OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT ECF No. 84-1

[ER 29]

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Attorneys for Defendant ST. JAMES CATHOLIC SCHOOL (erroneously sued herein as St. James School, a corp.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KRISTEN BIEL, an individual, Plaintiff,	Case No. 2:15-cv-04248 TJH (ASx)

vs. ST. JAMES SCHOOL, A CORP, a California non-profit corporation; and DOES 1-50, inclusive, Defendants.	Assigned to: Hon. Terry J. Hatter, Jr. Magistrate Judge: Alka Sagar DEFENDANT'S RESPONSE TO PLAINTIFF'S SEPARATE STATEMENT OF UNCONTROVERTED AND CONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF HER OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT [Filed and Served Concurrently with Defendant's Reply Brief to Plaintiff's Opposition to Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment; Declaration of Veronica Fermin; and Evidentiary Objections] Date: November 7, 2016

Time: UNDER SUBMISSION

Complaint Filed: 06/05/2015

Trial Date: 01/10/2017

[ER 30]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant, ST. JAMES CATHOLIC SCHOOL hereby submits its Response to Plaintiff's Separate Statement of Controverted and Uncontroverted Facts and Conclusions of Law in Support of Her Opposition to Defendant's Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment against Plaintiff, KRISTEN BIEL (hereinafter "Plaintiff").

I. Statement of Controverted and Uncontroverted Facts and Supporting Evidence

Moving Party's Statement of Uncontroverted Facts ("DSUF")

1. St. James Catholic School ("St. James" or the "School") is a private, Catholic elementary school in Torrance, CA.

Kreuper Declaration ("decl.") ¶ 3; Sister Mary Margaret Kreuper Deposition ("Kreuper depo." 11:3-12; Plaintiff depo., 24:7-8).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

2. St. James School is the parish school for St. James Catholic Church in Redondo Beach and, as such, is a religious, non-profit organization.

(Kreuper depo., 11:10-14).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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3. St. James School operates as part of the overall ministry of St. James Catholic Church in Redondo Beach, CA.

(Kreuper decl. ¶ 3)

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

[ER 31]

4. In other words, the school is one of several ministries that comprises the St. James Catholic Church parish.

(Kreuper decl. ¶ 3)

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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5. The School offers kindergarten through eighth grade with only one class per grade level.

(Kreuper depo., 20:7-12).

Plaintiff's Response and Supporting Evidence
CONTROVERTED
St. James School has operated with two teachers at one grade level.

Deposition of Mary Kreuper 20:23-21:7; 26:21-27:16; Deposition of Kristen Biel 14:22-15:25; 41:7-42:5

[DEFENDANT'S] RESPONSE: Objection: Mischaracterizes facts and evidence. This does not create a genuine dispute as to any material fact because the testimony Plaintiff presents does not controvert the fact that the school offers kindergarten through eighth grade with one class per grade level. Plaintiff's evidence relates to two teachers having shared the first grade which does not controvert the moving party's fact. Plaintiff attempts to create the appearance of a controverted fact when there isn't one here.

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6. For the past 27 years, Sister Mary has been the principal of the School. She is a vowed member of a religious congregation of the Roman Catholic Church.

(Kreuper depo., 11:19-22, Kreuper decl., ¶ 1).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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7. The mission of St. James is to develop and promote a Catholic school faith community within the philosophy of Catholic education [ ] as implemented at the School, and the doctrines, laws, and norms of * * *

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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* * *

[ER 35]

17. Every teacher at St. James was required to pray with their students every day.

(Kreuper decl. ¶ 9).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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18. Plaintiff is Catholic.

(Plaintiff depo., 24:9-10).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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19. As a Catholic, she prayed with her students every day both in the morning and at the end of each day.

(Plaintiff depo., 25:5-10).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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20. Plaintiff prayed Catholic prayers with her students including The Lord's Prayer and the Hail Mary Prayer.

(Plaintiff depo., 25:16-26:1).

Plaintiff's Response and Supporting Evidence
CONTROVERTED to the extent that Biel had prayer leaders in her class room that would teach and engage the students in daily prayer.

Deposition of Kristen Biel 25:11-15, 25:22-23

[DEFENDANT'S] RESPONSE: Objection: Mischaracterizes facts and evidence. This does not create a genuine dispute as to any material fact because the evidence presented by Plaintiff does not controvert the moving party's fact that Plaintiff prayed Catholic prayers with her students. Plaintiff testified that she

prayed each of the prayers described above with her students twice a day. Plaintiff attempts to create the appearance of a controverted fact when there isn't one here. **Evidence**: Biel Depo., 25:4-25:1.

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21. In addition, Plaintiff attended school Mass every month with her students where she also prayed with them and where they occasionally presented **[ER 36]** the Eucharistic gifts.

(Plaintiff depo., 29:9-15, 31:20-23, 32:1-11).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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22. In regards to the 5th grade curriculum, Plaintiff's duties included incorporating the Catholic faith into the students' every day curriculum.

(Kreuper decl., ¶ 5; Plaintiff depo., 24:11-14; 24:21-25:4; 26:18-22; 37:17-39:8, 40:4-18).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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23. Plaintiff taught the subject of Religion to her students four days per week.

(Plaintiff depo., 26:18-24).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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24. In fact, she was required to dedicate a minimum of 200 minutes every week to the subject of Religion.

(Kreuper decl. ¶ 7; Plaintiff depo., 30:3-31:9).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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25. The curriculum for the Religion course was grounded upon the norms and doctrines of the Catholic Faith, including, the sacraments of the Catholic Church, social teachings according to the Catholic Church, morality, the history of Catholic saints, Catholic prayers, and the overall * * *

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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* * *

[ER 38]

29. She also gave weekly tests to her students from this textbook.

(Plaintiff depo., 29:4-8).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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30. Moreover, Plaintiff was required to incorporate Catholic values and traditions throughout all subject areas, not just during the Religion course.

(Kreuper decl., ¶ 8; Plaintiff depo., 40:15-18).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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31. In fact, two standard requirements included in the School's teacher evaluation report were 1) incorporat-

ing "signs, sacramental, traditions of the Roman Catholic Church in the classroom," and 2) infusing "Catholic values through all subject areas."

(Kreuper decl., ¶ 8; Plaintiff depo., 37:6-21, 38:17-39:8, 40:15-18).

Plaintiff's Response and Supporting Evidence CONTROVERTED to the extent that these were two of thirty-four different requirements on the Elementary School Classroom Observation Report

Deposition of Mary Kreuper 89:24-90:16, Exh. 3 ("Elementary School Classroom Observation Report"); Deposition of Kristen Biel 37:6-37:25, Exh. 4 ("Elementary School Classroom Observation Report")

[DEFENDANT'S] RESPONSE: Objection: Mischaracterizes facts and evidence. This does not create a genuine dispute as to any material fact because the evidence presented by Plaintiff does not controvert the moving party's fact that the two abovementioned requirements were part of the teacher evaluation reports at St. James. Whether there were other requirements on the evaluation reports is not a material fact and does not controvert Defendant's fact. Plaintiff attempts to create the appearance of a controverted fact when there isn't one here. **Evidence**: (Kreuper decl., ¶ 8; Plaintiff depo., 37:6-21, 38:17-39:8, 40:15-18).

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* * *

[ER 44]

* * *

48. Within two weeks of the 2013-2014 school year, Sister Mary noticed that Plaintiff had difficulty keeping her classroom organized and controlling her classroom noise level.

(Kreuper depo., 72:16-21, 73:14-75:11, 76:23-77:5, 79:4-17, 101:23-102:5, 105:11-13; Plaintiff depo., 57:24-58:4).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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49. Sister Mary often observed a chaotic classroom environment with clutter on and around students' desks, and students out of their seats talking with other students.

(Kreuper depo., 73:14-21, 74:18-75:11, 79:11-17, 101:23-102:5, 106:6-12).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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* * *

[ER 58]

76. By January 2014, Sister Mary met with Plaintiff in her office once every week and sometimes twice a week to discuss Plaintiff's performance issues.

(Kreuper depo., 109:7-19; Kreuper decl., ¶ 15; Plaintiff depo., 44:21-45:8).

Plaintiff's Response and Supporting Evidence
CONTROVERTED

The testimony cited by Defendant does not establish that "performance issues" were the only thing discussed during these meetings as Sister Margaret testified that she wanted to "check in with her to see how she was doing with regards to all the things" Sister Margaret and Biel discussed.

Deposition of Mary Kreuper 109:16-109:19

For example, during these meetings, Biel and Sister Margaret also discussed other things including Biel's efforts to make sure the students were "understanding and learning" in her classroom which Sister Margaret complimented.

Deposition of Kristen Biel 45:21-47:2.

Also during these meetings Biel and Sister Margaret discussed the large number of students who were on Biel's honor roll during the first trimester.

Deposition of Mary Kreuper 83:24-86:14; 157:15-157:23

[DEFENDANT'S] RESPONSE: Objection: Mischaracterizes facts and evidence, lacks foundation, speculative, argumentative. This does not create a genuine dispute as to any material fact because the evidence presented by Plaintiff does not controvert the moving party's fact that, by January 2014, Sister Mary met with Plaintiff in her office once every week and sometimes twice a week to discuss Plaintiff's performance issues. Plaintiff's evidence does not refute this fact.

[ER 59]

Whether other things were discussed during these meetings is irrelevant and immaterial to the fact that these meetings occurred every week and Plaintiff's

performance issues were discussed. Plaintiff's belief that Sister thought she was "doing a good job" is speculative and lacks foundation, and ultimately, does not controvert the subject fact. Plaintiff attempts to create the appearance of a controverted material fact when there isn't one here.

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* * *

[ER 69]

99. She came to this decision based on the fact that Plaintiff failed to follow Sister Mary's guidance and abide by the policies and procedures of the School despite their numerous counseling sessions.

(Kreuper depo., 119:16-120:7, 156:17-157:1).

Plaintiff's Response and Supporting Evidence
CONTROVERTED to the extent that Biel testified that she had her students work in the Simple Solutions books.

Deposition of Kristen Biel 43:17-44:3

[DEFENDANT'S] RESPONSE: This does not create a genuine dispute as to any material fact because Plaintiff does not offer any evidence that controverts the fact that Sister Mary decided to not offer Plaintiff an employment contract based on the fact that Plaintiff failed to follow Sister Mary's guidance and abide by the policies and procedures of the School despite their numerous counseling sessions. Whether Plaintiff had her students work in the Simple Solutions book has no bearing on the subject fact. Plaintiff attempts

to create the appearance of a controverted material fact when there isn't one here.

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100. From January 2014 to April 2014, Sister Mary told Plaintiff on several occasions that it would be difficult to offer her an employment contract for the following school year.

(Kreuper depo., 120:10-121:3, 130:10-17).

Plaintiff's Response and Supporting Evidence
CONTROVERTED as Sister Margaret first testifies that she told Biel a "couple of times" only later to say that it was "several."

Q. Did you ever tell Ms. Biel she would not be offered a contract prior to her going out on leave?

A. Before May 22nd. I said a couple of times, "I'm going to find it difficult to offer you a contract."

Q. You said that a couple of times?

A. Couple of times, uh-huh.

Deposition of Mary Kreuper 120:14-120:20

Q. Did you ever tell Ms. Biel before the Monday after Easter, when she told you she might have cancer that she was not **[ER 70]** going to get a contract for the following school year?

A. I mentioned it on several occasions in early January, February when I met with her, that because of her performance, that I was going to find it very difficult to offer her a contract.

Deposition of Mary Kreuper 130:10-130:17.

[DEFENDANT'S] RESPONSE: Objection: Mischaracterizes facts and evidence, argumentative. This does not create a genuine dispute as to any material fact because Plaintiff does not offer any evidence that controverts the fact that Sister Mary told Plaintiff on several occasions that it would be difficult to offer her an employment contract for the following school year. Plaintiff attempts to misconstrue Sister Mary's testimony but alleging that "a couple of times" and "several times" are conflicting testimony. This is disingenuous and immaterial. Again, Plaintiff attempts to create the appearance of a controverted material fact when there isn't one here.

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101. In April 2014, following Easter break, Plaintiff told Sister Mary that she believed she had breast cancer and would need to undergo some tests.

(Kreuper depo., 124:14-25).

Plaintiff's Response and Supporting Evidence

CONTROVERTED to the extent that Biel had told Sister Margaret that she had cancer not that she believed that she had cancer.

Deposition of Kristen Biel 90:23-91:25; Deposition of Mary Kreuper 121:16-121:23; 124:14-124:25

[DEFENDANT'S] RESPONSE: Objection: Mischaracterizes facts and evidence, argumentative. This does not create a genuine dispute as to any material fact because whether Plaintiff told Sister Mary that she believed she had cancer or that she had cancer is immaterial. Again, Plaintiff attempts to create the appearance of a controverted material fact when there isn't one here.

[ER 71]

102. Sister Mary was sympathetic to Plaintiff's situation as she was also diagnosed with breast cancer in 2010, underwent a surgical procedure to treat her condition, and remained in continued treatment thereafter.

(Kreuper decl., ¶ 17).

Plaintiff's Response and Supporting Evidence

UNCONTROVERTED

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103. Plaintiff then informed Sister Mary that May 22, 2014 would be her last day of work so that she could receive medical treatment.

(Kreuper depo., 127:3-4, 127:14-20).

Plaintiff's Response and Supporting Evidence

CONTROVERTED as Biel continued to come to St. James School to pick up papers to grade and check her mailbox.

Deposition of Kristen Biel 23:19- 23:25; 105:25-106:18; 111:16-112:11

[DEFENDANT'S] RESPONSE: Objection: Mischaracterizes facts and evidence, argumentative. This does not create a genuine dispute as to any material fact because Plaintiff testified that her last day teaching the 5th grade at St. James before receiving chemotherapy treatment was approximately May 23, 2014. **Evidence:** Biel depo., 104:23-105:6 (attached as Exhibit C to the Fermin decl.). Whether Plaintiff continued to grade papers and check her mailbox is immaterial and has no bearing on the subject fact.

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104. Plaintiff continued to come to the School to pick up papers to grade and check her mailbox and was compensated until the end of the school year.

(Plaintiff depo., 23:9-18; 105:25-106:18).

Plaintiff's Response and Supporting Evidence
UNCONTROVERTED

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* * *

Excerpts from Transcript of Deposition of Kristen Biel

Kristen Biel v. St. James School,
No. 2:15-cv-04248 (TJH) (ASx)
(C.D. Cal. Nov. 10, 2015)

[ER 222]

[BY MS. FERMIN:]

Q. Are you claiming that St. James School owes you unpaid wages?

A. Again, the same question. I'm sorry. I'm not sure. I'd have to check my records.

Q. What records would you check?

A. My last paycheck stub.

Q. St. James is a Catholic School. Right?

A. Yes.

Q. Are you Catholic?

A. Yes.

Q. Was it your understanding that as a Catholic school St. James had the goal of incorporating the faith into their curriculum?

A. Yes.

Q. As a Catholic school St. James promoted and developed the Catholic faith amongst its elementary school students?

A. Are you asking me to agree?

Q. Is that your understanding?

A. Yes.

Q. As a teacher at St. James your duties encompassed promoting and furthering the Catholic faith amongst your students?

MS. SHOEMAKER: Objection; vague and ambiguous.

BY MS. FERMIN:

[ER 223]

Q. Is that your understanding?

A. What do you mean by "promoting and furthering"?

Q. Incorporating it into the curriculum.

A. We prayed every day, yes.

Q. You prayed with your students?

A. Yes.

Q. In the morning or at the end of the day?

A. Both.

Q. Twice a day?

A. Yes.

Q. Did you teach your students any Catholic prayers?

A. They already know them. I didn't need to teach them anything. And I had prayer leaders. The prayers that were said in the classroom were said mostly by the students. We had prayer leaders. That was like a job.

Q. Did you pray the Hail Mary with your students?

A. We did.

Q. The Lord's Prayer?

A. We did, yes.

Q. Those are Catholic prayers, aren't they?

A. Hail Mary is.

Q. The Lord's Prayer is not a Catholic prayer?

A. It's a Christian prayer.

Q. But used in mass. Right?

A. Yes, but used in mass of other Christian

* * *

[ER 227]

Q. – of the Eucharist and confession?

A. That was in the book, yes. But the kids – I'm sorry. Never mind.

Q. Did you give tests based on this religious workbook?

A. Yes.

Q. How often would you give tests?

A. Weekly.

Q. Did you ever attend mass with your students?

A. Yes.

Q. Where was mass held?

A. It was kind of a multi-purpose room.

Q. It was school mass, I'm assuming.

A. Yes. The church and the school are not connected.

Q. So it was a mass just with the St. James students?

A. Yes.

Q. Okay. How often did school mass take place?

A. Once a month.

Q. You attended the school mass with your students?

A. Yes.

MS. FERMIN: I'm going to mark this as Exhibit No. 2.

(Exhibit 2 was marked for identification by the

* * *

[ER 229]

Q. Did you go over with your students on how to present the gifts in mass?

A. As far as rehearsal? I don't think we did rehearsal. Most of them know how to do it already.

Q. So you did not go over how to present gifts?

A. I don't remember. Maybe we quickly did something, or not. I don't remember. It wasn't that often.

Q. Just for the record, when you say "gifts," you are referring to the Eucharist. Right?

A. Yes.

Q. How often would your class present the gifts at school mass?

A. It was only twice a year.

Q. That they would present the gifts?

A. Yes, something like that. Not very often. It was kind of a volunteer thing if the kids wanted to do it.

Q. During these school masses you mentioned that you made sure that the kids were quiet and sitting down and behaving during mass. Right?

A. Yes.

Q. Did your students pray during school mass?

A. Yes.

Q. Did you pray too?

A. Yes.

* * *

[ER 277]

[Exhibit 1]

FACULTY EMPLOYMENT AGREEMENT—ELEMENTARY
Exempt Full Time
Department of Catholic Schools
Archdiocese of Los Angeles

Name of School: St. James
Name of Teacher: Kristen Biel
Start Date: August 26, 2013 End Date: June 30, 2014

1. Term. The School ("School") and you (the "Teacher") make this Employment Agreement ("Agreement"), effective on the date below, for the work period shown above (the "Term"), for you to serve as a member of our faculty.

2. Philosophy. It is understood that the mission of the School is to develop and promote a Catholic School Faith Community within the philosophy of Catholic education as implemented at the School, and the doctrines, laws and norms of the Catholic Church. All duties and responsibilities of the Teacher shall be performed within this overriding commitment.

3. Duties. Your duties shall be those of a full-time or part-time faculty member as specified in the Compensation and Benefits Supplement which is an integral part of this Agreement. You shall use your best professional efforts and skills to perform your dunes in a diligent, energetic, competent, and ethical

manner, consistent with the School's established philosophy and its policies, directives and expected practices. You acknowledge and agree that the School retains the right to operate within the philosophy of Catholic education and to retain teachers who demonstrate as ability to develop and maintain a Catholic School Faith Community. You understand and accept that the values of Christian charity, temperance and tolerance apply to your interactions with your supervisors, colleagues, students, parents, staff and all others with whom you come in contact at or on behalf of the School. Accordingly, you are expected to model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church. Your duties shall include careful preparation and planning for each class consistent with School and departmental curriculum; diligent review and evaluation of student work and related communication to students and parents; and conferring with students, the administration, and parents as needed regarding each student's progress and development. You also shall attend faculty and staff meetings and conferences, including those prior to and following the School's regular academic year, participate in School activities including School liturgical activities, as requested, and complete other duties as assigned. You agree to maintain the levels of competency in subject matter, teaching methods, classroom management, and student supervision required by the School whether on your own initiative or at the direction of the School. Your duties and job assignment may be revised during the Term to meet the School's needs. In that event the School's operations are extended by reason of fire, disaster, act of God, act of public authority or any other necessity

or emergency cause, your services may be suspended for the time period and rescheduled as needed to complete the full School year.

4. Policies. You shall be familiar with, and comply with the School's personnel policies and procedures as they may be adopted or amended from time-to-time, including policies in the fatuity handbook. You should refer to such documents for information relating to your employment, duties, and benefits. You shall be familiar with, abide by, and assist and cooperate with School administration in enforcing, the School's policies for students and families whether outlined in our handbook(s), our School policies, or other directives and expected practices (together "Policies"). You acknowledge that a copy of the faculty handbook has been made available to you. You understand and acknowledge that the policies do not constitute a contractual agreement with yon.

5. Introductory Period. There is an introductory period for a newly hired or transferred teacher. The introductory period is a minimum of 90 calendar days, and may be extended, in writing, for up to another 90 calendar days at the discretion of the principal. During the introductory period this Agreement is at will; therefore, it can be terminated at any time, for any reason, without any notice. The Principal shall complete a performance appraisal at the end of the introductory period. Upon satisfactory completion of **[ER 278]** the introductory period, employment will be continued through any remaining term of this Agreement except as noted under "Termination."

6. Termination. Your employment, and this Agreement, may be terminated during the Term

without payment of salary or benefits beyond such date of termination, for any of the following reasons:

I. The School may terminate for "cause," without any prior notice. Such "cause" shall be determined by the School within its reasonable judgment and shall include but not be limited to:

a) Failure to meet any of your duties as described in Paragraphs 3 and 4 above.

b) Inappropriate physical or social contact with students during school or otherwise.

c) Unprofessional or unethical conduct, insubordination, unauthorized disclosure of confidential information, or habitual or unreasonable tardiness or absence from duties.

d) Any criminal, immoral or unethical conduct that related to your duties as a teacher or brings discredit upon the school or the Roman Catholic Church.

e) Unauthorized possession of, or working under the influence of, illegal drugs, intoxicants, or alcohol.

f) Threatening or causing bodily harm to others or other coercive and or intimidating acts, or any verbal or physical harassment.

g) Having a diploma, credential, permit, license or certificate denied, revoked or suspended.

h) Falsification of documents, false or misleading information on an application, resume, personnel record, professional or character reference, academic transcript, degree, or credential.

i) Any other breach of the terms of this Agreement.

II. Either you or the School may terminate this Agreement without cause, for day reason within the sole discretion of the terminating party, upon 30 calendar days' prior written notice to the other party in a manner that is consistent with applicable law and on a time frame that is mutually agreeable to you and the Principal. However, you may not terminate employment under this Agreement if the termination is effective during the 30 days immediately prior to the beginning of the school year except by mutual agreement with the Principal. You acknowledge that a breach by you of this provision is a grave ethical violation, may harm the educational program for the students and may cause expenses and damages to the School.

III. The School may terminate your employment if you are unable to perform the essential functions of your position and reasonable accommodation is not available or required under applicable laws.

The School's failure to invoke its right of termination on one occasion for the occurrence of a matter constituting a basis for discharge shall not affect the right of the School to invoke discharge when the same or a different basis for termination arises at a later date.

7. Renewal. Future employment will be determined on a year-to-year basis. It is agreed that you will give written notice to the School, on or before April 1, 20__, stating whether or not you wish to renew the Agreement. The School will give you written notice, on

or before May 15, 20__, stating whether or not it intends to renew the Agreement for the following year. In the absence of a notice by either party, this agreement will lapse under its own terms. The Principal alone, with the approval of the Pastor, has the final and sole authority with respect to offering contracts. This Agreement is contingent upon sufficient School enrollment and the School's financial condition. If the enrollment or the School's financial condition does not justify the staffing, the Principal has discretionary power to make decisions regarding personnel reduction including, but not limited to, modification or cancellation of this Agreement. Notwithstanding this, if the School closes for any reason, this Agreement will be considered terminated on the date of the closure. You understand that tenure is not granted by Archdiocesan Schools and upon expiration or termination of the Agreement fox any reason you shall have no right to **[ER 280]** employment or preferential treatment regarding employment at any other Archdiocesan School. There is no implied duty by you or the School to renew this Agreement, and no cause whatsoever is required by either party for non-renewal. Any other arrangement with respect to renewal, extension or duration of employment is valid only if in writing, executed by you and the Principal, with the approval of the Pastor.

8. Severability. If, for any reason, any one or more of the provisions of this Agreement shall beheld or deemed to be legally invalid or unenforceable, that shall not have any effect on any of the other provisions of this Agreement, all of which shall remain in full force and effect.

9. Entire Agreement. This agreement and the attached Compensation and Benefits Supplement contain the complete and entire agreement between you and the School, and it supersedes all prior offers, agreements, commitments, understandings, whether oral or written. No changes to this Agreement maybe made except by a document signed by you and the Principal, with approval of the Pastor.

10. Applicable Law. This Agreement is entered into under, and governed by, the laws of the State of California.

11. Dispute Resolution and Grievances. You and the School agree to attempt to resolve any disputes in good faith. Any unresolved dispute between you and the School arising out of or in any way related to your employment or the termination thereof, shall be subject to the Grievance Procedures promulgated by the Archdiocesan Department of Catholic Schools and no legal actions may be taken until all procedures have been fully discharged. This clause is intended to provide a speedy, economical and exclusive forum for resolving claims; its existence shall not imply any limitations upon the School's right to manage its affairs or terminate any employment.

12. Condition Precedent. It is agreed that a condition precedent of this Agreement is the receipt of the Criminal Record Summary report from the California Department of Justice and the Federal Bureau of Investigation, the completion of the I-9 Form from the Immigration and Naturalization Service, and the completion of the other relevant health and document requirements of the school.

By: /s/ Sister Mary Margaret
Principal's Signature

Sr. Mary Margaret 5/28/2013
Print Name Date

I accept a position as Grade 5 Teacher at St. James School School on each and all of the terms and conditions set forth in the above Agreement and the attached Compensation and Benefits Supplement.

By: /s/ Kristen Biel Kristen Biel 5/24/13
Teacher's Signature Print Name Date

Approval by Pastor required:
/s/ Msgr. Michael Meyers
Pastor's Signature

Msgr. Michal Meyers 5/28/13
Print Name Date

[ER 279]

FACULTY COMPENSATION AND BENEFITS SUPPLEMENT
Elementary – Exempt Full Time
Department of Catholic Schools
Archdiocese of Los Angeles

13. School Day and Work Schedule.

Full Time Faculty

As a full time teacher, you understand that there will be approximately 8 hours of work at the School each regular class day. You will also devote time to other assigned school responsibilities and in preparation and assessment activities at hours not during the regular class day. The School's regular class day is from 7:30 a.m. to 3:45 p.m.

14. Base Compensation.

Base Salary: $ 34,970

15. Additional Compensation For Designated Responsibility (If Any):

Note: Calculations and Additional Compensation for designated responsibility are based on anticipated time commitment and skills.

Responsibility	Additional Compensation
_____	$_____
_____	$_____
_____	$_____
_____	$_____

Total Additional Compensation: $_____

16. Payment Schedule.

Compensation for all faculty will be distributed on a [ ] semi-monthly [x] bi-weekly schedule beginning August 30, 2013 and ending June 20, 2014. *[Handwritten Comment:] 34,970 ÷ 22*

17. Education and Professional Growth Requirements:

In accordance with the regulations for salary placement and professional growth requirements, you agree that you will complete the following requirements to be eligible to be offered an employment agreement for the next school year.

[ ] _____

[ ] Enroll in California Teaching Credential Program.

[ ] Complete at least _____ units toward a California Teaching Credential.

[ ] California Teaching Credential program must be completed by July 1, 20__ for an Elementary School Faculty Employment Agreement to be offered for the 20___ - 20___ academic year.

18. Available Benefits.

See Department of Catholic Schools Lay Employees Benefit Guide

[ER 281]
Sick Days: Full-time Faculty: 10 days per school year.

/s/ Sister Mary Margaret
Principal's Signature

Sr. Mary Margaret	5/28/2013
Print Name	Date

/s/ Kristen Biel	Kristen Biel	5/24/13
Teacher's Signature	Print Name	Date

Approval by Pastor required:
/s/ Msgr. Michael Meyers
Pastor's Signature

Msgr. Michael Meyers	5/28/13
Print Name	Date

[ER 282]

[Exhibit 4]

Archdiocese of Los Angeles
Elementary School Classroom
Observation Report

Teacher: Kristen School: St. James
Principal: Sr. M City: Torrance
Grade: 5 School Year: 2013-14
Subject: Math Date: Nov. 12, 2013

Innovating	Implementing	Emerging	Not Exhibiting
Adjusts and creates new strategies for unique student needs and situations during the lesson.	Uses strategies at appropriate time, in the appropriate manner.	Attempts to use strategy but uses it incorrectly or at the wrong time.	Strategy was called for but not exhibited.

WCEA (*Catholic Identify Factors*) Check if observed

[ ] Innovating [ ] Implementing [ ] Emerging [ ] Not Exhibiting

[x] There is visible evidence of signs, sacramental, traditions of the Roman Catholic Church in the classroom.

[x] Curriculum includes Catholic values infused through all subject areas. *[Handwritten Comment:] Respect—*

[x] Integrates Schoolwide Learning Expectations

Observation Comments: _____

Objective to be Observed: *California Standards for the Teaching Profession*

For the following 5 standards, check if observed

Standard 1: Engaging and Supporting All Students in Learning

[ ] Innovating [ ] Implementing [ ] Emerging [ ] Not Exhibiting

[x] 1.1 Using knowledge of students to engage them in learning

[ ] 1.2 Connecting learning to students' prior knowledge, backgrounds, life experiences, and interests

[ ] 1.3 Connecting subject matter to meaningful, real-life contexts

[x] 1.4 Using a variety of instructional strategies, resources, and technologies to meet students' diverse learning needs

[x] 1.5 Promoting critical thinking through inquiry, problem solving, and reflection

[x] 1.6 Monitoring student learning and adjusting instruction while teaching

Observation Comments: _____

Standard 2: Creating and Maintaining Effective Environments for Student Learning

[ ] Innovating [ ] Implementing [ ] Emerging [ ] Not Exhibiting

[x] 2.1 Promoting social development and responsibility within a caring community where each student is treated fairly and respectfully

[x] 2.2 Creating physical or virtual learning environments that promote student learning, reflect diversity, and encourage constructive and productive interactions among students *[Handwritten Comment:] with teacher*

[x] 2.3 Establishing and maintaining learning environments that are physically, intellectually, and emotionally safe *[Handwritten Comment:] Very good—*

[x] 2.4 Creating a rigorous learning environment with high expectations and appropriate support for all students

[x] 2.5 Developing, communicating, and maintaining high standards for individual and group behavior

[x] 2.6 Employing classroom routines, procedures, norms, and supports for positive behavior to ensure a climate in which all students can learn *[Handwritten Comment:] There is a variety of work displayed.*

* * *

[ER 565]

[Exhibit 10]

Faculty/Staff Handbook
St. James School
4625 Garnet Street
Torrance, CA 90503

* * *

[ER 587]

STAFF GUIDELINES AND RESPONSIBILITIES

* * *

Personal Example

Staff members at St. James School are expected to reflect a positive attitude and to be models of Christian virtue who give fine personal example at all times. They are expected to maintain professional excellence and personal integrity, just as we would like our students to strive for these.

* * *

School Masses

School-wide and grade level Masses are scheduled throughout the year. Teachers prepare their students to be active participants at Mass, with particular emphasis on Mass responses.

Each class participates in a special way at one Sunday liturgy during the school year (at the 10:00 AM Mass on the first Sunday of the month). Students are prepared for special participation in that Mass. Teachers are encouraged to attend this Mass each month, especially when their students are participating.

School Day Masses at St. James Church /Drivers

On occasion students attend Mass at St. James Church (e.g., before rehearsals for the Christmas Program and Spring Sing). At these times, students are dropped off at Church at 7:45 a.m. and need transportation back to school at approximately recess time. Teachers and/or room parents need to coordinate parent drivers for their students. A permission slip is signed at the beginning of the school year to cover all trips from Church.

* * *

[ER 589]

Daily Prayer

The school day should begin and end with prayer. A prayer should also be said before and after lunch. Students should know and frequently use the prayers in the back of their religion book.

Students should also know the following prayers and be prepared to pray them at the school's morning assembly. See end pages of this handbook.

September	Message from Jesus
October	Angel of God
November	Prayer of the Faithful Departed
December	Hail Mary
January	Act of Faith
February	Act of Love
March	Act of Hope
April	Prayer of St. Francis
May	One decade of the Rosary
June	Apostle's Creed

* * *

Excerpts from Transcript of Deposition of Janell O'Dowd
Volume I
Kristen Biel v. St. James School,
No. 2:15-cv-04248 (TJH) (ASx)
(C.D. Cal. Jan. 28, 2016)

[ER 834] [Tr. 20]

* * *

BY MS. SHOEMAKER:

Q. Do you remember the school year when Ms. Biel began teaching the fifth grade, what year that was?

A. No. It was – well, what – like was it three years ago? One, two, three. I don't remember.

Q. We've alleged that it occurred in 2013 to 2014.

A. Okay.

Q. Does this seem about right?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. And at that time, M[redacted] was in her class; is that correct?

A. Yes.

Q. And during that 2013 to 2014 school year, did you personally observe any problems with Ms. Biel's teaching?

MR. VASIN: I'm just going to object as overly broad, vague, ambiguous.

THE WITNESS: Yes.

[ER 835] [Tr. 21]

BY MS. SHOEMAKER:

Q. And what were those issues?

A. One, their calculators were being used for math. I had a problem with study guides not being corrected. I had a problem with the math workbook not being used. I had a problem with the use of the Simple Solution math workbooks, the classroom environment and I guess that the work not being challenging.

Q. Any other problems you can think of?

A. Not at this second.

Q. You said one of the problems was that they were using calculators for math?

A. Yes.

Q. What's the issue with that?

A. Long division. So this is – I mean, fifth grade usually calculators aren't used. So it was just the type of problems the calculators were being used for.

Q. And then you said something about having issues with the study guides?

A. Uh-huh.

Q. What do you mean by that?

A. The students were given study guides after they completed a chapter. She was passing out the study guides, giving them class time to finish them but then never going back to correct the answer. So then when my **[Tr. 22]** daughter would bring the study guides to prepare for a test, they didn't have the correct answers on it. So then as a present, I was going back looking in

the book trying to fix – find the correct answers so that I could help her study.

Q. And what book were you looking in?

A. This was social studies.

Q. A teacher book? Your daughter's school book?

A. No, my daughter's school book.

Q. To see – to see if the answers she had in the study guide was correct?

A. Correct.

Q. So it's not like you had the teacher manual readily available?

A. No.

Q. And then you mentioned an issue with the math workbooks?

A. Uh-huh.

Q. What was that?

A. Our math workbook supplements our textbook and she was not using the math book. So they weren't having homework to reinforce the math skills that they were being taught during the day.

Q. So the issue was that the supplements weren't being used?

[Tr. 23]

A. Correct.

Q. And what about the Simple Solutions books?

A. She – it's a consumable math workbook and they were not using it as a consumable. So they were using a piece of paper but then she would go – so the kids

were doing it on paper – So then when the kids would have a test on it, there was no work in the workbook for the parents to review or you'd --

Q. Go ahead.

A. So you couldn't find your child's mistake or help them with a mistake.

Q. And what's a consumable?

A. You write on it. So like your textbook you would not write in. We can't – we don't highlight our books but a workbook is consumable because you write in it.

Q. And if it was on loose leaf paper, it'd be hard to keep all that work together?

A. Uh-huh, and I don't even think they had – they got those back.

Q. The?

A. The loose leaf papers.

Q. And you mentioned you had an issue with the classroom environment?

A. Uh-huh.

[Tr. 24]

Q. And what do you mean by that?

A. Very loud, noisy, sometimes I'd walk by and there'd be kids just, you know, walking or crawling on the floor. And just with their desks, they had taped pencil holders and things around their desk and just books on the – in the aisle.

Q. How close was your classroom to Ms. Biel's classroom?

A. We were separated by let's see, one, two, I think three classrooms.

Q. Could you hear noise from her classroom when you were in your classroom?

A. No.

MR. VASIN: You answered the question.

THE WITNESS: Okay.

BY MS. SHOEMAKER:

Q. So when you state that the classroom was loud or noisy, you only heard this when you walked by the classroom; is that correct?

A. When I walked by or when I was in the computer lab.

Q. And where is the computer lab in reference to her classroom?

A. Right next door.

* * *

[ER 836] [Tr. 37]

Q. Any other students?

A. Not that I remember.

Q. And how many conversations did you have with A.W. about issues with Ms. Biel's teaching?

A. I drove to soccer practice with them in my car. So if I had – if M[redacted] came home using her calculator in the car, I would say, is it true that you're allowed to use your calculator? And then how – how are you able to use your calculator? The kids would talk about things that happened during the day. So I would just

get in on the conversation and ask questions about, you know, the events.

Q. Was F.D. also in the car with these drives to soccer practice?

A. Not all of them.

Q. Is that where the conversations with F.D. would have taken place?

A. Yes.

Q. Do you recall discussing any issues, other than the one you previously told me about?

A. No.

Q. And approximately how many times did you have these conversations?

A. I don't know. September, October, November. **[Tr. 38]** Maybe 12 conversations. If I drove – if I had to drive extra carpool, I mean, there would have been more.

Q. Did you have -- ever have any conversations about the issues with Ms. Biel's teaching with Sister Mary Margaret?

A. Yes.

Q. And approximately how many conversations did you have with her?

A. Probably about three.

Q. Do you remember when the first conversation took place?

A. It would have been sometime in the first trimester.

Q. And what was said in that conversation?

A. I don't – I don't recall what specifically we talked about.

Q. What do you recall generally speaking about?

A. I know I spoke to her about three things. We talked about the math workbooks not being used. I talked to her about M[redacted]'s progress report. I discussed the study guides with her and the math workbook.

Q. When do progress reports come out for the students?

A. Midway through the trimester. The first one comes out about Thanksgiving.

[Tr. 39]

Q. When does –

A. Progress report or report card?

Q. Progress report.

A. Progress report. Sorry. It would be six weeks into school.

Q. So the first conversation took place approximately six weeks after the start of the school year?

A. I think I said first trimester that we – I met with her the first trimester, during the first trimester. So that would have been before Thanksgiving.

Q. But you spoke to her about M[redacted]'s progress report?

A. That was later in the year.

Q. So I'm just right now talking about this first conversation you had with her.

A. Okay.

Q. What was first discussed at the first – during the first conversation?

A. I don't remember the specifics.

Q. So the issues – so –

A. If I – no. It's probably the math workbook.

MR. VASIN: Well –

BY MS. SHOEMAKER:

Q. I don't want you to guess.

[Tr. 40]

MR. VASIN: Don't guess.

THE WITNESS: Then, no, I don't.

BY MS. SHOEMAKER:

Q. So you recall having approximately three conversations with Sister Mary Margaret?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. And during those three conversations, within at least one conversation, you discussed the math workbooks, M[redacted]'s progress report, study guides and math workbook?

A. Yes.

Q. You don't recall specifically which issues were discussed in which conversation?

A. No.

Q. And when you refer to M[redacted]'s progress report, are you referring to her first progress report?

A. I'm not positive.

Q. And what would your problem have been with M[redacted]'s progress report?

A. She had a behavior check.

* * *

Excerpts from Transcript of Deposition of Kathleen McDermott

Kristen Biel v. St. James School,
No. 2:15-cv-04248 (TJH) (ASx)
(C.D. Cal Dec. 3, 2015)

[ER 839]

* * *

Q. Okay: When does the school year start?

A. August, end of August we start with meetings.

Q. And it goes to what month?

A. Halfway through June.

Q. During Kristen Biel's first year teaching as a fifth grade teacher, did you meet once a week from August through June with her?

A. No, she didn't finish out the year.

Q. Until she left in May, did you meet with her once per week?
A. Yes, unless it wasn't possible because of different schedules people had.

Q. From that time August through May that you were meeting with her once per week, was there any specific topic that was often discussed or a certain issue that **[ER 840]** she had that you had to go over multiple times with her?

A. I talked with her at the beginning of the year about behavior problems that I knew she was having, you know. I asked her questions because she had come to me about things. The other one was her classroom maintenance.

Q. When you say behavior problems, what do you mean?

A. The children were often out of control.

Q. What do you mean by out of control?

A. Not working, sometimes outside of the classroom, having behavior problems, different things.

Q. Would they ever get in physical altercations?

A. No, but that's not—that doesn't happen at our school, so. . .

Q. What do you mean, then, with problems outside the classroom?

A. Where the children wouldn't be following rules and there would be different problems that I saw, other people saw, and I talked with her about them.

* * *