No. 19-267

In the
Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES MORRISSEY-BERRU,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly held—after an intensive, fact-specific inquiry into the circumstances of Respondent's employment with Petitioner—that a teacher at a private Catholic school was not a "minister" for purposes of the ministerial exception, where:

- the school neither required its teachers to be Catholic, nor required them to have any training, experience, or education in religion or in teaching the Catholic faith;
- the teacher at hand did not have any formal training, degrees, or certificates with regard to teaching the Catholic faith when she was hired as a teacher by Petitioner;
- the school regarded its teachers as "lay" employees, and the school itself attributed a completely secular title of "teacher" to them;
- the teacher at hand neither considered herself a "minister," nor held herself out as one;
- although the teacher taught religion, it was only one of numerous subjects she taught to her students, the remainder of which were secular subjects;
- the teacher prayed alongside her students, but did not lead them in prayer;
- the teacher merely accompanied her students to weekly mass, but did not lead

any part of the mass or participate in presenting the Eucharist; and

- the teacher did not lead her students, the school, or the community in any other Catholic rituals or practices?

In other words, when employed by a parochial school, does a teacher's incorporation of religion into some aspects of the curriculum automatically render that teacher a "minister" for purposes of the ministerial exception, notwithstanding that *only one* of the four considerations enumerated by the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) weighs in favor of finding that teacher a "minister"?

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INTRODUCTION

The question presented in this case is not whether the Religious Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee who carried out some religious functions, but whether the Ninth Circuit erred in holding that Agnes Morrissey-Berru was not a "minister" for purposes of the ministerial exception based on its analysis of the totality-of-the-circumstances of her employment with Petitioner. The answer to that question is "no."

In 2012, this Court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) and held that Cheryl Perich was a "minister" covered by the ministerial exception. *Id.* at 192. In deciding the issue, the Court found that there was no need "to adopt a rigid formula for deciding when an employee qualifies as a minister" because "given all the circumstances of [Perich's] employment" – including considering formal title, substance reflected in that title, her own use of that title, and the important religious functions she performed for the religious organization – she was covered by the ministerial exception. *Id.* at 190-192.

After *Hosanna-Tabor*, the lower courts – including the Ninth Circuit – have been consistent in

their interpretation of the ministerial exception. *See, e.g.*, *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 174, 175-176 (5th Cir. 2012) (calling it a "totality-of-the-circumstances analysis"); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834-835 (6th Cir. 2015) (stating the *Hosanna-Tabor* Court did not "adopt a rigid formula for deciding when an employee qualifies as a minister"). The Ninth Circuit in both *Puri v. Khalsa*, 844 F.3d 1152 (9th Cir. 2017) and *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018) recognized there is not a rigid formula for deciding when an employee qualifies as a minister; instead, courts should analyze all of the circumstances of employment. *See, Biel v. St. James School*, 911 F.3d at 607-609; *Puri v. Khalsa*, 844 F.3d at 1159-1162.

And, yet, despite this unity among the various circuit courts as to the approach for determining whether an employee is a "minister" under the ministerial exception, Petitioner requests this Court overrule *Hosanna-Tabor* and adopt – in essence – a "function-only" test. Petitioner argues that while this "is not an exclusive inquiry," courts should put their primary focus on the "important religious functions" of the position such that if the individual employee performs even a single religious function, that employee would be covered under the ministerial

exception as a "minister." **Such a new and rigid test is *not* tenable.**

It is for this reason that the Petition for Writ of Certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

I. The Circumstances of Agnes Morrissey-Berru's Employment With Our Lady Of Guadalupe School

Agnes Morrissey-Berru ("Morrissey-Berru") attended two colleges and received her Bachelor of Arts in English language arts with a minor in secondary education in 1973. In 1998, Morrissey-Berru began working for Our Lady of Guadalupe School as a substitute teacher. Pet. App. 80a. The following school year, she was offered a full-time position teaching the sixth grade. *Id.* The school's principal, April Beuder, understood the position she was offering to Morrissey-Berru, which was that of an elementary teacher. Although Petitioner's ideal teaching candidate is an actively practicing Catholic, being Catholic is not a requirement. Pet. App. 56a-57a. Morrissey-Berru herself is not a practicing Catholic. Resp. App. 2a. Petitioner also does not require that its teachers have any religious training before beginning to teach at the school.

As part of her employment with Petitioner, Morrissey-Berru was required to sign a *one-year* "Teacher Employment Agreement" that defined her title as "Teacher" throughout the document. *See* 32a-42a. Petitioner required Morrissey-Berru to sign a similar teacher employment agreement for *each* of the 16 years that Morrissey-Berru taught at Our Lady of Guadalupe School. Resp. App. 1a.

Morrissey-Berru testified that, upon being hired by Petitioner, "[a]t no time did I believe my employment at Our Lady of Guadalupe Catholic School was a 'called' position nor did I believe I was accepting a formal call to religious service by working at Our Lady of Guadalupe as a fifth or six grade teacher. Resp. App. 2a. Further, at no time during or after my employment with Our Lady of Guadalupe did I feel like God was leading me to serve in the ministry." Resp. App. 2a.

As one of Petitioner's employees, Morrissey-Berru was *not* required to attend any religious training for the first 13 years that she taught at the school. Pet. App. 84a. Any "religious" training Morrissey-Berru received was only in 2012 and even that "training" was limited to a course on the history of the Catholic church. Pet. App. 84a, 86a.

As an elementary teacher at Our Lady of Guadalupe School, Morrissey-Berru taught a variety of subjects, including reading, writing, grammar, vocabulary, science, social studies, and religion. Pet. App. 80a-81a. And, even though she accompanied her students to mass on a weekly and monthly basis, Morrissey-Berru *never* led the services, *never* selected the hymns, *never* delivered a sermon, and *never* prepared her students to alter serve or had them deliver a sermon. Pet. App. 89a. Likewise, in the classroom, Morrissey-Berru did not lead her students in devotional exercises, though she did lead her students in saying a Hail Mary once a day. Pet. App. 87a.

II. The Proceedings Below

A. The United States District Court for the Central District of California

On December 19, 2016, Morrissey-Berru filed a civil complaint in the United States District Court, Central District of California, pursuant to 28 U.S.C. § 1331, based on Morrissey-Berru's allegations of violations of the laws of the United States of America. Pet. App. 4a.

On August 18, 2017, Our Lady of Guadalupe filed a motion for summary judgment, which Morrissey-Berru opposed on August 28, 2017. Pet. App. 4a. On

September 27, 2017, the United States District Court, Central District of California, issued an order granting the summary judgment. Pet. App. 4a-9a.

The district court's order stated that "it is clear that every factor cuts in favor of the ministerial exception applying, except for Plaintiff's lack of formal membership in the Catholic clergy." Pet. App. 8a. The district court stated that the "Court must consider Plaintiff's actual duties, not whether she personally felt called to the ministry" or whether her title was religious in nature. Pet. App. 8a. In fact, the district court went so far as to say that the consideration of whether the individual felt called to serve was "irrelevant." Pet. App. 8a. Morrissey-Berru appealed.

B. The Ninth Circuit proceedings and *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018)

On appeal, Our Lady of Guadalupe School argued that functional consensus is the legal standard for analyzing whether an employee has the legal status of a "minister." Answering Br. 30-32, ECF No. 17. In response, Morrissey-Berru argued that the Ninth Circuit should follow this Court's ruling in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) and conduct a complete factual examination of Morrissey-Berru's

employment with Our Lady of Guadalupe School. Reply Br. 11, 13, ECF No. 23.

After the close of briefing in this matter, the Ninth Circuit issued a 2-to-1 decision in *Biel v. St. James School,* 911 F.3d 603 (9th Cir. 2018), where the majority opinion held that in "assessing the totality of Biel's role at St. James, the ministerial exception does not foreclose her claim." *Id.* at 605. In reaching its decision, the majority panel relied on *Hosanna-Tabor*, noting that "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.'" *Id.* at 607 (quoting *Hosanna-Tabor, supra,* 565 U.S. at 190). To focus its examination of Kristen Biel's employment with St. James School, the majority panel focused its analysis on the four major considerations discussed in *Hosanna-Tabor* using them *not* as a rigid formula, but to distinguish Kristen Biel's employment with that of Cheryl Perich, who was held to be a minister covered by the exception. *Id.* at 607-609. St. James School sought *en banc* review.

While the *Biel* petition for rehearing was pending, a different panel of the Ninth Circuit reversed the district court below and held that "[c]onsidering the totality of the circumstances in this case, we conclude that the district court erred in

concluding that Morrissey-Berru was a 'minister' for purposes of the ministerial exception." *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 Fed.Appx. 460, 461 (9th Cir. 2019); Pet. App. 2a.

The Ninth Circuit analyzed the fact that, on the one hand, Morrissey-Berru did have religious responsibilities as a teacher; whereas, on the other hand, her formal title of "teacher" was secular, she did not have any religious credentials and training or ministerial background (other than a single course on the history of the Catholic church), and she did not hold herself out to the public as a minister or religious leader. Pet. App. 2a-3a. Relying on both *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) and *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), the Court concluded that, on balance, Morrissey-Berru was not a "minister" for purposes of the ministerial exception, and therefore, the ministerial exception did not bar her ADEA claim. Pet. App. 3a.

On June 25, 2019, the Ninth Circuit denied the petition for rehearing *en banc* in *Biel v. St. James School*. *See, Biel v. St. James School,* 926 F.3d 1238 (9th Cir. 2019).

REASONS FOR DENYING THE PETITION

Petitioner fails to show a conflict between the Ninth Circuit Court of Appeals and those of this Court or any of the other federal circuit or state courts.

I. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012)

In 2012, this Court considered for the first time "whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 188 (2012). In *Hosanna-Tabor*, this Court examined Cheryl Perich's employment as a teacher at the Hosanna-Tabor Evangelical Lutheran School to determine whether she was qualified as a "minister" for purposes of the exception. *Id.* at 177-178. In considering the issue, this Court unanimously declined "to adopt a rigid formula for deciding when an employee qualifies as a minister" and instead examined "all the circumstances of [Perich's] employment," including "the formal title given Perich by the Church, the substance reflected in that title, [Perich's] own use of that title, and the important religious functions [Perich] performed for the church." *Id.* at 190-192.

II. Review Is Unnecessary Because The Ninth Circuit Court Of Appeals' Approach Is Aligned With This Court, And It Likewise Does Not Split With Other Circuits Or State Courts

The Ninth Circuit's approach to the ministerial exception is consistent with other federal and state courts after *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012). In *Puri v. Khalsa*, 844 F.3d 1152 (9th Cir. 2017), the Ninth Circuit wrote that "the Supreme Court has made clear, there is no 'rigid formula for deciding when an employee qualifies as a minister' within the meaning of the ministerial exception;" however "[t]he Supreme Court has provided some guidance on the circumstances that might qualify an employee as a minister within the meaning of the ministerial exception." *Id.* at 1159-1160. After analyzing the pleadings in light of the considerations raised in *Hosanna-Tabor*, the Ninth Circuit Court of Appeals in *Puri* held that "[a]bsent any allegation that board members have ecclesiastical duties or are held out to the community as religious leaders, and with scant pleadings on the religious requirements for the positions, we agree with the plaintiffs that it is not apparent on the face of the complaint that the

disputed board positions are 'ministerial.'" *Id.* at 1160-1162.

Similarly, in *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012), the Fifth Circuit heard the case of Philip Cannata, the Music Director at St. John Neumann Catholic Church. *Id.* at 170-171. In holding that Cannata was a minister for purposes of the exception, the panel followed *Hosanna-Tabor* and "declined to adopt a 'rigid formula' for determining when an employee is a minister within the meaning of the ministerial exception," choosing instead to look to all the circumstances of employment. *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 174, 175-76 (5th Cir. 2012) (citing *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012) (calling it a "totality-of-the-circumstances analysis"). In that case, the Fifth Circuit found it sufficient to find Cannata a "minister" because of the "integral role" he played "in the celebration of Mass", as well as the fact that he "furthered the mission of the church and helped convey its message to the congregants." *Id.* at 177. Additionally, the Fifth Circuit noted that "[b]ecause [Cannata] made unilateral, important decisions regarding the musical direction at Mass, the church considered him a minister." *Id.* at 178. Such independent decisions regarding the direction of Mass

included Cannata choosing the hymns to be played at Mass each Sunday, and on top of that, Cannata himself "boasted of his role in building one of the best music programs in the diocese and training a 'large number' of cantors." *Id.* In considering the totality of Cannata's employment with the church as its musical director, including the integral role he played at Mass each week and the importance that even his secular duties played in furthering the mission and message of the church at Mass, the Fifth Circuit concluded that the ministerial exception applied to Cannata and barred his suit from proceeding further. *Id.* at 177-180.

In *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015), Judge Batchelder, joined by Judges Rogers and Beckwirth, found that while the *Hosanna-Tabor* Court did not "adopt a rigid formula for deciding when an employee qualifies as a minister," it could use the considerations raised in *Hosanna-Tabor* to guide its analysis of the circumstances of Alyce Conlon's employment with InterVarsity Christian Fellowship/USA as a "spiritual director" or "Spiritual Formation Specialist." *Id.* at 834-835. The Sixth Circuit concluded that Conlon's title as "Spiritual Formation Specialist" or "spiritual director" was a sufficiently formal religious title, essentially equivalent to titles such as "pastor,"

"reverend," "priest," "bishop," or "rabbi," because "[t]he word 'spiritual] is such an identifying term" that conveys a religious meaning. *Id.* Conlon had "earned a certification in 'spiritual direction'", but the pleadings did not detail the extent or rigor required to obtain that certification, so the second factor was not demonstrated to be present. *Id.* at 835. The pleadings also did not suggest that Conlon publicly interacted with the community as an ambassador of the faith that rises to the leave of a leadership role within the church and community, and as a result, the third factor was not demonstrated. *Id.* The court noted that Conlon did perform important religious functions for the religious organization, and therefore, the fourth factor was present. *Id.* The Sixth Circuit thus concluded that "[t]wo of the four *Hosanna-Tabor* factors are clearly present in Conlon's former position" and that "where both factors—formal title and religious function—are present, the ministerial exception clearly applies." *Id.*

The Second and Third Circuits have similarly followed suit. *See, Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 116-117 (3rd Cir. 2018) (employee-plaintiff was a former pastor of the Sixth Mount Zion Missionary Baptist Church—a position he obtained only after the Church's Deacon board recommended and voted him in as church

pastor—and he was required by his employment contract to "lead the pastoral ministerial of the Church and … work with the Deacons and Church staff in achieving the Church's mission of proclaiming the Gospel to believers and unbelievers"); *Penn v. New York Methodist Hospital*, 884 F.3d 416, 420-421 (2nd Cir. 2018) (employee-plaintiff was a former Duty Chaplain of New York Methodist Hospital who admitted that he was "primarily responsible for ministry" and had previously "coordinated the distribution of Bibles, conducted an in-hospital memorial service for an employee who died, and 'maintained . . . active, on-going pastoral care to staff.'").

In both cases, it was undisputed that the ministerial exception applied in light of the title and role each of the employees had within their respective religious employers. *See, Penn v. New York Methodist Hospital*, 884 F.3d at 424 (2nd Cir. 2018); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d at 119-120 (3rd Cir. 2018). And, with each case, because there was no doubt as to the application of the ministerial exception, a complete analysis of all the circumstances of their employment was not required. In each instance, however, the Second and Third Circuits recognized *Hosanna-Tabor* as controlling in their individual interpretations of whether or not the

ministerial exception applies. *See, Penn v. New York Methodist Hospital*, 884 F.3d at 424 (2d Cir. 2018) (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 190 (2012)); *Fratello v. Archdiocese of New York*, 869 F.3d 190, 204-205 (2d Cir. 2017); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d at 119-120 (3rd Cir. 2018).

State courts have also remained consistent in their approaches to the "ministerial exception." *See, Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination,* 463 Mass. 472, 485 (Mass. 2012) (considering the various factors enumerated in *Hosanna-Tabor*, and stating that "[a]ll that is plain from the record is that she taught religious subjects at a school that functioned solely as a religious school, whose mission was to teach Jewish children about Jewish learning, language, history, traditions, and prayer", and because she taught solely religious subjects at a religious afterschool and Sunday school, the fact that she was not called a minister or did not detract from finding the ministerial exception applied); *Kirby v. Lexington Theological Seminary* (2014) 426 S.W.3d 597, 614 (considering the four factors from *Hosanna-Tabor*, but also attempting "to add substance to the four factors, hopefully providing guidance to trial courts" but ultimately reaffirming

that "consideration of these factors, in light of the totality of the circumstances," is required to determine whether an employee is a "minister" for purposes of the ministerial exception; concluding employee satisfied "most of the factors listed above" because he "gave sermons on multiple occasions, served communion, taught classes on Christian doctrine, opened class with prayer each day, affirmatively promoted students' development in the ministry, and served as a representative—a literal embodiment—of the Seminary at events on multiple occasions", which included that he "conducted worship services, important religious ceremonies and rituals, and acted as a messenger of the Seminary's faith."); *Su v. Stephen S. Wise Temple*, 32 Cal.App.5th 1159, 1168 ("[c]onsidering all the relevant circumstances of the teachers' employment" and although the Temple's teachers were responsible for some religious instruction, the court did not read *Hosanna-Tabor* to suggest that the ministerial exception applies based on this fact alone, and stated "[t]o the contrary, it was central to *Hosanna-Tabor's* analysis that a minister is not merely a teacher of religious doctrine—significantly, he or she 'personif[ies]' a church's (or synagogue's) beliefs and 'minister[s] to the faithful.' [Citation]").

The Ninth Circuit considered the ministerial exception in the employment context in *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), and consist with the holding in *Hosanna-Tabor*, considered the totality of Biel's employment in reaching its conclusion as to whether the ministerial exception applied. Kristen 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 require medical leave to undergo chemotherapy. *Id.* at 605. In determining whether the ministerial exception applied, the Ninth Circuit first recognized that:

> 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, 132 S.Ct. 694. *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.

Id. at 607.

Then, much like the courts in *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015) and *Grussgott v. Milwaukee Jewish Day*

Sch., Inc., 882 F.3d 655 (7th Cir. 2018), the Ninth Circuit used the considerations raised in *Hosanna-Tabor* to guide its analysis of all of the circumstances of Biel's employment with St. James School. *Id.* at 607-609. Ultimately, in "assessing the totality of Biel's role at St. James," the panel in *Biel* held that "the ministerial exception [did] not foreclose her claim." *Id.* at 605.

After *Biel* was decided by the Ninth Circuit, the Seventh Circuit decided *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568 (7th Cir. 2019). Stanislaw Sterlinski was a part-time Polish employee who was demoted to a church organist in 2014, and thereafter brought suit alleging age discrimination and retaliation under the Age Discrimination in Employment Act (ADEA). *Sterlinski v. Catholic Bishop of Chicago*, 319 F.Supp.3d 940, 941 (N.D.Ill. 2018). Saint Stanislaus Bishop & Martyr Parish moved to dismiss, arguing the ministerial exception barred all of Sterlinski's claims. *Id.* at 942. The district court granted summary judgment and dismissed the suit. *Id.* at 950.

On appeal, the Seventh Circuit affirmed the district court below and attempted to distinguish the approach taken by the Ninth Circuit in *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018) with their own. Compared to the Ninth Circuit, the Seventh

Circuit "adopted a different approach in *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018)." *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d at 570 ("*Sterlinski*"). The panel in *Grussgott*, however, utilized the same approach as the Ninth Circuit in determining whether the ministerial exception applies: a totality-of-the-circumstances test where all facts must be taken into account and weighed on a case-by-case basis. *Compare, Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 190 ("It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment") *with Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) (stating "[w]e read the Supreme Court's decision to impose, in essence, a totality-of-the-circumstances test…all facts must be taken into account and weighed on a case-by-case basis") *and Biel v. St. James School*, 911 F.3d 603, 605 (9th Cir. 2018) ("We hold that, assessing the totality of Biel's role at St. James, the ministerial exception does not foreclose her claim.").

In fact, Petitioner's suggestion that the Ninth Circuit broke with the other Circuits in engaging in a "Perich-comparison analysis" is inconsistent with an

earlier opinion of the Seventh Circuit – *Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018).

In *Grussgott*, the Seventh Circuit compared the role of Miriam Grussgott with that of Cheryl Perich to help guide it in answering the question of whether she was a minister under the "ministerial exception." *See, e.g., id.* at 659 (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 178, 191 (2012)) ("This ostensibly lay title is distinct from *Hosanna-Tabor*, in which the plaintiff was a "called teacher" (as opposed to a "lay teacher") who had been given the formal title of "Minister of Religion, Commissioned.").

III. The Ninth Circuit Court Of Appeals Correctly Concluded—Based On This Court's Precedent And Considering The Totality Of The Circumstances—That Morrissey-Berru Was Not A "Minister" For Purposes Of The Ministerial Exception

The Ninth Circuit in this matter properly applied the analysis from *Hosanna-Tabor*, a totality of the circumstances approach. Pet. App. 2a. In so doing, the Ninth Circuit analyzed whether the ministerial exception applied, by applying the four considerations enumerated by the Supreme Court in *Hosanna-Tabor*:

(1) whether the employer held the employee out as a minister by bestowing a formal religious title;

(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.*

Applying the circumstances of Morrissey-Berru's position, the Ninth Circuit went through each consideration:

(1) Morrissey-Berru's "formal title of 'Teacher' was secular." Pet. App. 2a

(2) Morrissey-Berru had only taken a single course on the history of the Catholic church, and "did not have any religious credential, training, or ministerial background." Pet. App. 3a.

(3) Morrissey-Berru "did not hold herself out to the public as a religious leader or minister." Pet. App. 3a.

(4) Morrissey-Berru's role as a teacher did have "significant religious responsibilities" because she "incorporated Catholic values and teachings into her curriculum," "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." Pet. App. 3a.

The Ninth Circuit reiterated that "an employee's duties alone are not dispositive under *Hosanna-Tabor's* framework" and that "[t]herefore, on balance, we conclude that the ministerial exception does not bar Morrissey-Berru's ADEA claim." Pet. App. 3a.

IV. Unhappy with the Outcome in the Ninth Circuit, Petitioner Now Asks this Court to Effectively Adopt a *Different* Analysis than What This Court Held in *Hosanna-Tabor* Just Seven Years Ago

Petitioner attempts to portray other Circuits and courts as having veered from this totality-of-the-circumstances approach that was discussed and applied in *Hosanna-Tabor*, and to instead adopt a "functional consensus" analysis. Petitioner is really asking that the Supreme Court overturn its holding in *Hosanna-Tabor*, overturn the totality-of-the-circumstances approach, and adopt a new test that simply asks whether the employee's duties involve any religious functions.

The Ninth Circuit has not split from other circuits in applying the totality-of-the-circumstances approach and analyzing various relevant considerations such as those enumerated in *Hosanna-Tabor*. The only difference between the Ninth Circuit in the underlying case, and the other circuits, appears to be the *outcome* that was reached *based on the facts of the underlying case* and application of the facts specific to each particular employee's circumstances of employment. There is no reason for the Court to now reconsider its earlier holding in *Hosanna-Tabor*, a decision which only came out in 2012, and which has consistently been applied by the various circuits, and for this Court to suddenly adopt a more stringent, rigid test for determining if an employee is a "minister" for purposes of the ministerial exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

[ER 247]

DECLARATION OF AGNES DEIRDRE MORRISSEY-BERRU

I, Agnes Deirdre Morrissey-Berru, do hereby declare that if called upon as a witness, I could and would testify competently to the matters set forth herein as they are based upon my personal knowledge and belief.

1. I am an individual and resident of Redondo Beach, California.

2. I was employed by Our Lady of Guadalupe Catholic School from approximately 1999 to 2015 as the fifth and sixth grade teacher.

3. During each year of my employment with Our Lady of Guadalupe Catholic School, I signed a Faculty Employment Agreement where I specifically accepted a position as either a fifth grade teacher or a sixth grade teacher.

4. During my employment with Our Lady of Guadalupe Catholic School, I consistently held my position out in the community to those affiliated and unaffiliated with Our Lady of Guadalupe Catholic School as an elementary school teacher. I also personally viewed myself as an elementary school teacher.

5. Whenever I scheduled parent-teacher meetings, I always introduced myself as either the fifth or sixth grade teacher at Our Lady of Guadalupe

Catholic School, depending upon which grade I was teaching that year.

6. During the majority of my sixteen years of employment, I worked in a self-contained classroom where I taught reading, writing, grammar, vocabulary, science, social studies, math and religion. I described myself to my students as either the fifth or sixth grade teacher at Our Lady of Guadalupe Catholic School, depending upon which grade I was teaching that year.

7. Our Lady of Guadalupe has a school website located at https://ourladyofguadalupeschool.org. On the school's website, each teacher is listed under the tab "Educators" and is identified by the grade or subjects that they teach.

8. At no time did I believe my employment at Our Lady of Guadalupe Catholic School was a "called" position nor did I believe I was accepting a formal **[ER 248]** call to religious service by working at Our Lady of Guadalupe as a fifth and sixth grade teacher. Further, at no time during or after my employment with Our Lady of Guadalupe did I feel God was leading me to serve in the ministry.

9. Prior to working at Our Lady of Guadalupe Catholic School, I worked in advertising with the Los Angeles Times Newspaper for 20 years.

10. I am not currently a practicing Catholic.

11. I currently work as a substitute teacher for Manhattan Beach Unified School District. I also teach English to Chinese students at Ivy League School.

I hereby declare under penalty of perjury, under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 25th day of August, 2017, in Redondo Beach, California.

/s/ Agnes Deirdre Morrissey-Berru
AGNES DEIRDRE MORRISSEY-BERRU