2020

Brief for Child USA et al. as Amici Curiae Supporting Respondents, Our Lady of Guadalupe School v. Morrissey-Berru

Leslie C. Griffin

Nos. 19-267 & 19-348

In The Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES MORRISSEY-BERRU,

Respondent.

ST. JAMES SCHOOL,

Petitioner,

v.

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

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF CHILD USA; LAW, RELIGION & CIVIL RIGHTS PROFESSORS MIGUEL H. DIAZ, CHARLES E. CURRAN, MARGARET A. FARLEY, MARCI HAMILTON, ANN C. MCGINLEY, ANGELA D. MORRISON, MICHAEL A. OLIVAS, JEAN PORTER, & JESSICA L. ROBERTS; DIGNITYUSA; CATHOLICS FOR CHOICE; NEW WAYS MINISTRY & QUIXOTE CENTER IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

With the written consent of the Petitioner and the Respondent filed with the Clerk of the Court, *Amici* respectfully submit this brief as *amici curiae*.[1]

INTERESTS OF *AMICI CURIAE*

CHILD USA is the leading national non-profit think tank working to end child abuse and neglect in the United States. CHILD USA engages in high-level legal, social science, and medical research and analysis to derive the best public policies to end child abuse and neglect. Distinct from an organization engaged in the direct delivery of services, CHILD USA develops evidence-based solutions and information needed by policymakers, youth-serving organizations, courts, media, and the public to increase child protection and the common good. CHILD USA works to protect children from abuse in various contexts including its national child sex abuse statute of limitations reform initiative. CHILD USA's interests in this case are directly correlated with its mission to increase public safety and eliminate barriers to justice for child sex abuse victims who have been harmed by individuals and institutions.

[1] Counsel for *amici curiae* authored this brief in whole and no other person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent granted consent to file.

Law, Religion and Civil Rights Professors include women and men who teach constitutional law, religious studies, theology, and employment discrimination law. They are concerned that the ministerial exception denies equal opportunity and civil rights to thousands of men and women of faith who work for religious employers. They wish to ensure that the range of scholarly and religious views on the ministerial exception—including those that understand the widespread problem of discrimination and the need for legal protection from discrimination—are before the Court. Their institutional identification is for informational purposes only.

The Professors are Miguel H. Diaz, Ph.D., Ambassador to the Holy See, Ret., The John Courtney Murray Chair in Public Service, Loyola University Chicago; Charles E. Curran, Elizabeth Scurlock University Professor of Human Values, Southern Methodist University; Margaret A. Farley, Gilbert L. Stark Professor Emerita of Christian Ethics, Yale Divinity School; Prof. Marci Hamilton, Fels Institute of Government Professor of Practice, University of Pennsylvania, CEO & Academic Director, CHILD USA; Ann C. McGinley, William S. Boyd Professor of Law, University of Nevada, Las Vegas, Boyd School of Law; Angela D. Morrison, Associate Professor of Law, Texas A&M University School of Law; Michael A. Olivas, Wm. B. Bates Distinguished Chair in Law (retired), University of Houston Law Center; Jean Porter, John A. O'Brien Professor of Theology, University of Notre Dame;

Jessica L. Roberts, Leonard H. Childs Chair in Law, University of Houston Law Center.

DignityUSA believes that gay, lesbian, bisexual, transgender, queer and intersex Catholics in our diversity are members of Christ's mystical body, numbered among the People of God. We have an inherent dignity because God created us, Christ died for us, and the Holy Spirit sanctified us in Baptism, making us temples of the Spirit, and channels through which God's love becomes visible. Because of this, it is our right, our privilege, and our duty to live the sacramental life of the Church, so that we might become more powerful instruments of God's love working among all people.

Catholics for Choice was founded in 1973 to serve as a voice for Catholics who believe that the Catholic tradition supports a woman's moral and legal right to follow her conscience in matters of sexuality and reproductive health. We strive to be an expression of Catholicism as it is lived by ordinary people. We are part of the great majority of the faithful in the Catholic church who disagrees with the dictates of the Vatican on matters related to sex, marriage, family life and motherhood. We are part of the great majority who believes that Catholic teachings on conscience mean that every individual must follow his or her own conscience—and respect others' right to do the same.

New Ways Ministry is a national Catholic ministry of justice and reconciliation for lesbian, gay, bisexual, transgender people and the wider Catholic Church. In our 39-year history, we have worked with

hundreds of parishes, schools, colleges, hospitals, religious communities of vowed men and women, promoting greater equality for LGBT people. Recently, we have been involved with numerous cases where LGBT people and their allies have been fired from Catholic institutions due to their support for marriage equality and other issues. Because we value the Catholic teaching on the inherent human dignity of all people, as well as the teaching that promotes justice for workers, we strongly support the right of church employees to due process when disputes occur. Catholic church employees do not forgo their U.S. civil rights when employed by church institutions.

The **Quixote Center** is a social justice center founded in 1976, animated by Catholic social teaching, committed to the full participation of all people in church and society. A key expression of this commitment to inclusion in terms of gender and sexuality is the translation and publication of the Inclusive Bible and Lectionaries, which engage the organization in communication with church workers and the broader community in a variety of Christian denominations. Consistent with these values and informed by these relationships, Quixote Center supports this brief.

SUMMARY OF ARGUMENT

A non-Catholic woman and a Catholic laywoman cannot be turned into ministers by actions of the federal courts. The Ninth Circuit ruled properly in these

cases that these women were teachers, not ministers, and their rulings should be affirmed. *See Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018), *cert. granted*, No. 19-348, 2019 WL 6880705 (U.S. Dec. 18, 2019); *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460 (9th Cir. 2019), *cert. granted*, No. 19-267, 2019 WL 6880698 (U.S. Dec. 18, 2019).

This Court is presently asked to answer "Whether the First Amendment's Religion Clauses prohibit lay teachers at religious elementary schools from bringing employment discrimination claims."

NO is the clear answer to that question in this case. The civil courts can and should hear these cases of disabilities and age discrimination. The Ninth Circuit correctly ruled that Kristen Biel and Agnes Morrissey-Berru were teachers, not ministers subject to the ministerial exception, when they worked for two different Catholic schools. *See id*. Thus Biel's estate can sue for disabilities discrimination, and Morrissey-Berru for age discrimination.

Amici have a long history working both as and for employees in religious organizations. They also teach and publish in support of employees' rights. They urge this Court to recognize that religious freedom is not protected by giving religious organizations a right to fire anyone for any reason and avoid liability under neutral, generally applicable laws. Allowing this unchecked freedom undermines the freedom of individuals who work for such organizations and allows the employers to engage in unfettered wrongdoing.

This Court needs to clarify that religious freedom does not protect all conduct. The development of sexual abuse cases around this country proves this point. At the beginning, many courts thought sexual abuse by clergy was a religious decision that could not be examined by the courts because the abusers' and their defenders' decisions were argued as religious. Over time, however, courts have recognized that they can decide these cases according to neutral principles of law and hold the wrongdoers liable for their actions. *See*, *e.g.*, *Doe v. Coe*, 2019 IL 123521, 135 N.E.3d 1.

Moreover, unlike Cheryl Perich, the Respondent in this Court's *Hosanna-Tabor* case, these two teachers gave *no* indications they were ministers. Neither ever used the title or took the tax status of a minister. Instead, they were named teachers and worked as teachers. Morrissey-Berru is not Catholic, so there is no way she could be a Catholic minister. Biel was a Catholic laywoman, and all her life her church's theology did not allow her to be a minister, and so the courts may not do so now.

The post-*Hosanna* cases show that many employees are harmed by the defendants' easy use of the word minister to get rid of their cases. We present these results so that this Court clearly understands its legal need to protect all individual employees from harm, whether employed by a religious organization or otherwise. Such absolute religious freedom for employers undermines the religious freedom of individual employees, which is also protected by the United States Constitution.

Amici repeatedly and frequently protect people from abuse by religious and nonreligious actors. Many religious actors hide their wrongdoing instead of revealing this abuse. This Court should remind the nation's lower courts that religious freedom does not protect illegal conduct, whether the sexual abuse of parishioners or age and disability discrimination against teachers. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990). These cases should, and indeed can, be decided according to neutral, generally applicable principles of law in the civil courts, as the Ninth Circuit correctly concluded.

ARGUMENT

I. The Sexual Abuse Cases Teach Us that the Courts Must Be Open to Protect Victims from Harm, Even By Religious Actors.

Amici are advocates who support *children's* right to be free from sexual abuse as well as *women's and men's* right to freedom from sexual abuse and harassment. Children's advocates have taught us "child sexual abuse is both *everyone's problem and responsibility*." *See* Prevent Child Abuse America, *Preventing Child Sexual Abuse*, https://preventchildabuse.org/resource/preventing-child-sexual-abuse/ (emphasis added).

Through the work of children's rights advocates, *amici* have learned that "[o]ne in four girls and one in six boys will be sexually abused before they turn 18 years old." National Sexual Violence Resource Center,

Get Statistics, https://www.nsvrc.org/node/4737. Adults face similar, and now more visible, problems with sexual abuse and harassment in the workplace. Slowly, the courts have become more willing to hear their claims of sexual harassment and abuse and the legislatures have moved to protect employees against their employers' wrongdoing. *See*, *e.g.*, Kirkland Alert, *California Strengthens Sexual Harassment Laws in Wake of #MeToo*, Jan. 14, 2019, https://www.kirkland.com/publications/kirkland-alert/2019/01/california-strengthens-sexual-harassment-laws; Kristen Rasmussen, *Sexual Harassment Cases Surged Last Year in Wake of #MeToo: Seyfarth Report*, LAW.COM, Jan. 7, 2019, https://www.law.com/corpcounsel/2019/01/07/sexual-harassment-cases-surged-last-year-in-wake-of-metoo-seyfarth-report/?slreturn=20200025102719. Some law professors who support the ministerial exception have explained that it should not bar sexual harassment claims based on a pervasive, hostile environment. *See*, *e.g.*, Ira C. Lupu, Robert W. Tuttle, *#metoo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 249, 249 (2019).

The lawyers' path in abuse cases against religious perpetrators and entities has been difficult because, in the past, courts frequently protected such abuse, incorrectly believing that abuse-related decisions were protected by privacy or religious liberty. The courts rarely wanted to interfere with the free practice of religion. *See*, *e.g.*, *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997).

The disgusting and pervasive facts about sexual abuse across the country, however, have changed the law's perspective on the range of religious freedom. The lower courts have clarified that sexual abuse, and the protection of abusers from courts and police, are always against "neutral principles of law," and can be handled justly by state and federal courts without interfering with religious freedom. Allowing survivors of abuse into court is one of the best ways that everyone can receive justice. For example, the Illinois Supreme Court allowed one Jane Doe, who was sexually assaulted by a youth pastor at her church, to sue the pastor and the church for negligent hiring, supervision, and retention. *Doe v. Coe*, 2019 IL 123521, 135 N.E.3d 1, 19-20. Negligent hiring, negligent supervision, and negligent retention are all direct causes of action against the employer for the employer's misconduct in failing to reasonably hire, supervise, or retain the employee. In the past, courts thought they were religious decisions. Now the courts recognize those cases can be decided according to neutral principles of law. *Id.*

State and federal prosecutors, judges, and legislators have increasingly recognized the need to protect children from religious wrongdoers, whether they are ministers who abuse children[2] or their superiors who

[2] Broadly speaking, *amici* hope the outcome of this case emphasizes the fact that religious organizations can and should be subject to neutral and generally applicable laws, because sexual abuse, assault, and harassment (among other claims) are not related to religious doctrine, with most religions preaching against this conduct. These claims, and those at issue in this case, can be decided without entanglement with religious doctrine.

work to systematically conceal misconduct from police. *See*, *e.g.*, *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712 (Pa. 2018). Across the country, thousands of children are in danger of abuse by these types of offenders whose misconduct may take decades to reveal, a lapse in time that is only amplified by systemic employer cover-ups. *Id.*

While this case does not involve children, this Court should clarify that religious freedom does not provide religious organizations freedom from neutral, generally applicable laws, or allow them to fire non-minister *teachers* for disabilities or age. As in the sex abuse cases, such decisions have no relation to ministry, the only title expressly protected. Consequently, it is of vital importance that this Court clarify the law, thereby encouraging others to come forward and discontinue their silence for fear of dismissal of their cases by hesitant courts. As organizations and individuals devoted to the protection of children's and adults' well-being, we urge this Court to affirm the correct decisions of the Ninth Circuit that Biel and Morrissey-Berru were teachers, not ministers, as well as reinforce and clarify the applicability of neutral and generally applicable laws to religious organizations.

II. These Cases Can Be Decided According to Neutral Principles of Law.

This Court has long stated that religious actors are required to obey neutral laws because the rule of law protects everyone. *See*, *e.g.*, *Jones v. Wolf*, 443 U.S.

595, 604 (1979); *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990). This Court should clarify that the neutral principles of law apply to this case. Consistent with this Court's First Amendment jurisprudence, state and federal courts have abstained from hearing cases only when the dispute cannot be resolved according to neutral principles of law. *See*, *e.g.*, *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 618 (Ky. 2014) ("Secular courts may, however, have jurisdiction over a case involving a church if 'neutral principles of law' can be applied in reaching the resolution.").

For this reason, courts allow lawsuits against a Christian seminary to proceed because the litigation can be resolved according to neutral, non-religious principles of law, just like the teachers' case here. *Id.* at 615. *See also Galetti v. Reeve*, 331 P.3d 997, 1001 (N.M. Ct. App. 2014) (when tort and contract claims can be "'resolved by the application of purely neutral principles of law and without impermissible government intrusion . . . there is no First Amendment shield to litigation'") (quoting *McKelvey v. Pierce*, 800 A.2d 840, 856 (N.J. 2002) (emphasis, internal quotation marks, and citations omitted)).

Petitioners mischaracterize Biel's and Morrissey-Berru's cases as religious disputes that the courts cannot adjudicate. This misinterprets the women's lawsuits for disabilities and age discrimination, which can be determined according to neutral principles of law, just as the sex abuse cases have been.

Biel filed a claim under the Americans With Disabilities Act (ADA) because her employer fired her after she began chemotherapy for breast cancer. According to the ADA:

> 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.

42 U.S.C. § 12112(a). Disability means "a physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102.

Biel easily, neutrally, and non-religiously can argue that she was discriminated against due to her breast cancer. Cancer qualifies as a disability under the statute:

> Despite significant gains in cancer survival rates, people with cancer still experience barriers to equal job opportunities. Often, employees with cancer face discrimination because of their supervisors' and co-workers' misperceptions about their ability to work during and after cancer treatment. Even when the prognosis is excellent, some employers expect that a person diagnosed with cancer will take long absences from work or be unable to focus on job duties.

> As a result of changes made by the ADAAA [ADA Amendments Act of 2008], people who currently have cancer, or have cancer that is in remission, *should easily be found to have a disability* within the meaning of the first part of the ADA's definition of disability because they are substantially limited in the major life activity of normal cell growth or would be so limited if cancer currently in remission was to recur.

U.S. E.E.O.C, *Questions and Answers About Cancer in the Workplace*, https://www.eeoc.gov/laws/types/cancer.cfm (emphasis added) (citing 29 C.F.R. § 1630.2(j)(3)(iii) ("it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated . . . cancer substantially limits normal cell growth")); 29 C.F.R. § 1630.2(j)(1)(vii) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.").

Biel's employer was covered by the lawsuit, 42 U.S.C. § 12112(a), and the school's religious status has nothing to do with its liabilities toward employees who have no ministerial status. Biel's firing demonstrates that she suffered "negative job action based on disability." *Id.*

Morrissey-Berru's lawsuit can also be resolved according to neutral principles of law. Morrissey-Berru filed an Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, case against her employer. That law does not allow employers "to exclude or to

expel from its membership, or otherwise to discriminate against, any individual because of his age." 29 U.S.C. § 623. Because Morrissey-Berru is a teacher, the lawsuit is about her age, and whether she was discriminated against because of it. The courts can review age-related claims without paying any attention to Morrissey-Berru's religion or her school's religion. Her lawsuit can be decided according to neutral principles of law.

Like the sex abuse cases, both of these lawsuits can be litigated according to neutral principles of law. Neither Morrissey-Berru nor Biel, moreover, can be considered a minister.

III. The Facts Show, as the Ninth Circuit Ruled, that Biel and Morrissey-Berru were both Teachers.

Biel was a teacher. Following this Court's reasoning in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), the Ninth Circuit distinguished Biel from Cheryl Perich, the plaintiff in *Hosanna-Tabor*.

> 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.

Biel, 911 F.3d at 608. The court concluded there was nothing in Biel's title, "Grade 5 Teacher," or work that could lead to the conclusion she was a minister. *Id.* "And she neither presented herself as nor was presented by St. James as a minister." *Id.* at 610. On the fourth part of this Court's test, the court recognized that teaching lessons in the Catholic faith could not make her a minister:

> 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." . . . to comport with the Founders' intent, the *exception need not*

> *extend to every employee whose job has a religious component*.

Id. at 610-11 (emphasis added).

Following *Hosanna-Tabor*, the Ninth Circuit also ruled that Morrissey-Berru was a teacher, not a minister. Her "formal title of 'Teacher' was secular." *Morrissey-Berru*, 769 F. App'x at 461.

> Aside from taking a single course on the history of the Catholic church, Morrissey-Berru did not have any religious credential, training, or ministerial background. Morrissey-Berru also did not hold herself out to the public as a religious leader or minister.

Id. Moreover, *Morrissey-Berru was not Catholic*. This alone proves she cannot be a Catholic minister by any stretch of the imagination.

The Ninth Circuit made a careful review of the facts in both these cases, determining that, as their titles demonstrated, these two teachers could proceed in their legal cases against their employers. Other courts have also concluded that teachers at religious schools are not automatically ministers.[3] Courts have

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[3] *See*, *e.g.*, *Su v. Stephen S. Wise Temple*, 32 Cal. App. 5th 1159, 1161, 244 Cal. Rptr. 3d 546, 547 (Ct. App.), *reh'g denied* (Apr. 2, 2019), *review denied* (June 19, 2019), *cert. dismissed*, 140 S. Ct. 341 (2019) (preschool teachers are not ministers); *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, No. 119CV03153RLYTAB, 2019 WL 7019362 (S.D. Ind. Dec. 20, 2019) (allowing discovery to proceed for Catholic high school guidance counselor); *Hough v. Roman Catholic Diocese of Erie*, No. CIV.A. 12-253, 2014 WL 834473, at *3 (W.D. Pa. Mar. 4, 2014) (mere

comments by employer about teachers' ministerial status did not make them ministers pre-discovery); *Bonadona v. Louisiana Coll.*, No. 1:18-CV-00224, 2019 WL 4073247, at *5 (W.D. La. Aug. 28, 2019) (finding that a football coach is not a minister); *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165, at *1 (S.D. Ohio Mar. 29, 2012) (a Non-Catholic Technology Coordinator at a Catholic school is not a minister); *Herx v. Diocese of Ft. Wayne-S. Bend Inc.*, 48 F.Supp.3d 1168, 1177 (N.D. Ind. 2014) (Catholic schoolteacher is not a minister, so her Title VII sex discrimination and pregnancy discrimination lawsuits could proceed); *Richardson v. Nw. Christian Univ.*, 242 F.Supp.3d 1132, 1138 (D. Or. 2017) (Professor of Exercise Science was not a minister); *Bohnert v. Roman Catholic Archbishop of San Francisco*, 136 F.Supp.3d 1094, 1101 (N.D. Cal. 2015) (Catholic high school's biology teacher was not a minister, even though she did some work for the campus ministry); *Gallagher v. Archdiocese of Phila.*, 2017 Phila. Ct. Com. Pl. LEXIS 148, *24-25 (sixth grade teacher Cindy Gallagher was not a minister, she was a "lay teacher" at a Catholic school); *Braun v. St. Pius X Par.*, 827 F.Supp.2d 1312 (N.D. Okla. 2011), *aff'd*, 509 F. App'x 750 (10th Cir. 2013) (rejecting ministerial exemption for lay teacher of secular subjects who was not member of parochial school faith); *Redhead v. Conference of Seventh–Day Adventists*, 440 F.Supp.2d 211, 221 (E.D.N.Y. 2006) *adhered to on reconsideration*, 566 F.Supp.2d 125 (E.D.N.Y. 2008) ("plaintiff's teaching duties were primarily secular; those religious in nature were limited to only one hour of Bible instruction per day and attending religious ceremonies with students only once per year"); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F.Supp.2d 849, 852 (S.D. Ind. 1998) ("[plaintiff] did participate in some religious activities as a teacher at All Saints, but it cannot be fairly said that she functioned as a minister or a member of the clergy"); *Galetti v. Reeve*, 2014-NMCA-079, ¶ 5, 331 P.3d 997, 999-1000 (Melissa Galetti, principal of a Seventh Day Adventist School, was not a minister); *Mis v. Fairfield Coll. Preparatory Sch.*, No. FBTCV166057613, 2018 WL 7568910, at *3-4 (Conn. Super. Ct. June 12, 2018) (history teacher at Catholic high school is not a minister even though employers said he was really an Ignatian Educator).

similarly ruled that other employees of religious institutions are not ministers.[4] Some courts have understood this point and demonstrated that the employment laws can be applied to employees of religious organizations, including teachers, without adverse effect on religious freedom.[5]

Like all these other employees, Biel and Morrisey-Berru are not ministers, but are teachers. Therefore the ministerial exception does not apply.

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[4] *See*, *e.g.*, *Kelley v. Decatur Baptist Church*, No. 5:17-CV-1239-HNJ, 2018 WL 2130433 (N.D. Ala. May 9, 2018) (Kelley, a maintenance and child care employee at Baptist institution, could not be ruled a minister); *Rose v. Baptist Children's Homes of N. Carolina*, No. 1:19-CV-620, 2019 WL 5575878, at *3 (M.D.N.C. Oct. 29, 2019) (married couple that was not hired because wife was deaf should not have their case dismissed at an early stage); *Edley-Worford v. Virginia Conference of United Methodist Church*, No. 3:19CV647 (DJN), 2019 WL 7340301, at *6-8 (E.D. Va. Dec. 30, 2019) (currently facts are insufficient to support ministerial exception); *Davis v. Baltimore Hebrew Congregation*, 985 F.Supp.2d 701 (D.Md. 2013) (denying application of ministerial exception to employee whose primary duties—maintenance, custodial, and janitorial work—were entirely secular); *Bigelow v. Sassafras Grove Baptist Church*, 247 N.C. App. 401, 402, 786 S.E.2d 358, 360 (2016) (pastor can sue for breach of contract); *Barrett v. Fontbonne Acad.*, 2015 WL 9682042, at *10-11 (Mass. Super. Dec. 16, 2015) (Food Service Director at Catholic school was not a minister).

[5] *See*, *e.g.*, *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (high school teacher allowed to sue for age discrimination); *Longo v. Regis Jesuit High Sch.*, 02-CV-001957-PSF-OES, 2006 WL 197336 (D. Colo. Jan. 25, 2006) (ADA claim allowed for high school teacher); *Welter v. Seton Hall Univ.*, 608 A.2d 206 (1992) (computer professors allowed to sue a Catholic university for breach of contract).

IV. Neither the Non-Catholic Morrissey-Berru nor the Laywoman Catholic Biel Can Become a Catholic Minister in Court.

One difficulty with the ministerial rule is that women employees of denominations that do not ordain women suddenly become ministers at the moment they file a lawsuit. Although Roman Catholic, Muslim and Orthodox Jewish women may not become priests, imams, or rabbis and perform their jobs with full understanding that they cannot be ministers, the courts and churches confer ministerial status upon them just long enough to keep their lawsuits out of court.[6]

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[6] Cases involving Catholic women incorrectly deemed ministers for purposes of the ministerial exception include *Fratello v. Roman Catholic Archdiocese of New York*, 863 F.3d 190, 203-04 (2d Cir. 2017) (Catholic woman lay principal was ruled to be a minister); *Ciurleo v. St. Regis Par.*, 214 F.Supp.3d 647 (E.D. Mich. 2016) (Catholic grade school teacher is a minister); *Ginalski v. Diocese of Gary*, No. 2:15-CV-95-PRC, 2016 WL 7100558 (N.D. Ind. Dec. 5, 2016) (Catholic school principal is minister); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (non-ordained chaplain assured women were eligible for her position); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (Catholic communications director); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1240 (10th Cir. 2010) (Catholic Director of Religious Formation); *Musante v. Notre Dame of Easton Church*, CIV.A. 301CV2352MRK, 2004 WL 721774 (D. Conn. Mar. 30, 2004) (Director of Religious Education); *Pardue v. the Center City of Consortium Schools of the Archdiocese of Washington, Inc.*, 875 A.2d 669 (D.C. 2005) (school principal); *Archdiocese of Miami, Inc. v. Minagorri*, 954 So. 2d 640 (Fla. Dist. Ct. App. 2007) (school principal); *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003) (Director of Religious Education); *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W. 2d 483 (Mich. Ct. App. 2008) (elementary school

The Ninth Circuit's decision was correct because, as a non-Catholic, Morrissey-Berru cannot be a Catholic minister. Similarly, by Catholic theology Biel was a laywoman, not a priest. Indeed, as Catholic women learn in churches and schools across the world, she cannot be a priest. Accordingly the teachers' work must be analyzed by the principles that apply to all teachers.

Agnes Morrissey-Berru is not Catholic. Our Lady of Guadalupe School, a Catholic school that does not require its employees to be Catholic, hired her as one of its teachers. She filed a lawsuit alleging age discrimination against her employer.

That lawsuit should proceed. Even if some of Morrissey-Berru's responsibilities at the school were religious, the courts and the schools cannot turn a non-Catholic into a Catholic minister. Ordaining her a minister in order to award her employer a court victory would violate the Religion Clauses of the First Amendment.

In *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012), for example, a non-Catholic Technology Coordinator was fired by a Catholic school. The Ohio district court refused to recognize her as a minister. In *Kant v. Lexington Theological Seminary*, 426 S.W.3d 587 (Ky. 2014),

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teacher); *Sabatino v. Saint Aloysius Parish*, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996) (high school principal); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dept. of Workforce Dev.*, 768 N.W.2d 868 (Wis. 2009) (first grade teacher).

the Kentucky Supreme Court acknowledged that a Jewish rabbi could not be called a minister at a Christian seminary, even though the seminary urged the ministerial title in order for the lawsuit to be dismissed. Kant participated in many religious ceremonies and events, including the school's chapel ceremonies. Using this Court's *Hosanna* factors, the Court concluded Kant was not a minister. *Id.* at 591-592. Therefore Kant was a professor whose breach of contract lawsuit could be heard by the court without violating the First Amendment. In *Braun v. St. Pius X Par.*, 827 F.Supp.2d 1312 (N.D. Okla. 2011), *aff'd*, 509 F. App'x 750 (10th Cir. 2013), the court ruled a non-Catholic fifth grade teacher at a Catholic school could not be a minister of the Catholic faith. As the Court concluded, "It is difficult to conceive that Braun might properly be classified as a minister of the Catholic faith when she is not even a member of that faith." *Id.* at 1319.

In a terrible case of kidnapping and torture, John Doe, a Muslim man born in Syria, argued that the Presbyterian Church wrongly put a video of his baptism on the Internet, even though he had asked the church to keep news of his baptism private. *Doe v. First Presbyterian Church U.S.A. of Tulsa*, 421 P.3d 284, 291 (Okla. 2017), *cert. denied*, 139 S. Ct. 940 (2019). As a response to the video, Doe was kidnapped and tortured by Syrian extremists. The appeals court dismissed any ministerial exception defense, noting "Doe simply asked for baptism, but never to become a member subject to the Appellees' ecclesiastical hierarchy. Without

this consent, Doe's religious freedom to *not subject himself to the Appellees' judicature* must be respected and honored under the longstanding and clear constitutional decisions from our Court and the Supreme Court of the United States." *Id.* at 291.

Religious freedom principles keep non-Catholic Morrissey-Berru from being converted into a Catholic minister by the courts.

The courts would also violate the First Amendment if they identified laywoman Kristen Biel as a minister. Biel is in similar circumstances to Cindy Gallagher, a sixth grade "lay teacher" at a Philadelphia Catholic school. *Gallagher v. Archdiocese of Phila.*, 2017 Phila. Ct. Com. Pl. LEXIS 148, *24-25.

> [Gallagher's] teaching qualifications or duties in no way compare to the called teacher in *Hosanna-Tabor*. Appellee was not formally labeled a minister of the Catholic Church or even held herself out as a minister; Appellee did not plan or lead mass; Appellee was only considered to be a "lay teacher." Thus, labeling Appellee as a minister of the church based on her role in prayer with her students and her participation in obtaining mandatory religious credits to be a teacher at the school would expand the scope of the ministerial exception beyond its intended purpose. Clearly, Appellee was not a minister for purposes of the ministerial exception. The record does not support a conclusion that Appellee was a ministerial employee. Accordingly, Appellee's

> defamation claim was not barred by the First Amendment.

Id.

The Philadelphia court ruled there, as the Ninth Circuit did here, that the teachers' responsibilities did not turn them into ministers. As Catholic laywomen, Biel and other Catholic women know very well that their church does not recognize women in its priesthood:

> The Catechism of the Catholic Church states that only men can receive holy orders because Jesus chose men as his apostles, and the "apostles did the same when they chose collaborators to succeed them in their ministry." Blessed John Paul II wrote in 1994 that *this teaching is definitive* and not open to debate among Catholics.

Francis X. Rocca, *Why Not Women Priests? The Papal Theologian Explains*, NATIONAL CATHOLIC REPORTER, Feb. 5, 2013, https://www.ncronline.org/news/theology/why-not-women-priests-papal-theologian-explains (emphasis added). The article continued, the "son of God became flesh, but became flesh not as sexless humanity but as a male, . . . since a priest is supposed to serve as an image of Christ, *his maleness is essential* to that role." *Id.* (emphasis added). This is not a teaching the courts can overturn without impermissible entanglement. By making Biel and Morrissey-Berru ministers, the Court would be in violation of the Constitution.

A Vatican representative recently reasserted the "infallible" nature of the popes' teaching on a male-only priesthood:

> The leader of the Vatican's doctrine department says the Church's belief in a male-only priesthood is *infallible teaching* which should be held as an unchanging and "definitive" part of the Catholic faith.
>
> Delivering the most forthright doctrinal statement so far against the ordination of women under Francis' papacy, Cardinal-designate Luis Ladaria SJ says that maleness is "an indispensable element" of the priesthood and that the Church is "bound" by Christ's decision to *only choose male apostles*.

Christopher Lamb, *Vatican's Doctrine Prefect Says Church Teaching on Male-Only Priesthood is "Definitive,"* THE TABLET, May 30, 2018, https://www.thetablet.co.uk/news/9167/vatican-s-doctrine-prefect-says-church-teaching-on-male-only-priesthood-is-definitive- (emphasis added). This theologian's recent remarks confirmed the teaching of Pope John Paul II, who insisted that "[p]riestly ordination . . . [has] from the beginning always been reserved to *men alone*." John Paul II, Apostolic Letter *Ordinatio Sacerdotalis*, 1994, https://w2.vatican.va/content/john-paul-ii/en/apost_letters/1994/documents/hf_jp-ii_apl_19940522_ordinatio-sacerdotalis.html (emphasis added). As Pope John Paul II added, "Therefore, in granting admission to the ministerial priesthood, the Church has always acknowledged as a *perennial norm* her Lord's way of

acting in choosing the twelve men whom he made the foundation of his Church," *Id.* As the pope concluded:

> Wherefore, in order that all doubt may be removed regarding a matter of great importance, a matter which pertains to the Church's divine constitution itself, in virtue of my ministry of confirming the brethren (cf. Lk 22:32) I declare that the Church has no authority whatsoever to confer priestly ordination on women and that this judgment is to be definitively held by all the Church's faithful.

Id. Catholic priests have been disciplined or suspended for engaging in ministries with women. *Id.*

In contrast, the Catholic laity are recognized for their "secular" character. CWR Staff, *Cardinal Arinze on the Role of the Laity*, CATHOLIC WORLD REPORT, Oct. 9, 2013. Kristen Biel always understood that she was a laywoman, not a priest or a minister. The courts need to recognize, as the Ninth Circuit did, that the status that she held did not ordain her to the priesthood. As well, Morrissey-Berru was not Catholic and the Court cannot redefine her faith into a faith that is not her own.

V. Employees' Religious Freedom is at Stake in These Cases.

In *Hosanna-Tabor*, this Court recognized that the two Religion Clauses mandate the Court's recognition of a ministerial exception. That exception, however, is not absolute. As this Court held, each ministerial

exception case should be influenced by the specific facts before the court. The ministerial exception should not authorize courts to ordain plaintiffs when their own churches have not, nor should it exempt churches from all liability.

"The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation's deep commitment to religious plurality and tolerance. That constitutional promise is why, '[f]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2446-47, 201 L. Ed. 2d 775 (2018) (Kagan, J., dissenting) (quoting *Town of Greece v. Galloway*, 572 U.S., at ___, 134 S.Ct., at 1841 (Kagan, J., dissenting)). *See also Doe v. First Presbyterian Church U.S.A. of Tulsa*, 421 P.3d 284, 291 (Okla. 2017), *cert. denied*, 139 S. Ct. 940 (2019).

As part of our blessing of religious freedom, the Free Exercise Clause reserves the right of American citizens to accept any religious belief, but limits their rights to action. *Smith*, 449 U.S. at 877. It does not allow religious employers to change their actions when they get to court if it keeps the case non-justiciable. In other words, although the freedom to believe is absolute, the freedom to act, whether religiously motivated or otherwise, is not.

Under *Sherbert v. Verner*, 374 U.S. 398 (1963), the government's action in turning a non-Catholic woman and a Catholic laywoman into ministers would

substantially burden the two women's religious beliefs. The government has no compelling interest to keep the present lawsuits out of court. Instead, the government has a strong interest in making sure that disabilities discrimination and age discrimination are prohibited for employers, and not excused away by falsely calling someone a minister. Under *Sherbert* and *Smith*, employers must obey the law when ministers are not involved, as is true in this case. *Id.*; 494 U.S. 872 (1990).

The consequences of a pro-Petitioners ruling would be overwhelming if lay Catholic teachers were turned into ministers by the courts. "Sixty-six percent of private schools, enrolling 78 percent of private school students and employing 70 percent of private school FTE [full-time-equivalent] teachers in 2017-18, had a religious orientation or purpose."[7] In 2018-2019, there were 6,289 Catholic elementary, middle and secondary schools.[8] In those schools, "non-Catholic student enrollment has risen from 2.7% in 1970 to 11.2% a decade later and today is 18.7%."[9] In Catholic schools, 3,344 schools with 113,152 students received Title I

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[7] STEPHEN P. BROUGHMAN, BRIAN KINCEL, JENNIFER PETERSON, CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2017-18 PRIVATE SCHOOL UNIVERSE SURVEY: FIRST LOOK (2019) 2, https://nces.ed.gov/pubs2019/2019071.pdf.

[8] DALE MCDONALD AND MARGARET SCHULTZ, UNITED STATES CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS: THE ANNUAL STATISTICAL REPORT ON SCHOOLS, ENROLLMENT AND STAFFING 2018-2019, 155, https://www.ncea.org/ncea/proclaim/catholic_school_data/catholic_school_data.aspx.

[9] *Id*. at 349; *see also id.* at Exhibit 28.

aid; 2,756 schools with 133,104 students for breakfast and 210,084 for lunch received nutrition aid; 1,817 schools with 197,623 students received transportation aid.[10] Over the past decade, the lay faculty percentages increased from 93% to the current 97.2%. At present, only 2.8% of the professional staff are religious and clergy.[11]

The lay faculty, who generously give their lives to Catholic and non-Catholic students throughout the country, know very well that they are not ministers, just as their employers know they are not ministers until the very moment a lawsuit is filed. If the courts turn them into ministers, there is danger that they cannot practice their own religions or turn to the courts when their employers mistreat them. This Court should make clear that religious employers are not given freedom to discriminate against them in any way.

CONCLUSION

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). The courts cannot prefer religion by giving religious employers a right to fire their teachers for disabilities or age discrimination. Or for sexual harassment and

[10] *Id*. at 378; *see also id.* at Exhibits 35-37.

[11] *Id*. at 151, 357; *see also id.* at Exhibit 31.

sexual abuse and other terrible things that happen to church employees and parishioners.

The courts are capable of adjudicating these employment cases against religious organizations without need of the ministerial exception. These cases, like so many others, can be decided according to "neutral principles of law."

For the foregoing reasons, *amici* urge the Court to affirm the decisions below.

Respectfully submitted,

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