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Brief for Prof. Leslie C. Griffin as Amica Curiae in Support of Neither Party, Cannata v. Catholic Diocese of Austin

Leslie C. Griffin
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No. 11-51151

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PHILIP E. CANNATA,

Plaintiff-Appellant,

v.

CATHOLIC DIOCESE OF AUSTIN AND
ST. JOHN NEUMANN CATHOLIC CHURCH,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION
NO. 1:10-CV-00375-LY
THE HONORABLE LEE YEAKEL, PRESIDING

AMICUS BRIEF OF PROFESSOR LESLIE GRIFFIN IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

Amicus Curiae Professor Leslie C. Griffin is a professor of constitutional law at the University of Houston Law Center who specializes in the First Amendment's Religion Clauses. Amicus was invited by this Court to address whether the test for determining the applicability of the ministerial exception in employment discrimination suits as set out by this Court in *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) remains valid in light of the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, ___ U.S. ___, 132 S. Ct. 694 (2012).

No party's counsel authored in whole or in part this brief. No party or party's counsel contributed to funding the preparation or the submission of this brief. Amicus Curiae is solely responsible for this brief.

STATEMENT OF THE ISSUE

Does the test for determining the applicability of the ministerial exception in employment discrimination suits as set out by this Court in *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) remain valid in light of the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, ___ U.S. ___, 132 S. Ct. 694 (2012)?

SUMMARY OF THE ARGUMENT

In *Hosanna-Tabor*, the Supreme Court rejected the type of bright-line test embodied in *Starkman* in favor of a fact-intensive inquiry that looks at many aspects of how the religious institution regarded the plaintiff and how the plaintiff conducted herself. As a result, the district court's decision would probably need to be reevaluated under the *Hosanna-Tabor* standard.

ARGUMENT

I. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), the Supreme Court emphasized "the formal title given …by the Church, the substance reflected in that title, [the employee's] own use of that title, and the important religious functions she performed for the Church" as key factors in determining if an employee is a minister.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), the Supreme Court for the first time

recognized a ministerial exception, grounded in the Religion Clauses of the First Amendment, that requires the dismissal of some employment discrimination lawsuits by ministers against their religious employers. Before *Hosanna-Tabor* was decided, and beginning with this Court's decision in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), every circuit court had recognized the ministerial exception. *Hosanna-Tabor*, 132 S. Ct. at 705, n. 2; *id*. at 714. The circuit courts repeatedly disagreed, however, about what legal test identified who would be considered a minister.

In *Hosanna-Tabor*, Justice Alito's concurrence confirmed this Court's holding in *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) that "formal ordination [is] not necessary for the 'ministerial' exception to apply." *Hosanna-Tabor*, 132 S. Ct. at 714 (Alito, J., concurring). The Opinion of the Court, however, did not adopt a bright-line test identifying who qualifies as a minister for ministerial exception purposes, instead announcing its reluctance "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 707.

Instead, the Court's ruling in *Hosanna-Tabor* was heavily fact-dependent. The case involved a "commissioned" teacher at a Lutheran elementary school, Cheryl Perich, who was fired when she tried to return to

work after a medical leave of absence for narcolepsy. Perich alleged retaliation under the Americans With Disabilities Act.

Focusing on the employee's *function* instead of her ordination, the Sixth Circuit Court of Appeals had allowed Perich's lawsuit to proceed on the grounds that her *primary duties* were secular, not religious. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 778 (6th Cir. 2010). Several circuit courts had adopted the "primary duties" test as the best method for determining ministerial status. *See Alcazar v. Corporation of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291-92 (9th Cir. 2010) (identifying circuit court tests for the ministerial exception). In the Sixth Circuit, an employee was considered a minister if her "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Hosanna-Tabor*, 597 F.3d at 778. The Sixth Circuit viewed Perich's duties as primarily secular because she taught the same classes as lay teachers and spent minimal time (only 45 minutes) during the school day on religious activity. *Id.* at 779-80.

The Supreme Court firmly rejected the primary duties test, identifying three flaws in the circuit court's reasoning. First, the circuit court ignored Perich's status as a "called" teacher who had taken special theological

courses in order to attain commissioned status; the Supreme Court concluded that her title and training mattered. Second, the circuit court was wrong to conclude that the fact that Perich and the lay teachers at the school performed the same duties affected Perich's ministerial status. Third, the circuit court erred in emphasizing that religious duties consumed only 45 minutes of Perich's workday; the Court found that the amount of time was not dispositive. *Hosanna-Tabor*, 132 S. Ct. at 708. The Court also rejected the idea that the ministerial exception should apply only to employees who perform *exclusively* religious functions, expressing doubt that any exclusively religious employee actually exists. *Hosanna-Tabor*, 132 S. Ct. at 708-709.

In rejecting the primary duties test, the Court concluded that ministerial status "cannot be resolved by a stopwatch." *Id.* at 709. Instead, the Court summarized the four issues relevant to Perich's ministerial status: "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 708.

About those four issues, the Court was detailed in its inclusion of the facts of Perich's case. Perich had the official title, "Minister of Religion, Commissioned," spelled out on her "diploma of vocation," and was

reviewed by her congregation for her "skills of ministry," "ministerial responsibilities," and "continuing education as a professional person in the ministry of the Gospel." *Id.* at 707. Perich also had significant religious training (eight college-level courses and oral examinations) as well as an official commissioning (requiring endorsement by the local synod, letters of recommendation, a personal statement, written answers to ministry-related questions, and election by a congregation). *Id.*

The Court noted that "Perich held herself out as a minister of the Church," not only by accepting the church's call to service and describing herself as a minister at Hosanna-Tabor, but also by claiming a housing allowance on her tax return that was available only to members of the ministry. *Id.* at 707-708.

Finally, "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission. … As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation." *Id.* at 708. Despite its criticism of the Sixth Circuit for counting the activities in Perich's day, the Court itemized Perich's responsibilities in the school, where she taught religion four days a week, led students in prayer three times a day, took her students to chapel once a week and led the services two times a year. *Id.*

Although the Court declined to "adopt a rigid formula for deciding when an employee qualifies as a minister," the Court found it had evidence "enough … to conclude" that Perich was a minister on the facts of her specific case. *Id.* at 707. The clearest factors influencing the Court were "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 708.

II. This Court identified a different three-part test for identifying a minister in *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999).

As noted above, Justice Alito's concurrence in *Hosanna-Tabor* confirmed this Court's holding in *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) that "formal ordination [is] not necessary for the 'ministerial' exception to apply." *Hosanna-Tabor*, 132 S. Ct. at 714 (Alito, J., concurring). In *Southwestern Baptist*, this Court upheld the district court's ruling that the Seminary's *faculty* were ministers because the Seminary "ma[de] employment decisions regarding faculty members largely on religious criteria." *Southwestern Baptist*, 651 F.2d at 283. The faculty, moreover, were "intermediaries between the Convention and the future ministers of many local Baptist churches" and instructed the seminarians in religious doctrine. *Id.*

In contrast, the Seminary's support staff—even those who were ordained or studying for ordination—were not ministers because they were "not engaged in activities traditionally considered ecclesiastical or religious." *Id.* at 284. The opinion acknowledged that under its standard some Seminary administrators would qualify as ministers but that others (specifically those involved in finance, maintenance and non-academic matters) would not. *Id.* at 285.

This Court relied upon *Southwestern Baptist*'s analysis when it addressed the ministerial status of a Choir Director in *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999). *Starkman* identified the following three-factor test for determining ministerial status:

> First, this court must consider whether employment decisions regarding the position at issue are made "largely on religious criteria" [citation omitted] … Second, to constitute a minister for purposes of the "ministerial exception," the court must consider whether the plaintiff was qualified and authorized to perform the ceremonies of the Church … [citation omitted]; Third, and probably most important, is whether Ms. Starkman "engaged in activities traditionally considered ecclesiastical or religious," [citation omitted] including

whether the plaintiff "attends to the religious needs of the faithful." *Id.* at 176.

Following *Southwestern Baptist*, the third factor received the most emphasis as this Court observed that it was "*sufficient* that Ms. Starkman clearly performed tasks that were 'traditionally ecclesiastical or religious.'" *Id.* at 177 (emphasis added).

There are similarities between the last factor identified by the Supreme Court (the "important religious functions performed for the Church") and the third *Starkman* factor ("activities traditionally considered ecclesiastical or religious"). *Hosanna-Tabor*, however, unlike *Starkman*, did not hold that it is *sufficient* that the tasks performed were traditionally ecclesiastical or religious. Instead, in *Hosanna-Tabor*, the Court looked also to the details of the position that conferred the legal ministerial designation. The elements in *Hosanna-Tabor*—a formal title, the substance of the title, the use of the title—are significant issues that may escape consideration in the *Starkman* test. This point is confirmed by the Court's criticism of the Sixth Circuit for failing to take into account Perich's status as a called teacher who had taken special theological courses and then been commissioned to her role when it applied the primary duties test. *Hosanna-Tabor*, 132 S. Ct. at 708. A review of the district court's opinion in this case

confirms that *Hosanna-Tabor* mandates a different analysis from that conducted under the *Starkman* factors.

III. The *Starkman* test, used by the district court to determine whether Cannata was a minister, does not address all the issues identified by the Supreme Court in *Hosanna-Tabor.*

The status of an employee as a minister is a legal conclusion subject to plenary review. *Southwestern Baptist*, 651 F.2d at 283*; see also Starkman*, 198 F.3d at 176 (the "status of employees as ministers . . . remains a legal conclusion for this court."). The district court concluded that Cannata was not a minister under prong one of the *Starkman* test but was a minister under prongs two and three. *Cannata v. Catholic Diocese of Austin*, No. A-10-CA-375 LY, 2011 WL 4352771, at *7-*12 (W.D. Tex. Sept. 16, 2011). The district court's determination of facts must be accepted unless they are clearly erroneous. *Southwestern Baptist*, 651 F.2d at 283.

Starkman's prong one, whether the hiring decision was made "largely on religious criteria," 198 F.3d at 176, does not match any of the four considerations identified by the Court in *Hosanna-Tabor*. Prong two, "whether the plaintiff was qualified and authorized to perform the ceremonies of the Church," and prong three, whether the employee "engaged in activities traditionally considered ecclesiastical or religious," *id.* at 176, are similar to the Court's consideration of the "important religious

functions … performed for the Church" in *Hosanna-Tabor.* 132 S. Ct. at 708.

The district court's reliance on prongs two and three of *Starkman* runs counter to the Court's clear finding that other facts might be significant to determining ministerial status. *Cannata,* 2011 WL 4352771 at *9-*12. Facts from Cannata's case that might lead to a different result under *Hosanna-Tabor's* standard than under the *Starkman* test are that Cannata held the title of Music Director, *id.* at *2, not Minister; that he was not hired according to religious criteria, *id.* at *7, *8; that he had no training or commissioning similar to those that weighed against the plaintiff in *Hosanna-Tabor*, *id.* at *8; that his hiring and job responsibilities were exactly the same as prior Music Directors who were not Catholic, *id.* at *8; and that there is no reference to whether Cannata claims tax status as a minister.

Furthermore, in contrast to Perich, who had been through a commissioning ceremony and claimed tax status as a minister, the only evidence that Cannata held himself out as a minister was his statement that by his labor he was "helping to unfold the Creator's work and contributing, by our personal industry, to the realization in history of the divine plan." *Id.* at *12; *see also* Appellees' Brief at 19. Although some denominations may view every member as a minister, *Hosanna-Tabor* does not hold that

unordained employees who make statements of personal spirituality are holding themselves out as ministers.

Both parties argue that Justice Alito's concurrence supports their position. *See* Appellant's Brief at 14; Appellees' Brief at 24; Appellant's Reply Brief at 2. The Alito concurrence, joined only by Justice Kagan, places its "focus on the function performed by persons who work for religious bodies." *Hosanna-Tabor,* 132 S. Ct. at 711. According to the concurrence, 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,* 132 S. Ct. at 712; *see also id.* (Ministers "include those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation."). The language of the concurrence is more similar to *Starkman* than to the Opinion of the Court, and it is possible that it would lead to the same result as *Starkman.* However, the concurrence would also lead the Court to make some additional inquiries, including, e.g., whether a Music Director "conducts worship services." *Id.*

Moreover, it is the unanimous Opinion of the Court that is controlling, not the concurrence.

CONCLUSION

In *Hosanna-Tabor*, the Supreme Court rejected the type of bright-line test embodied in *Starkman* in favor of a fact-intensive inquiry that looks at many aspects of both how the religious institution regarded the plaintiff and how the plaintiff conducted herself. As a result, the district court's decision would probably need to be reevaluated under the *Hosanna-Tabor* standard.

Respectfully Submitted,

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NOTICE OF ELECTRONIC FILING

The undersigned, LESLIE C. GRIFFIN, ESQ., hereby certifies that on May 23, 2012, I electronically filed the foregoing ***Amicus Curiae*'s Post-Trial Brief** with the Clerk of Court in accordance with the Electronic Case Files System of the Fifth Circuit Court of Appeals.

/s/ Leslie C. Griffin
LESLIE C. GRIFFIN
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CERTIFICATE OF SERVICE

The undersigned, LESLIE C. GRIFFIN, ESQ., hereby certifies that a true and correct copy of the foregoing ***Amicus Brief*** has been served by United States mail on this the 23rd day of May, 2012, addressed as follows:

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