No. 17-2332

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

MIRIAM GRUSSGOTT,

Plaintiff–Appellant,

v.

MILWAUKEE JEWISH DAY SCHOOL, INC.,

Defendant–Appellee.

On Appeal from the United States District Court for the
Eastern District of Wisconsin
Case No. 2:16-cv-01245 – Judge J.P. Stadtmueller

Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Defendant-Appellee

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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

Amicus Curiae The Becket Fund for Religious Liberty

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Becket is a non-profit, nonpartisan law firm dedicated to protecting religious liberty for all. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others. Becket regularly represents parties in court to protect their rights under the ministerial exception. For instance, Becket successfully represented the church in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

As explained in Becket's motion for leave to file, this case is of special importance. First, it is this Court's first opportunity to consider the scope of the ministerial exception since *Hosanna-Tabor*, including how to define both what a ministry and a minister are for purposes of the exception. Second, Appellant's arguments on those definitions call for impermissible entanglement of the State with internal church affairs. And third, how the Court interprets the exception could materially affect Becket's interest in at least one case currently before the Western District of Wisconsin, *FFRF v. Trump*, No. 3:17-CV-00330 (W.D. Wis. filed May 4, 2017).

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

SUMMARY OF THE ARGUMENT

The First Amendment's ministerial exception guarantees the right of religious groups to select who will "preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012). That right includes especially the freedom to choose who will "transmit[] the . . . faith to the next generation." *Id*. at 200. And the right is not just a personal right for religious groups, but a structural safeguard that protects government from having to become entangled in internal religious affairs.

Milwaukee Jewish Day School's decision to fire Miriam Grussgott falls squarely within the doctrine. As a part of the School's Jewish mission, Grussgott taught Jewish elementary school students how to pray, led them in worship services, instructed them directly from the *Torah*, and taught from an integrated curriculum focused on Judaism, Jewish culture, and the Hebrew language. Thus, the District Court correctly found that she was a "minister" and dismissed her discrimination claims.[2]

[2] The term "minister" for purposes of the ministerial exception is a legal term of art, not a theological one. *Hosanna-Tabor*, 565 U.S. at 197 (Alito, J., joined by Kagan, J., concurring). The "ministerial exception" applies regardless of whether a particular religious group uses the term "minister" as a matter of religious practice. *Id.*

On appeal, Grussgott advances three positions that, if accepted, would dramatically undermine the ministerial exception and transgress its structural safeguards that benefit both Church and State. Because this is the Court's first opportunity to directly consider the doctrine since the Supreme Court's decision in *Hosanna-Tabor*, expressly rejecting those positions is important to the ministerial exception's continued vitality.

Grussgott first argues that the Jewish Day School is not a religious institution protected by the ministerial exception because it is willing to hire non-Jewish employees and does not impose on them a Jewish code of conduct. Aside from the factual inaccuracies of her argument, accepting that argument would impermissibly entangle courts in policing religious beliefs and leave whole religious denominations outside the First Amendment's protection of their internal affairs. Courts have overwhelmingly rejected this approach.

Second, Grussgott downplays the religious functions she performed, emphasizing instead that she was never called as a minister or endorsed by a synagogue. But neither formal ordination or endorsement are a necessary predicate to ministerial status. Rather, an employee's function is the critical consideration for determining whether she is a minister.

Finally, Grussgott attempts to defeat summary judgment by disputing that teaching Hebrew at a Jewish day school to Jewish elementary school children has any theological significance. But she is not the arbiter of the School's

religious beliefs. Nor can the Court play that role without violating a structural line set by the Religion Clauses that prevents courts from becoming entangled in deciding religious questions.

ARGUMENT

For over forty-five years, the federal courts of appeals have uniformly recognized that the First Amendment protects the relationship between religious ministries and their ministers from government interference. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012) (collecting cases); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 186 n.2 (7th Cir. 1994) (recognizing the protection). In 2012, the Supreme Court unanimously ratified the courts of appeals' decisions and confirmed that the protection is rooted in both Religion Clauses: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Hosanna-Tabor*, 565 U.S. at 184.

In *Tomic v. Catholic Diocese of Peoria*, this Court explained that the ministerial exception is a component of the broader "internal-affairs doctrine." 442 F.3d 1036, 1039, 1042 (7th Cir. 2006), *abrogated in part by Hosanna-*

Tabor, 565 U.S. at 171.[3] This doctrine traces its roots back over 100 years of Supreme Court precedent, *Hosanna-Tabor*, 565 U.S. at 185-186 (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872)), and prevents the government from using its "inherently coercive" power for "evaluating or interpreting religious doctrine" or otherwise "decid[ing] religious questions," *Tomic*, 442 F.3d at 1039, 1042. This Court later explained that the doctrine is "best understood" as "marking a boundary between two separate polities, the secular and the religious." *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013). And that boundary is mutually beneficial to both church and state—it ensures the freedom of churches to decide their internal affairs, and it protects government from entanglement in such matters. *See Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (allowing "governmental standards" to control church affairs "would significantly, and perniciously, rearrange the relationship between church and state").

Like other Establishment Clause protections, the doctrine provides something very like a "complete immunity," with "no balancing of competing

[3] In *Tomic* this Court held that the ministerial exception was jurisdictional. *Hosanna-Tabor* vacated *Tomic*'s jurisdictional ruling, but left the rest of the opinion untouched. *Demkovich v. St. Andrew the Apostle Parish,* No. 1:16-CV-11576, 2017 WL 4339817, at *4 n.3 (N.D. Ill. Sept. 29, 2017) ("The remainder of *Tomic* survives."); *see also McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013) (citing *Tomic* favorably).

interests, public or private." *Korte,* 735 F.3d at 678. Accordingly, it "categorically prohibits federal and state governments from becoming involved in religious leadership disputes." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) (relying on *Tomic,* 442 F.3d at 1042). It is not merely a "personal right" but a "structural limitation imposed on the government by the Religion Clauses." *Id.* For internal ecclesiastical matters, "the First Amendment has struck the balance" in favor of religious autonomy. *Hosanna-Tabor*, 565 U.S. at 196.

The doctrine applies to a number of laws that would otherwise interfere with internal church affairs, including ministerial contract disputes, *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940 (6th Cir. 1992); defamation claims related to a minister's termination, *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1576-77 (1st Cir. 1989); and—as relevant here—employment discrimination claims*, Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003).

In this case, the district court correctly determined that the Milwaukee Jewish Day School was a religious institution entitled to invoke the ministerial exemption and that Miriam Grussgott, a teacher who performed significant religious functions and who taught the Hebrew language, was a minister. Accordingly, it properly granted summary judgment to the school. In rejecting Grussgott's arguments, this Court should clarify that the ministerial exception

recognized in *Young* and affirmed in *Hosanna-Tabor* applies to a broad range of religious institutions; covers a teacher who performs religious functions and plays an important religious role teaching a curriculum infused with religious meaning; and requires courts to avoid entangling themselves in the "proper" interpretation of a religious institution's doctrine and mission.

I. The Milwaukee Jewish Day School is a religious institution protected by the ministerial exception.

Before the district court, Grussgott argued that the Jewish Day School should not be considered a religious organization for purposes of the ministerial exception. The court swiftly rejected that argument, declaring that the "Plaintiff's attempt to contest [the religious status of the Jewish Day School] . . . is meritless." *Grussgott v. Milwaukee Jewish Day Sch. Inc.*, No. 16-CV-1245-JPS, 2017 WL 2345573, at *4 (E.D. Wis. May 30, 2017). On appeal, Grussgott raises the issue in the introductory portions of her brief, (Opening Br. at 2-3), but waives it by failing to provide any further analysis or support. *See Sere v. Bd. of Trustees of Univ. of Ill.*, 852 F.2d 285, 287 (7th Cir. 1988) (concluding that the cursory mention of an issue without support "by appropriate judicial authority" did not adequately raise the issue for consideration on appeal).

But even if she had properly raised the issue, her argument must be rejected. The ministerial exception covers a broad variety of openly religious

organizations, from churches and parochial schools to hospitals and nursing homes. *See e.g.*, *Hosanna-Tabor*, 565 U.S. at 171 (church and school); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) (religious hospital); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (Jewish assisted living center). "[T]he ministerial exception's applicability does not turn on its being tied to a specific denominational faith; it applies to multidenominational and nondenominational religious organizations as well." *Conlon*, 777 F.3d at 834. The key inquiry is whether the religious organization's "mission is marked by clear or obvious religious characteristics." *Shaliehsabou*, 363 F.3d at 310; *accord Conlon*, 777 F.3d at 834; *see also Scharon,* 929 F.2d at 362 (considering the institution's "substantial religious character").

The Jewish Day School's mission is replete with religious characteristics. It has all of the characteristics present in *Shaliehsabou*: it was established for religious purposes, its mission is to provide a Jewish education, it employs a rabbi on staff, takes care to make provision for following Jewish dietary laws, and places religious symbols throughout the school. *Compare* 363 F.3d at 310 *with* D-App 48-50 ¶¶ 2-5, 7, D-App.103-104.

But the School's Jewish character is even more "clear" and "obvious" than the nursing home at issue in *Shaliehsabou*, 363 F.3d at 310, because, as a school, it is an institution whose "very existence" is dedicated to passing on its

religious values "to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., joined by Kagan, J., concurring). Religious schools have long been recognized as a quintessential example of religious organizations that qualify for the ministerial exception. *See EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 804 (4th Cir. 2000) (applying the ministerial exception to a music director at a Catholic elementary school). And that obviously fits here: students at the School study Hebrew and the Jewish tradition each day, say daily prayers, and celebrate Jewish Holidays and the weekly Shabbat. D-App. 48-50 ¶¶ 2-6.

Grussgott's chief reason for discounting the Jewish Day School's religious identity is not its lack of religious characteristics, but its anti-discrimination policy with regard to hiring employees and what she characterized as the School's decision not to impose a code of conduct on employees. Opening Br. at 20 (arguing that the Jewish Day School cannot have a "Jewish mission that is religious" while at the same time making aspirational statements against discrimination).[4] But that is not the rule, and for good reason.

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[4] Grussgott also briefly argues that the Jewish Day School's policy manual is essentially secular and does not even use the words "'G-d', 'faith' or 'religion.'" Opening Br. at 3. Not so. The manual expressly invokes "God," D-App. at 104, and also contains a trove of other unquestionably religious terms and concepts such as "rabbi," "Bar/Bat Mitzvah," "Torah," "synagogue," "kosher," "*Shabbat*," "*chagim* (holidays)," "*Tefillah*" [prayer], and "*b'rachot* (blessings)." D-App. at 59, 92-93, 102-105.

Accepting Grussgott's "not religious enough" argument would deprive the Jewish Day School of the right to determine the contours of its own faith and would put government (including the courts) in the position of showing favor to those with the most fervor. The School believes that "an important part of what the Jewish religion promotes is acceptance of others so a policy which discourages and denounces harassment and discrimination is completely consistent with the teachings of Judaism." Dkt. 34 at 3. It also believes in "cultiv[ating] an understanding and respect for other people and their cultures while embracing our own unique heritage." D-App. 58. Indeed, allowing a space for a diversity of Jewish observance is central to the Jewish Day School's unique religious mission. D-App. at 59. It was founded as "an alternative to an Orthodox day school" to provide a Jewish education to children "from homes of varying degrees of religious observance." *Id.*

Accepting Grussgott's argument would impose a religious litmus test, penalizing the School for its beliefs and frustrating its unique religious mission. But the whole point of the First Amendment's protection for internal religious affairs is to prevent the government from "evaluating or interpreting religious doctrines" or otherwise "decid[ing] religious questions." *Tomic*, 442 F.3d at 1039, 1042. Grussgott's argument is flatly inconsistent with the ministerial exception's purpose of allowing a religious organization "to shape its own faith and mission." *Hosanna-Tabor*, 565 U.S. at 188.

Moreover, under Grussgott's interpretation of the ministerial exception, *whole denominations* that embrace broadly inclusive practices would not qualify for protection under the ministerial exemption. *See, e.g.*, Unitarian Universalist Association Bylaws Art. 2 Section C-2 (noting the faith's commitment to "[t]he right to conscience . . . within [its] congregations" and affirming its commitment to "religious pluralism which enriches and ennobles [the] faith"); David Hodgkin, *Quakerism: A Mature Religion For Today*, Quaker Universalist Fellowship (1995) (explaining that "[t]he Society is universal in the sense that no one who is drawn to our meetings and to our understanding of life is excluded because of their particular background or present beliefs"). But the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *See Larson v. Valente*, 456 U.S. 228, 244 (1982). The School's Judaism cannot be questioned just because Grussgott rejects it.

In the analogous Title VII context, the Third Circuit rejected a similar argument while finding that a Jewish Community Center qualified as a religious organization. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 229 (3d Cir. 2007). There the court emphasized that the community center had a religious mission even though it "engage[d] in secular activities," did "not adhere absolutely to the strictest tenets of [its] faith," "declare[d] [its] intention not to discriminate . . . in its employee handbook," and did "not

enforce an across-the-board policy of hiring only coreligionists." *Id.* at 229-30. Many of the factors that the Third Circuit identified as support for that conclusion are equally applicable to the Jewish Day School, including its close ties to the local Jewish religious community, observance of holidays and the Jewish religious calendar, keeping a kosher kitchen, honoring the Sabbath, and teaching members about Judaism and Jewish culture. *Id.* at 228-29.

Finally, Grussgott makes the similarly flawed argument that the School is not religious because it "does not expect its employees . . . to engage in a course of conduct that is consistent with any specific religious practice." Opening Br. at 19-20. But, as established above, an organization can be religious even if it does not require employees to absolutely adhere to every jot and tittle of the faith. *LeBoon*, 503 F.3d at 229. Adopting Grussgott's argument would result in a government requirement that religious organizations *must* rigidly enforce their rules against their adherents. That is an evil the Establishment Clause was designed to prevent.

Grussgott is also wrong on the facts. Among other conduct requirements, faculty are instructed not to: bring outside food to the school because of Jewish dietary standards, schedule class or giving homework on Jewish holidays, "communicate with parents or fellow staff members" concerning school matters on Shabbat and holidays, or celebrate "Christian based holidays" such as

Easter or Christmas (but also Valentine's Day and Halloween) with their students. D-App. at 64, 105, 106.

In sum, whatever the "full reach" of the ministerial exception's protection for "religious institutions" may be, *Shaliehsabou*, 363 F.3d at 311, the Jewish Day School is "unquestionably" well within it. *Grussgott*, 2017 WL 2345573, at *4.

II. Grussgott was a minister for purposes of the ministerial exception.

To determine whether an employee qualifies as a "minister" under the ministerial exception, courts primarily look to whether the employee held a role that included important religious functions. Here, Grussgott performed a variety of important religious functions for the Jewish Day School. Accordingly, she was properly found to be a minister.

A. Ministerial status is primarily determined by focusing on an employee's functions.

To determine whether an employee is a minister, this Court has long emphasized the need to focus on the role the employee occupied and the function she fulfilled rather than formalistic considerations such as ordination or ecclesiastical endorsement. *See Alicea-Hernandez*, 320 F.3d at 703 ("In determining whether an employee is considered a minister for the purposes of applying this exception, we do not look to ordination but instead to the function of the position"); *accord Young*, 21 F.3d at 186 (citing *Rayburn*, 772 F.2d at

1168 (ministerial status "does not depend upon ordination but upon the function of the position").

The Supreme Court's decision in *Hosanna-Tabor* is consistent with this approach. In *Hosanna-Tabor*, the Court declined to "adopt a rigid formula" for determining "when an employee qualifies as a minister" such as a requirement for formal ordination. 565 U.S. at 190. Instead, it identified four considerations that, on the facts of the case before it, were sufficient to determine ministerial status. The first three considerations all concerned the employee's title—(1) "the formal title given . . . by the Church"; (2) "the substance reflected in that title"; (3) "[the teacher's] own use of that title." *Id.* at 192. All of these title-related considerations went to show that the employee was a "minister" because she had a "role distinct from that of most of [the Church's] members." *Id.* at 191. And the fourth consideration was "the important religious functions she performed for the Church," since those duties had her "conveying the Church's message and carrying out its mission" in "transmitting the Lutheran faith to the next generation." *Id.* at 192.

Justices Alito and Kagan fully concurred in the majority opinion, and wrote separately to clarify that its four considerations had done nothing to upset the "functional consensus" among the courts of appeals that the ministerial exception applied to employees who serve in "roles of religious leadership" or whose duties require "serv[ing] as a teacher or messenger of [a religious

group's] faith." *Id.* at 200, 202-03 (Alito, J., joined by Kagan, J., concurring). They explained that "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one." *Id.* at 198.

That "functional consensus" among the circuits has only strengthened since *Hosanna-Tabor* was decided. No federal appellate court has held that it is necessary to replicate all four of *Hosanna-Tabor*'s considerations, and *amicus curiae* is unaware of any district courts that have, either. For instance, quoting Justice Alito and Justice Kagan's exhortation to focus on the "perform[ance of] important functions," the Fifth Circuit found that it had "enough" basis to apply the exception simply upon finding that the employee in question "played an integral role" in worship services and thereby "furthered the mission of the church and helped convey its message." *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (quoting *Hosanna-Tabor*, 565 U.S. at 191, 199 (Alito, J., joined by Kagan, J., concurring)).

Similarly, the Sixth Circuit in 2015 held that the ministerial exception "clearly applie[d]" where just two of the four *Hosanna-Tabor* considerations—"formal title and religious function"—were met. *Conlon*, 777 F.3d at 835.

Most recently, the Second Circuit held that "'courts should focus' primarily 'on the function[s] performed by persons who work for religious bodies.'" *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 205 (2d Cir. 2017) (quoting

Hosanna-Tabor, 565 U.S. at 198 (Alito, J., joined by Kagan, J., concurring)). The court accordingly concluded that the principal of a religious school was a minister because "she served many religious functions" even though she had an ostensibly lay title. *Id.* at 206.

Other courts have taken a similar approach to applying *Hosanna-Tabor*. For instance, the Massachusetts Supreme Judicial Court ruled that a teacher at a Jewish school was covered by the ministerial exception even though "she was not a rabbi, was not called a rabbi, . . . did not hold herself out as a rabbi," and had not been proven to have received "religious training." *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012). Instead, the Court found it dispositive that "she taught religious subjects at a school that functioned solely as a religious school" for children. *Id.*[5]

Applying those legal principles to the facts here demonstrates that Grussgott exercised significant religious functions at the Jewish Day School.

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[5] *See also Ciurleo v. St. Regis Par.*, 214 F. Supp. 3d 647, 652 (E.D. Mich. 2016) (in case involving Catholic elementary school teacher, the court held that "religious function alone can trigger the [ministerial] exception in appropriate circumstances"); *Sterlinski v. Catholic Bishop of Chi.*, 203 F. Supp. 3d 908, 913 (N.D. Ill. 2016) (in a case involving a Catholic church's music director, the court held that "[i]n determining whether an employee qualifies as a minister, a court's focus is on the *function* of the plaintiff's position" (emphasis in original)).

B. Grussgott's role required her to perform important religious functions.

Grussgott performed significant religious functions in "conveying the [Jewish school's] message and carrying out its mission," *Hosanna-Tabor*, 565 U.S. at 192, because, among other things, she conducted "religious ceremonies and rituals" and taught "the tenets of the faith to the next generation." *Id.* at 199-200 (Alito, J., joined by Kagan, J., concurring); *see also Cannata*, 700 F.3d at 175 (same); *Roman Catholic Diocese of Raleigh*, 213 F.3d at 801 (same).

As part of her responsibilities as a teacher of Hebrew and Jewish studies, Grussgott led and participated in significant "religious ceremonies and rituals." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., joined by Kagan, J., concurring); *see also Fratello,* 863 F.3d at 209 (applying ministerial exception where Catholic school principal "led daily prayers for students"). Each week, she led her third-grade students in a prayer session. D-App at 50 ¶ 8. She also attended a weekly community prayer session with her students, D-App at 50-51 ¶ 8, and led religious rituals related to welcoming the Sabbath. D-App. at 110 (discussing *Kabbalat Shabbat*).[6] Grussgott admitted that the purpose of

[6] *Kabbalat Shabbat* is the Friday service that heralds the start of the Jewish sabbath. It usually involves the reciting of prayers and the lighting of candles as well as other religious customs. *See* George Robinson, *Kabbalat Shabbat*, My Jewish Learning, http://www.myjewishlearning.com/article/kabbalat-shabbat/.

leading in prayer, modeling how prayers should be performed, and teaching about prayer was expressly devotional: it was to "prepare students to pray properly . . . in their homes and synagogues." D-App. at 156.

Grussgott was also expected to teach her students about the Jewish religion, including setting apart class time to observe "the sanctity of Shabbat," D-App. at 104, and incorporating "appropriate learning activities [and] observances" regarding Jewish holidays. D-App. at 105. And the record is replete with evidence that Grossgott fulfilled those religious expectations. For instance, she routinely taught her Hebrew students a weekly portion from the Torah, the "*Parashat Hashavuah*."[7] D-App. at 108; D-App. at 154. She also taught her students "Torah text and translation" and "[taught] from the Torah itself (Scroll)." D-App. at 155.[8] Grussgott accordingly closely integrated religious stories, Jewish culture, and the Hebrew language into a unified curriculum for

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[7] Each Shabbat, a particular portion of the Torah (five books of Moses) called the *Parshah* is read and discussed. Rabbi Paul Steinberg, *Why Jews Read Torah on a Yearly Cycle*, My Jewish Learning, https://www.myjewishlearning.com/article/why-jews-read-torah-on-a-yearly-cycle/.

[8] In many strands of Judaism, the Torah scroll is a sacred object that is treated with reverence and incorporated into religious ceremonies and ordinances. *See* Jeffrey Spitzer, *How to Treat Jewish Holy Books (Sifrei Kodesh),* My Jewish Learning, https://www.myjewishlearning.com/article/how-to-treat-holy-jewish-books/; Rabbi Aryeh Kaplan, *Sanctity of Torah Scrolls*, http://www.aish.com/jl/b/bb/48937512.html.

her students. *See Fratello*, 863 F.3d at 209 (observing that the Catholic school principal was responsible for the "integration of Catholic saints and religious values in . . . lessons and [in the] classroom").

The record provides a helpful case study of a typical class period that Grussgott led.[9] During that class period, the students read a scriptural portion from the Torah in Hebrew, acted out part of the story, discussed the main characters in the story, and drew a spiritual lesson from the story. D-App. at 115. They also reviewed the words to some of the most iconic and meaningful prayers in the Jewish liturgy, and some of the students sang the words of the prayers during class time. *Id.* Moreover, male students wore a *Kippah* (a Jewish ritual head covering) during her classes to show "respect for God." D-App. at 104.

Further, Grussgott also made sure that her students were living consistent with the values of the Jewish faith. For instance, she was expected to enforce

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[9] Grussgott suggests that this example is not reflective of her teaching during the second year of her contract. But e-mails from the months immediately prior to her termination still refer to teaching about Jewish holidays and weekly Torah readings. *See* D-App at 108 (teaching "*parashat hashavuah* in Hebrew"); D-App. at 110 (taking all of the second graders to study the Torah); D-App. at 113 (discussing teaching the second grades about the holiday of Chanukah). Moreover, that she was previously entrusted with teaching such indisputably religious topics both reflects the role that she held at the school, and how she would have been viewed by the students.

a student dress code based on the "Jewish values of *kavod* (respect) and *tzni'ut* (modesty)." D-App. at 95.

That is enough to resolve this appeal. Grussgott indisputably qualifies as a minister based on her functions of leading children in devotional religious prayer, religious ritual, and religious study. The Massachusetts Supreme Court, facing a very similar set of facts, held that the teacher at a Hebrew School was a minister because her "teaching duties included teaching the Hebrew language, selected prayers, stories from the Torah, and the religious significance of various Jewish holidays." *Temple Emanuel,* 975 N.E.2d at 442. Grussgott did all those things with her students and more. Her argument that her lessons were purely cultural and historical in nature is not only ignores the religious significance the School attached to them, but completely contrary to evidence in the record and even the religious significance she clearly attached to them.

C. Teaching Hebrew at the Milwaukee Jewish Day School was an important religious function.

Grussgott hangs most of her argument on her assertion that teaching Hebrew at a Jewish day school to Jewish schoolchildren is a wholly non-religious function. But, as established above, even if she were right, the other important religious functions she performed would be sufficient to find that she qualified as a "minister." And, in fact, that Grussgott is a minister only

becomes clearer upon reviewing the content and purpose of her Hebrew teaching.

The Jewish Day School believes that the Hebrew language is closely connected to Judaism, and that teaching it to the Jewish children in their care is important to their Jewish mission. D-App. at 52-53 ¶13. Grussgott counters that, for her, "Hebrew . . . is cultural and historical but not predominately religious." Opening Br. at 25. But this is insufficient to create a material dispute of fact that must be resolved by a jury, for two reasons.

First, the religious significance of teaching Hebrew at a Jewish Day School to elementary school children is a religious question "that federal courts are not empowered to decide (or to allow juries to decide)." *McCarthy*, 714 F.3d at 980. It is not within the judicial "province to evaluate whether particular religious practices or observances are necessarily orthodox or even mandated by an organized religious hierarchy." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 452 (7th Cir. 2013). Rather, "secular judges must defer to ecclesiastical authorities on questions properly within their domain." *Korte*, 735 F.3d at 678. And "matters of . . . faith and doctrine" are plainly within that domain and "free from state interference." *Hosanna-Tabor*, 565 U.S. at 185-86; *accord Tomic*, 442 F.3d at 1038-39 (same); *see also Alicea-Hernandez*, 320 F.3d at 703 (the First Amendment guarantees "unfettered church choice" in this context).

Here, the Jewish Day School has clearly articulated that it sincerely believes that teaching Hebrew is a religious function at the School. D-App. at 52 ¶ 13. Grussgott cannot ask this Court to second-guess that belief. *See*, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 194 (refusing to permit pretext inquiries); *accord Cannata*, 700 F.3d at 179-80 (courts cannot "second-guess" sincere religious beliefs). As this Court has cautioned, "to entertain such arguments would plunge a court deep into religious controversy and church management." *Schleicher v. Salvation Army*, 518 F.3d 472, 477 (7th Cir. 2008). Therefore in *Schleicher*, this Court rightly refused to reframe the work of wine-making monks as secular. It must grant similar deference to Hebrew-teaching at a Jewish day school for Jewish children.

Rejecting Grussgott's argument would not require the court to accept a schools' baseless claims that the ministerial exception covers math teachers or janitors who have no function other than computation and cleaning. That would be a sham, which the ministerial exception does not protect. *Schleicher*, 518 F.3d at 478 (protection does not apply where "the church is a fake" or ministerial status is "arbitrarily applied" to employees "solely engaged in commercial activities").

But here, it is clear from the record that the Jewish Day School's assertion of its beliefs is sincere. The School treats the teaching of Hebrew as a sacred rather than purely secular subject. For instance, the School has a tradition of

having male students wear religious head coverings during Hebrew lessons but not during secular subjects such as English or science. D-App. at 104. Moreover, students were taught to read the Hebrew scriptures in Hebrew and taught specific Hebrew words so that they could understand certain scriptural passages. D-App. at 105-06, 115. *See also Temple Emanuel,* 975 N.E.2d at 442 (noting religious significance of "teaching the Hebrew language"); *accord* Dr. Mayer Gruber, *Hebrew's Theological Significance*, My Jewish Learning, https://www.myjewishlearning.com/article/hebrews-theological-significance/ ("Language, especially Hebrew, has a theological significance in Judaism not commonly associated with language in any other religion.").[10] Even the Tal Am curriculum that Grussgott used was intended to "enable Jewish children . . . to receive and study Torah in its original language Hebrew." Tal Am, *FAQ*, http://www.talam.org/faq.html.

Second, there is no way to permit Grussgott's requested inquiry without impermissibly entangling federal courts in sensitive internal religious beliefs. The First Amendment's protection of religious autonomy is "plainly

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[10] A recent study of Hebrew language learning in 41 Jewish day schools across the country observed that such schools have made a "an exceptionally deep commitment to Hebrew" and dedicate "between 25% and 50% of the week to Hebrew and/or Judaic studies." Alex Pomso & Jack Wertheimer, *Hebrew For What? Hebrew at the Heart of Jewish Day Schools* 38 (2017), https://www.rosovconsulting.com/wp-content/uploads/2017/04/Hebrew-for-What-AVI-CHAI-Foundation.pdf.

jeopardized when . . . litigation is made turn on the resolution by civil courts of controversies over religious doctrine and practice." *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 710 (1976). Given the sensitive nature of internal religious governance, even the "very process of inquiry" into such affairs "may impinge on rights guaranteed by the Religion Clauses." *Tomic*, 442 F.3d at 1038-39.

Where, as here, that process requires courts to "inquire into the significance of words and practices to different religious faiths, and . . . by the same faith," it would "tend inevitably to entangle the State with religion in a manner forbidden by" Supreme Court precedent. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). As Justices Alito and Kagan warned in *Hosanna-Tabor,* "the mere adjudication of such questions would pose grave problems for religious autonomy" by requiring "calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." 565 U.S. at 205-06.

Indeed, this is why the district court was not only right to reject Grussgott's teaching-Hebrew-is-always-secular argument, but also recognized that allowing a jury to "question[] the tenets of Defendant's practice of Judaism, namely whether they can hold Hebrew as sacred" would improperly "interfere in what is a matter of faith." *Grussgott*, 2017 WL 2345573, at *6. The

ministerial exception's protections are not just an immunity from liability, but also from unnecessary trial or litigation. *Heard v. Johnson*, 810 A.2d 871, 876–77 (D.C. 2002) (the ministerial exception is a "claim of immunity from suit under the First Amendment" that is "effectively lost if a case is erroneously permitted to go to trial" (citations and quotation marks omitted)). For this reason, the Third and Tenth Circuits have analogized the ministerial exception to qualified immunity. *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity "is an immunity from suit rather than a mere defense to liability" and stands as "an entitlement not to stand trial or face the other burdens of litigation").[11]

By resolving the ministerial exception "early in litigation, the courts avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. Cases that proceed unnecessarily transgress the structural separation of church and state, making "the discovery and trial process itself a [F]irst [A]mendment violation." *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1200 (Conn. 2011);

[11] This is not to say that Hebrew cannot, in other contexts, such as a state university, be taught in an entirely secular fashion. But the fact that it can be taught in a non-religious way in a non-religious context does not deprive the School or other religious institutions of the right to teach it in a religious way in a religious context.

accord Skrzypack v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1245 (10th Cir. 2010) (unnecessary discovery can "only produce by [its] coercive effect the very opposite of that separation of church and State contemplated by the First Amendment").

Accordingly, Grussgott cannot defeat summary judgment by putting forth an alternative interpretation of the School's religious beliefs and asking a jury to agree with her. The district court rightly concluded that, for the Jewish Day School, "[t]eaching Hebrew is so intertwined with Judaism that there is no way to separate out any of its secular components without questioning the validity of an aspect of Jewish belief, thereby offending the First Amendment." *Grussgott*, 2017 WL 2345573, at *6 n.6.[12] This Court should reject her efforts to "drag" both this Court and ultimately a jury "into a religious controversy." *Tomic,* 442 F.3d at 1042.

CONCLUSION

A teacher of Hebrew at a Jewish day school who leads her elementary-school students in prayer and worship and instructs them on matters of theological importance is a minister under controlling Seventh Circuit case law and

[12] The district court drew an apt analogy to Latin in Catholic schools, which is taught "as a sacred or liturgical language, connected to the institution's overall religious instruction." *Grussgott*, 2017 WL 2345573, at *6 n.7. Just like Latin, Hebrew is not taught primarily "to increase . . . communication skills," but for theological reasons. *Id.*

Hosanna-Tabor. The ministerial exception both protects and prevents the Court from being forced to second-guess whether the Jewish Day School is sufficiently orthodox and whether the teaching of Hebrew by Jewish teachers to Jewish children to advance a Jewish mission is sufficiently sacred.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Cir. Rule 29 because it contains 6,119 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

/s/ *Daniel Blomberg*
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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

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I further certify that some of the participants in the case are not CM/ECF users. I have caused the foregoing document to be mailed by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participant:

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October 13, 2017

/s/ *Daniel Blomberg*
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