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

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner in No. 19-276, Our Lady of Guadalupe School, was the defendant-appellee below. Respondent in No. 19-276, Agnes Morrissey-Berru, was the plaintiff-appellant below.

Petitioner in No. 19-348, St. James School, was the defendant-appellee below. Respondent in No. 19-348, Darryl Biel, in his capacity as the personal representative of the estate of his wife Kristen Biel, was the plaintiff-appellant below. Ms. Biel passed away on June 7, 2019 and Darryl Biel was substituted as the party to this case by the court of appeals.

Neither Petitioner has a parent corporation nor does either Petitioner issue stock.

Our Lady of Guadalupe School is a canonical entity and part of the canonical parish of Our Lady of Guadalupe in the Roman Catholic Archdiocese of Los Angeles. St. James School is a canonical entity and part of the canonical parish of St. James in the Roman Catholic Archdiocese of Los Angeles. Civilly, both schools are treated as unincorporated associations under the corporate laws of the State of California. The Archdiocese of Los Angeles operates in the civil forum through several religious corporations under the corporate laws of the State of California; civilly, the real property and related assets of Our Lady of Guadalupe School and Parish and St. James School and Parish are held by and operated through certain of those corporations.

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INTRODUCTION

In *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, this Court unanimously recognized the existence of the "ministerial exception," a First Amendment doctrine developed over decades in the lower courts that protects the employment relationship between a religious organization and its "ministers." 565 U.S. 171 (2012). According to the Court, "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" precluded enforcement of the employment discrimination laws at issue in that case. The Court then applied the exception to a Lutheran schoolteacher, holding that she could not bring disability and retaliation claims against the Lutheran school that employed her.

In reaching its decision, the Court expressly rejected a "rigid formula" for determining whether an individual held a ministerial role. Instead it concluded that four "considerations" were sufficient to conclude in that case that the plaintiff Cheryl Perich was a minister: "formal title"; "the substance reflected in that title"; the plaintiff's "use of that title"; and "the important religious functions she performed." Each of the considerations showed that Perich had "a role in conveying the Church's message and carrying out its mission." In refusing to adopt a rigid formula, the Court did not specify the exact relationship among the four considerations, or in what circumstances other considerations absent from *Hosanna-Tabor* could be taken into account.

Since then, the lower courts have applied *Hosanna-Tabor* to a number of those other circumstances, most often in situations where some of the four

considerations were not present. Following *Hosanna-Tabor*'s analysis, lower courts have tended to "focus primarily 'on the *function[s]* performed by persons who work for religious bodies.'" *Fratello* v. *Archdiocese of New York*, 863 F.3d 190, 205 (2d Cir. 2017) (emphasis added) (quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring)). In particular, relying on guidance from Justice Alito's concurring opinion in *Hosanna-Tabor*, which was joined by Justice Kagan, lower courts have asked whether the plaintiff engages in "certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith." *Fratello*, 863 F.3d at 206 n.30. These decisions are based on a commonsense idea: Little is more important to the independence of religious groups, and to the separation of church and state, than the principle that government shouldn't interfere with who leads worship or teaches religion.

The Ninth Circuit broke from the consensus, holding in the decisions below that the Catholic teachers suing their Catholic school employers were not ministerial employees under *Hosanna-Tabor*. Under the Ninth Circuit's new rule, *Hosanna-Tabor*'s "important religious functions" consideration can *never* suffice on its own to bring a plaintiff within the ministerial exception. Thus, even where a plaintiff has admittedly "significant religious responsibilities[,]" "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework." OLG.App.3a.

The Ninth Circuit was wrong to turn *Hosanna-Tabor*'s flexible framework into a rigid formula. Properly understood, *Hosanna-Tabor*'s flexible doctrinal structure allows courts to deal with the wide

array of factual scenarios that will come before them in a religiously pluralistic society. In some cases, the plaintiff's religious functions alone will be enough to count him or her as within the ministerial exception. In other cases, such as those of a priest, rabbi, nun, or granthi, the plaintiff's formal title, the substance behind that title, the use of that title, or some combination of the three, may suffice to determine ministerial status without any recourse to a functional analysis. And in still other cases, a deciding court might look at all four of the *Hosanna-Tabor* considerations, and even other considerations, in deciding whether a particular plaintiff is ministerial.

In the mine run of cases, however, the functional analysis will provide the rule of decision, because it most directly reaches the animating purpose of the ministerial exception. Control over religious functions, such as deciding or teaching religious doctrine, must remain in the hands of religious bodies. And to have control over those functions, religious organizations must control who performs them. Were governmental actors empowered to control who leads ministries, conducts worship, performs rituals, or teaches the faith, then the government would control those core religious functions. Particularly for religious bodies, personnel cannot be detached from policy.

Indeed, as history shows, the question of "Who controls?" is a common thread running through many religious autonomy doctrines. And as Justices Alito and Kagan explained in their *Hosanna-Tabor* concurrence, the answer to that question is straightforward: "[r]eligious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious

importance." *Hosanna-Tabor*, 565 U.S. at 200. These "positions of substantial religious importance" include at a minimum the "roles of religious leadership, worship, ritual, and expression[.]" *Id.* And where a plaintiff performs one of those "objective functions," then the ministerial exception applies. *Id.* This standard ensures that religious bodies have "independence from secular control or manipulation," *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952), and avoids judicial interference in internal religious affairs that would impermissibly "affect the way an organization carried out what it understood to be its religious mission." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987).

That makes these cases easy. Both of the Catholic schoolteachers here exercised important religious functions of worship, ritual, and expression. As teachers at religious schools, they each taught the faith to fifth graders—and, indeed, did so for more hours per week than most parish pastors. That alone is dispositive. But they also personified Catholic values and imbued every subject they taught with Catholic beliefs. They accompanied their students to and in worship. And they led their students in prayer daily. Respondents accordingly held an important role in "conveying the Church's message and carrying out its mission," particularly by "transmitting the [Catholic] faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 192. That is more than enough to reverse the Ninth Circuit's decisions.

OPINIONS BELOW

The Ninth Circuit's opinion in No. 19-267 is reported at 769 F. App'x 460 (9th Cir. 2019) and reproduced at OLG.App.1a.

The district court's opinion in No. 19-267 is reported at 2017 WL 6527336 (C.D. Cal. 2017) and reproduced at OLG.App.4a.

The Ninth Circuit's opinion in No. 19-348 is reported at 911 F.3d 603 (9th Cir. 2018) and reproduced at StJ.App.1a.

The Ninth Circuit order in No. 19-348 denying the petition for rehearing en banc is reported at 926 F.3d 1238 (9th Cir. 2019) and reproduced at StJ.App.40a.

The district court's opinion in No. 19-348 is unreported and is reproduced at StJ.App.69a.

JURISDICTION

The court of appeals entered its judgment in No. 19-267 on April 30, 2019. Justice Kagan extended the time in which to file a petition for a writ of certiorari in No. 19-267 to August 28, 2019.

The court of appeals entered its judgment in No. 19-348 on December 17, 2018. The petition for en banc rehearing in No. 19-348 was denied on June 25, 2019.

The petitions in both cases were granted on December 18, 2019.

This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The relevant portions of the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq*. ("ADEA"), are reprinted at OLG.App.10a.

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

STATEMENT OF THE CASE

A. Doctrinal Background

For almost fifty years, federal courts of appeals have uniformly recognized that the First Amendment protects the relationship between religious groups and their ministers from government interference. See *Hosanna-Tabor*, 565 U.S. at 187-88 & n.2 (collecting cases). The first case to apply the ministerial exception was *McClure* v. *Salvation Army*, which concerned a Title VII lawsuit brought by a minister against her church. 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). The court found that because ministers are the "chief instrument by which the church seeks to fulfill its purpose," applying Title VII "to the employment relationship existing between * * * a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter." *Id.* at 558-560. The first reported case to dub this doctrine the

"ministerial exception" was authored by Judge Wilkinson in 1985. See *Rayburn* v. *Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).[1]

Over the next four decades, eleven other federal courts of appeals and over a dozen state supreme courts followed *McClure*'s lead. The overwhelming majority of these courts determined that, in "evaluating whether a particular employee is subject to the ministerial exception," "the focus should be on the 'function of the position.'" *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006) (quoting *Rayburn*, 772 F.2d at 1168).

In 2012, this Court issued its first opinion on the ministerial exception in *Hosanna-Tabor*, unanimously ratifying the lower courts' recognition of the right. The plaintiff, Cheryl Perich, was a fourth-grade teacher and "commissioned minister" at a Lutheran church school. After she was terminated, Perich filed charges with the Equal Employment Opportunity Commission, claiming discrimination and retaliation under the ADA. 565 U.S. at 179. In resolving her

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[1] The term "ministerial exception" has been recognized as something of a misnomer. *Rweyemamu* v. *Cote,* 520 F.3d 198, 206-207 (2d Cir. 2008) ("[T]he term 'ministerial exception' is judicial shorthand" and it "protects more than just 'ministers.'"). Many religious traditions do not use the term "minister," and some call all of their members "ministers." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). "Exception" is also somewhat misleading because the doctrine functions more like an immunity than a proviso. See, *e.g.*, *Korte* v. *Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013) ("[T]he church-autonomy principle operates as a complete immunity[.]"). Thus, a term like "ecclesiastical immunity" might be a better fit for the legal concept it denotes. We use "ministerial exception" in this brief.

claim, this Court first confirmed that there is a ministerial exception and that it arises from both Religion Clauses: "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184. The Court traced the origins of the ministerial exception back to Magna Carta, while also invoking the Court's own decisions in disputes involving church property and choice of clergy. *Id.* at 182. Thus, while society's interest in employment nondiscrimination statutes is "undoubtedly important," the First Amendment had "struck the balance" in favor of protecting "religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196.

In applying the ministerial exception to Perich, the Court found it unnecessary to adopt a rigid standard to resolve the case. Instead, it determined that certain "considerations" were sufficient to conclude Perich was a ministerial employee: her title, the substance behind the title, her use of the title, and "the important religious functions she performed." *Hosanna-Tabor*, 565 U.S. at 190, 192.

Justice Thomas concurred, stating that "the Religion Clauses require civil courts * * * to defer to a religious organization's good-faith understanding of who qualifies as its minister" in order to prevent secular courts from "second-guess[ing] the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets." *Hosanna-Tabor*, 565 U.S. at 196-197.

Justices Alito and Kagan also concurred, emphasizing that the Court's decision was fully consistent with the "functional consensus" among the lower courts that courts ought to determine ministerial status by "focus[ing] on the function performed by persons who work for religious bodies." *Hosanna-Tabor*, 565 U.S. at 198, 203. They explained that "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" should normally be found to be ministers, because they perform functions that are "essential to the independence of practically all religious groups." *Id.* at 200.

B. The Our Lady of Guadalupe School Dispute

1. Our Lady of Guadalupe School ("Our Lady") is a Catholic parish school located in Hermosa Beach, California that offers transitional kindergarten through eighth grade. OLG.App.66a. The school is a ministry of, and is operated by, the parish of Our Lady of Guadalupe as part of the Archdiocese of Los Angeles. OLG.App.12a-13a, 43a-44a. The Archdiocese is a constituent entity of the Roman Catholic Church and is the largest archdiocese in the United States. It is headed by Archbishop José H. Gomez.

Our Lady was founded almost sixty years ago, in 1961, and was staffed by Carmelite Sisters for its first 13 years. OLG.App.43a. While all children are welcome to enroll, Our Lady was established specifically to serve the educational needs of the children of the parish. OLG.App.43a. The mission of Our Lady is to grow a Catholic faith community that

reflects both a Catholic philosophy of education and the doctrines of the Catholic Church. OLG.App.32a, 43a.

The parish pastor leads Our Lady and is responsible both for carrying out Archdiocesan policy and for setting school policy that carries out the mission of the Catholic Church. OLG.App.14a, 44a. Our Lady's staff members join "in service [t]o the Church," and "whether priests, religious or laity, work in a collaborative way to carry out the mission of the Church." OLG.App.53a. For faculty and staff at Our Lady, "**[m]odeling, teaching of and commitment to Catholic religious and moral values are considered essential job duties**." OLG.App.55a (emphasis in original).

Teachers have expressly religious roles at Our Lady. Every teacher must sign a written agreement to perform "[a]ll" of the teacher's "duties and responsibilities" in a manner consistent with Catholic doctrine and educational philosophy as an "overriding commitment." OLG.App.32a. Teachers must lead their classrooms in alignment with "the values of Christian charity, temperance, and tolerance," and "model and promote behavior in conformity to the teaching of the Roman Catholic Church in matters of faith and morals." OLG.App.32a-33a. Teachers are also expected to participate in Our Lady's liturgical activities, including faculty-wide prayer services. OLG.App.33a, 87a. As part of this responsibility, Catholic teachers hired by Our Lady must be in good standing with the Church. J.A.91, 144; OLG.App.56a. And teachers who teach religion are required to be Catholic. OLG.App.57a.

Our Lady's expectations are reflected in its employment contracts, which must be signed by the pastor and renewed annually. OLG.App.36a, 42a. Teachers are also evaluated on whether their teaching "include[s] Catholic values infused through all subject areas" and whether their classrooms visibly reflect the "sacramental traditions of the Roman Catholic Church." OLG.App.23a.

2. Respondent Morrissey-Berru began teaching full-time at Our Lady of Guadalupe School in 1999. OLG.App.80a. She understood that Our Lady's mission was to impart Catholic faith and values to its students. OLG.App.82a. She also understood that, as the only teacher for her fifth-grade class, and thus the main source of religious instruction for her students, she had a special role in teaching and modeling Catholic beliefs for her students. OLG.App.81a-83a, 93a; J.A.23, 92, 135. She testified that she was "committed" to fulfilling that special role by "teaching children Catholic values" and providing a "faith-based education." OLG.App.82a.

Consistent with this religious commitment, Morrissey-Berru taught daily religion classes every year of her employment. OLG.App.81a, 90a. Her religion classes "introduce[d] students to Catholicism" and "gave them a groundwork for their religious doctrine." OLG.App.93a. She testified that in just her last year of teaching the religion class, she led her students to:

- "express belief that Jesus is the son of God and the Word made flesh";
- "recognize the presence of Christ in the Eucharist";

- "experienc[e] the water, bread, wine, oil and light"—symbols of the seven Catholic sacraments—"with the[ir] senses";[2]
- "celebrate the sacrament[s]," including by "participating in the prayer service related to" the sacraments;
- "pray the Apostles' Creed and the Nicene Creed";
- "locate, read, and understand" passages from the Bible;
- understand the Catholic doctrines of creation and original sin;
- "explain the communion of saints" and "identify the ways that the church" effectuates God's work on earth; and
- follow the liturgical calendar, including the "Sacred Triduum" of Holy Thursday, Good Friday, and Easter Sunday.

OLG.App.91a-94a; see also OLG.App.16a-21a, 45a-50a. One of the resources Morrissey-Berru used was the Catholic religion textbook *Blest Are We*. OLG.App.45a-51a, 90a-91a. She tested her students periodically on how well they had learned the religious knowledge she taught them. OLG.App.24a, 87a; OLG.ER.831. Notably, her instruction was devotional in nature: she used prayer, worship, and the reading of Scripture to teach the students Catholic doctrine. OLG.App.45a-51a.

Morrissey-Berru also modeled and practiced the Catholic faith with her students. She testified that she

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[2] The seven Catholic sacraments are Baptism, Confirmation, the Eucharist, Penance (also known as Reconciliation), the Anointing of the Sick, Marriage, and Holy Orders.

personally showed the "children how to go to Mass, the parts of the Mass, communion, prayer, and confession." OLG.App.81a. She used her role as a teacher at Our Lady to demonstrate "the importance of prayer and worship." OLG.App.96a. For instance, she led daily prayer with the students at the beginning or end of class, and would also lead spontaneous prayer as appropriate, such as praying for a student's ill mother. OLG.App.86a-87a. She periodically prepared her students to proclaim readings from Scripture during weekly school Masses and monthly family Masses, and then took her students to attend and participate in those Masses. OLG.App.82a-84a, 87a-88a. Her class was in charge of one Mass per month, and she helped plan the liturgy for that Mass. OLG.App.40a, 42a, 83a-84a. She took her students to specific Holy Days of Obligation and other religious observances, such as Lenten Services, the Feast of Our Lady of Guadalupe, the Stations of the Cross, All Saints Day, and Christmas. OLG.App.88a. She included visible Catholic symbols in her classroom. OLG.App.95a. And, as required by Our Lady's policies, she infused Catholic faith and values into all other academic subjects that she taught. OLG.App.86a, 95a.

Beyond regular classroom and school religious observances and training, Morrissey-Berru also led other important religious activities for her students. For instance, she annually directed her students in a play of the Passion of the Christ, depicting Christ's final hours and crucifixion. OLG.App.69a. As a part of the play, she would explain the scriptural significance of the Passion, would help students prepare dialogue from Bible passages, and would rehearse the play with them. OLG.App.69a. The play was then performed

before the entire school as a part of its celebration of Easter. OLG.App.68a-69a. Morrissey-Berru also annually took her class to the Cathedral of Our Lady of the Angels to give them the opportunity to serve at the altar there. OLG.App.95a-96a. She believed it was an "important experience" and "a big honor" for the students. OLG.App.96a.

To ensure that Morrissey-Berru herself was properly teaching Catholic beliefs, Our Lady regularly evaluated her teaching of the faith. OLG.App.94a-95a. Our Lady also required her to take catechist courses to become a certified Catechist. OLG.App.84a, 60a-62a. The courses were provided by the Archdiocese of Los Angeles's religious education department. OLG.App.60a-62a, 84a-85a.

3. The catechist certification requirement was first implemented in 2012 as a part of sweeping reforms at Our Lady to save it from closure. OLG.App.59a-61a. The school's attendance had steadily dwindled to the point that the eighth-grade class in 2011 had only one graduate, and Our Lady remained afloat solely because of a heavy subsidy from the parish. OLG.App.27a. A Catholic school accreditation team report in 2012 identified the reason for decline as negative parental perception about the school, which was attributed to factors such as a perceived lack of academic rigor and a need for catechetical training of teachers. OLG.App.59a.

The parish brought in a new principal, April Beuder, to address these problems. OLG.App.27a, 57a-59a. She immediately began requiring all faculty to obtain catechist certification based on guidelines set by the United States Conference of Catholic Bishops. OLG.App.61a. The catechist courses trained teachers

to "provide a Catholic education to students." OLG.App.61a. Beuder also required teachers to implement a new reading program to address concerns about academic rigor. OLG.App.27a-28a, 66a-67a. After being disappointed with Morrissey-Berru's implementation of the program, OLG.App.28a, 68a-73a, Beuder created a part-time position for Morrissey-Berru that removed duties related to the program while allowing her to teach fifth-grade religion and fifth-through-seventh-grade social studies. OLG.App.29a. That experiment was unsuccessful, and so Beuder informed Morrissey-Berru in May 2015 that she would not offer her a new contract for the following school year. OLG.App.30a-31a.

4. Morrissey-Berru filed a charge with the EEOC on June 2, 2015, alleging, as relevant here, age discrimination in violation of the ADEA. Morrissey-Berru was issued a right-to-sue letter on September 19, 2016, and filed suit in federal district court on December 19, 2016.

Our Lady filed a motion for summary judgment in August 2017. On September 27, 2017, the district court granted the motion, ruling that Morrissey-Berru's claim was barred by the First Amendment's ministerial exception. OLG.App.4a, 8a. The court found that Morrissey-Berru held a ministerial role because she "expressly admitted that her job duties involved conveying the Church's message," and she sought to fulfill those duties by "integrating Catholic values and teachings into all of her lessons," "leading the students in religious plays," and teaching "her students the tenets of the Catholic religion, how to

pray, and * * * a host of other religious topics." OLG.App.7a-8a.

Morrissey-Berru appealed to the Ninth Circuit in October 2017.

C. The St. James School Dispute

1. St. James School is a Catholic parish school located in Torrance, California. The school is a ministry of, and is operated by, the parish of St. James, which is a neighboring parish of Our Lady.

St. James was founded in 1918. The first teachers were Sisters of the Order of St. Joseph of Carondelet, and at the time of this lawsuit nearly 100 years later, the school was still led by a religious sister. The mission of St. James is to develop and promote a Catholic faith community that reflects both a Catholic philosophy of education and the doctrines, laws, and norms of the Catholic Church. StJ.App.96a.

As at Our Lady, teachers have an important role in carrying out St. James's religious mission. Teachers are expected to "personally demonstrate [their] belief in God," to "delight in and enjoy our noble position as Catholic educators," and to "actively take part in worship-centered school events." StJ.App.19a, StJ.ER.568. Also as at Our Lady, St. James's teachers must agree to perform "[a]ll" of their "duties and responsibilities" in a manner consistent with an "overriding commitment" to Catholic faith and practice. StJ.App.96a. Teachers apply Christian values to all their interactions with others at the school, StJ.App.97a, "guide the spiritual formation of the student[,]" and "help each child strengthen his/her personal relationship with God." StJ.App.20a, StJ.ER.571. Teachers are also expected to participate

in St. James's liturgical activities, StJ.App.19a, 97a, to begin and end each school day with prayer, StJ.App.110a, to teach students specific prayers each month of the school year, StJ.App.110a, and to prepare their students to be "active participants" in regularly-scheduled school-wide Masses, StJ.App.109a. In light of these responsibilities, St. James prefers to hire teachers that are practicing Catholics, J.A.331, and all teachers are required to "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church." StJ.App.97a.

As with Our Lady, St. James's expectations are reflected in each teacher employment contract, which must be signed by the parish pastor and renewed annually. StJ.App.98a, 101a. And teachers are evaluated on whether a teacher's instruction "infus[es] 'Catholic values through all subject areas'" and whether their classrooms visibly reflect the "sacramental traditions of the Roman Catholic Church." StJ.App.83a-84a, 106a.

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

Biel was Catholic, and she understood that, as a Catholic school, St. James had the goal of "promot[ing] and develop[ing] the Catholic faith" in its students. StJ.App.92a. She also agreed that, as a teacher at St. James, she was responsible for incorporating the Catholic faith into the curriculum. StJ.App.92a. And as the sole teacher for her fifth-grade class, and thus the primary conduit of religious instruction for her

students, she held a distinct role in imparting Catholic beliefs to her students. StJ.App.80a-84a, J.A.288-289.

Biel met her religious teaching requirements in a number of ways. Most prominently, she taught religion classes four days a week. StJ.App.82a. Biel was required to spend more than three hours a week teaching her students about the Catholic faith. StJ.App.50a, 82a-83a. In teaching her students, Biel used the Catholic religion textbook *Coming to God's Life* as a resource. J.A.332; StJ.SER.100, 103-104. In these classes, she taught her students Catholic doctrine and practice, including the sacraments of the Catholic Church (such as the Eucharist and confession), Catholic social teaching, Catholic holy days and observances like Lent and Easter, Catholic prayers, scriptural accounts, and Church history. StJ.App.18a, 82a-84a. Biel tested her students on whether they had retained this knowledge. StJ.App.83a; StJ.ER.525.

In addition to teaching religion classes, Biel displayed Catholic sacramental symbols throughout her classroom. StJ.App.18a, 83a-84a, 106a. She was also required to incorporate Catholic values and traditions in all the other subjects taught in her classroom. StJ.App.19a, 83a-84a, 106a.

Further, Biel modeled and practiced the Catholic faith by taking part in school-based religious rituals and worship. She testified that she prayed prayers like the Lord's Prayer and the Hail Mary with her students twice each day. StJ.App.93a. She attended school Masses with her students every month, where twice a year her students participated by presenting the Eucharistic gifts of bread and wine to be consecrated in the Mass. StJ.App.34a, 95a-96a. Biel testified that,

during these monthly Masses, she also prayed with her students. StJ.App.81a, 95a-96a.

St. James evaluated Biel's teaching of the Catholic faith across all subjects to ensure she was accomplishing the school's religious mission. StJ.App.32a, 83a-84a, 106a. St. James also required her to attend the Los Angeles Religious Education Congress, a day-long conference for Catholic teachers that included training in how to incorporate the Catholic faith into their teaching. StJ.App.30a; StJ.SER 77-78.

3. Two weeks into the 2013-2014 school year, St. James's principal, Sister Mary Margaret Kreuper, noticed that Biel's classroom was disorganized and noisy. StJ.App.85a. This led to a formal performance review which, while commending her for displaying Catholic symbols in her classroom, also counseled her to improve her classroom management. StJ.SER 79, 82-84.

But as the year went on, teachers and administrators at St. James observed that Biel's classroom was "chaotic" and "often out of control." StJ.App.85a, 120a-121a. Books and papers were seen in the aisles, and children were seen "crawling on the floor." StJ.App.114a. Janell O'Dowd, a teacher at St. James whose daughter was also a student in Biel's classroom, testified that Biel's classroom was "very loud." StJ.App.114a-115a. By January 2014, Biel was called into weekly meetings with school administrators raising her classroom performance and was told that it would be difficult to offer her a contract for the following school year. StJ.App.85a-86a, 87a-89a.

Following Easter break in April 2014, Biel told Sister Mary Margaret that she had breast cancer and that May 22 would be her last day teaching so that she could pursue treatment. StJ.App.88a-91a. Sister Mary Margaret expressed sympathy and noted that she, too, was being treated for breast cancer. StJ.Pet.App.90a-91a. Biel remained employed at St. James through the end of her 2013-2014 contract. But St. James did not renew Biel's contract for the 2014-2015 school year. StJ.App.6a-7a.

4. Biel filed charges with the EEOC in December 2014, alleging disability discrimination, and was issued a right-to-sue letter in March 2015. Biel then filed suit in June 2015.

After discovery, St. James moved for summary judgment. StJ.App.7a. The district court granted the motion on January 17, 2017, concluding that the ministerial exception foreclosed Biel's claim. The court's determination "turn[ed] on whether Biel was a 'minister.'" StJ.App.71a. She was, the court ruled, because she "conveyed the Catholic Church's message" in three key ways: "by teaching religion to her students," "by administering and evaluating weekly tests from a Catholic textbook," and "by praying with the students twice each day." StJ.App.73a. The court also observed that Biel herself "clearly sought to carry out St. James's Catholic mission by, for example, including Catholic teachings into all of her lessons and attending a conference to learn techniques for incorporating religious teachings into her lessons." StJ.App.73a. While Biel's case did not "contain all of the hallmarks of ministry identified in *Hosanna-Tabor*," the court concluded that *Hosanna-Tabor* "was

not intended to represent the outer limits of the ministerial exception." StJ.App.73a.

Biel appealed to the Ninth Circuit in February 2017.

D. The Ninth Circuit Proceedings

On appeal, Biel argued, among other things, that there "was nothing ecclesiastical about the performance of [her] job duties" because she "was required to follow a set curriculum and teach religion out of a textbook that was selected by Sister Mary Margaret, entitled 'Coming to God's Life.'" Opening Br. at 48-49, *Biel* v. *St. James School*, No. 17-55180 (9th Cir. Sept. 20, 2017), ECF No. 20.

The EEOC moved for leave to file an *amicus curiae* brief and to present oral argument, which was granted. In its brief, the EEOC asserted that courts since *Hosanna-Tabor* have applied the ministerial exception only to those employees in a "spiritual leadership role." EEOC Br. at 24, *Biel* v. *St. James School*, No. 17-55180 (9th Cir. Sept. 27, 2017), ECF No. 25. This was analogous to the argument the EEOC had made unsuccessfully before this Court in *Hosanna-Tabor*. See EEOC Br. at 51, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2011) (No. 10-553) (ministerial exception limited to those with an "exclusively" religious role, such as "clergy," "chaplain[s]," and "spiritual leaders").

On December 17, 2018, a divided panel of the Ninth Circuit adopted the EEOC's reasoning to rule in favor of Biel. StJ.App.4a. The panel majority held that Biel's religious duties were, taken alone, insufficient to invoke the ministerial exception, and that the exception was ordinarily applied to those with

"religious leadership" roles, while "Biel's role in Catholic religious education" was "limited to teaching religion from a book." StJ.App.13a, 14a.

Judge D. Michael Fisher, sitting by designation, dissented, opining that "Biel's duties as the fifth grade teacher and religion teacher are strikingly similar to those in *Hosanna-Tabor*." St.J.App.32a. Judge Fisher said it was wrong to downplay religious doctrinal instruction as teaching "straight out of a textbook," StJ.App.33a, and warned that the majority's approach improperly "invite[d] the very analysis the ministerial exception demands we avoid" and caused judicial "entanglement in the affairs of religious organizations." StJ.App.34a-35a.

St. James then filed a petition for rehearing en banc.

While that petition was still pending, a different panel of the Ninth Circuit heard argument in *Morrissey-Berru* on April 11, 2019. Three weeks later, the panel followed *Biel*'s analysis to rule against Our Lady. The panel agreed that the teacher's "significant" religious duties included that she had "committed to incorporate Catholic values and teachings into her curriculum," and that she "led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School's Easter celebration every year." OLG.App.3a. But, in the panel's view, all of this was insufficient because *Biel* instructs that "an employee's duties alone are not dispositive." *Ibid*.

On June 25, 2019, the Ninth Circuit denied the petition for rehearing en banc in *Biel*. Nine judges dissented, stating that *Biel*'s analysis "poses grave

consequences for religious minorities" and "conflicts with *Hosanna-Tabor*, decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles." StJ.App.42a (R. Nelson, J., dissenting). The dissent noted that the *Morrissey-Berru* panel had already relied on the *Biel* decision to cut back on the ministerial exception's protections, and observed that "[i]n each successive case, we have excised the ministerial exception, slicing through constitutional muscle and now cutting deep into core constitutional bone." StJ.App.44a.

Our Lady and St. James sought review in this Court, and on December 18, 2019, the Court granted certiorari and consolidated the cases.

SUMMARY OF THE ARGUMENT

Hosanna-Tabor identified four considerations—"formal title"; "the substance reflected in that title"; the plaintiff's "use of that title"; and "the important religious functions [the plaintiff] performed"—indicating that the Lutheran teacher in that case was covered by the ministerial exception. 565 U.S. at 192. The Court went on to specifically reject a "rigid formula" for applying the exception. *Id.* at 190.

The flexible framework adopted in *Hosanna-Tabor* has been followed by most of the lower courts, with a particular focus on the "functions" consideration. Those courts have by no means ignored the other *Hosanna-Tabor* considerations, but generally speaking the "functions" consideration has been *primus inter pares*.

The Ninth Circuit rejected this functional consensus, imposing a new and rigid ministerial exception test: that performing admittedly important

religious functions is *never* enough on its own for the ministerial exception to apply. The question posed in this case is whether the Ninth Circuit's new rule can be reconciled with *Hosanna-Tabor*.

The answer is no. Like the other religious autonomy doctrines it is related to, the ministerial exception ensures that control over religious functions lies with the church, not the state, to the great benefit of both.[3] When an employee of a religious organization performs important religious functions, that is enough under *Hosanna-Tabor* for the ministerial exception to apply. Indeed, it is hard to understand *Hosanna-Tabor*'s injunctions regarding those who "teach the[] faith" and "guide" the church any other way. 565 U.S. at 196. The Court gave no indication that these functions must come packaged with a formal title or extensive training for the ministerial exception to apply. To the contrary, the ministerial exception caselaw until *Biel* had firmly rejected the idea that title was a necessary requirement. Important religious functions can be enough for the ministerial exception to apply.

The Ninth Circuit's rule, by contrast, amounts to forbidden "manipulation" of religious institutions. *Kedroff*, 344 U.S. at 116. Making title crucial to the ministerial exception determination exerts great

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[3] Professor Douglas Laycock published the first significant legal scholarship on "church autonomy" in *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Columbia L. Rev. 1373 (1981); see also Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J. L. & Pub. Pol'y 253 (Winter 2009). A number of courts and scholars continue to use that term; we use the term "religious autonomy" in this brief to describe the same concept.

pressure on religious groups to add titles to existing positions "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own * * * doctrinal assessments." *Rayburn*, 772 F.2d at 1171. Worse yet, religious organizations would have to consult legal counsel to find out which titles might seem religious enough *to a court*. Cf. *Amos*, 483 U.S. at 336 ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."). Moreover, the Ninth Circuit's rule would have the perverse effect of penalizing religious groups that give significant religious responsibilities to laypeople, creating a *de facto* government-induced clericalism. That would twist *Hosanna-Tabor*'s rationale beyond recognition.

The subsidiary question—what are important religious functions?—was also answered in *Hosanna-Tabor*, where the Court described in detail the religious functions Perich performed: teaching "her students religion four days a week"; "le[ading] them in prayer three times a day"; "t[aking] her students to a school-wide chapel service"; twice annually leading the chapel service; and leading her students in brief devotional exercises. 565 U.S. at 192. She thus "performed an important role in transmitting the Lutheran faith to the next generation." *Ibid.*

Justices Alito and Kagan expanded on this description, offering a list of four "objective" functions that are "essential" to the autonomy of "practically all religious groups," and so presumptively qualify as "important religious functions" for purposes of the ministerial exception. 565 U.S. at 200, 204 (Alito, J., concurring). The four are "roles of religious leadership,

worship, ritual, and expression," including "teaching and conveying the tenets of the faith to the next generation." *Id.* at 200, 204.

The "important religious functions" analysis provides a straightforward answer in these cases. First and foremost, both Morrissey-Berru and Biel taught the Catholic religion to their students for hours every week. Indeed, the record discloses that they spent *more* time teaching Catholicism to their students than Perich spent teaching Lutheranism to hers. That fact alone is enough to decide these cases, and the Court could stop there if it wanted to.

But the functions analysis can go further, because Morrissey-Berru and Biel also performed other religious functions, including accompanying and assisting their students in worship, leading them in prayer, and personifying Catholic values and imbuing all of the subjects they taught with Catholic beliefs.

Even apart from the functions analysis, other *Hosanna-Tabor* considerations apply to Morrissey-Berru and Biel. Both teachers had formal titles—teacher and catechist—that were not fake but reflected real substance, along with training designed to make them more effective in those roles. Those *Hosanna-Tabor* considerations, too, make for a straightforward application of the ministerial exception.

ARGUMENT

I. The ministerial exception ensures religious groups control who performs important religious functions.

Religious functions like worship, ritual, and teaching the faith are what make religious communities distinctive. Therefore, religious bodies must have control over religious functions in order to have control over *themselves*. Much of the caselaw concerning the autonomy of religious institutions thus demonstrates a focus on protecting religious organizations' ability to control their own religious functions. And as we explain below, this is especially true of the caselaw of the ministerial exception.

Read in the context of that history, *Hosanna-Tabor* likewise requires a focus on important religious functions in order to make the determination whether a particular person counts as ministerial.

A. The history of religious autonomy doctrines in general and the ministerial exception in particular shows that religious bodies—not the government—must control religious functions.

1. In *Hosanna-Tabor*, the Court rooted the ministerial exception in an extensive discussion of the history of other religious autonomy doctrines. *Hosanna-Tabor*, 565 U.S. at 185-189. Religious autonomy doctrines have arisen where civil law has come into conflict with religious organizations' internal governance. When one party to a dispute invokes civil law to interfere with a religious body's internal affairs, the religious body will often raise religious autonomy as a claim or defense. See *Serbian*

E. Orthodox Diocese v. *Milivojevich*, 426 U.S. 696, 707 (1976) (claim); *Kedroff*, 344 U.S. at 100 (defense). The resulting family of religious autonomy doctrines is hardly uniform. Sometimes a particular doctrine derives from the Free Exercise Clause, from the Establishment Clause, or from both.[4] Sometimes a particular form of religious autonomy arises from state constitutional provisions, or even from the common law. See, *e.g.*, *Watson* v. *Jones*, 80 U.S. 679 (1871) (pre-*Erie* case applying federal common law). Sometimes a doctrine is jurisdictional, and sometimes it is not. And many of the cases dealing with these issues arise in state court rather than federal court, which has led to a multiplicity of different ways to categorize religious autonomy doctrines.

Despite their variety, a golden thread running through many religious autonomy doctrines, including the ministerial exception, is that they often locate *control* over the religious functions of the religious body with the religious body alone, expressly rejecting government interference. Decisions in this vein all recognize that there is "a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). The history of

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[4] *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which upheld "an across-the-board criminal prohibition," *id.* at 884, does not apply to religious autonomy doctrines. See *Hosanna-Tabor*, 565 U.S. at 190.

these doctrines illuminates the key role of important religious functions:

Clergy-penitent privilege. The earliest known case to invoke religious autonomy (and indeed, the Free Exercise Clause) was *People* v. *Philips*.[5] In *Philips* a Catholic priest refused to comply with a criminal subpoena seeking testimony regarding what he had heard in confession. New York City Mayor DeWitt Clinton, acting in a judicial role, refused to enforce the subpoena, holding that "[i]t is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected[.]" *Ibid.* The court rejected the far stingier common law approach to clergy-penitent privilege, announcing that "this is a great constitutional question, which must not be solely decided by the maxims of the common law, but by the principles of our government." *Ibid.*

Leadership selection. The protection of religious autonomy extends not only to the "ordinances" and "ceremonies" themselves, but also to *who* will perform them. That means government entities (including courts) cannot control selection of members of the clergy or other leaders. As *Hosanna-Tabor* described in detail, this principle arose well before employment discrimination law and has deep roots in both English law and early American practice. *Hosanna-Tabor*, 565 U.S. at 182-185 (citing English cases and Madison's refusal to involve the government in "the selection of

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[5] Court of General Sessions, City of New York (June 14, 1813). Although unreported, the case is described in Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1504 (1990).

ecclesiastical individuals"). Much later, the Court made a similar ruling in a case that turned on trust law. In *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), the Court held that the courts of the Philippines (then a United States territory) could not order that a ten-year-old boy be appointed to the ecclesiastical office of chaplain, despite a trust document that purported to require it. Justice Brandeis wrote that the decision about whether the plaintiff was qualified to inhabit the office was entrusted entirely to church authorities: "the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive * * *." *Id.* at 16.

Governance, membership, and discipline. Courts also may not control the outcome of disputes over church governance, membership, and discipline, treating these as the religious body's alone to decide. Civil courts cannot decide "matters of faith, discipline, and doctrine[.]'" *Watson*, 80 U.S. at 732 (quoting *German Reformed Church* v. *Commonwealth ex rel. Seibert*, 3 Pa. 282, 291 (Pa. 1846)). Indeed, the Court has "no power to revise or question ordinary acts of church discipline, or of excision from membership." *Bouldin* v. *Alexander*, 82 U.S. 131, 139 (1872); see also *Westbrook* v. *Penley*, 231 S.W.3d 389, 397 (Tex. 2007) (unconstitutional for church discipline matter to give rise to professional negligence claim).

Religious questions. Courts are also barred from deciding religious questions, because they lack the competence to make such decisions. For Madison, the assertion that the "Civil Magistrate is a competent Judge of Religious truth" was "an arrogant pretension

falsified by the contradictory opinions of Rulers in all ages, and throughout the world[.]" James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 2 Writings of James Madison 187 (Gaillard Hunt, ed. 1901). That goes for juries too. *McCarthy* v. *Fuller*, 714 F.3d 971, 980 (7th Cir. 2013) (Posner, J.) ("[F]ederal courts are not empowered to decide (or to allow juries to decide) religious questions."). And this Court has repeatedly held that government may not question the "truth" of a religious belief, but only whether it is "truly held." *United States* v. *Seeger*, 380 U.S. 163, 184-185 (1965). Cf. *United States* v. *Ballard*, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.").

Ecclesiastical abstention. Religious autonomy principles sometimes manifest themselves in state courts under the term "ecclesiastical abstention."[6] The term means different things in different states, and in many cases merely repackages other religious autonomy doctrines. Some courts use the term to mean that civil courts cannot decide questions of doctrine or governance: "Under the ecclesiastical abstention doctrine, apparently derived from both First Amendment religion clauses, 'civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity.'" *Smith* v. *Calvary Christian Church*, 614 N.W.2d 590, 592 (Mich. 2000) (quoting

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[6] The term appears very infrequently in federal courts of appeals decisions. See *Paul* v. *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 878 (9th Cir. 1987) (Reinhardt, J.); *Puri* v. *Khalsa*, 844 F.3d 1152, 1162 (9th Cir. 2017).

Paul v. *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 878 n.1 (9th Cir. 1987)). Other courts treat it as a more general religious autonomy rule that applies to many different fact patterns: a court cannot "entertain cases that require the court to resolve doctrinal conflicts or interpret church doctrine." *Pfeil* v. *St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528, 534 (Minn. 2016) (characterizing the ministerial exception as "a derivative of the ecclesiastical abstention doctrine").

Statutory analogues. Moreover, as the Seventh Circuit has held, a number of statutory religious liberty protections also sound in religious autonomy. In *Korte* v. *Sebelius*, the Seventh Circuit provided a taxonomy of religious liberty statutes. 735 F.3d 654, 677-678 (7th Cir. 2013). Judge Sykes described religious autonomy statutes as "perhaps best understood as marking a boundary between two separate polities, the secular and the religious, and acknowledging the prerogatives of each in its own sphere." *Id.* at 677. These statutes are "categorical, not contingent" and apply primarily to religious organizations rather than individuals. *Id.* at 678. By contrast, other religious liberty statutes protect the Free Exercise "right of conscientious objection to laws and regulations that conflict with conduct prescribed or proscribed by an adherent's faith." *Id.* at 677. These statutes, like the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*, cover all sorts of conscientious objectors, including both individuals and institutions, and are subject to a strict scrutiny affirmative defense. *Korte*, 735 F.3d at 678-679.

Another sort of statutory religious autonomy protection arises when courts apply the canon of

constitutional avoidance under *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), to avoid raising questions of religious autonomy. In *Universidad Central de Bayamon* v. *NLRB*, for example, then-Judge Breyer wrote that *Catholic Bishop* entanglement concerns—including entanglement "arising out of the inquiry process itself"—meant that the NLRB could not enforce a collective bargaining order against a religious university. 793 F.2d 383, 401-402 (1st Cir. 1985) (evenly divided en banc). Similarly, in *Curay-Cramer* v. *Ursuline Academy*, the Third Circuit held under *Catholic Bishop* that Title VII could not be enforced against a religious school that fired a schoolteacher who had signed on to "a pro-choice advertisement." 450 F.3d 130, 142 (3d Cir. 2006).

These historic examples do not necessarily lend themselves to some grand unified theory of religious autonomy. But the existence of this family of doctrines across a great variety of factual contexts, across time and in many different state and federal courts, is at the least strong evidence of a background principle of American law that control over religious functions ought to belong to religious bodies, not the government. And that principle is in turn rooted in "the essential distinction between civil and religious functions" that undergirds the American concept of separation of church and state. *Hosanna-Tabor*, 565 U.S. at 184-185 (quoting James Madison, in 22 Annals of Cong. 982-983 (1811)).

2. That principle of ensuring control over religious functions by religious bodies rather than civil authorities also runs through the history of the ministerial exception itself. The doctrine began when

a new body of law came into conflict with preexisting ecclesiastical governance. With the widespread adoption of employment discrimination laws in the 1960s, federal courts soon confronted a variety of lawsuits between religious employers and their ministers. In response, they recognized the ministerial exception.

The 1972 decision in *McClure* was the first case to apply the ministerial exception. 460 F.2d at 560. The Fifth Circuit agreed that the Salvation Army was an employer within the meaning of Title VII and the plaintiff would normally be able to bring a claim against the Salvation Army. But the court nevertheless rejected the claim on constitutional grounds, discerning "a common thread" linking this Court's religious autonomy decisions. *Ibid.* The Fifth Circuit called the church-minister relationship the church's "lifeblood," recognizing that all matters "touching this relationship" as "necessarily" of "prime ecclesiastical concern." *Id.* at 558-559.

Four decades elapsed from the inception of the ministerial exception in 1972 to the Court's first opportunity to consider it in 2012 in *Hosanna-Tabor*. During that time, each of the twelve federal courts of appeals to consider the issue recognized the ministerial exception, along with at least fourteen state supreme courts.[7] In reaching these decisions, the

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[7] See *Hosanna-Tabor*, 565 U.S. at 188 & n.2 ("the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception'"; collecting federal court of appeals cases); *El-Farra* v.

courts of appeals and state supreme courts for the most part "concluded that the focus should be on the 'function of the position'" in "evaluating whether a particular employee is subject to the ministerial exception." *Petruska*, 462 F.3d at 304 n.6 (quoting *Rayburn*, 772 F.2d at 1168, and collecting cases from the D.C., Fourth, Fifth, and Seventh Circuits); see also OLG.Pet.15-16 (collecting cases). This was what Justices Alito and Kagan called the "consensus" among the lower courts that the "functional approach" should be used to decide ministerial exception cases. *Hosanna-Tabor*, 565 U.S. at 203-204.

The history of religious autonomy doctrines in general and the ministerial exception in particular thus shows a recurring concern that religious bodies, not governmental entities, ought to have control over religious functions.

Sayyed, 226 S.W.3d 792 (Ark. 2006); *Catholic Charities of Sacramento, Inc.* v. *Superior Court*, 85 P.3d 67 (Cal. 2004); *Dayner* v. *Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011); *Pardue* v. *Center City Consortium Sch.*, 875 A.2d 669 (D.C. 2005); *Pierce* v. *Iowa-Missouri Conference*, 534 N.W.2d 425 (Iowa 1995); *Music* v. *United Methodist Church*, 864 S.W.2d 286 (Ky. 1993); *Archdiocese of Washington* v. *Moersen*, 925 A.2d 659, 661-663 (Md. 2007); *Williams* v. *Episcopal Diocese of Mass.*, 766 N.E.2d 820 (Mass. 2002); *Sawyer* v. *Brandon*, 825 So. 2d 26 (Miss. 2002); *Miller* v. *Catholic Diocese of Great Falls*, 728 P.2d 794 (Mont. 1986); *McKelvey* v. *Pierce*, 800 A.2d 840 (N.J. 2002); *Westbrook* v. *Penley*, 231 S.W.3d 389 (Tex. 2007); *Cha* v. *Korean Presbyterian Church*, 553 S.E.2d 511 (Va. 2001); *Coulee Catholic Sch.* v. *Labor and Indus. Review Comm'n*, 768 N.W.2d 868 (Wis. 2009). While all of the state cases recognized the ministerial exception doctrine, not all of them found it outcome-determinative.

B. Because religious bodies must control religious functions, the ministerial exception prohibits government interference where a plaintiff performs important religious functions.

Hosanna-Tabor supports the proposition that where a plaintiff has important religious functions, the ministerial exception applies. Indeed, that is why Justices Alito and Kagan and the vast majority of state supreme courts and federal courts of appeals (save the Ninth Circuit) to address the question have adopted the functional approach to answering the "Who is a minister?" question.

Hosanna-Tabor's stated principles leave little doubt that employees who exercise important religious functions fall within the ministerial exception, title or no. The Court repeatedly emphasized the importance of control, starting with its recounting of the colonial religious establishments. See *Hosanna-Tabor*, 565 U.S. at 182 ("Seeking to escape the *control* of the national church, the Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship."); *id.* at 183 ("Colonists in the South * * * sometimes chafed at the *control* exercised by the Crown and its representatives over religious offices.") (emphases added). In concluding that "there is a ministerial exception" the Court held that religious organizations must have "*control* over the selection of those who will personify [their] beliefs" and that "depriving the church of *control* over the selection of those who will personify its beliefs" interferes with internal church governance. *Id.* at 188, 190 (emphases added). And again, the ministerial exception "ensures that the authority to

select and *control* who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." *Id.* at 194-195 (quoting *Kedroff*, 344 U.S. at 119) (emphasis added).[8]

Similarly, the First Amendment requires that every religious group "be free to choose those who will guide it on its way." *Hosanna-Tabor,* 565 U.S. at 196. Indeed, it is hard to understand "minister[ing] to the faithful" or "gui[ding]" a religious group "on its way" as anything other than carrying out religious functions. *Id.* at 195-196. There is no hint that ministering to the faithful is ministering only when it comes packaged with a title, or that guiding must be done only by those trained in a seminary.

Hosanna-Tabor also recognized that control by the religious body must also extend to the specific teaching function that Perich exercised. The Court pointed out that the congregation who selected her to work at the school "recognized God's call to her to teach." 565 U.S. at 191. "As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation." *Id.* at 192. And most importantly, the Court held that "the interest of religious groups in choosing who will preach their beliefs, *teach their faith*, and carry out their mission" was of paramount importance under the First

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[8] In his *Kedroff* concurrence, Justice Frankfurter went so far as to compare the New York statutes at issue with German laws that "gave the State the right of interference with *ecclesiastical functions* where it deemed them improperly performed." 344 U.S. at 124 n.3 (citations omitted; emphasis added). The New York Legislature's sin in *Kedroff* was the same as the German Reichstag's: arrogating to itself control over religious functions, rather than leaving those functions to the religious bodies.

Amendment. *Id.* at 196 (emphasis added). This should be no surprise, as the Court has long "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Catholic Bishop*, 440 U.S. at 501. Teaching the faith thus invokes the ministerial exception.

Drawing on the strong "functional consensus" among the courts of appeals, Justices Alito and Kagan further explained that important religious functions alone suffice to prove up a ministerial exception affirmative defense: "courts should focus on the function performed by persons who work for religious bodies." *Hosanna-Tabor*, 565 U.S. at 198; see also *id.* at 202-204 (collecting cases). Because "[t]he First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith[,]" "religious groups must be free to choose the personnel who are essential to the performance of these functions." *Id.* at 199. "A religious body's control over such 'employees' is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world." *Id.* at 199, 201. Ultimately, "religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance," such as "those who are entrusted with teaching and conveying the tenets of the faith." *Id.* at 200.

Moreover, Justices Alito and Kagan agreed with the long line of unanimous lower court precedent specifically rejecting the idea that a religious title, though of course relevant, should be *required*. See *id.*

at 202-203. Indeed, requiring a title to prove a ministerial exception affirmative defense would privilege some religious faiths over others, as many religions do not use the word "minister" in the typically Protestant fashion (Catholics, Jews, Muslims) and yet others reject the idea of ordained clergy altogether (Quakers, Sikhs). See *id.* at 202 & n.3; see also CLS Cert. Br. 9-13 ("[N]arrow definitions of 'minister'—especially laws setting educational and other credentials for ministers—were among the key evils to which the Religion Clauses were a response."). The Ninth Circuit's approach would thus "threaten to embroil the government in line-drawing and second-guessing regarding matters about which it has neither competence nor legitimacy." *Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1265 (10th Cir. 2008) (McConnell, J.).

2. The workability and correctness of the focus on function in *Hosanna-Tabor* has been borne out by courts deciding ministerial exception cases after *Hosanna-Tabor*. Since 2012, the federal courts of appeals (except the Ninth Circuit) and state supreme courts continued to follow the functional approach. For instance, in *Cannata* v. *Catholic Diocese of Austin*, the Fifth Circuit held it was "enough" to conclude that an employee "played an integral role" in worship services and thereby "furthered the mission of the church and helped convey its message." 700 F.3d 169, 177 (5th Cir. 2012). The plaintiff was ministerial "because [he] performed an important *function* during the service." *Id.* at 180 (emphasis added).

And in *Fratello*, the Second Circuit expressly agreed that *Hosanna-Tabor* left function as the central analytical consideration, holding that "'courts should

focus' primarily 'on the *function*[*s*] performed by persons who work for religious bodies.'" 863 F.3d at 205 (quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring)) (emphasis added).[9]

The Ninth Circuit's failure to give function its due has been roundly criticized. The nine-judge dissent from denial of rehearing en banc rejected the *Biel* panel's analysis as a "resemblance-to-Perich test" cobbled together from *Hosanna-Tabor*'s "'four considerations,'" and pointed out that *Hosanna-Tabor* "specifically reserved the ministerial exception's legal floor." StJ.App.49a-50a. The nine dissenting judges concluded that, "[i]n applying the ministerial exception, our court should look to the function performed by employees of religious bodies" because that would "honor the foundational protections of the First Amendment and ensure *all* religious groups are afforded the same protection." StJ.App.67a (emphasis in original).

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[9] See also *Lee* v. *Sixth Mount Zion Baptist Church*, 903 F.3d 113, 122 n.7 (3d Cir. 2018) ("[T]he ministerial exception 'applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions.'") (quoting *Petruska*, 462 F.3d at 299); *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015) (title plus function sufficed, so court did not need to reach the question of whether function alone would); *Temple Emanuel of Newton* v. *Massachusetts Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012) (no evidence with respect to three other *Hosanna-Tabor* considerations, but plaintiff's function of teaching of religious subjects at a religious school sufficed to trigger ministerial exception); *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597, 613 & n.61 (Ky. 2014) (courts should give "more" focus to "actual acts or functions conducted by the employee" and avoid "danger of hyper-focusing" on considerations such as title).

Similarly, the Seventh Circuit rejected the Ninth Circuit's function-plus-more standard in favor of focusing on religious functions. See *Sterlinski* v. *Catholic Bishop of Chicago*, 934 F.3d 568, 570 (7th Cir. 2019). The Seventh Circuit rested its holding on function alone. *Id.* at 572 ("The record shows that organ playing serves a religious function in the life of Saint Stanislaus Bishop & Martyr Parish. Under the rationale of *Hosanna-Tabor*, Sterlinski's discharge is therefore outside the scope of Title VII.").

What this continuing "functional consensus" among the lower courts demonstrates is that the functional approach provides a tested, workable rule of decision for ministerial exception cases. *Hosanna-Tabor*, 565 U.S. at 203 (Alito, J., concurring).

C. Important religious functions include leadership, worship, ritual, and expression.

Because "important religious functions" are the touchstone of the functional inquiry, that raises the question: What are "important religious functions"? In *Hosanna-Tabor*, the Court touched briefly on what important religious functions were, all in the specific context of Perich's duties. "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission." *Hosanna-Tabor*, 565 U.S. at 192. The Lutheran church had expressly charged her with "lead[ing] others toward Christian maturity" and "teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." *Ibid.* (quoting Supplemental Diploma of Vocation, Joint Appendix at 48). Perich carried out

these important religious responsibilities in several ways. She:

- "taught her students religion four days a week";
- "led them in prayer three times a day";
- "took her students to a school-wide [weekly] chapel service";
- "took her turn leading [chapel], choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible"; and
- "led her fourth graders in a brief devotional exercise each morning."

Ibid. This led the Court to conclude that, "as a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation." *Ibid.* These were the "important religious functions [Perich] performed for the church." *Ibid.* Thus at the very least, in the specific context of teaching school, important religious functions include teaching religion, leading students in prayer, taking students to worship services, occasionally leading those worship services, and leading students in devotional exercises.

In their *Hosanna-Tabor* concurrence, Justices Alito and Kagan laid out a more comprehensive list of important religious functions, stating that the ministerial exception applies "to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Hosanna-Tabor*, 565 U.S. at 199. They repeated the same list, with slight variations, three other times. See

id. at 200 (listing "religious leadership, worship, ritual, and expression").

Given that "[d]ifferent religions will have different views on exactly what qualifies as an important religious position," this list of important religious functions was not meant to be exhaustive. *Hosanna-Tabor*, 565 U.S. at 200 (noting that employees who perform religious functions "*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" (emphasis added)). Rather, the form of the protection must follow the function protected—and since there are many different religious functions that exist in a religiously diverse nation, there will necessarily be many different sorts of protections.

Justices Alito and Kagan emphasized that the four categories of function on their list were "objective functions that are important for the autonomy of any religious group, regardless of its beliefs." *Hosanna-Tabor*, 565 U.S. at 200. Put another way, it does not matter if the teacher is teaching Lutheranism to students at a Lutheran church school, teaching Judaism to students at a Jewish day school, or teaching Catholicism to students at a Catholic school. Teaching religion is, objectively speaking, an important religious function, regardless of the specific religious tradition involved. As Justice Breyer remarked recently, "there is nothing more religious, except perhaps for the service in the church itself, than religious education. That's how we create a future for our religion." Oral Argument Transcript at 62:3-6,

Espinoza v. *Montana Dep't of Rev.*, No. 18-1195 (Jan. 22, 2020); see also *Catholic Bishop*, 440 U.S. at 504 (noting that, for this reason, the "church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school").

Thus, when an individual serves in leadership, conducts worship or rituals, or serves as a messenger or teacher of the faith, those are important religious functions sufficient to bring the individual within the ministerial exception. As the cases demonstrate, the great majority of ministerial exception cases can be decided on the basis of these religious functions. That is, in most cases where a defendant has successfully interposed a ministerial exception affirmative defense, at least one of these functions has been present. See, *e.g.*, Law Professors Cert. Br. 18 (discussing cases applying *Hosanna-Tabor*); *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) (describing caselaw). And in cases where the ministerial exception has failed, the functions of leadership, worship, ritual, or expression have not been established. See, *e.g.*, *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 583 (6th Cir. 2018), cert. granted on other grounds, 139 S. Ct. 1599 (2019).

Focusing on the four important religious functions identified by Justices Alito and Kagan thus provides a time-tested, workable approach to applying the ministerial exception under *Hosanna-Tabor*.

II. Respondents' claims are barred by the ministerial exception.

Respondents' claims are barred by the ministerial exception under *Hosanna-Tabor* for two reasons.

First, they performed the important religious functions of teaching the Catholic faith to their fifth-graders, leading them in worship and ritual, and engaging in other forms of religious expression. That alone suffices to apply the ministerial exception. Second, Respondents also bore formal titles with substance behind them—teacher and catechist—along with training in religious pedagogy, all of which separately brings them within the scope of the ministerial exception.

A. The ministerial exception applies because Respondents carried out important religious functions.

1. Both Morrissey-Berru and Biel carried out the important religious function of teaching the Catholic faith to the next generation. It is undisputed that each taught regular devotional classes on Catholic doctrines and beliefs. That alone is enough for the ministerial exception to apply.

Morrissey-Berru taught religion every school day. She gave detailed testimony concerning the fundamental tenets of the Catholic religion that she taught to her students. OLG.App.90a-93a. These beliefs included doctrines of the Trinity, transubstantiation, ecclesiology, Christology, and soteriology. OLG.App.45a-51a, 90a-93a. They also included Catholic beliefs and practices regarding the sacraments, such as how to celebrate the sacraments. OLG.App.18a-20a, 45a-49a, 92a. And they included both the liturgy and history of the Church. OLG.App.49a-50a, 92a-93a.

Biel did the same. For over three hours a week—cumulatively, over 100 hours per school year—she

taught her students Catholic doctrine and practice, including the Church's sacraments, social teaching, holy days, prayers, scriptural accounts, and history. StJ.App.18a, 81a-84a.

Moreover, both teachers taught the subject of religion devotionally—that is, in a manner intended to encourage the children to make the Catholic faith their own. OLG.App.91a-94a; StJ.App.92a-96a. As the *Morrissey-Berru* panel correctly recognized, teaching religious doctrine to fifth-graders is a "significant religious responsibilit[y]." OLG.App.3a.

Respondents' teaching function compares favorably with the record in *Hosanna-Tabor*, where Perich also taught her students religion four days a week. Indeed, if anything, Morrissey-Berru and Biel did *more* than Perich to "transmit[] the [Catholic] faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 192. Morrissey-Berru taught her students religion five days a week rather than Perich's four. OLG.App.90a. And Biel taught her students religion for 200 minutes per week. StJ.App.50a, 82a. By contrast, Perich taught her students religion for a total of 180 minutes per week. *Hosanna-Tabor*, 565 U.S. at 192-193. In short, Respondents' students received more devotional Catholic doctrinal instruction on a weekly and annual basis from Respondents than from any other official of the Catholic Church, including their parish priest.

Nor was this an accident. Parochial schools are a fundamental design element of the Catholic Church's efforts to transmit the faith. The Code of Canon Law recognizes Catholic schools as "the principal assistance to parents" in providing a Catholic education. Code of Canon Law, Canon 796 § 1. And as

the Second Vatican Council declared, "Catholic parents [have] the duty of entrusting their children to Catholic schools whenever and wherever possible" to "prepare[] them for service in the spread of the Kingdom of God." Declaration on Christian Education, *Gravissimum Educationis* § 8 (1965). Thus, teachers at these schools have a unique, theologically-driven role within the Church to train the next generation. *Id.* ("[T]he Catholic school depends upon [teachers] almost entirely," and thus the "work of these teachers * * * is in the real sense of the word an apostolate."); see also NCEA Cert. Br. 6-9.

If churches must be free to pick their priests without government interference, then they must also be free to select those who hold the "critical and unique role" of teaching religion to their children. *Catholic Bishop*, 440 U.S. at 501. Respondents' teaching duties thus suffice on their own to bring Respondents within the ministerial exception.

2. Respondents' ministerial status is also proven here because—aside from their function of teaching a religion class—they engaged in other forms of religious expression, worship, and ritual with their students.

Both Morrissey-Berru and Biel infused Catholic faith and values into all of the academic subjects that they taught. OLG.App.86a, 95a; StJ.App.83a-84a, 106a; see also *Catholic Bishop*, 440 U.S. at 501 (noting that part of "the importance of the teacher's function in a church school" is that regardless of whether "the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,'" teachers can ensure "that religious doctrine will become intertwined"). Both included visible Catholic symbols in their classrooms.

OLG.App.95a; StJ.App.18a, 83a-84a, 106a. Morrissey-Berru annually directed a play of the Passion of the Christ, for which she explained the biblical significance of the Passion, prepared dialogue from biblical passages, and then held the play for the whole school to celebrate Easter. OLG.App.69a. They also embodied the Catholic faith in their interactions with students, and used their role as teachers to guide the spiritual formation of their students. OLG.App.32a-33a, 55a (noting that "[m]odeling, teaching of and commitment to Catholic religious and moral values are considered essential job duties"); StJ.App.19a-20a, StJ.SER.10. This is in keeping with the requirement of the Second Vatican Council that "teachers by their life as much as by their instruction bear witness to Christ, the unique Teacher." *Gravissimum Educationis* § 8.

Both teachers also accompanied their students in worship. Morrissey-Berru led her students in worship by taking them to Mass and by helping her students plan and carry out elements of the Mass. OLG.App.20a-23a; 81a-83a; 88a-89a. One of the duties in her contract in her final year was to help plan the liturgy for Mass. OLG.App.42a. And she annually brought her students to the Cathedral of Our Lady of Angels to let them serve at the altar. OLG.App.95a-96a. Biel also took her students to Mass, where she testified that she worshiped with them. StJ.App.82a; 95a-96a. Twice a year, Biel also brought her students to participate in the Mass by presenting the Eucharistic gifts of bread and wine to be consecrated in the Mass. StJ.App.94a-95a.

Both teachers joined their students in group prayer, which is of course a ritual in many religious

traditions, including Catholicism. Morrissey-Berru led her students in prayer, specifically the Hail Mary prayer, every day, along with spontaneous prayers, for example if a child's mother was ill. OLG.App.21a; 86a-87a. And Biel likewise led her students in the ritual of prayer twice a day, including both the Hail Mary prayer and the Our Father or Lord's Prayer. StJ.App.80a-82a; 93a-94a.[10]

In sum, Respondents' many additional functions of religious expression, worship, and ritual provide strong support to find that they were ministerial employees.

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[10] The Our Father reads:

Our Father, who art in heaven, hallowed be thy name;
thy kingdom come;
thy will be done on earth as it is in heaven.
Give us this day our daily bread;
and forgive us our trespasses
as we forgive those who trespass against us;
and lead us not into temptation,
but deliver us from evil. Amen.

The Hail Mary reads:

Hail Mary, full of grace, the Lord is with thee; blessed art thou among women, and blessed is the fruit of thy womb, Jesus.
Holy Mary, Mother of God, pray for us sinners now and at the hour of our death. Amen.

B. The ministerial exception applies because Respondents bore religious titles and had religious training.

Although it is unnecessary to reach the issue because the existence of important religious functions is alone sufficient, Respondents also qualify as ministers under *Hosanna-Tabor*'s other considerations. In a number of cases, some combination of the three "title" considerations will suffice. The clearest case is where a priest, rabbi or pastor sues, and there is therefore no need to examine functions in detail. See, *e.g.*, *Rweyemamu*, 520 F.3d at 209 (noting it sufficed that "Father Justinian [wa]s an ordained priest of the Roman Catholic Church").[11]

Here, Morrissey-Berru was a ministerial employee based both on her "formal titles" of teacher and certified Catechist, and on the substance behind those titles, namely her appointment and training as teacher and Catechist and her use of that training to instruct her students. OLG.App.60a-62a; 84a-85a.

Of particular note is that for anyone to become a teacher at Our Lady of Guadalupe School, the parish priest had to approve the prospective teacher's hiring

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[11] It seems unlikely that formal title alone—in the absence of any substance behind the title, or any separate use of the title—could suffice for the ministerial exception to apply. See *Hosanna-Tabor*, 565 U.S. at 193 ("[S]uch a title, by itself, does not automatically ensure coverage[.]"). We are aware of no case where a defendant has relied on formal title alone in an effort to prove up a ministerial exception defense. Cf. *United States* v. *Quaintance*, 608 F.3d. 717, 722 (10th Cir. 2010) (Gorsuch, J.) (merely receiving a certificate designating defendant as "an authorized church courier" for the Church of Cognizance did not allow RFRA defense to drug-running charge).

and any contract renewal; he also signed the employment contract. OLG.App.36a-37a, 42a; see also 14a. That is because the canon law of the Catholic Church provides that: "The local ordinary [bishop] is to be concerned that those who are designated teachers of religious instruction in schools * * * are outstanding in correct doctrine, the witness of a Christian life, and teaching skill." Code of Canon Law, Canon 804, § 2. The hiring of teachers is thus "a canonical act" and "it is the function of the church authorities to determine what the essential qualifications of a [teacher] are and whether the candidate possesses them." *Gonzalez*, 280 U.S. at 16.

Biel was in a similar position. Her formal title was "Grade 5 Teacher" *of St. James Catholic School*—which, in context, clearly bears religious significance. The substance behind the title also cuts strongly in favor of applying the ministerial exception. As Judge Fisher pointed out in his dissent in *Biel*, it is "strained" not to read Biel's title *in pari materia* with the school handbook's designation of all of St. James's teachers as "Catholic school educators." StJ.App.27a. Further, the school made clear its "expectation, to which Biel specifically consented in her employment contract, that she propagate and manifest the Catholic faith in all aspects of the role." StJ.App.28a. Moreover, Biel's appointment as a teacher at the school was also subject to the continuing approval of the parish priest and thus "a canonical act," just like Morrissey-Berru's. StJ.App.101a-103a. Indeed, the parish priest's role in deciding who was called to teach was analogous to the role of the congregation in *Hosanna-Tabor*, which called Perich to her role as a teacher. *Hosanna-Tabor*, 565 U.S. at 178.

Finally, Biel was also sent by Sister Mary Margaret to undergo training in how to become a better religious educator at a Catholic education conference called the Los Angeles Religious Education Congress. At the Congress Biel learned among other things different methods for "incorporating God" into her teaching of students. J.A.229, 262, 333.

In short, there is more than enough evidence in the summary judgment record to render judgment for Petitioners based on the other *Hosanna-Tabor* considerations.

* * *

These two teachers were deeply involved in guiding and growing the spiritual lives of the fifth-graders at Our Lady of Guadalupe and St. James. Indeed, inculcating their students in the Catholic faith was their "overriding commitment." And the record demonstrates in great detail how Morrissey-Berru and Biel carried out that mission every day of the week.

In the end, these cases boil down to just a few crucial facts: Respondents carried out the important religious functions of transmitting the Catholic faith to the next generation and accompanying their students through Catholic worship and ritual. They were religious teachers who catechized their students, just as they had been trained to do. The First Amendment's ministerial exception places control over such employees in the hands of the church, not the state. That is enough to decide these cases.

CONCLUSION

The decisions below should be reversed.

Respectfully submitted.

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