CASE NO. 17-56624

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AGNES MORRISSEY-BERRU

Plaintiff and Appellant,

v.

OUR LADY OF GUADALUPE SCHOOL

Defendant-Appellee.

APPELLEE'S ANSWERING BRIEF

Appeal From the United States District Court for the
Central District of California, Western Division – Los Angeles
D.C No. 2:16-cv-09353-SVW-AFM
Hon. Stephen V. Wilson

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Federal Rules of Appellate Procedure, Rule 26.1, Defendant-Appellee Our Lady Of Guadalupe School, is not a corporation, does not have a parent corporation and no publicly held corporation owns 10% or more of its 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; civilly, Our Lady Of Guadalupe School is treated as an unincorporated association 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 are held by and operated through certain of those corporations.

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I.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the case pursuant to 28 U.S.C. § 1331, as the action arose under the Age Discrimination in Employment Act ("ADEA"), 29 USC §§ 621 *et seq*. On December 7, 2017, the District Court entered final judgment in favor of Defendant-Appellee Our Lady of Guadalupe School ("Our Lady of Guadalupe" or the "School"). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II.

ISSUES PRESENTED

This appeal primarily concerns the application of the "ministerial exception," a doctrine recognized by the United States Supreme Court as required by the First Amendment's Free Exercise and Establishment Clauses. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181 (2012); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1293 (9th Cir. 2010) (en banc).

The primary issue in this appeal is whether the District Court properly granted summary judgment in favor of Our Lady of Guadalupe based on its finding that Morrissey-Berru was covered by the ministerial exception created by the Religion Clauses to the First Amendment to the U.S. Constitution.

The following issues raised on summary judgment present alternative grounds for affirmance:

- Whether Morrissey-Berru failed to timely exhaust her administrative remedies with regard to the part time position she was assigned.

- Whether the School had legitimate non-discriminatory reasons for assigning Morrissey-Berru to the part time position, and whether this decision would not have been made "but-for" Morrissey-Berru's age.
- Whether the School had legitimate non-discriminatory reasons for not offering Morrissey-Berru a new contract, and whether this decision would not have been made "but-for" Morrissey-Berru's age.

III.

STATEMENT OF THE CASE

A. Our Lady of Guadalupe School is a Non-Profit Religious Entity Committed to Providing a Catholic Education

Our Lady of Guadalupe is a Catholic parish school operated by the parish under the jurisdiction of the Archdiocese of Los Angeles. (Excerpts of Record, vol. 2 at 58-59 ("ER 2:58-59").) The parish, of which the School forms a part, is a non-profit religious entity. (ER 2:59.) The pastor is the ex-officio chief administrative officer of Our Lady of Guadalupe, and he carries out the policies of the Archdiocesan Advisory Board. (ER 2:60.) Our Lady of Guadalupe follows guidelines established by the Archdiocese's Department of Catholic Schools. (ER 2:62-64, 4:562-563, 676-677.)

The faculty and staff of Our Lady of Guadalupe are committed to faith-based education, with their overriding mission to provide a quality Catholic education for the students in a spiritual environment grounded in Catholic teachings, values, and traditions. (ER 2:60-61, 64-65, 4:539, 663, 607-647, 675, 718-719, 5:824-826, 838-839.)

The School's mission of developing and promoting a Catholic faith community is set forth in every teacher's employment agreement. (ER 2:65-67, 4:539, 663, 676, 718-719, 5:838-840.) All duties and responsibilities of each teacher at Our Lady of Guadalupe are to be performed within the School's overriding commitment to developing the faith. *Id.* So as to most effectively develop the faith of its students, in order to teach religion at the School, a teacher needed to be a Catholic, and it was strongly preferred that teachers of all other subjects also be actively practicing Catholics. (ER 4:719-720.)

B. Morrissey-Berru Was Responsible for Introducing Students to Catholicism and for Giving Students a Groundwork for their Religious Doctrine

Morrissey-Berru began working full time at the School as a teacher in 1999, at the age of 48. (ER 2:61.) She taught religion every year of her employment. (ER 2:67, 4:677, 5:819, 834.) Morrissey-Berru understood that the School's mission was to promote and develop the Catholic faith amongst its students by incorporating its faith into their curriculum. (ER 2:64-67, 4:539, 663, 676, 718-719, 5:838.) Morrissey-Berru believed that the mission of the School was to teach children with Catholic values. (ER 5:824.) Morrissey-Berru was committed to teaching children Catholic values and to faith-based education. (ER 5:826.) Her job was to introduce students to Catholicism and to give them a groundwork for their religious doctrine. (ER 5:826, 838.)

Every teacher annually executed a written employment agreement, by which they agreed to promote and develop the Catholic faith within their students. (ER 2:61-62, 65-67, 4:539, 663, 676, 718-

719, 5:838-840.) Morrissey-Berru's employment agreements stated the following:

> It is understood that the mission of the School is to develop and promote a Catholic School Faith Community within the philosophy of Catholic education as implemented at the School, and the doctrines, laws, and norms of the Catholic Church. All duties and responsibilities of the Teacher shall be performed within this overriding commitment.

(ER 4:539, 663.)

Further, Our Lady of Guadalupe specifically outlined its religious requirements in regards to Morrissey-Berru's duties:

> You acknowledge that the School operates within the philosophy of Catholic education … You understand and accept that the values of Christian charity, temperance and tolerance apply to your interactions with your supervisors, colleagues, students, parents, staff and all others with whom you come in contact at or on behalf of the School. In both your professional and private life you are expected to model and promote behavior in conformity to the teaching of the Roman Catholic Church in matters of faith and morals.

(ER 4:539, 663.)

Morrissey-Berru further agreed that the School retained the right to "operate[] within the philosophy of Catholic education and retain[ed] the right to employ individuals who demonstrate an ability to teach in accordance with this philosophy." (ER 4:539, 663.)

Morrissey-Berru additionally agreed to instill and advance the Catholic faith in her students by not only teaching it but also by modeling the values of the faith to her students. *Id.* To that effect, Morrissey-Berru was expected to participate in school liturgical

activities herself, including attending monthly family Mass and faculty prayer services. (ER 2:28:25-29:2, 34:4-6, 72-73, 4:678, 5:840.)

Morrissey-Berru also agreed to perform her duties and responsibilities in conformity with the School's overriding mission of promoting and developing the Catholic faith. (ER 2:64-69, 4:539, 663, 5:824-826, 838-839.) Her duties included incorporating the Catholic faith into the students' daily curriculum, and teaching Religion every day during her employment. (ER 2:67, 74-75, 4:677, 5:819, 830, 834.) She taught students about Creation, the seven sacraments, the sacramentals, baptism, confirmation, the Eucharist, reconciliation, the Holy Orders and matrimony. (ER 2:69-70, 4:614-634, 679, 5:834-836.) Her students were expected to learn and express the belief that Jesus is the son of God and the Word made flesh, and to identify the ways that the Church carries on the mission of Jesus. (ER 2:69-71, 5:836.) She also taught students to explain the communion of saints and to recognize the presence of Christ in the Eucharist. (ER 2:70-71, 5:836-837.)[1]

Through Morrissey-Berru's teaching, students learned to locate, read and understand stories from the Bible that relate to the sacraments. (ER 2:70-71, 5:837.) She taught students the four marks of the Church, to know the names, meanings, signs and symbols of each of

[1]The Eucharist is bread and wine which becomes Christ's Body and Blood by the invocation of the Holy Spirit during Mass. *See* Catechism of the Catholic Church, HOLY SEE (last visited May 14, 2018), http://www.vatican.va/archive/ENG0015/__P3Z.HTM.

the seven sacraments, to recognize the liturgical calendar, to recognize the meaning and celebration of the Sacred Triduum, and to understand Original Sin. (ER 2:69-71, 5:837-838.) She utilized a Catholic textbook entitled "Blest Are We." (ER 2:69-70, 5:834.) Morrissey-Berru was also responsible for administering the yearly assessment of children religious education test, a test on Catholic teachings for the fifth grade. (ER 2:73-74, 5:831.)

Morrissey-Berru also gave evidence to the importance of prayer and worship. (ER 2:71-73, 5:921-922.) She taught children how to go to Mass, the parts of the Mass, communion, prayer (including the prayer service of Reconciliation, the Apostles' Creed and the Nicene Creed), confession, how to celebrate the sacrament, and how to participate in the prayer service with the water, bread, wine, oil, and light. (ER 2:71-73, 5:825, 837.)

Religious teachings and practices were required to be applied in everyday life and in all subjects. (ER 2:74-75, 5:830.) The School required all teachers to pray with their students every day. (ER 2:71-72, 5:831.) Morrissey-Berru led the "Hail Mary" daily prayer with the students, and said another prayer at the end of each class. (ER 2:71-72, 5:831.) She also tried to incorporate spontaneous prayers, such as prayers for students' ill family members. (ER 2:71-72, 5:830-831.)

Morrissey-Berru took her class to weekly Mass and monthly school-wide Mass, and prepared students to read during these services. (ER 2:72-73, 5:832-834.) She also took her class to prayer services for the Feast of our Lady, Reconciliation, Stations of the Cross, Lenten Services, and Christmas. (ER 2:72-73, 5:832-833.) Her class was in

charge of All Saints Day Mass and liturgy planning for monthly school-wide Mass . (ER 2:72-73, 5:827, 832.)

On her own initiative, Morrissey-Berru annually took her students to tour Our Lady of Angels Cathedral and gave them the opportunity to serve at the altar there. (ER 2:76, 5:921.) She believed this was an important experience and honor for the students. *Id.*

Morrissey-Berru was responsible for integrating Catholic teachings and values into *every* subject she taught. (ER 2:74-75, 5:830.) She integrated religious attitudes and values into all curricular areas, and strove to instruct students consistent with Church teachings. (ER 2:74-75, 5:922.) Our Lady of Guadalupe evaluated Morrissey-Berru's overall teaching performance by how well she incorporated the Catholic faith in all subjects, and also on Catholic identity factors in the classroom (*e.g.*, visible evidence of Catholic signs and sacramental traditions). (ER 2:73, 4:659-661, 670-673, 679, 5:919-920.)

The most sacred time of the Catholic liturgical calendar is the week leading up to Easter Sunday. This includes reenacting the Passion of the Christ, which depicts the journey of Jesus in his final hours and eventual crucifixion. (ER 2:75, 4:678, 743-745, 773.) Morrissey-Berru planned that celebration each year, including explaining the scriptural significance of the Passion to the students, and she directed annual student performances of the Passion play. (ER 2:75, 4:678, 743-745, 773.)

April Beuder was hired as Principal in 2012, when the School was on the verge of closing and needed drastic changes to remedy declining enrollment. (ER 2:76, 4:652-655, 675, 679, 720-723, 727-732.) There was

only one eighth grade graduate the prior year, and the parish heavily subsidized the School to keep it open. *Id.* Among the changes needed was to provide teachers with Catechetical formation -- training that should have been done prior to Beuder's arrival, according to guidelines set forth by the United States Catholic Conference of Bishops. (ER 2:67-68, 4:654-655, 722-727.) Within the Archdiocese in the Department of Catholic Schools, each teacher is called to be a catechist or teacher of religion, and is responsible for their students' faith formation. (ER 4:719, 722-727.) After Beuder joined the School, the Archdiocese's religious education department provided courses to the teachers, including on the history of the Catholic Church and the Bible. (ER 2:40-45, 67-68, 4:635-639, 677, 722-727, 5:828-830.) Morrissey-Berru underwent this religious training and obtained Catechist certifications, certifying her knowledge of Catholicism. (ER 2:40-45, 67-68, 4:635-639, 677, 722-727, 5:828-830.)

C. Beuder Re-Hires Morrissey-Berru

Beuder asked 5th-8th grade teachers to apply for their positions for the 2012-2013 school year, and decided to offer Morrissey-Berru a contract. (ER 2:78-79, 4:679-680, 736-738, 761-769, 770-772, 5:841-843.) Beuder was 51 years old, and Morrissey-Berru was 61 years old at the time. (ER 2:76, 79; 4:675, 679-680, 712; 5:842-843.) The School's teachers all work on one-year fixed-term contracts, with the decision to offer a new contract determined year-to-year at the School's discretion. (ER 2:61; 4:538-544, 662-667, 676; 5:819-822.) Morrissey-Berru understood the School had no implied duty or obligation to offer a new

agreement and that no cause was required for the decision not to offer a new contract. (ER 2:62; 4:538-544, 662-667, 676; 5:819-822.)

D. Beuder's Hiring Mandate Is to Adopt a New Reading Program, but Morrissey-Berru Fails to Implement It

Beuder was also tasked with addressing other critical goals that accreditation organizations for Catholic schools had identified for Our Lady of Guadalupe, and made improvement in the reading and writing curriculum a top priority. (ER 2:76-77, 4:652-655, 679, 720-732, 5:844.) The accreditors' Report of Findings identified the following critical goal: "*Investigate and adopt new reading program for grades 2-5.*" (ER 4:654-655.) Beuder immediately adopted a comprehensive curriculum called Readers and Writer's Workshop ("the Workshop"), which emphasized the use of short "mini-lessons" followed by individual student work time that gave the teacher an opportunity to "confer" with students and "differentiate" instruction among students at different levels, depending on students' needs. (ER 2:79-80; 4:520-525, 652-655, 680, 694, 696, 733-744; 5:844, 870, 894.)

Beuder hired an outside consultant, Dr. Sarah Kersey, to help teachers implement the program. (ER 2:80-81; 4:680, 693, 735; 5:852-855, 890.) Dr. Kersey observed and coached Morrissey-Berru and the other teachers, taught them about the curriculum, conducted classroom evaluations, met with them and gave suggestions for improvement. *Id.*

By the end of the 2012-2013 school year, Beuder determined that Morrissey-Berru had not fully implemented the program in her class. (ER 2:81-84; 4:656-667, 680, 693-694, 749-754, 787-788; 5:874-882.) Beuder's June 2013 Evaluation of Morrissey-Berru indicated that she

"*need[ed] improvement in continuing to implement Reader's and Writer's Workshop, specifically integrating conferring and spending more time on text*." (ER 2:84-85, 4:661, 680, 693-694; 5:876-877.) Beuder reviewed this evaluation with Morrissey-Berru, and both signed it. *Id.*

Beuder offered Morrissey-Berru a new contract for 2013-2014, but specifically added a stipulation stating that one of her job duties for the school year would be to "*fully implement readers/writers workshop.*" (ER 2:85-89; 4:662-667, 681, 693-694, 740-741, 749-754; 5:876-877.) Morrissey-Berru understood that Beuder was trying to help her implement the Workshop, and Dr. Kersey provided extra support for Morrissey-Berru during the 2013-2014 school year. (ER 2:89-90; 4:520-521, 656-658, 668-669, 681, 693-695, 753-754; 5:852-857, 860-861, 884-886, 890.)

However, Beuder and Dr. Kersey continued to have concerns about Morrissey-Berru's failure to implement the Workshop. (ER 2:90-94; 4:520-535, 668-673, 681, 756-758, 789-790, 693-697; 5:857-898.) In particular, Dr. Kersey saw no evidence that Morrissey-Berru was properly conferring with the students or that students were writing in the classroom, both essential components of the new program. (ER 2:94-95; 4:520-525, 681, 694-697, 703-704; 5:857, 860, 871, 873-874.) Dr. Kersey also was generally critical of Morrissey-Berru's teaching methods, giving her suggestions for improvement. (ER 2:95, 4:520-525, 681, 693-697, 756-758, 5:857-864, 869-870, 872-874.)

Incredibly, in her deposition, Morrissey-Berru admitted that there was an element of pretense in her purported compliance with Dr. Kersey's feedback. (ER 2:95-97; 5:865-867, 885-888.) For example, she

deliberately put up student work on the classroom wall that she had yet to grade, just for Dr. Kersey's benefit, and then took it down immediately after Dr. Kersey left the classroom. (ER 2:95-96; 4:520-523, 695-696; 5:865-867.) When another teacher did a peer visit of Morrissey-Berru's class, Morrissey-Berru re-taught the *exact same* lesson from the day before, drawing an admonition from Beuder. (ER 2:97, 4:682, 695-696, 5:885-888.)

Dr. Kersey frequently relayed her concerns regarding Morrissey-Berru's failure to implement the Workshop to Beuder, who communicated those concerns and her own to Morrissey-Berru. (ER 2:97-99; 4:520-521, 680-683, 694, 696-697, 703-705, 746-750, 756-758, 776-777, 787-788; 5:858-860, 874-875.) Morrissey-Berru understood that Dr. Kersey and Beuder were not pleased with her performance. (ER 2:99-100; 4:520-535, 668-673, 680-683, 693-697, 703-704, 746, 749-750, 787-788; 5:857-898.) Morrissey-Berru's November 14, 2013 Professional Conduct Review Form, which Beuder reviewed with her, stated that Morrissey-Berru needed improvement in the Workshop, including in the conferring and writing requirements. (ER 2:101-102; 4:670-673, 681, 693-697; 5:884-885.)

In February 2014, teachers were asked in advance to bring a set of writing samples from one of their lessons to be used for a Peer Lesson Study. (ER 2:102-103; 4:526-530, 682; 5:888-890.) Morrissey-Berru brought in a poor example of student work, as the other teachers confirmed. *Id*. In March 2014, Beuder made a previously-scheduled visit to Morrissey-Berru's classroom to observe and evaluate a Workshop lesson, but Morrissey-Berru failed to teach a lesson using the essential

elements of the Workshop – a mini-lesson and conferring. (ER 2:103-104; 4:531-535, 682-683, 794-795, 5:891-898.) Beuder was unable to complete Morrissey-Berru's evaluation because she did not feel that Morrissey-Berru had conducted a Workshop lesson. *Id.* There were also parental complaints that Morrissey-Berru's teaching was not rigorous enough (*e.g.*, excessive coloring and drawing as opposed to substantive learning). (ER 2:104-105; 4:553-555, 683,778-779, 791-792, 799, 5:903-906.)

E. Beuder Creates A Part Time Position For Morrissey-Berru

Because of Morrissey-Berru's performance problems, Beuder determined that, for the sake of the students, she could not have Morrissey-Berru continue to teach the Workshop. (ER 2:106-108; 4:520-535, 668-673, 684, 693-697, 704, 789-790, 793-794, 5:857-898.) The Workshop was a progressive system that became more challenging as the students advanced in grade level, and Beuder did not feel that she could continue to send Morrissey-Berru's students to the next grade, unprepared for the next steps in the Workshop. (ER 2:108-110, 4:684, 697, 759-760, 789-790.)

In May 2014, Beuder told Morrissey-Berru that she was not implementing the Workshop program correctly and that the School needed to devise a solution for her role. (ER 2:110, 4:684, 693-697, 793, 5:898-900.) After shuffling schedules and the budget, Beuder created a new part-time position for Morrissey-Berru, that would allow her to keep teaching but avoid involvement with the Workshop. (ER 2:110-111, 4:684, 782-783, 793-798, 800; 5:898-901.) In mid-May 2014, Beuder offered Morrissey-Berru the part-time position to teach 5th

grade Religion and 5th-7th Grade Social Studies for one year. (ER 2:111, 4:538-544, 684; 5:819-820.) Morrissey-Berru accepted the offer and signed her employment agreement, which identified a lower salary, on May 19, 2014. (ER 2:111, 4:538-544, 684; 5:819-820.)

In July 2014, Beuder hired Andrea Ruma Harrington, age 39, for a part-time position teaching 5th grade Reading and Writing. (ER 2:112-113; 4:685, 5:901-902.) Ruma-Harrington had a teaching credential, a Master's in education, and over 10' years teaching experience. *Id.* Morrissey-Berru conceded Ruma-Harrington was "experienced" and a "very good teacher," and admired her teaching techniques. (ER 2:113; 4:685; 5:901-902)

F. Morrissey-Berru is Not Offered a New Contract For Business Reasons

Morrissey-Berru completed her 2014-2015 contract in the part-time position Beuder created. (ER 2:117-118, 4:538-544, 556-557, 686; 5:909.) However, the position was budgeted for only one school year, and the School determined it could not financially sustain the position for 2015-2016. (ER 2:116, 4:556-557, 685, 800, 809; 5:901.)

In addition, while the initial goal had been to implement the Workshop program in Reading and Writing class, as the program took off and students' learning needs changed and advanced, Beuder wanted a teacher who could incorporate the Workshop into the social studies curriculum. (ER 2:116-117, 4:685, 780-781, 800-802, 809; 5:906-907, 909.) Morrissey-Berru did not implement mini-lessons when teaching social studies. (ER 5:903.) Indeed, "many" of Morrissey-Berru's social studies courses involved coloring maps, and during the 2014-2015

school year, Beuder continued to field parental complaints about the lack of academic rigor in Morrissey-Berru's classroom. (ER 2:114-115; 4:553-555, 685, 792, 799; 5:903.)

Thus, in May 2015, Beuder advised Morrissey-Berru that the part-time position had been eliminated due to the budget and the changing needs of the students, and consequently she would not be offered a new contract for 2015-2016. (ER 2:117, 4:556-557, 685-686, 780-781, 800-802, 809; 5:906-907, 909.) No teacher has held Morrissey-Berru's part-time position since it was eliminated, and all of her classes were absorbed by existing staff. (ER 2:118, 4:556-557, 685-686; 5:908.) Beuder invited Morrissey-Berru to lead an after-school program in art or photography, both interests of Morrissey-Berru's, but Morrissey-Berru never responded. (ER 2:119-120; 4:686, 803-805; 5:909-911.)

G. Procedural History

Morrissey-Berru filed her charge with the Equal Employment Opportunity Commission ("EEOC") on June 2, 2015. (ER 2:121, 4:605-606, 708.) She filed her complaint against the School on December 19, 2016, alleging age discrimination and retaliation in violation of the ADEA, and wrongful termination in violation of public policy. (ER 5:992-1000.) Morrissey-Berru dismissed the retaliation and wrongful termination claims on September 6, 2017. (ER 2:27-28.)

On August 18, 2017, the School filed its motion for summary judgment. (ER 4:520-5:991.) On September 27, 2017, the District Court granted the motion, and determined that Morrissey-Berru was a "minister" within the meaning of the ministerial exception. (ER 1:4-7.) The Court did not reach the School's other arguments on summary

judgment, but noted that part of Morrissey-Berru's claim may also be time-barred. *Id.* The District Court entered judgment on December 6, 2017. (ER 1:1-2.) Morrissey-Berru filed this appeal on October 25, 2017. (ER 1:3.)

IV.
STANDARD OF REVIEW

An order granting summary judgment is reviewed de novo. *Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1137 (9th Cir. 2009). This Court may affirm on any ground supported in the record. *Wood v. City of San Diego*, 678 F.3d 1075, 1086 (9th Cir. 2012).

V.
SUMMARY OF ARGUMENT

The District Court correctly found that Morrissey-Berru was a "minister" pursuant to *Hosanna-Tabor*.[2] Morrissey-Berru served an important religious role, as a religious school teacher who taught Catholic doctrine every day, and carried out religious functions such as leading students in prayer and teaching religious curriculum.

Morrissey-Berru's appellate arguments, if accepted, would dramatically undermine the ministerial exception and transgress its structural safeguards, which benefit both Church and State. She focuses on her "teacher" title to downplay the religious functions she performed. However, neither formal ordination nor endorsement are a necessary predicate to ministerial status. Rather, an employee's

[2] "Minister" is a legal term of art rather than a theological term. *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

function is the critical consideration under this Court's holding in *Alcazar*. Neither the federal courts nor the EEOC can evaluate the content of Our Lady of Guadalupe's religious beliefs without violating the structural protections created by the Religion Clauses that prevent government agencies and courts from becoming entangled in deciding religious questions.

Alternatively, Morrissey-Berru failed to timely exhaust administrative remedies as to her assignment to a part-time position; she filed her EEOC charge more than 300 days after she signed her part-time contract. (ER 2:121, 211; 4:538-544, 605-606, 684, 708; 5:819-820.) In any event, the School had legitimate, non-discriminatory reasons for assigning Morrissey-Berru to the part-time position – to allow her to keep teaching without involvement in the Workshop. The School also had legitimate, non-discriminatory reasons for not offering Morrissey-Berru a new contract for 2015-2016; it could not continue to financially sustain Morrissey-Berru's position, and Beuder wanted someone teaching social studies who was willing and able to incorporate the Workshop. There is no evidence that these decisions would not have been made "but-for" Morrissey-Berru's age.

VI.

MORRISSEY-BERRU WAS A MINISTER

The two Religion Clauses of the First Amendment "give[] special solicitude to the rights of religious organizations," and work in tandem to protect the autonomy of their internal decisions that "affect[ ] the faith and mission" of the organizations themselves. *Hosanna-Tabor*, 565 U.S. at 189, 190. Thus, both this Court and the Supreme Court have

"long recognized religious organizations' broad right to control selection of their own religious leaders." *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017). The Establishment Clause protects anti-establishment interests by keeping the State from becoming excessively entangled in the Church's internal affairs, including the hiring and firing of its ministers. *Hosanna-Tabor*, 565 U.S. at 184. And the Free Exercise Clause correspondingly prevents the State from restricting "the freedom of religious groups" to decide who will convey their "message and carry[] out [their] mission." *Id.* This 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." *Puri*, 844 F.3d at 1157. This exception is also "applicable to any . . . cause of action that would otherwise impinge on the church's prerogative to choose its ministers." *Id.* at 1152.

There is no dispute that the Archdiocese of Los Angeles and Our Lady of Guadalupe are "religious group[s]" entitled to assert the ministerial exception. *Hosanna-Tabor*, 565 U.S. at 177. As in *Hosanna-Tabor*, this case concerns a church-owned school which "offer[s] a 'Christ-centered education' to students in kindergarten through eighth grade." *Id.* at 177. Since Morrissey-Berru's "employer [wa]s a religious group," the only question before this Court is whether Morrissey-Berru was "one of the group's ministers." *Id.*

Under both Supreme Court precedent and Ninth Circuit law, Morrissey-Berru clearly was a minister for purposes of the ministerial exception. Each of the considerations identified as relevant in the

leading ministerial exception cases of *Hosanna-Tabor, Alcazar*, and *Puri* demonstrates that she had ministerial status.

A. Functional Consensus is the Legal Standard for Analyzing Whether an Employee has the Legal Status of Minister.

For over forty years, federal appealate courts have uniformly recognized a ministerial exception to employment laws. *See Hosanna-Tabor*, 565 U.S. at 188 n.2 (collecting cases); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012) (ministerial exception bars claims under ADEA). For example, this Court applied the ministerial exception in *Alcazar* to prohibit a Catholic seminarian from bringing a claim for overtime pay under state law. 627 F.3d at 1293. Further, this Court has prohibited a minister from suing a church for discrimination under Title VII. *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1104 (9th Cir. 2004).

In *Hosanna-Tabor*, the EEOC sued a Lutheran church school on behalf of a teacher, Cheryl Perich ("Perich"), under the Americans with Disabilities Act ("ADA"). 565 U.S. at 179. The Sixth Circuit held Perich was not a minister because, among other things, she engaged in only 45 minutes of religious instruction per school day, with the remainder devoted to secular subjects. *Id.* at 181. The Supreme Court unanimously reversed. *Id.* at 188. The Court declined to "adopt a rigid formula" for determining "when an employee qualifies as a minister." *Id.* at 190. Instead, it identified four considerations relevant to determining ministerial status:

(1) "the formal title given . . . by the Church";

(2) "the substance reflected in that title";

(3) "[the teacher's] own use of the title"; and

(4) "the important religious functions she performed for the church."

Id. at 192. Justice Alito, joined by Justice Kagan, wrote a concurring opinion to clarify that these four considerations had not upset the "functional consensus" among appellate courts, and that the ministerial exception applies 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. Specifically, the concurrence 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.

In describing the "functional consensus," the concurrence relied particularly on this Court's *en banc* decision in *Alcazar*:

> The Ninth Circuit too has taken a functional approach, just recently reaffirming that "the ministerial exception encompasses more than a church's ordained ministers." *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010) (en banc); *see also Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 958 (9th Cir. 2004). The Court's opinion today should not be read to upset this consensus.

Hosanna-Tabor, 565 U.S. at 204.

Since *Hosanna-Tabor*, the Courts of Appeals have uniformly embraced the "functional consensus," focusing primarily on the employee's role and the functions that the employee performs. *Fratello*

v. Archdiocese of N.Y., 863 F.3d 190, 205 (2d Cir. 2017); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015). "Where, as here, the four considerations are relevant in a particular case, 'courts should focus' primarily 'on the function[s] performed by persons who work for religious bodies.'" *Fratello*, 863 F.3d at 205 (quoting *Hosanna-Tabor*, 565 U.S. at 198) (Alito, J., concurring)); see also *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012).

This Court similarly continues to place great weight on the actual duties performed by the employee. "[A]n employee whose 'job duties reflect a role in conveying the Church's message and carrying out its mission' is likely to be covered by the exception . . . . " *Puri*, 844 F.3d at 1160 (quoting *Hosanna-Tabor*, 565 U.S. at 192).

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 Discrim.*, 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.* ("[T]he ministerial exception applies…regardless whether a religious teacher is called a minister or holds any title of clergy"); *see also Ciurleo v. St. Regis Parish*, 214 F. Supp. 3d 647, 652 (E.D. Mich. 2016) (holding that "religious function alone can trigger the [ministerial] exception in

appropriate circumstances"); *Sterlinski v. Catholic Bishop of Chicago*, 203 F. Supp. 3d 908 (N.D. Ill. Aug. 13, 2016) (in case involving Catholic church's music director, 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)); *Penn v. N.Y. Methodist Hosp.*, No. 11-cv-9137, 2013 WL 5477600 at *6 (S.D.N.Y. Sept. 30, 2013) (determining ministerial status solely by reference to evidence that chaplain's "employment functions were primarily religious in nature").

Giving weight to other factors, such as the employee's subjective belief regarding her position or a third-party's interpretation of the job title, interferes with the religious entity's authority to select its own ministers and defeats the purpose of the exception. "[T]he exception . . . [e]nsures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194–95.

C. The Ministerial Exception Applies to Employees that Perform Religious Functions, Even If They Are Not Ordained.

The ministerial exception is not limited to the head of a religious congregation or a Church's ordained minister. *Hosanna-Tabor*, 565 U.S. at 191– 93; *Alcazar*, 627 F.3d at 1291. Rather, the exception extends to a lay person whose position serves the spiritual and pastoral mission of the Church. *Hosanna-Tabor*, 565 U.S. at 191–93; *Alcazar*, 627 F.3d at 1291; *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243 (10th Cir. 2010). The minister title has been applied to teachers at religious schools. *See Hosanna-Tabor*, 565 U.S. at 191–92.

The teacher in *Hosanna-Tabor*, Perich, taught secular subjects in addition to a religion class, led her students in daily prayer and devotional exercises, and took her students to a weekly school-wide chapel service. *Id.* at 178. In applying the ministerial exception to bar the ADA claims, the Supreme Court examined the circumstances of Perich's employment, including her job duties. *Id.* at 192. Her duties "reflected a role in conveying the Church's message and carrying out its mission." *Id.* Specifically, as a source of religious instruction, Perich played an important role in transmitting the Lutheran faith. *Id.* at 188-89. Perich's position also had an underlying religious mission. *Id.*

Similarly here, Morrissey-Berru's job duties reflect an important role in conveying the Church's message and carrying out its mission. Consequently, the ministerial exception extends to Morrissey-Berru, as her position served the spiritual and pastoral mission of the School.

D. The Undisputed Facts Demonstrate that Morrissey-Berru's Duties As a Catholic Teacher Conveyed the Church's Message and Carried Out its Mission

In the same vein as *Hosanna-Tabor*, Morrissey-Berru's position as a Catholic school teacher qualified her as a "minister" for purposes of the ministerial exception, and her duties were almost identical to those performed by Perich.

Teaching the faith. Morrissey-Berru taught the subject of Religion, which entailed a specific curriculum grounded on the doctrines and teachings of the Catholic faith. (ER 2:67, 4:677, 5:819, 834.) For example, Morrissey-Berru taught her students about Creation, the sacraments, the saints, teachings of the Church, and Catholic values.

(ER 2:69-70, 4:614-634, 679, 5:834-846.) Morrissey-Berru taught her students specific Catholic practices such as how to recognize the presence of Christ in the Eucharist, and Reconciliation (act of confession). (ER 2:70-71, 5:836-837.) In addition, Morrissey-Berru taught her students stories from the Bible. *Id*. As part of her teaching, students were expected to learn that Jesus is the son of God and the Word made flesh, and the ways that the Church carries on the mission of Jesus. (ER 2:69-71, 5:836.)

In fact, Morrissey-Berru was required to teach the Catholic faith every day of every week. (ER 2:67, 4:677, 5:819, 834.) The curriculum for the Religion course was based on a Catholic text book which Morrissey-Berru used as a guide. (ER 2:69-70, 5:834.) Morrissey-Berru was also responsible for administering the yearly assessment of Catholic teachings for the fifth grade. (ER 2:73-74, 5:831.)

Although Morrissey-Berru also taught secular subjects to her students, she was required to incorporate the Catholic values and traditions throughout all her subjects as mandated in her employment contract. (ER 2:74-75; 4:539, 663, 5:830.) Morrissey-Berru's overall performance as a teacher was evaluated based on her ability to incorporate the Catholic traditions throughout all subjects. (ER 2:73, 5:920.) For example, two standard requirements included in the School's teacher evaluation reports were 1) incorporating "signs, sacraments, traditions of the Roman Catholic Church in the Classroom," and 2) "infusing Catholic values through all subjects areas." (ER 2:73, 4:659-661, 670-673, 679, 5:919-920.)

Praying with Students. As a Catholic, Morrissey-Berru prayed specific Catholic prayers with her students, including the Hail Mary, at least once a day every day. (ER 2:71-72, 5:830-831.) She also took her class to weekly mass and monthly school-wide masses, and additional prayer services. (ER 2:72-73, 5:832-834.) She was responsible for preparing her students to read during weekly mass, and for the school mass. *Id.* Her class was also in charge of liturgy planning one school mass a month and the All Saints Day mass. (ER 2:72-73, 5:827, 832.) In addition, every year, on her own initiative, she took her students to Our Lady of Angels Cathedral to alter-serve. (ER 2:76, 5:921.) Morrissey-Berru not only attended services with her students, she taught her children *how* to go to mass, and the parts of the mass, communion, prayer and confession. (ER 2:72-73, 5:825.) For example, she taught students *how* to celebrate the sacrament, and *how* to pray the Apostles' Creed, the Nicene Creed, and Reconciliation. (ER 2:71, 5:837.)

Training. Beuder required Morrissey-Berru to attend catechist certifications, where she was trained on the Bible and the history of the Catholic Church. (ER 2:40-45, 67-68; 4:635-639, 654, 677, 722-727; 5:828-830.)

Teaching is an essential religious function for practically all religious groups. *Hosanna- Tabor*, 565 U.S. at 200 (Alito, J., concurring). Thus, those employees "who are entrusted with teaching and conveying the tenets of the faith to the next generation" are essential to the continuing independence of religious groups. *Id.*

E. Morrissey-Berru Accepted Our Lady of Guadalupe's Call to Religious Service

Just like the minister-employee in *Hosanna-Tabor*, Morrissey-Berru "held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms." *Hosanna-Tabor*, 565 U.S. at 191. Our Lady of Guadalupe offered Morrissey-Berru a formal call to teach and emulate the Catholic faith by presenting her with a written agreement that made it clear that the parties "understood that the mission of the School [was] to develop and promote a Catholic School Faith Community within the philosophy of Catholic education as implemented at the School, and the doctrines, laws and norms of the Catholic Church." (ER 4:538-544, 662-667.) Morrissey-Berru acknowledged and formally accepted these terms by signing the written agreement. *Id.* Morrissey-Berru confirmed her commitment to this mission in her sworn deposition testimony as well. (ER 5:838-839.)

Morrissey-Berru's contractual acceptance of her religious duties is not diminished by the fact that it did not occur during a formal religious ceremony. Morrissey-Berru explicitly agreed to advance the Catholic faith through her duties as a teacher. (ER 4:538-544, 662-667; 5:838-839.) As discussed, that involved teaching a daily religion class, saying daily prayers with her class, attending Mass with her class, and incorporating the Catholic faith into all she taught.

The School made an offer of employment for Morrissey-Berru to teach and advance the tenets of the Catholic faith to her students, which is "a role distinct from that of most of its members." *Hosanna-Tabor*, 565 U.S. at 191. Morrissey-Berru's acceptance of the School's

written employment offer to serve as a teacher of its faith supports the conclusion that she is a minister. *Puri*, 844 F.3d at 1160. As a result, Morrissey-Berru cannot refute the fact that she was selected to formally teach and convey the Church's message to students on a daily basis.

F. The Court Should Defer To Our Lady of Guadalupe's Good-Faith Determination That Morrissey-Berru was a Minister

The religious significance of teaching is a religious question "that federal courts are not empowered to decide (or to allow juries to decide)." *McCarthy v. Fuller*, 714 F.3d 971, 980 (7th Cir. 2013). 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 v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013). And "matters of ... faith and doctrine" are plainly within that domain and "free from state interference." *Hosanna-Tabor*, 565 U.S. at 185-86; *see Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (the First Amendment guarantees "unfettered church choice" in this context).

Our Lady of Guadalupe's good-faith and sincere determination on the issue should be the beginning and end of the discussion of whether Morrissey-Berru was a minister. As discussed in Justice Thomas's concurring opinion in *Hosanna-Tabor*, courts ought "to defer to a religious organization's good-faith understanding of who qualifies as its minister." 565 U.S. at 196 ("[T]he evidence demonstrates that *Hosanna-*

Tabor sincerely considered Perich a minister. That would be sufficient for me to conclude that Perich's suit is properly barred by the ministerial exception.").

Indeed, tasking a court to determine whether an employee's activities are sufficiently religious for that employee to qualify as a minister necessarily requires it to take over the purely religious role of the religious entity. It is the religious entity's prerogative to determine its religious mission, who it selects to advance and promote that mission (i.e. its ministers) and what duties they are to perform to that end. *See Alcazar*, 627 F.3d at 1292 ("The district court retains the flexibility to determine whether a religious institution's designation of a person as a 'minister' is mere subterfuge.").

Here, the District Court correctly ruled that Morrissey-Berru's role as a teacher fell within the ministerial exception, by finding that Morrissey-Berru's job duties demonstrate that her position "reflected a role in conveying the Catholic Church's message and carrying out its mission." *See Hosanna-Tabor*, 565 U.S. at 192. (ER 1:18-21.) The Court explained that:

> "Plaintiff has expressly admitted that her job duties involved conveying the Church's message. … Plaintiff clearly sought to carry out the School's mission by, for example, integrating Catholic values and teachings into all of her lessons, leading the students in religious plays, and attending regular catechist certifications. She also taught her students the tenets of the Catholic religion, how to pray, and instructed them on a host of other religious topics. Plaintiff also administered the yearly assessment of the children religious education test."

(ER 1:20-21.)

Further, the District Court considered Morrissey-Berru's overall role as a messenger of the Catholic faith by finding that:

> "The faculty and staff of Our Lady of Guadalupe School "are committed to faith-based education, providing a quality Catholic education for the students and striving to create a spiritually enriched learning environment, grounded in Catholic social teachings, values, and traditions.""

(ER 1:20.)

Indeed, there is no dispute that the School considered Morrissey-Berru a minister. The School tasked her to teach its religion to her students, to "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church" and to perform her duties and responsibilities in conformance with the School's overall mission to "develop and promote a Catholic School Faith Community within the philosophy of Catholic education as implemented at the School, and the doctrines, laws, and norms of the Catholic Church." (ER 4:538-544, 662-667.) The facts related to each of the *Hosanna-Tabor* factors confirm that the School made this determination in good faith and not as a subterfuge to avoid any obligation.

This Court should not second-guess Our Lady of Guadalupe's good-faith determination and substitute its own judgment for the School's on a purely religious issue. Morrissey-Berru cannot ask this Court to second-guess that belief. *See, e.g., Hosanna-Tabor*, 565 U.S. at 194 (refusing to permit pretext inquiries); *Cannata*, 700 F.3d at 179-80 (courts cannot "second-guess" sincere religious beliefs). Courts have

cautioned that "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). As the concurrence warned in *Hosanna-Tabor*, "the mere adjudication of such questions would pose grave problems for religious autonomy" by requiring "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 (Alito, J., concurring).

G. Morrissey-Berru's Novel Re-Interpretation of the Ministerial Exception Finds No Support in the Law

In response to the School's showing that Morrissey-Berru was a minister, Morrissey-Berru seeks to confine *Hosanna-Tabor* to its facts, re-litigate issues the Supreme Court has already decided, and narrowly focus on Morrissey-Berru's "teacher title." Morrissey-Berru contends that she was not a minister because: 1) her title was "teacher"; 2) she did not obtain a significant degree of religious training; 3) she did not hold herself out as a minister; and 4) she followed a set curriculum. However, these arguments ignore the many undisputed facts found by the District Court and disregard the Supreme Court's legal framework in *Hosanna-Tabor*, the long history giving rise to the ministerial exception, and the decisions following *Hosanna-Tabor*.

1. Morrissey-Berru's Focus on Her Title is Misplaced

Morrissey-Berru contends that she was not a minister under the ministerial analysis because her title was "teacher." (AOB 39-42.) In the calculus of determining whether Morrissey-Berru is a minister, title is relevant but carries little weight. First, while Morrissey-Berru argues that the title "teacher" is not necessarily religious, this title has certainly been used by many great leaders, Jesus among them. *See* The Gospel according to St. Matthew 22:36 (New American Standard Bible) ("'*Teacher*, which is the great commandment in the Law?' And He said to him, 'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind.'"). It would be one thing if Morrissey-Berru's title were "language arts teacher," or "professor of exercise science" as was the situation in other distinguishable cases on which Morrissey-Berru relies.[3] But Morrissey-Berru's title does no such thing. Further, the evidence in the record makes clear that while Morrissey-Berru taught both secular and religious subjects, she was expected to weave religious elements into even her secular subjects. (ER 2:74-75; 5:830.) As discussed above, the substance of Morrissey-Berru's position was more than that of a secular fifth grade teacher. She was tasked with teaching religion and advancing the School's religious mission. (ER 2:64-69, 4:539, 663, 677, 5:819, 824-826, 833-839.) To

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[3] *See, e.g., Richardson v. Northwest Christian Univ.*, 242 F. Supp. 3d 1132 (D. Or. 2017)(professor of exercise science); *Herx v. Diocese of Fort Wayne-South Bend, Inc.,* 48 F. Supp. 3d 1168 (N.D. Ind. 2014) (high school language arts teacher).

assist Morrissey-Berru to perform her religious duties, Beuder required her to attend courses on the Bible and history of the Catholic Church to help her with her pivotal role in the faith formation of the students. (ER 2:40-45, 67-68; 4:635-639, 654, 677, 719, 722-727; 5:828-830.) Moreover, she was also required to agree by written agreement to advance and promote the School's religious mission. (ER 4:538-544, 662-667.)

In addition, the School mandated that Morrissey-Berru incorporate God into her teachings to promote and advance the Catholic faith and she was specifically evaluated on her effectiveness in these areas. (ER 2:73; 4:538-544, 662-667; 5:919-920.) In this regard, the formal review process included the following areas of evaluation: 1) incorporating "signs, sacramental, traditions of the Roman Catholic Church in the classroom"; and 2) infusing "Catholic values through all subject areas." (ER 2:73, 4:659-661, 670-673, 679, 5:919-920.)

Second, Morrissey-Berru's title, while relevant, is not dispositive. *Fratello*, 863 F.3d at 207. ("Nor would plainly secular titles (by themselves) prevent application of the ministerial exception. We think the substance of the employees' responsibilities in their positions is far more important.").

Justice Alito explained why reliance on title alone is untenable. The term "minister" is commonly used in some—mostly Protestant Christian—faiths to denote their leaders, but are not used, and sometimes outright rejected, by other faith traditions. *Hosanna-Tabor*, 565 U.S. at 198. In a country where "virtually every religion in the world is represented," it would "be a mistake if the term 'minister'" were "viewed as central." *Id.* Indeed, some religious groups, such as Sikhs or

Quakers, believe that it is wrong to give any believer a ministerial title or to recognize any clergy, though as a practical matter there are many individuals who serve religious functions. *See id.* at 202 n.3-4 (noting that Muslims typically do not use the term "minister" for their leaders, but Jehovah's Witnesses consider all baptized believers to be "ministers"). Indeed, no circuit has ever made "formal title determinative" of the ministerial exception's applicability. *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring).

The courts have instead reached a consensus that the exception "encompasses more than a church's ordained ministers." *Id.* (quoting *Alcazar,* 627 F.3d at 1291); *see also EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000) ("[C]ourts have routinely applied the exception in cases involving persons other than ordained ministers."). "[T]he term 'ministerial exception' is judicial shorthand" and the doctrine "protects more than just 'ministers.'" *Rweyemamu v. Cote,* 520 F.3d 198, 206-07 (2d Cir. 2008) (noting the doctrine's application to a press secretary, staff of a Jewish nursing home, and an organist/music director). In the end, it is "the realities of the position" and not considerations such as "title" that render [a] position ministerial." *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 704 n.4 (7th Cir. 2003) (noting that, had the press secretary at issue "simply served in the capacity of translating the [Church's] message from English to Spanish," instead of "crafting the message," she would not have been a minister). That Morrissey-Berru received her title and position differently than in *Hosanna-Tabor* is of no moment. The Court in *Hosanna-Tabor* did not hold or even suggest that a

formalized commissioning process was required. Further, *Hosanna-Tabor*'s progeny confirm that commissioning is not required for ministers under the ministerial exception.

The Fifth Circuit, for example, found 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*, 700 F.3d at 177 (quoting *Hosanna-Tabor*, 565 U.S. at 192). The court was untroubled by the employee's argument that he did not have the title of "minister." *Id*. Similarly, the Sixth Circuit 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 v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015).

Further, Morrissey-Berru's argument that her title of "teacher" somehow negates the ministerial exception disregards the fact that consistent with the rationale of *Hosanna-Tabor*, the Supreme Court has recognized generally the "critical and unique role of the teacher in fulfilling the mission of a church-operated school." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979). Other federal courts have followed suit. *Ciurleo v. St. Regis Parish*, 2016 U.S. Dist. LEXIS 139686, *5 (E.D. Mich. Oct. 7, 2016) (ministerial exception barred ADEA claims of teacher because duties of giving daily religious instruction and leading morning prayers "are the hallmark of religious exercises through which religious communities transmit their received wisdom and heritage to the next generation of believers"); *Clapper v. Chesapeake Conference of Seventh-Day*

Adventists, 1998 U.S. App. LEXIS 32554, *7 (4th Cir. 1998) (ministerial exception barred teacher's ADEA claim of discrimination because his duties included leading students in prayer, Bible instruction, and incorporating church doctrine into curriculum); *Woods v. Cent. Fellowship Christian Acad.*, 2012 U.S. Dist. LEXIS 196418, 11-13 (N.D. Ga. Oct. 1, 2012) (granting summary judgment of plaintiff teacher's claims noting that although he taught some secular classes, he also taught a Bible class, led students in prayer, and took his students to weekly chapel); *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F.Supp.2d 858, 870 (E.D. Wisc. 2004) (applying ministerial exception where school required teachers to incorporate religion into classes); *Henry v. Red Hill Evangelical Church of Tustin*, 201 Cal.App.4th 1041, 1049-50, 1055 (2011) (plaintiff "fulfilled [spiritual] function by teaching her preschoolers religion, leading them in prayers every day, and leading chapel services. She taught religion and spread the faith.").

Morrissey-Berru cites selectively to Beuder's testimony that she offered Morrissey-Berru the position of teacher, and suggests that the principal's "subjective understanding" of Morrissey-Berru's title could be relevant here. However, Morrissey-Berru glaringly fails to advise the Court of Beuder's explanation of what the title of teacher means at the School: "Each teacher is considered a catechist and responsible for the faith formation of the students in their charge each day." (ER 4:719.) Similarly, Morrissey-Berru's misleading reference to her employment agreements as supposedly stating only her position of teacher, omits any reference to the actual extensive language in the agreements requiring Morrissey-Berru to agree in writing to advance and promote

the School's religious mission as a condition of her employment as a "teacher." (ER 4:538-544, 662-667.)

In sum, Morrissey-Berru's attempt to downplay her title and role in teaching the Catholic faith to her students is unavailing. Just as the Court in *Hosanna-Tabor* concluded that a lay teacher was a minister, Morrissey-Berru was a source of religious instruction, and as such, performed an important role in transmitting the Catholic faith to the next generation. *Hosanna-Tabor*, 565 U.S. at 192. She was a teacher and messenger of the Catholic religion, and a vehicle for passing the faith on to younger generations.

2. Morrissey-Berru's Lack of Ordination Does Not Preclude the Ministerial Exception

As discussed above, courts have consistently held that the ministerial exception encompasses more than a church's ordained ministers. *Hosanna Tabor*, 565 U.S. at 203 (Alito, J., concurring) (quoting *Alcazar,* 627 F.3d at 1291); see also *Roman Catholic Diocese of Raleigh*, 213 F.3d at 801. The central analysis undertaken by the Supreme Court, the Ninth Circuit, and other circuits in determining when the ministerial exception applies is focused upon an employee's duties and function within the religious entity. *Hosanna-Tabor*, 565 U.S. at 192; *Alcazar,* 627 F.3d at 1292; *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996); *Conlon,* 777 F.3d 829, 834. The *Cannata* court, for example, found an employee was a minister despite the employee's argument that he had no specialized religious "training, education, or experience." 700 F.3d at 177. Here, Morrissey-Berru misses the significance and policy of the ministerial exception. Whether

or not she took courses to become an ordained minister or seminarian is not essential to the ministerial analysis. *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring). Accordingly, in teaching her students the doctrines of the Catholic faith and in modeling its practices and traditions, Morrissey-Berru qualified as a "minister" for purposes of the ministerial exception.

Importantly, while Morrissey-Berru highlights her lack of training prior to 2012 before Beuder joined the school, once Beuder did join the school and the operative events of this case unfolded, Morrissey-Berru admittedly did receive religious training as Beuder enforced catechetical requirements. (ER 2:40-45, 67-68; 4:635-639, 654, 677, 722-727; 5:828-830.) Although it was not training to become ordained—or "commissioned" in the parlance of Perich's Lutheran church school—it was required religious training nevertheless. And nothing in *Hosanna-Tabor* implies that religious training aimed at ordination or "commissioning" is the only training that counts, while religious training for teachers of religion does not.

H. Morrissey-Berru Does Not Dispute that She Had Religious Duties

In support of her claim that she did not perform religious duties, Morrissey-Berru relies on two trivial contentions, namely, that she attended but never led Mass and that she was "required" to teach the Religion course curriculum. (AOB 46-48.) Morrissey-Berru attempts to distinguish herself from the plaintiff in *Hosanna-Tabor* by noting that "unlike Perich who took her turn leading the mass, Morrissey-Berru testified that she attended mass, but never led it." (AOB 47.) However,

Morrissey-Berru's distinction is misplaced as only ordained priests are permitted to "lead" Mass ("celebrate") under Roman Catholic doctrine and practice unlike the particular Lutheran confession to which Perich belonged. Masses follow an established ritual of the Roman Catholic faith.

Moreover, Morrissey-Berru selectively omits any reference to her own testimony that she was expected to take her class to Mass, was responsible for preparing her students to read for the weekly and school Mass, and that she was responsible for the liturgy planning of the All Saints Day Mass. (5:826-827, 832-834.) Indeed, Morrissey-Berru was also in charge of teaching her students the prayers and *how* to pray. (ER 2:71-73; 5:825, 837.) Morrissey-Berru thus modeled "behavior in conformity with the teaching of the Roman Catholic Church," as mandated in her employment agreement. (ER 4:538-544, 662-667.)

Furthermore, the fact that Morrissey-Berru was "required" to teach Religion confirms that she was a minister rather than the opposite. The School is deeply invested in ensuring that its teachers teach students the tenets of the Roman Catholic faith. That is job number one. By contrast, if teaching religion were something Morrissey-Berru did as a kind of hobby, or spontaneously, that would show less of a commitment on the School's part. Here, of course, both the School and Morrissey-Berru agreed that teaching religion was one of her principal duties as a schoolteacher.

Similarly, there is no dispute that Morrissey-Berru was expected to teach her students the hallmarks of the Catholic religion every single day. (ER 2:67, 4:677, 5:819, 834.) Morrissey-Berru admits that in her

role she laid the groundwork for the Catholic religion in her young students throughout all her duties as the fifth grade teacher. (ER 5:826, 838.) Morrissey-Berru thus acted as precisely the sort of "messenger of faith" that falls into this ministerial category.

1. The District Court Correctly Found that Morrissey-Berru's Secular Duties Do Not Preclude the Ministerial Exception

Morrissey-Berru was a minister despite the secular duties she performed, such as teaching secular subjects. Morrissey-Berru claims that her secular duties overshadowed her religious duties. (AOB 39-42.) However, this contention is directly undermined by *Hosanna-Tabor* and binding Ninth Circuit authority.

The Court in *Hosanna-Tabor* found the lower court erred, in part, because it "placed too much emphasis on [the teacher's] performance of secular duties." *Hosanna-Tabor*, 565 U.S. at 193. The concurring opinion commented that:

> It makes no difference that respondent also taught secular subjects. While a purely secular teacher would not qualify for the "ministerial" exception, the constitutional protection of religious teachers is not somehow diminished when they take on secular functions in addition to their religious ones. What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities. *Id.* at 204 (Alito, J., concurring).

This Court subsequently held that "an employee whose 'job duties reflect[] a role in conveying the Church's message and carrying out its

mission' is likely to be covered by the exception, even if the employee devotes only a small portion of the workday to strictly religious duties and spends the balance of her time performing secular functions. *Puri*, 844 F.3d at 1160 (quoting *Hosanna-Tabor*, 565 U.S. at 192). Similarly, the *en banc* Court in *Alcazar* rejected the idea that secular duties can undermine an employee's role as a minister: "That some of [the plaintiff's] duties may have encompassed secular activities is of no consequence. A church may well assign secular duties . . . to promote its religious mission in some material way. The ministerial exception applies notwithstanding the assignment of some secular responsibilities." *Alcazar*, 627 F.3d at 1293. Likewise, the teacher in *Hosanna-Tabor* qualified as a minister with only 45 minutes of each work-day devoted to religious teaching. 565 U.S. at 193. Morrissey-Berru similarly devoted time each day to religious teaching. (ER 2:67, 4:677, 5:819, 834.) Moreover, the School tasked Morrissey-Berru to incorporate Catholic values and traditions when teaching all secular subjects. (ER 2:74-75, 5:830.) Morrissey-Berru also had to constantly "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church," even when engaging in secular duties. (ER 4:538-544, 662-667.) Thus, even Morrissey-Berru's "secular" duties were religious in nature as she constantly worked to convey the Church's message and carry out its mission. (5:830, 838-839.) As such, Morrissey-Berru's religiously-infused secular duties do not defeat her ministerial status, regardless of how much time she devoted to them. The question of whether the ministerial exception applies is "not one that can be resolved by a stopwatch." *Hosanna-Tabor*, 565 U.S. at 193–94.

I. Morrissey-Berru's Contention That Being Catholic Was Not A Requirement to Work at Our Lady of Guadalupe is Irrelevant

Finally, Morrissey-Berru also relies on her allegation that it was not a requirement to be Catholic in order to work at the School. (AOB 42.) But Morrissey-Berru selectively omits Beuder's testimony that "to teach religion at the school, you *need* to be a Catholic," and to be a teacher at all, the "ideal" and "preferred" candidate "is an actively practicing Catholic." (ER 4:719 (lines 11-23.) Moreover, this argument is irrelevant because Morrissey-Berru was in fact Catholic and represented herself as such to the School. (ER 5:921-922.) Thus, to decide this case, the Court need not consider the hypothetical issue of whether a non-Catholic employee at a Catholic school could qualify as a minister.

Further, the ministerial exception does not require an exact identity between the religious beliefs of the employer and the religious beliefs of the employee. In fact, Morrissey-Berru presents no authority showing that the religious beliefs of the employee are relevant to the ministerial exception. *Hosanna-Tabor* does not identify the employee's religious beliefs as a factor. Rather, it focuses on what the employee actually does to promote the religion, not whether they have internalized the religious tenets they are promoting. *Hosanna-Tabor*, 565 U.S. at 178, 192, 204. In fact, Perich claimed that she had different beliefs about the scope of Lutheran doctrine than did her employer, the Church; yet that fact was not relevant to the outcome in *Hosanna-Tabor*. The ministerial exception test is thus an objective one based on

observable facts, not a subjective one based on the internal state of mind of the employee. In this case, Morrissey-Berru was Catholic, was expected to attend faculty prayer services plus monthly family Mass, and was tasked with promoting the Catholic faith in all of her duties. (ER 2:64-76)

J. The Cases Relied Upon By Morrissey-Berru Are Irrelevant, Distinguishable And/Or Further Support The District Court's Finding

The ministerial exception has long encompassed employees who are not ordained leaders of a congregation. *Hosanna-Tabor*, 565 U.S. at 190-192, 203. The correct inquiry involves the individual employee's job duties, performance and training. *Id.* at 192. Under many circumstances, music directors, parochial school teachers and even some administrators have been found to be "ministers" in the broader sense of the word. *See, e.g., Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006); *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668 (N.D. Ill. 2012); *Dayner v. Archdiocese of Hartford*, 301 Conn. 759 (Conn. 2011). As noted above, the proper application of the "ministerial exception" post-*Hosanna-Tabor* cannot be rendered in a "rigid formula." *Cannata*, 700 F.3d at 176.

Instead, reviewing courts must simply consider whether an individual'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 Supreme Court expressly noted that "the ministerial exception is not limited to the head of a religious organization." *Id.* at 190. As

Justice Thomas noted, "The question whether an employee is a minister is itself religious in nature, and the answer will vary widely," requiring that reviewing courts "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id*. at 196 (Thomas, J, concurring).

Here, the District Court's analysis comports with this proper understanding of the scope of the "ministerial" exception as applicable to those in a position with significant religious responsibilities. The Court's analysis of Morrissey-Berru's responsibilities in a Catholic school amply confirms that she performed important religious functions and indeed had a leadership role. Morrissey-Berru's actual performance of her duties confirms that she provided religious leadership by conveying the Church's message and carrying out its mission through her teachings. For example, a portion of Morrissey-Berru's teaching duties was allotted solely to religious teaching. (ER 2:67, 4:677, 5:819, 834.) She was tasked to incorporate religion in all of her teaching, she prayed daily with her students, and she attended Mass with them weekly. (ER 2:71-75, 5:830-832.)

The single pre-*Hosanna-Tabor* case Morrissey-Berru cites which involves a teacher, *Hendricks v. Marist Catholic High School*, No. 09–6336–AA, 2011 WL 996757 (D. Or. Mar. 17, 2011), is not instructive, as Morrissey-Berru fails to address several key factual distinctions. Specifically, the school emphasized that teaching or promoting the Catholic faith would not occur in the classroom; the plaintiff's job duties never consisted of spreading the faith, or facilitating or participating in religious ritual or worship; and the school treated him as "a lay

academic teacher, and not someone responsible for the spiritual development and religious training in the tenets of the Catholic faith." *See id.* at *3-4. Here, the School does emphasize Catholic faith being promoted in the classroom, and Morrissey-Berru's job duties required her to engage in religious rituals and worship and to teach Catholic theology. (ER 2:64-76)

Morrissey-Berru's reliance on cases pre-dating *Hosanna-Tabor* that do not involve teachers are inapposite. For example, she cites to *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1278 (9th Cir. 1982), a case that even pre-dates *Alcazar*, and is distinguishable because it involved a secretary at a religious publishing house. Morrissey-Berru's role as a *teacher of religion* at a *religious school* is obviously very different from that of a secretary at a publishing house. Morrissey-Berru highlights *Pac. Press Publ'g Ass'n*'s reliance on two fifth circuit opinions that declined to apply the ministerial exception to certain faculty, but neither of these cases involved teachers of religion. Specifically, in *EEOC v. Mississippi College*, 626 F.2d 477, 479 (5th Cir. 1980), the faculty did not "instruct students in the whole of religious doctrine", and the plaintiff was a psychology professor not a teacher of religion like Morrissey-Berru. *Id.* at 485. Similarly, *EEOC v. Southwestern Baptist Theological Seminary* (5th Cir. 1981) 651 F.2d 277, dealt with the application of the ministerial exception to support staff and administrators whose functions related to the seminary's finance, maintenance, or non-academic departments, not teachers of *religion* like Morrissey-Berru.

The post-*Hosanna-Tabor* authority relied on by Morrissey-Berru fares no better. *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132 (D. Or. 2017) is easily distinguishable. *Richardson* involved a plaintiff employed in a purely secular position, assistant professor of exercise science, who received no religious training, did not hold herself out as a minister, and "was not tasked with performing any religious instruction and she was charged with no religious duties such as taking students to chapel or leading them in prayer" *Id.* at 1145. Based on these facts, the court determined the ministerial exception did not apply. *Id.* As discussed, the facts at issue are totally different. Morrissey-Berru unquestionably was tasked with performing religious instruction, was charged with religious duties, received some religious training and formally accepted her religious functions.

Herx v. Diocese of Fort Wayne-South Bend, Inc., 48 F. Supp. 3d 1168 (N.D. Ind. 2014) is similarly distinguishable. The limited factual record in *Herx* suggests that the language arts teacher was not tasked with teaching religion as a subject, and received no religious training. *Id.* at 1171. These facts are entirely different from the extensive record of religious activity here.

The glaring, distinguishing factor in *Hendricks, Herx,* and *Richardson* is the sheer lack of duties related to religious instruction and lack of any charge to engage in religious duties. Our Lady of Guadalupe unquestionably tasked Morrissey-Berru with religious duties and functions and she formally accepted them. (ER 2:67, 4:677, 5:819, 834.) The facts at issue here are much more akin to *Hosanna-Tabor*, which held the ministerial exception applied.

Finally, any reliance on *Puri* is misplaced. Indeed, *Puri* actually supports the District Court's finding as it confirms the broad application of the exception. "Certain language in *Hosanna-Tabor* . . . suggests a fairly broad application of the exception." *Puri*, 844 F.3d at 1159. "[T]he exception extends to 'the Church's choice of its hierarchy' when that choice implicates 'a religious group's right to shape its own faith and mission." *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 190).

The underlying facts in *Puri* are completely distinguishable and do not undermine the District Court's decision. *Puri* did not involve a teacher. Rather, it involved board members of an organization that was not even a church. *Puri* "relied heavily on the absence of any allegation that board members had 'ecclesiastical duties or privileges,' the fact that the organizations were not themselves churches, and that the board members' titles ("manager" and "trustee") were secular." *Richardson*, 242 F.Supp.3d at 1144-45 (quoting *Puri*, 844 F.3d at 1160-61). These facts have nothing in common with Morrissey, who was tasked to teach religion and convey the Church's message and carry out its mission. (ER 2:64-76) The undisputed facts in this case establish that Morrissey-Berru was a minister for purposes of the exception.

VII.

MORRISSEY-BERRU'S CLAIM BASED ON ASSIGNMENT TO A PART-TIME POSITION IS TIME-BARRED

Morrissey-Berru failed to timely exhaust her administrative remedies with regard to the discrete alleged adverse act of assigning her to a part time position, and therefore her claim is time-barred to

this extent. It is undisputed that Morrissey-Berru was offered and accepted the part time position in mid-May 2014, and signed her 2014-2015 contract for the part-time position on *May 19, 2014*. (ER 2:111.) It is undisputed that she did not file her charge with the EEOC until June 2, 2015, *more than 300 days* from May 19, 2014. (ER 2:121.) A jurisdictional pre-requisite to a claim under the ADEA is a timely charge of discrimination filed with the EEOC. 42 USC § 2000e-5; 29 USC 626(d)(1).

Unable to get around her untimely charge, Morrissey-Berru argued below that the clock should start running on her claim that the decision to assign her to a part-time position was discriminatory at the start of the 2014-2015 school year on August 11, 2014, when she actually "began receiving less money." But the Ninth Circuit has held that "the proper focus is upon the time of the discriminatory acts, *not* upon the time at which the consequences of the acts became most painful." *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979) (cited with approval in *Delaware State College v Ricks*, 449 U.S. 250, 258 (1980)). In *Abramson*, the Ninth Circuit decided that the plaintiff's tenure rejection, though not a final termination, was the proper action from which the limitations period should run because the plaintiff's final termination was an inevitable consequence of the tenure decision.

Similarly, in *Delaware State College v. Ricks*, the plaintiff was notified on June 26, 1974 that he would be denied tenure and offered a "terminal" contract for the upcoming 1974-1975 school year. The

Supreme Court held that the limitations period began to run on the date that the plaintiff was first notified of the denial of tenure, not the date of the eventual loss of his teaching position, finding that "the only alleged discrimination occurred -- and the filing limitations periods therefore commenced -- at the time the tenure decision was made and communicated to Ricks." *Ricks*, 449 U.S. at 258.

In considering the Supreme Court's holding in *Ricks*, the Ninth Circuit explained that "Ricks, on learning of the denial of tenure, would have notice of all allegedly wrongful acts that he later sought to challenge,[and] the statute of limitations must be deemed to commence at that time." *Hoesterey v. City of Cathedral City*, 945 F.2d 317, 319 (9th Cir. 1991). Likewise, Morrissey-Berru had "notice" of the alleged wrongful act (of being assigned to a part time position) at the time she signed her contract, because the contract informed her in binding language that she was going to be teaching part time. (ER 4:542.) *See, e.g. Chardon v. Fernandez*, 454 U.S. 6 (1981) (holding that a wrongful termination claim accrued at the time the plaintiff received "notice" of the termination, not at the time of the termination itself).

Morrissey-Berru was notified on May 19, 2014 that she would be assigned to a part time position and offered and accepted a "part-time" contract for the upcoming 2014-2015 school year on this date. (ER 2:111.) Just as in *Ricks* and *Abramson*, it was clear at this time that the School "had established its official position -- and made that position apparent to" Morrissey-Berru, because she signed a binding contract to that effect. *Ricks* at 252.

Indeed, Morrissey-Berru knew of the injury that was the basis for her action at the time she was advised of the decision. "The touchstone for determining the commencement of the limitations period is notice: a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Stanley v. Trs. of the Cal. State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006); *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 593 (9th Cir. 1981) ("In ADEA suits, the applicable limitations period is activated once the employee knows or should know that an unlawful employment practice has been committed.") Morrissey-Berru was aware that the part-time position came with less money at the time she signed the contract. (ER 4:542.) She also claimed that "at the time" she signed the contract, she was asked if she wanted to retire and believed she was being replaced by an individual "who was in his 30's". (ER 2:129-130.)

While the District Court did not base its grant of summary judgment on this argument, it did suggest that this alleged adverse act may be time-barred:

> "Part of Plaintiff's claim may also be time barred. Here, the presentation of the part-time contract is the alleged discriminatory act. Although the effects would not become "most painful" until Plaintiff actually started drawing her reduced salary, she was clearly notified of the consequences when she signed the contract in May of 2014. Plaintiff alleges that "at the time" she signed the contract in May 2014, she was asked if she wanted to retire (Plaintiffs Undisputed Material Facts "PUMF" 113), and believed she was being replaced by an individual "who was in his 30's". (PUMF 117).

(ER 1:19 n.1.)

In sum, Morrissey-Berru was on notice of purported discrimination on May 19, 2014, but waited more than 300 days after notice of the allegedly wrongful act to file her administrative charge. Morrissey-Berru's claim with regard to her assignment to a part-time position is therefore time-barred by her failure to timely exhaust her administrative remedies. (ER 2:111, 121.)

VIII.

THE SCHOOL'S LEGITIMATE REASONS FOR ITS DECISIONS ARE UNDISPUTED, AND MORRISSEY-BERRU CANNOT MEET THE BUT-FOR STANDARD

Alternatively, Morrissey-Berru's claim fails on its merits because the School had legitimate reasons for its employment decisions and ADEA claims require a "but-for" analysis. *Sutton v. Atlantic Richfield Co.,* 646 F.2d 407, 412 (9th Cir. 1981).

A. The School's Legitimate Reasons For Moving Morrissey-Berru To A Part Time Position Are Not Disputed

The decision to assign Morrissey-Berru to a part time position was legitimate because Morrissey-Berru was unable to implement the reading and writing program. Morrissey-Berru's performance deficiencies in this regard were well-documented and indeed, Morrissey-Berru conceded that she was aware of the importance of implementing the Workshop and the concerns about her failure to implement it. (ER 2:77, 99-100; 4:520-535, 668-673, 680-683, 693-697, 703-704, 746, 749-750, 787-788; 5:857-898.) Specifically, Morrissey-Berru conceded that

from the time Beuder started as Principal in March 2012, Beuder was tasked with improving the reading program and made it a top priority, immediately adopting the Workshop. (ER 2:76-77, 79.) She admitted that Beuder felt the need to provide Morrissey-Berru with extra support with the implementation of the Workshop during the 2013-2014 school year. (ER 2:80, 89-90.) She admitted that this came to a head in March 2014, when Beuder was unable to complete an evaluation of a Workshop lesson she had come to Morrissey-Berru's classroom to observe, because Morrissey-Berru *failed* to conduct a Workshop lesson. (ER 2:103.) Morrissey-Berru has never disputed that she was failing at the Workshop. Indeed, she conceded that the very purpose of the part-time role was to allow her to keep teaching, *but avoid involvement with the Workshop*. (ER 2:110-111.) This was a legitimate non-discriminatory reason for Morrissey-Berru's assignment to the part time position.

Nor does Morrissey-Berru have any evidence of pretext. The teacher who was hired to teach the 5th grade reading and writing class when Plaintiff was assigned the part-time position, while younger, was qualified, experienced and a "very good" teacher, as Morrissey-Berru herself acknowledged. (ER 2:113.) The law is clear that merely replacing an older worker with a younger employee does not create a genuine issue of material fact capable of defeating summary judgment. *LaMontagne v. Amer. Convenience Products, Inc.*, 750 F.2d 1405, 1413 (7th Cir. 1984) ("Because younger people often succeed to the jobs that older people held for perfectly legitimate reasons, the mere fact that an older employee is replaced by a younger one does not permit an inference that the replacement was motivated by age discrimination.");

Laugesen v. Anaconda Co. 510 F.2d 307, 313, n.4 (6th Cir. 1975) ("we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age".)

B. The School's Legitimate Reasons For Not Offering Morrissey-Berru A New Contract Are Not Disputed

Morrissey-Berru did not dispute the School's legitimate non-discriminatory reasons for its decision to not offer Morrissey-Berru a new part time contract. (ER 2:116.) Specifically, Morrissey-Berru responded that it was "uncontroverted" that Morrissey-Berru was not offered a new contract because the School could not continue to financially sustain Morrissey-Berru's extra part time position for the 2015-2016 school year, and this position was therefore eliminated. (ER 2:116.) *Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1117-1118 (6th Cir. 1980) (where plaintiff's job is eliminated due to economic conditions and his duties are assigned to another employee who performs them in addition to other duties, there is no evidence of age discrimination and the plaintiff failed to make out a prima facie case); *see also Birkbeck v. Marvel Lighting Corp*., 30 F.3d 507, 513 (4th Cir. 1994) (finding that the employer's layoff decisions reflected "business realities, not age discrimination"). Indeed, with regard to the School's financial straits, Morrissey-Berru also conceded that when Beuder was hired, the School was on the verge of closing, and the parish was having to heavily subsidize it to keep it open. (ER 2:76.) She conceded that Beuder had to shuffle the budget around in order to even create the part-time role for Morrissey-Berru. (ER 2:110-111.) She affirmed that no teacher held Morrissey-Berru's part-time position after it was eliminated. (ER 2:118)

Instead, all of Morrissey-Berru's classes were absorbed by the existing staff. (ER 2:118.)

In addition, Morrissey-Berru also responded that it was "uncontroverted" that the School's other reason for not offering her a new part-time contract was because going forward, Beuder wanted someone teaching social studies who would be willing and able to incorporate the Workshop so that these lessons could be reinforced across the curriculum as the students learning needs had changed. (ER 2:116.) Morrissey-Berru conceded that her social studies instruction did not incorporate the tenets of the Workshop or academic rigor. (ER 2:80, 114-115.) *Nash v. Optomec, Inc.*, 849 F.3d 780 (8th Cir. 2017)(summary judgment granted against plaintiff in age case, finding legitimate non-discriminatory business reasons where it was the company's "vision for the future of the lab technician position, and Nash's inability to fit that vision, that led to his dismissal.").

C. Given The Undisputed Facts, Morrissey-Berru Cannot Show That But-For Her Age The Decisions Would Not Have Been Made

"It is not ... the function of this court to second guess the wisdom of business decisions." *EEOC v. Clay Printing Co.*, 955 F.2d 936, 946, (4th Cir. 1992). "Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Gross v. FBL Financial Services* 557 U.S. 167, 174 (2009). Instead, Morrissey-Berru needed to – but given her significant concessions – could not demonstrate, "by a preponderance of the evidence, that age was the "*but-for*" cause of the challenged adverse

employment action." *Id.*; *Scheitlin v. Freescale Semiconductor,Inc.*, 465 Fed. Appx. 698, 699 (9th Cir. 2012). There is simply no evidence that age was the "but-for" reason for any decision made with regard to Morrissey-Berru.

Indeed, the undisputed evidence negates any inference of animus on account of age. Morrissey-Berru was offered a contract by Beuder at the age of 61, and she was given tremendous support to implement the reading and writing program. (ER 2:78-79, 89-90.) The School gave Morrissey-Berru every opportunity to succeed not only by giving her constant feedback, counseling and support, but by allowing her to complete her one year full time teaching contract. (ER 2:89-90.) And even then, the School did not terminate Morrissey-Berru, but created a new part time position just for her. (ER 2:110-111.) The School decided to end the employment relationship only as a last resort – and even then not with a termination, but rather she was just not offered a new contract. (ER 2:117-118.) Given all of these indisputable facts, no basis exists for a *reasonable* inference of age discrimination.

Morrissey-Berru's argued below that pretext could be seen based on some positive comments that she received in reviews. But this evidence consists solely of positive comments Morrissey-Berru received in reviews of a math and science classes (not reading and writing), or irrelevant comments focusing on her use of *technology* in the classroom. (ER 2:160-163.) Similarly, there was no evidence of positive feedback from the 2013-2014 school year, the year that Beuder concluded that she could no longer have Morrissey-Berru teaching reading and writing.

Morrissey-Berru also claimed that the School's reasons for its decisions were pretextual because Beuder allegedly rolled her eyes at a teacher and parent named Sylvia Bosch when Morrissey-Berru's name came up, and other parents allegedly relayed to Bosch that they felt Beuder did not like Morrissey-Berru. (ER 2:158-159.) There is no evidence that these hearsay conversations, lacking in foundation and personal knowledge, had anything to do with Morrissey-Berru's *age*.

Finally, Morrissey-Berru tried to prove pretext through a hearsay comment allegedly made by Beuder to Bosch about another employee in 2013. Bosch testified that she wanted to terminate an older employee for performance reasons, but *Beuder overruled her*, allegedly warned that terminating an older employee could lead to a lawsuit, and then supposedly spoke hypothetically about how best to address an older employee with poor performance. (ER 2:155-158, 214-222, 251.) Beuder's alleged stray comment is a recognition of the realities of today's litigious workplace, and not evidence of pretext. Indeed, in *Bashara v. Black Hills Corp*., 26 F.3d 820, 824 (8th Cir. 1994), the Eighth Circuit found that a similar comment by a supervisor that he was concerned that the plaintiff's termination might violate the ADEA was not direct evidence of age discrimination, and rather should be viewed as the "functional equivalent of a stray remark that we have said does not constitute evidence of discriminatory animus." *Id.* In coming to that decision, the court explained that:

> It would be a foolhardy supervisor indeed who, however well-documented and irrefutably established a termination decision might be, would not have some concern over possible litigation arising out of the termination of an

> age-protected employee. An expression of concern in these circumstances should not be equated with an admission of age-related animus … but rather should be regarded as a natural reaction to the ever-present threat of litigation attendant upon terminating an age-protected employee.

Id.; *see also Brune v. BASF Corp*., 2000 U.S. App. LEXIS 26772, *10-11 (6th Cir. 2000) ("Notes acknowledging that Ashing was the oldest and longest service chemist … only demonstrate BASF's awareness of the potential risk an employer faces when it terminates an employee over forty years of age, but *does not insinuate that Ashing was a less qualified chemist or terminated because of her age*."); *Tuttle v. Missouri Dep't of Agric*., 172 F.3d 1025 * (8th Cir, 1999)("That an employer involved in a RIF which affected only [age] protected employees would voice some concern over the possibility of litigation does not strike us as probative of whether the employer was motivated by age animus in today's litigious society.").

Indeed, if Beuder bore animus towards Morrissey-Berru because of her age, why would she have hired Morrissey-Berru at age 61? ((ER 2:78-79.) "It is simply incredible … that [Beuder] who hired [Morrissey-Berru at 61] had suddenly developed an aversion to older people less than [three] years later." *Lowe v. J. B. Hunt Trans. P., Inc.*, 963 F.2d 173, 175 (8th Cir. 1992).

IX.

CONCLUSION

The District Court properly determined that Morrissey-Berru qualified as a "minister" for purposes of the ministerial exception. Accordingly, it correctly granted summary judgment. Summary

judgment was also appropriate based on the statute of limitations, and Our Lady of Guadalupe's legitimate non-discriminatory reasons for its actions and the lack of but-for evidence of age discrimination. Our Lady of Guadalupe respectfully requests that this Court affirm the judgment.

DATED: May 25, 2018

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STATEMENT OF RELATED CASES

Counsel for Appellee identify the following related case pending in this circuit pursuant to Circuit Rule 28-2.6(c)**:** *Biel v. St. James Catholic School*, Ninth Circuit Case No. 17-55180, which raises the same or closely related issue of whether the District Court properly granted summary judgment in favor of the appellee Catholic School based on its finding that the appellant teacher was a "minister" under the ministerial exception created by the Religion Clauses to the First Amendment to the U.S. Constitution.

Date: May 29, 2018

Ballard Rosenberg Golper & Savitt

/s/ Stephanie B. Kantor

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-56624

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The brief is [13,775] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant [//s// Stephanie B. Kantor] Date [May 25, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

ADDENDUM: PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S. Const. amend. I.

***

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary [Commission]. Such a charge shall be filed-- within 180 days after the alleged unlawful practice occurred; or in a case to which section 14(b) [29 USCS § 633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. 29 U.S.C. § 626(d)

***

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 USCS § 626] before the expiration of sixty days

after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority. 29 U.S.C. § 633

***

It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. 29 U.S.C. § 623(a)(1).

9th Circuit Case Number(s) 17-56624

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 25, 2018 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) //s// Lisa Aguilar

****

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When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document 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 participants:

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