Nos. 19-267 & 19-348

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,

v.

AGNES MORRISSEY-BERRU,
Respondent.

ST. JAMES SCHOOL,
Petitioner,

v.

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

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

There is a through-the-looking-glass quality to Respondents' brief. Their claims about the law of the ministerial exception, while self-assured, are demonstrably wrong. They reject the flexible framework of *Hosanna-Tabor* in favor of a rigid four-factor conjunctive test. They reject the functional analysis used in *Hosanna-Tabor* and applied by the lower courts. They say that courts "uniformly" and "universally" hold "lay" teachers not to be ministers, when in fact courts often hold that they are. They invent a co-religionist requirement that has no basis in law and would be unworkable in practice. And their self-declared "formalistic" approach introduces a host of administrability problems, not least the entanglement of church and state. That may not be six impossible things before breakfast, but it's close.

Respondents' claims about the facts are also frequently detached from reality. But they concede the most important fact: Respondents taught the Catholic religion to fifth-graders daily, devotionally, and for longer duration than the parish priest did. Teaching the faith is an important religious function they performed for the Church, and that is enough to decide these cases.

I. The First Amendment protects religious groups' ability to control who performs important religious functions.

The First Amendment has long vouchsafed control over religious functions to religious groups themselves. That protects both religious groups' right to autonomy and the government's duty not to control religious functions. Pet'r.Br.27-33. In *Hosanna-Tabor*, the

Court applied those principles in the context of an employment claim brought by a fourth-grade teacher at a religious school. In doing so, the Court laid out a flexible framework for deciding such cases that includes a primary-but-not-exclusive focus on the functions performed by the employee. That framework should be preserved, not transformed into the rigid title requirement Respondents advocate, nor made subject to either the "lay teachers" exclusion or the "co-religionist requirement" they propose.

A. The ministerial exception analysis focuses on function over form.

1. Respondents first reject *Hosanna-Tabor*'s flexible framework. They say that *Hosanna-Tabor*'s four "considerations"—a considered word—are actually four mandatory "factor[s]." Resp.Br.20. In Respondents' view, it is a conjunctive test: all four factors must be present for the ministerial exception to apply. Resp.Br.15. "[F]irst and foremost" courts should evaluate "the trio of formalistic" title-related considerations. Resp.Br.20-21. Only if the formalistic factors are satisfied should courts conduct a "cross-check" of "substantive realities" by looking to functions. Resp.Br.23. And only if that cross-check too is satisfied would the ministerial exception apply.

This is precisely the "rigid formula" *Hosanna-Tabor* rejected. *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171, 190 (2012). *Hosanna-Tabor* instead provided a flexible doctrinal framework for deciding ministerial exception cases, as has been borne out in the lower courts. Sometimes a court will find the ministerial exception applies when all four of the considerations are present, as in *Ho-*

sanna-Tabor itself. In other cases, courts will find ministerial status when fewer considerations are present. See, *e.g.*, *Fratello* v. *Archdiocese of N.Y.*, 863 F.3d 190 (2d. Cir. 2017). And in still other cases, only one consideration will suffice to invoke the ministerial exception. See *Temple Emanuel of Newton* v. *Massachusetts Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012) (function sufficient); *Cannata* v. *Catholic Diocese of Austin*, 700 F.3d 169, 180 (5th Cir. 2012) (same); Pet'r.Br.39-40, 50.[1]

Using a flexible approach to decide these delicate constitutional questions is common sense: "given the pluralism of religious thought for which America is known and celebrated," a "one-size-fits-all approach to the ministerial exception" wouldn't work. *Cannata*, 700 F.3d at 176. Respondents' four-factor test is "one-size-fits-all": it recognizes ministerial status only if religious employees are carbon copies of the *Hosanna-Tabor* teacher. *Hosanna-Tabor* ought not stand for the idea that "We are all Lutherans now," especially at the direction of the government.

2. While purporting to want to "stick to" *Hosanna-Tabor*, Resp.Br.17, Respondents actually squarely reject the focus on function applied in *Hosanna-Tabor*, articulated in the Alito/Kagan concurrence, and employed by the lower courts for decades. Resp.Br.24.

Hosanna-Tabor itself focuses on functions, holding that "[t]he church must be free to choose those who will guide it on its way," that is, to "choos[e] who will preach their beliefs, teach their faith, and carry out

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[1] Respondents do not mention *Temple Emanuel* or *Cannata*.

their mission." *Hosanna-Tabor* at 196. Similarly, the Establishment Clause prohibits government involvement in "determin[ing] which individuals will minister to the faithful." *Id.* at 188-189. Those verbs—guide, choose, preach, teach, carry out, and minister—are functions, not titles. Function is thus the animating principle of the decision.

Justices Alito and Kagan spell this out further. Although all four *Hosanna-Tabor* considerations are relevant, they are not all equal: "courts should focus on the function performed by persons who work for religious bodies." *Id.* at 198 (Alito, J., concurring). That is because the First Amendment protects the ability of religious groups to engage in "certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith." *Id.* at 199. "Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions." *Ibid.*

This is precisely how lower courts have applied the ministerial exception for decades. For example, in *Rayburn* v. *General Conference of Seventh-Day Adventists*—a case Respondents call "foundational," Resp.Br.23—Judge Wilkinson proclaimed the primacy of function: "The 'ministerial exception' * * * does not depend upon ordination but upon the function of the position." 772 F.2d 1164, 1168-1169 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). Judge Wilkinson reiterated this point fifteen years later, while concluding that a "lay" teacher at a Catholic school was a minister: "Our inquiry thus focuses on 'the function of the position' at issue and not on categorical notions of who

is or is not a 'minister.'" *EEOC* v. *Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000) (quoting *Rayburn*, 772 F.2d at 1168);[2] see also *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 (3d Cir. 2006) (collecting cases).

Respondents' rejection of the functional focus thus flies in the face of both this Court's precedents and the decisions of the lower courts. And even Respondents can't quite keep their story straight. Although they spend much of their brief arguing against the importance of religious functions, they ultimately admit that it is "critical" to consider important religious functions, Resp.Br.23, and that *Hosanna-Tabor* "requires" that inquiry, Resp.Br.15.

3. Respondents suggest the functional analysis is "unnecessary," Resp.Br.49, invoking statutory exemptions, Resp.Br.49-51, and freedom of association under *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), Resp.Br.51. We agree with Respondents that "associational rights are at their zenith in the religious context." Resp.Br.51. But that is all the more reason that other constitutional doctrines should be understood to *complement* the ministerial exception rather than displace it. See, *e.g.*, Inazu Br.3. Different constitutional provisions should be read to harmonize with one another, not conflict. See *Patton* v. *United States*, 281 U.S. 276, 298 (1930) ("The first ten amendments and

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[2] Respondents do not mention *Raleigh*, despite citing then-Judge Sotomayor's opinion in *Hankins* v. *Lyght*, which treated *Raleigh* as a leading opinion. 441 F.3d 96, 117, 118 n.3 (2d Cir. 2006) (Sotomayor, J., dissenting); Resp.Br.4 n.1.

the original Constitution were substantially contemporaneous and should be construed *in pari materia*.").

In practice, this would mean that the ministerial exception would apply to a religion teacher at a Jewish school, but not to the janitor, because the janitor has no religious title and performs no important religious functions. But if, for example, the janitor begins wearing clothing espousing antisemitic slogans, other constitutional provisions (like freedom of speech) might protect the school's right to terminate his employment. However, the mere existence of these doctrines is no reason to diminish the scope of the ministerial exception, as *Hosanna-Tabor* itself held. *Id.* at 189.

4. Respondents say that using the important religious functions standard would force courts to decide religious questions. Resp.Br.16-17. But this misunderstands how the functions analysis works. It is not a mind-reading exercise where a court guesses at how central a particular activity might be to that religious group's beliefs. Cf. Resp.Br.2. Instead it is an objective inquiry into whether the functions are *religious* and whether they are *important*—the same inquiry this Court conducted in *Hosanna-Tabor* and lower courts have conducted for decades.

First, as *Hosanna-Tabor* recognized, not every function an employee performs for a religious entity is "religious"; rather, the Court distinguished between the Lutheran teacher's "secular duties" and "religious duties." *Hosanna-Tabor* at 193. Courts and agencies make this distinction every day in other contexts ranging from workplace accommodations, *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), to prisoner civil rights lawsuits, *Yellowbear* v. *Lampert*, 741 F.3d 48, 54 (10th Cir. 2014). Indeed, *Wisconsin* v.

Yoder turned on just such a distinction between "secular considerations" and "religious belief." 406 U.S. 205, 215 (1972).

Second, *Hosanna-Tabor* examined whether the employee had "important religious functions she performed for the Church"—such as "perform[ing] an important role in transmitting the Lutheran faith to the next generation." *Hosanna-Tabor* at 192. *Hosanna-Tabor* didn't invent this inquiry. Lower courts for decades have asked whether an employee's religious functions are "*important* to the spiritual and pastoral mission of the church." *Rayburn*, 772 F.2d at 1169 (emphasis added). Dozens of courts have quoted and applied *Rayburn*'s "important to" language, and dozens more have done the same with *Hosanna-Tabor*'s guidance on "important religious functions," including both panels below and other cases Respondents cite approvingly. See OLG.App.2a; StJ.App.10a; *Richardson* v. *Northwest Christian Univ.*, 242 F.Supp.3d 1132, 1144 (D. Or. 2017); *Dias* v. *Archdiocese of Cincinnati*, No.11-251, 2012 WL 1068165, at *5 (S.D. Ohio 2012).

Nor is it any great mystery what religious functions are objectively important, because they were described in *Hosanna-Tabor*. The Court's opinion described Perich's role in "transmitting the Lutheran faith to the next generation" as "important[.]" *Hosanna-Tabor* at 192. And the Court held that "preach[ing] their beliefs, teach[ing] their faith, and carry[ing] out their mission" and "guid[ing] [the Church] on its way" were all "undoubtedly important." *Id.* at 196. Similarly, Justices Alito and Kagan said that "lead[ing] a religious organization, conduct[ing] worship services or important religious ceremonies or rituals, or serv[ing] as a messenger or teacher of its

faith" all count as important religious functions. *Id.* at 199. Thus there may be other functions, but almost all of the "important religious functions" one can even hypothesize already fall within the categories already outlined by the Court and the concurring Justices.

B. The ministerial exception does not include a "lay teacher" exclusion or a "co-religionist requirement."

Respondents also propose two new additions to the ministerial exception—a "lay teacher" exclusion, and a "co-religionist requirement." Both additions are contrary to precedent and logic.

1. First, Respondents propose a rule excluding all "lay teachers at religious elementary schools." Resp.Br.i. In support, they claim that lower courts have "uniformly" and "universally" ruled that "lay teachers in religious schools are not 'ministers.'" Resp.Br.1, 3-4.

They could not be more wrong. Courts both before and after *Hosanna-Tabor* have regularly applied the functional analysis to conclude that some lay teachers are within the ministerial exception and some aren't.

In *Raleigh*, for example, Judge Wilkinson explained that a music teacher at a Catholic school was a minister because "the functions of the position[]" were "important to the spiritual and pastoral mission." 213 F.3d at 802 (quoting *Rayburn*, 772 F.2d at 1169). It did not matter that the teacher was "lay" within the Catholic tradition, since courts "*routinely* applied the exception in cases involving persons other than ordained ministers." *Raleigh*, 213 F.3d at 801-802 (emphasis added). And in *Clapper* v. *Chesapeake Conference of Seventh-day Adventists* an unordained (and

thus "lay" in the Adventist tradition) teacher at a religious elementary school was a "minister" because he led his students in daily prayer and worship, taught them religion, and incorporated Adventist theology into every subject. 166 F.3d 1208 (4th Cir. 1998) (table). Other courts reached similar results. See, *e.g.*, *Coulee Catholic Schools* v. *Labor & Indus. Rev. Comm'n*, 768 N.W.2d 868 (Wis. 2009) (first grade "lay" teacher); *Stately* v. *Indian Cmty. School of Milwaukee*, 351 F.Supp.2d 858, 868 (E.D. Wis. 2004) (unordained teacher at Native American religious elementary school); see also *Dayner* v. *Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011) ("lay" principal); *Pardue* v. *Ctr. City Consortium Schools*, 875 A.2d 669 (D.C. 2005) ("lay" principal); cf. *Watson* v. *Jones*, 80 U.S. 679, 721 (1871) (selection of non-clerical trustees was under church's control, not courts'). We cited several of these cases in our brief; Respondents simply ignore them.

After *Hosanna-Tabor*, courts have reached the same results. An "ostensibly lay" teacher at a Jewish school was a "minister" because she was a "'teacher of [] faith' to the next generation." *Grussgott* v. *Milwaukee Jewish Day School, Inc.,* 882 F.3d 655, 659, 661 (7th Cir. 2018) (citation omitted). A "lay" principal at a Catholic elementary school was a minister because she "'convey[ed]' the School's Roman Catholic 'message and carr[ied] out its mission.'" *Fratello*, 863 F.3d at 209 (citation omitted). And a "lay" first-grade teacher was a minister because "religious function alone can trigger the exception in appropriate circumstances." *Ciurleo* v. *St. Regis Parish*, 214 F.Supp.3d 647, 652 (E.D. Mich. 2016); see also *Temple Emanuel*, 975 N.E.2d 433 (non-titled teacher at Jewish school); *Hutson* v. *Concord Christian School*, No.3:18-CV-48, 2019

WL 5699235 (E.D. Tenn. 2019) (unordained second-grade teacher at Baptist school); *Curl* v. *Beltsville Adventist School*, No.GJH-15-3133, 2016 WL 4382686 (D. Md. 2016) (music teacher at Adventist elementary school).

This win-some/lose-some track record is the hallmark of a well-functioning analytical approach. And it bears no resemblance to Respondents' account of the caselaw.

Given all the foregoing, Respondents' reliance on *Dayton* to support their "lay teacher" rule smacks of desperation, particularly since the *Hosanna-Tabor* respondents made the same argument without success. *Dayton Christian Schools* v. *Ohio Civil Rights Comm'n* was a *Younger* abstention case, and the Court thus expressly disclaimed that it was reaching the merits. 477 U.S. 619, 628 (1986).[3] Moreover, nothing in *Dayton* indicates whether the plaintiff was a "lay" teacher or not, or even a "minister." The words do not appear in the decision. Respondents' assignment of the *Dayton* teacher to the "lay" category is an especially dubious guess since the defendant nondenominational school was part of the "fundamentalist" Protestant tradition that does not use theological categories of "lay" and "clerical." *Dayton Christian Schools* v. *Ohio Civil Rights Comm'n*, 578 F.Supp.1004, 1021 (S.D. Ohio 1984). Small wonder, then, that no court has ever viewed *Dayton* as a ministerial exception case, much less concluded that it is the secret key to ministerial exception doctrine.

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[3] Respondents do not mention *Younger*.

Similarly, Respondents' use of lower-court precedent reads like snipped-out words in a ransom note. Resp.Br.4 n.1. *DeMarco*, *Geary*, *Cline*, *Dole*, and *Vigars* are not ministerial exception cases at all, instead applying precedents like *Sherbert*, *Lemon*, and *Catholic Bishop*. *Dolter* is irrelevant because it doesn't define ministerial status. *Mississippi College*, *Fremont,* and *Tree of Life* miss the mark because, among other things, they concern religious schools' efforts to define *all* of their teachers as ministers, without looking to each teacher's specific functions. *Redhead* and *Guinan* are simply bad law after *Hosanna-Tabor*. For example, *Guinan* restricted the ministerial exception to "exclusively religious" positions. 42 F.Supp.2d 849, 853 (S.D. Ind. 1998). Respondents' lower-court cases were also relied on by the Sixth Circuit, the EEOC, and Perich in *Hosanna-Tabor*, so it is surprising to see them recycled here. Not everyone failed to learn the lesson of *Hosanna-Tabor*. The ACLU, who supported the *Hosanna-Tabor* respondents, concluded that there is no categorical "lay teacher" exclusion. ACLU Br.26 (Morrissey-Berru was "a minister"); cf. Laycock Br.22.

2. Respondents' argument also fails because "lay teachers" is an incoherent legal category. Arising from the Christian tradition, "lay" is not a good fit for other faiths, particularly for those that reject Christian clergy-laity distinctions altogether. See, *e.g.*, "Laity," 8 Encyclopedia of Religion 5290 (2d. ed. 2005) (Lindsay Jones, ed.) ("to speak of 'laity' and 'clergy' within the community of Islam is to introduce categories that are more likely to distort than to illuminate the religio-social dynamics of this tradition."); see also *id.* at 5288-5289 (problematizing "lay" for other traditions, *e.g.*,

"category 'laity'" "has little to contribute" "to a discussion of Judaism in the common era."); Uddin Br.15-16.

Even within the set of specifically Christian traditions, the term "lay" means different things in different churches, and the term is not used at all by many. "Clergy and Laity," 1 Encyclopedia of Christianity 596 (1999) (Erwin Fahlbusch, *et al.*, eds.) ("Luther abolished the theological distinction between clergy and laity with his doctrine of the priesthood of all believers."). Today many Protestant groups continue to reject all clergy-laity distinctions. *Id.* And for those churches that do use the word "lay," the concept of the laity has wildly different meanings. *Id.* (describing differences among Orthodox, Anglican, Presbyterian, and Methodist traditions).

Within Catholicism itself, the word "lay" is used differently in different contexts. For example, under canon law, the ordained are "sacred ministers who in law are also called clerics," while "the other members of the Christian faithful are called lay persons." Code of Canon Law, can.207 §1. Male members of religious orders may be *either* clerics or lay persons. *Id.*, can.207 §2. Religious sisters like Sister Mary Margaret are for purposes of canon law "lay" because they cannot be ordained. Yet Respondents seem to think that their lay teacher exclusion would *not* apply to religious sisters. Resp.Br.21 ("nuns are 'ministers'").[4] Their proposed exclusion of "lay teachers" from the "ministerial" category is thus not just legally incoherent but also doesn't

[4] This is also why, *contra* Respondents, religious sisters cannot "conduct[] the mass." Resp.Br.9.

match the categories of plaintiffs they think it does, even within Catholicism.

Moreover, even on its own incoherent terms, Respondents' "lay teacher" exclusion would "penalize religious groups for allowing laypersons to participate in their ministries and thus create an incentive for religious organizations to bar laity from substantial 'role[s].'" *Fratello*, 863 F.3d at 207 (citation omitted); see also USCCB Br.11 (Catholicism encourages ministry by laypersons); Partnership Schools Br.4, 7. And it would disfavor the many faiths that reject any clergy-laity distinction, such as Muslims, Quakers, and Jehovah's Witnesses. Uddin Br.11-17. That would violate the Establishment Clause command that "one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982).

3. Respondents also attempt to graft onto the ministerial exception a new "Co-religionist Requirement" for teachers. Resp.Br.44. But *Hosanna-Tabor* rejected the idea that Perich's position was not ministerial simply because non-Lutheran lay teachers had the same duties. *Id.* at 193. Courts before and after have done the same. *Raleigh*, 213 F.3d at 803-804 (the fact that "the occupants of the [ministerial] position were not required to be Catholic" does not "diminish the spiritual significance of the * * * ministry role"); see also *Cannata*, 700 F.3d at 179 (same).

And for good reason. The ministerial exception exists to "preserve the independence of religious institutions in performing their spiritual functions." *Raleigh*, 213 F.3d 801. A religious school ought not lose that independence solely because one of its religion teachers was of another faith.

Respondents' co-religionist rule would also harm religious minorities, who often decline to "exclude members of other faiths" both for "promotion of inclusion" and so they have a sufficient pool of teachers. *Grussgott*, 882 F.3d at 658. Indeed, in *Grussgott*, the teacher was Orthodox Jewish while the school was non-Orthodox, and did "not require its teachers to be Jewish." *Id.* at 656; see Stephen Wise Br.8 (noting that Judaism allows "non-Jews [to] teach Jewish doctrine"). The rule would also penalize ecumenism and open religious traditions, such as Unitarian Universalism, Buddhism, and Bahá'í.

Grussgott flags an additional problem for Respondents' novel requirement: how similar is similar enough for someone to qualify as a co-religionist? Are Orthodox Jews and non-Orthodox Jews co-religionists? What about Orthodox Jews and "cultural" Jews? *Grussgott*, 882 F.3d at 659. Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists? Respondents' co-religionist requirement would be a constitutional thicket.

C. The ministerial exception's focus on function over form is administrable.

Lastly, Respondents attack the administrability of the functional consensus. But it is their "formalistic" focus on title that has rightly been rejected as unworkable, entangling, and inconsistent with religious autonomy.

1. The formalistic approach would turn religious-sounding titles into a ministerial exception requirement. Resp.Br.20. But "while a ministerial title is undoubtedly relevant in applying the First Amendment

rule at issue, such a title is neither necessary nor sufficient." *Hosanna-Tabor* at 202 (Alito, J., concurring). In fact, "no circuit has made * * * formal title determinative." *Id.*

Respondents say they were not ministerial because they held the "secular title of 'teacher.'" Resp.Br.40. There is, though, nothing inherently secular about the title "teacher." "Rabbi" and "guru" mean "teacher." And in Catholicism, Christ is the preeminent "Teacher." *Catechesi tradendae* ¶ 8. Whether "teacher" is a secular or religious title thus depends on what is being taught and in what context.

Courts before and after *Hosanna-Tabor* also reject Respondents' approach. "[T]he purely secular title of 'grade school teacher' does not rule out the application of the ministerial exception." *Grussgott*, 882 F.3d at 659. Nor do "plainly secular titles," by themselves, "prevent application of the ministerial exception" because "the substance of the employees' responsibilities in their positions is far more important." *Fratello*, 863 F.3d at 207. The ministerial exception applies "regardless whether a religious teacher * * * holds any title of clergy." *Temple Emanuel,* 975 N.E.2d at 486.[5]

2. It is not difficult to understand why courts resist a title-focused approach. Among other things, the "formalistic" aspects of religious practice fall particularly within the realm of religious autonomy. Allowing a

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[5] See also *Alicea-Hernandez* v. *Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) ("Hispanic Communications Manager"); *Yin* v. *Columbia Int'l Univ.*, 335 F.Supp.3d, 803 816-817 (D.S.C. 2018) ("Director of the TESOL Program"); *Ciurleo*, 214 F.Supp.3d at 651-652 ("teacher"); *Curl*, 2016 WL 4382686, at *10 ("music teacher").

space of internal freedom for religious bodies to decide what to call their religious employees and how to prepare them for service protects the *mens ecclesiae*. It thus parallels the Free Exercise Clause's "absolute" protection for freedom of belief. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). And it comports with the Establishment Clause's historical focus, as one hallmark of a religious establishment was government control over the title "minister," including by imposing training requirements, CLS Br.12-17; see also Laycock Br.4-17; U.S. Br.10-12.

Respondents' title-first focus would also entangle church and state. In their view, courts should examine not "substantive realities," but rather whether religious employers are "send[ing]" the right sort of "message" and "signaling." Resp.Br.15, 23. So under Respondents' test, where a judge or jury deems the "signals" insufficiently clear, the government would be allowed to select who teaches religion at a religious school. That entangling *result* is a far graver constitutional problem than an entangling *test*.

But Respondents' test is entangling too. For the only way a church could protect its decision-making ability from Respondents' test would be to hand out titles that would "send the right message," and to require particular training to ensure that courts recognize the need for church control. *Hosanna-Tabor* at 196. Further, a government-mandated focus on outward shows would create a moral hazard (in both the economic and religious senses) for religious organizations. See, *e.g.*, *Fratello*, 863 F.3d at 207 (a religious group "cannot insulate itself" from employment discrimination laws "by bestowing hollow ministerial titles"); cf. *Agency for Int'l Dev.* v. *AOSI, Inc.*, 570 U.S.

205, 219 (2013) ("evident hypocrisy"). That is hardly the way to separate church and state.

3. Respondents make fanciful predictions about "downstream consequences," Resp.Br.37, but their "predictions partake of Cassandra's gloom more than of her accuracy." *Local 1545* v. *Vincent*, 286 F.2d 127, 132 (2d Cir. 1960).

Some of Respondents' horribles have never paraded, despite ample opportunity. For example, there are no reported ministerial exception cases involving a nurse, Resp.Br.34. There have been just a handful of ministerial exception cases involving religious healthcare defendants, most brought by chaplain-plaintiffs. Likewise, there are no cases putting cooks, facilities managers, or receptionists, Resp.Br.34, within the exception. That some religious employers sought to apply the ministerial exception to those employees but *failed* under the functional standard is a reason to *follow* the functional approach, not reject it. See, *e.g.*, *Davis* v. *Baltimore Hebrew Congregation*, 985 F.Supp.2d 701, 711 (D. Md. 2013) (applying *Rayburn* and *Raleigh* to find that facilities manager served no "important" religious "function" for synagogue). Experience shows that the functional approach does not make "everyone" a minister. Resp.Br.35.

Other horribles are based on Respondents' notion that "no true minister" could work in certain jobs. For example, Respondents say workers at Catholic Charities or other social services organizations such as homeless shelters just can't be ministerial. Resp.Br.34. This approach trades on cultural and semantic associations with the word "minister," but ultimately begs the question about how to determine who fits in the *legal* ministerial category. Of course some of

these workers will be excluded from the ministerial exception. But if they perform important religious functions, then it is no answer to say that "no true minister" could possibly serve the poor. See, *e.g.*, *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (Salvation Army employee); Jack Jenkins, *While Politicians Talk About Banning Syrian Refugees, Pope Francis Washes Their Feet*, Think Progress (Mar. 24, 2016), https://perma.cc/564E-97AB.

Without citing any real-world examples, Respondents say the government's interest in preventing retaliation for reporting health-and-safety violations or sexual abuse could be harmed. Resp.Br.17, 39. But this proves too much—the government's interest would be no different if a nun reported a violation than if a religion teacher did. And of course religious employers would still be liable for the underlying conduct regardless of the ministerial exception. For example, mandatory reporting statutes govern sexual abuse reporting. Religious autonomy *protects* society's interests by protecting employers who are sued for publishing names of credibly-accused sexual abusers. See, *e.g.*, *Stepek* v. *Doe*, 910 N.E.2d 655, 662 (Ill. App. Ct. 2009).

Finally, other horribles just aren't horrible. Camp counselors who lead their campers in multiple daily prayers and devotions ought to be within the exception. Resp.Br.33. The same is true of writers, editors, and public relations specialists who perform the important religious function of communicating the faith to others on behalf of their church. Resp.Br.33, 34; see *Alicea-Hernandez*, 320 F.3d at 704.

Ultimately Respondents' parade of horribles shows how futile it is to look at titles first. Slapping a title

onto a job description is far "eas[ier]" and more "susceptible to manipulation," Resp.Br.43, than actually adding important religious functions onto an otherwise secular job.

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

A. Respondents performed important religious functions.

Respondents do not contest the most important religious function they performed: they taught the Catholic faith to fifth-graders 4-5 days a week, covering a wealth of religious doctrine in a devotional manner intended not just to educate their students but to inculcate the faith in them. Pet'r.Br.11-14, 18-19. Respondents likewise do not contest that they incorporated the Catholic faith into all subjects, tested their students on Catholicism, adorned their classrooms with Catholic symbols, embodied Catholic faith and morality for their students, and regularly joined them in prayer and brought them to Mass. Pet'r.Br.45-49; see also Resp.Br.9, 13. Nor do they contest that their contracts and employment handbooks spelled out their religious duties, or that they were evaluated on their religious performance. Pet'r.Br.11, 14, 16-19. That is sufficient to find that the exception applies.[6]

1. In response to this overwhelming record, Respondents rely on formalistic critiques and misstatements of fact. First, Respondents repeatedly minimize

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[6] Under the First Amendment, the Court must undertake "independent appellate review" despite the summary judgment standard. *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 510 (1984).

their religious functions, objecting that they taught religion from a "pre-selected" curriculum,[7] that they didn't "lead" students in prayer but merely "participat[ed]," and that in worship, they were just "keep[ing] [the] class settled and quiet." Resp.Br.8-9, 45-46, 49. But these word games do not change the "substantive realities" of their roles. To their fifth-graders, Respondents were spiritual leaders.

Teaching the faith. Vis-à-vis their students, Respondents were the Church's voice in "introduc[ing] students to Catholicism" and giving "them a groundwork for their religious doctrine." OLG.App.93; StJ.App.83a; Pet'r.Br.11-14; 18-19. Biel, for example, taught her students, among many other things, how to "Becom[e] a Catholic"; that Jesus is "Savior of all people" and both "human and divine"; the liturgical celebrations of "Mary and the saints"; and the seven sacraments of Baptism, Confirmation, Eucharist, Reconciliation, Anointing of the Sick, Matrimony, and Holy Orders. StJ.SER.17-21. Morrissey-Berru did much the same. Pet'r.Br.11-12.

Moreover, the "slice" of time Respondents used for such key religious instruction was the same size or bigger than Perich's—and still constituted more religious

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[7] Respondents think "pre-selection" is fatal: unless a minister is a "leader" who can exercise "judgment regarding religious dogma," she is not ministerial. Resp.Br.29. Not so. *Grussgott*, 882 F.3d at 660 ("discretion * * * is irrelevant"); *Raleigh*, 213 F.3d at 803 (same). The words of the Mass are "pre-selected," as is much of Jewish and Muslim ritual. Respondents' rubric would exclude mashgichim, mohelim, and perhaps the Pope.

instruction than students received from their parish priests. Pet'r.Br.26.

Prayer. Morrissey-Berru prayed the (pre-selected) Hail Mary daily with her students and prayed spontaneously with them when the need arose. OLG.App.86a-89a. Biel was expected to begin and end the school day with prayer, and to ensure her students prayed specific prayers monthly, including "Angel of God" and "Prayer of the Faithful Departed." StJ.App.110a. Respondents controlled the classroom and could not have required their fifth-graders to pray without being "truly in charge" of their classrooms. Resp.Br.22.

Worship. The schools told Respondents that when accompanying students to Mass teachers were expected to "actively take part" and "encourage" students to do the same. StJ.App.19a, 33a; OLG.App.68a-69a. Directing the Easter Passion play, taking students to the Cathedral for altar service, and helping plan liturgies was not just keeping students "settled and quiet." Resp.Br.9.

2. Respondents fault the schools for not using the Protestant-inflected shibboleth "minister" in their employment contracts or handbooks. Resp.Br.8. But the schools told Respondents that they were expected to participate in the spiritual formation of their students by teaching and practicing the faith. Morrissey-Berru's handbook said she was expected to be "ministering" to her students, OLG.ER.651, that "teaching of and commitment to Catholic religious and moral values" were "essential job duties," OLG.App.55a, and that she was meant to "carry out the mission of the Church," OLG.ER.647. Her contract likewise required her to make an "overriding commitment" to perform

"[a]ll" of her "duties and responsibilities" in a way that aligns with Christian values and which personally "model[s] and promote[s] behavior in conformity to the teaching of the Roman Catholic Church." OLG.App.32; J.A.145, 155; cf. Resp.Br.52 ("model and instruct").

Biel's contract explained that teachers are "expected to model, teach, and promote behavior in conformity to the teachings of the Roman Catholic Church," J.A.321. And her handbook said they should "guide the spiritual formation of the student in partnership with the parents," by, among other things, "[t]eaching the Gospel message and Catholic doctrine in such a way as to make them relevant to everyday life," "[i]ntegrating Catholic thought and principles into secular subjects," and "[e]ncouraging student participation in liturgical services." StJ.ER.571-572. Biel's handbook also explained that teachers were "following the call of Jesus" by advancing "one of the most important missions of the Church," a mission whose "success depends upon * * * the teacher who chooses to teach in a Catholic school." StJ.ER.569, 573. And what she taught confirmed these high expectations. StJ.SER.17-21. Respondents knew they were expected to impart the Catholic faith and values to their students. Pet'r.Br.11, 16-17; OLG.App.32a; StJ.App.19a, J.A.154-155, 321.

3. Finally, Respondents imply Morrissey-Berru was not a practicing Catholic during her tenure, relying on her declaration that she was "not *currently* a practicing Catholic." OLG.Resp.App.2a (emphasis added); Resp.Br.13.[8] But the only record evidence

[8] Biel was Catholic. StJ.App.92a.

about her practice *while teaching* shows that Morrissey-Berru "enjoyed sharing *her Catholic faith* with the students and was very active in the para-liturgies" that Our Lady hosted. OLG.ER.773 (emphasis added). "[B]efore litigation commenced," Resp.Br.22, Morrissey-Berru repeatedly signed contracts affirming that, as a Catholic, she was "in good standing with the Church." J.A.91, 100, 154, 164. And every teacher at Our Lady was required, subject to exceptions not relevant here, to be an "actively practicing Catholic and participate in catechetical formation." J.A.111; OLG.Pet.App.57a.

B. Respondents bore religious titles and had religious training.

Respondents' titles of "teacher" and "catechist," together with their religious training, reflect their role in "teaching and conveying the tenets of the [Catholic] faith to the next generation." *Hosanna-Tabor* at 200, 204. As noted above, Respondents wrongly attempt to secularize the title "teacher," but here it accurately reflected Respondents' role leading their fifth-graders into the Catholic faith.

As for training, the schools hired Respondents on the basis of their training and their personal Catholic faith. The schools then equipped them to transmit that faith to their fifth-graders by giving them both detailed in-school feedback and off-site courses.[9] When Respondents accepted their positions, they agreed that

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[9] Respondents quibble over whether Morrissey-Berru finished the last stage of catechist training. Resp.Br.13. But Morissey-Berru testified that her "Catechist Certification" meant she was "knowledgeable in the Catholic religion." OLG.App.85a.

their training was sufficient to effectively carry out the schools' religious mission, OLG.App.32-33a; StJ.App.28a, and the schools evaluated them on how well they did so, J.A.332; StJ.App.83a-84a, 106a; OLG.App.95a.

More fundamentally, the Catholic Church should decide how much training its teachers need to teach schoolchildren religion, not government. Laycock Br.29. Some religious groups rely on volunteers with no training at all; others entrust this task to professional clergy; most use a combination. A "resemblance-to-Perich test" requiring years of formal postsecondary religious education will significantly prejudice small and minority faith groups as well as those that, for theological reasons, entrust teaching the faith to laypeople. USCCB Br.18-19.

C. The schools did not need a religious reason.

Finally, Respondents argue that lower courts can "without treading on First Amendment freedoms, decide whether [Respondents were] fired for discriminatory reasons." Resp.Br.53-54. But *Hosanna-Tabor* held that this "misses the point" of the exception, which is to ensure that the Church alone chooses "who will personify" its faith. *Id.* at 188, 194; Resp.Br.20.

A religious school can therefore decide that a religion teacher's poor classroom management harms its religious mission without also crying heresy. Rightly so. A chaotic classroom can "directly interfere[] with the teaching of religion." See *Miller* v. *Catholic Diocese of Great Falls*, 728 P.2d 794, 796-797 (Mont. 1986). And because secular and religious teaching are "intertwined," Resp.Br.31, poor teaching performance *is* a

"religious reason" that even Respondents agree courts must accept "without further inquiry." Resp.Br.18.

Further, "the very process of inquiry" into the reasons for ministerial selection would entangle the state in internal religious affairs. *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979); *Hosanna-Tabor* at 205-206 (Alito, J., concurring). To avoid imposing "the full panoply of legal process designed to probe the mind of the church in the selection of its ministers," *Rayburn*, 772 F.2d at 1171, courts have long treated religious autonomy as a threshold inquiry "similar to a government official's defense of qualified immunity": a "question of law to be resolved at the earliest possible stage of litigation" to "avoid excessive entanglement in church matters." *Bryce* v. *Episcopal Church*, 289 F.3d 648, 654 & n.1 (10th Cir. 2002); see generally Inter-Varsity Br.13; EPPC Br.13; Resp.Br.19 (conceding "immunity").

Here, Respondents personified the Church to their fifth-graders, but in the estimation of the Church, they weren't succeeding in their role. That was reason enough for the district courts to dismiss their lawsuits.

CONCLUSION

The decisions below should be reversed.

Respectfully submitted.

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