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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the First Amendment's Religion Clauses prohibit lay teachers at religious elementary schools from bringing employment discrimination claims.

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INTRODUCTION

The question whether a lay teacher may bring an employment discrimination claim against a religious school is not a new one. In the decades following the enactment of the Civil Rights Act of 1964 and similar legislation, the lower courts considered numerous such cases. The courts uniformly allowed them to proceed. *See infra* at 3-6 & n.1. In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), this Court likewise allowed a lay teacher in a religious elementary school to sue her employer. The school had refused to renew the teacher's contract after she became pregnant, maintaining that "mothers should stay home with their preschool age children." *Id.* at 623. Rejecting the school's argument that the teacher's duties—which included religious instruction, infusing secular subjects with Biblical themes, and leading students in prayer—were so important to the church that the Religion Clauses barred governmental inquiry into the school's employment action, the Court unanimously held that the school enjoyed no immunity against the teacher's sex discrimination claim. *Id.* at 628; *see also id.* at 625 n.1.

Now that this Court has recognized the "ministerial exception" to compliance with employment discrimination laws, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), petitioners ask the Court to embrace the very same argument it (and so many other courts) soundly rejected years ago. The Court should decline that request. The Court in *Hosanna-Tabor* acknowledged

that a church's employment of a teacher with a religious title and "a significant degree of religious training" should be treated akin to the selection of any other designated ecclesiastical leader—that is, as beyond the government's power to control. 565 U.S. at 191-92. But the Court signaled no disapproval of the well-established boundaries of such immunity. And concurring Justices stressed that the Court's opinion "should not be read to upset th[e] consensus" that had developed "over time" in the lower courts concerning how the ministerial exception operated. *Id.* at 203-04 (Alito, J., concurring).

What is more, holding that the ministerial exception can be triggered simply by showing that an employee performs "important religious functions," Petrs. Br. 36, would turn the exception inside out. Countless employees of religious institutions—not just lay teachers, but also nurses in hospitals, counselors in summer camps, cooks and administrators in social services centers, and other categories of workers—perform duties that their employers sincerely consider important to their religious missions. The main point of the ministerial exception, therefore, is to identify *which* employees who perform important religious functions are barred from bringing discrimination (or other types of employment) claims. Any other conception would render the doctrine either unintelligible or virtually boundless. After decades of stability and agreement in the lower courts, there is no sound reason to invite such upheaval.

STATEMENT OF THE CASE

A. Legal Background

1. When Congress passed Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, it allowed religious organizations to give employment preference to members of their own faith. *Id.* at 2000e-1. But the statute did not exempt religious employers altogether from its coverage. And after carefully considering the matter several years later, Congress decided that such organizations should "remain subject to the provisions of Title VII with regard to race, color, sex, and national origin." Section-by-Section Analysis of H.R. 1946, the Equal Employment Opportunity Act of 1972, *reprinted in* Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate, Legislative History of the Equal Employment Opportunity Act of 1972 (Comm. Print 1972), at 1844-45. Many states that enacted parallel legislation, both before and after Title VII, made the same determination.

As a result, employment discrimination lawsuits against religious employers began filtering into the courts. One recurring fact pattern involved lay teachers in religious schools who performed some religious, but mostly secular, duties. The teachers were almost always women, and the typical scenario involved being fired for becoming pregnant without being married or otherwise departing from traditional conceptions of mothering or childrearing. The federal

courts universally held that the lawsuits could proceed.[1] And across several presidential administra-

[1] *See, e.g.*, *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 655 (6th Cir. 2000) (elementary teacher who "provided daily religious instruction to students, took students to Mass on a regular basis, and prepared her second-grade students for the sacraments of Reconciliation and Holy Communion"); *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 331 (3d Cir. 1993) (elementary school teacher required "to be a visible witness to the Catholic Church's philosophy and principles"); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171-73 (2d Cir. 1993) (high school teacher who led class in prayers and took them to mass); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396-97 (4th Cir. 1990) (K-12 teachers whose full-time curriculum included instruction in Bible study); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364-65, 1369-70 (9th Cir. 1986) (pre-K-12 teachers whom the church considered part of its "ministry" and as performing "an integral part of the religious mission of the [c]hurch"); *EEOC v. Miss. College*, 626 F.2d 477, 485 (5th Cir. 1980) (faculty members of a Baptist college who were "expected to serve as exemplars of practicing Christians"); *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 214 (E.D.N.Y. 2006) (fifth-grade teacher who "taught one hour of Bible study per day"); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 852 (S.D. Ind. 1998) (fifth-grade teacher who "was a Catechist, taught at least one class in religion per term, and organized Mass once a month"); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 804 (N.D. Cal. 1992) (librarian who was required, through her work, to serve "the mission of the church (to instill fundamentalist christian values)"); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700, 707-08 (S.D. Ohio 1990) (teachers in elementary and secondary schools where "principles of the Christian faith pervade the schools' educational activities"); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 270 (N.D. Iowa 1980) (high school English teacher "significantly involved in the religious pedagogical ministry of the Catholic Church"); *see also Hankins v. Lyght*, 441 F.3d 96, 117 (2d Cir. 2006) (Sotomayor,

tions, the federal government agreed with this consensus—sometimes suing on behalf of lay teachers and supporting them as amicus.[2]

Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990), is illustrative. In that case, the Department of Labor and Equal Employment Opportunity Commission brought suit against a religious school, challenging its "head-of-household" pay policy. Under the policy, "all married male teachers received a salary supplement." *Id.* at 1392. But "[m]arried women were not eligible to receive the supplement," even when their husbands were full-time students or unable to work. *Id.* The school maintained that the First Amendment immunized them from suit because the lay teachers—just like "nuns who teach in church-affiliated schools"—taught "a full-time curriculum that included instruction in Bible study and in traditional academic subjects into which biblical material had been integrated." *Id.* at 1392, 1396.

The Fourth Circuit disagreed, holding that "lay teachers in a church-operated private school" are not "ministers." *Id.* at 1396-97. "This is not to minimize the vocation of the [school's] teachers or the sincerity

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J., dissenting) (agreeing, in case in which majority did not reach the issue, with precedent that ministerial exception does not cover lay teachers in parochial school with "some religious duties").

[2] *See, e.g.*, *Geary*, 7 F.3d 324 (amicus support); *DeMarco*, 4 F.3d 166 (same); *Shenandoah Baptist Church*, 899 F.2d 1389 (brought suit on behalf of teachers); *Fremont Christian Sch.*, 781 F.2d 1362 (same); *Miss. College*, 626 F.2d 477 (same); *Tree of Life Christian Schs.*, 751 F. Supp. 700 (same).

which they bring to it." *Id.* at 1397. But where a teacher "belong[s] to no clearly delineated religious order," serves no leadership role in the church, and "perform[s] no sacerdotal functions," federal employment law does not unduly intrude on a "church's ability to administer its relationship" with its spiritual leaders. *Id.* at 1396-97. Solicitor General Starr defended that holding in this Court, explaining for the Government that the special protection the First Amendment accords to employment of "members of religious orders" "does not extend to lay teachers at a church-operated school." Br. in Opp. 11-12, No. 90-16; *see also id.* 14-15. Having held a few years before that the lay teacher in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), could bring her employment discrimination claim, the Court denied certiorari. 498 U.S. 846 (1990).

3. In 2012, the Sixth Circuit went farther, holding that a "called" teacher, who was a "commissioned minister," was not covered by the ministerial exception. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769 (6th Cir. 2010). In response, this Court recognized the ministerial exception, confirming that the First Amendment's Religion Clauses "bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181 (2012). The Court also determined that four factors established that the teacher in that case, Cheryl Perich, qualified as a "minister." Specifically, (1) the Lutheran church had conferred upon her the title of

"Minister of Religion, Commissioned"; (2) that ministerial title "reflected a significant degree of religious training followed by a formal process of commissioning"; (3) Perich "held herself out as a minister of the Church"; and (4) Perich served "important religious functions," including teaching religion, leading her students in prayer, and crafting and leading schoolwide chapel services. *Id.* at 191-92.

Nothing in the Court's opinion called into question the longstanding consensus in the lower courts about *lay* teachers. To the contrary, the Court "express[ed] no view" on whether "lay teachers" who perform the same duties as Perich should be considered ministers, *id.* at 193—let alone whether lay teachers with less significant religious duties would qualify as ministers.

B. Factual Background and Proceedings Below

These cases arise in the summary judgment context, and respondents are the nonmoving parties. This Court thus views any disputed facts in the light most favorable to respondents. *See Green v. Brennan*, 136 S. Ct. 1769, 1774 (2016).

1. *Kristen Biel*

a. Kristen Biel received a bachelor's degree in liberal arts and a teaching credential from California State University, Dominguez Hills. StJ.App. 4a-5a;

JA 243-44.[3] After graduating, Biel worked at two tutoring companies and as a substitute teacher at several public and private schools. StJ.App. 4a; JA 244-46.

In 2013, St. James School, a Catholic parish school in Torrance, California, hired Biel as a long-term substitute teacher. StJ.App. 4a; JA 248. Biel was a "team teacher"—that is, she taught a first-grade class two days a week, while another teacher taught the same class three days a week. JA 248-49. At the end of that school year, St. James's principal, Sister Mary Margaret Kreuper, hired Biel as a full-time fifth-grade teacher. StJ.App. 4a; JA 250.

Biel's employment contract with the School—titled "Faculty Employment Agreement—Elementary"—identified her position as "Grade 5 Teacher." StJ.App. 96a-105a; JA 328-29. Neither the contract nor the School's faculty handbook suggested that, by virtue of accepting this position, Biel would be considered a Catholic "minister," and therefore exempt from generally available employment laws. To the contrary, the contract referred to Biel throughout as simply "teacher," and directed her to "[s]ee Department of Catholic Schools *Lay* Employees Benefit Guide" for available benefits. StJ.App. 105a; JA 320, 325, 327-29 (emphasis added).

Further, while St. James School "recommended" that its teachers be Catholic (and Biel was, in fact,

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[3] For ease of reference, this brief uses the same naming conventions as the Schools' brief, *see* Petrs. Br. xii, and refers to Respondent's Appendix in No. 19-267 as "OLG.Resp.App."

Catholic), this was not a requirement for teaching positions at the School. StJ.App. 4a; JA 289. Nor were teachers required to have experience, training, or schooling in religious pedagogy; Biel had no such credentials at the time she was hired. StJ.App. 4a; JA 242-244, 263. Biel's only Catholic educational training occurred well into her tenure at St. James: a single half-day conference that all of the School's teachers—including, for example, the computer teacher—attended. StJ.App. 4a-5a; JA 261-63. Conference topics ranged from techniques for teaching art to incorporating religious themes into lesson plans. StJ.App. 4a-5a; JA 262-63.

Biel taught the fifth graders at St. James School all academic subjects, including English, spelling, reading/literature, mathematics, science, and social studies. StJ.App. 5a; StJ.ER 588. The curriculum also included religion, which Biel taught for approximately thirty minutes a day, four days a week. StJ.App. 5a; JA 254-55. When teaching those religion modules, the School required Biel to follow instructions in a workbook on the Catholic faith. StJ.App. 5a; JA 254-55.

Biel's duties did not include any spiritual leadership. She did not lead her students in classroom prayer or teach them prayer rituals. JA 93a-94a. Once a month, she accompanied her students to the multi-purpose room for mass. But a Catholic priest or a nun—often, Sister Mary Margaret—always conducted the mass. JA 258. Biel's job was to keep her class settled and quiet. StJ.App. 5a, 13a; JA 258-59.

b. Towards the end of her first full school year—a few months after receiving a generally positive teaching evaluation, JA 277-86—Biel learned that she had breast cancer. StJ.App. 6a; JA 265-66. Biel told the School that she would need to undergo surgery and chemotherapy, and that her condition would require her to take time off for this treatment. StJ.App. 6a; JA 267-69; JA 309.

Shortly after Biel informed the School that she would need such accommodations, Sister Mary Margaret notified her that the School would not renew her contract. StJ.App. 6a; JA 270-73.

c. After filing a charge of discrimination based on disability with the EEOC, Biel sued the School in the United States District Court for the Central District of California. Biel asserted that her firing violated the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, because she had breast cancer and required finite reasonable accommodations for treatment. StJ.ER 854-55.

At no time has the School asserted a religious reason for terminating Biel. Sister Mary Margaret initially said Biel "was not strict" enough and that "it wouldn't be fair to the students to have two teachers in one school year." StJ.App. 6a-7a; JA 272. She later acknowledged, however, that the School could have handled two teachers in the same year and, in fact, had done so in prior years to accommodate maternity leave. JA 317-18.

The district court nevertheless declined to adjudicate Biel's case. After inviting the School to seek sum-

mary judgment on the basis of the ministerial exception, the district court granted the motion and held that the exception applied. StJ.App. 7a; StJ.ER 1.

d. Noting that "[n]o federal court of appeals has applied the ministerial exception" to facts such as these, the Ninth Circuit reversed and remanded. StJ.App. 4a, 15a. The Ninth Circuit explained that, in contrast to the teacher in *Hosanna-Tabor*, St. James gave Biel the secular title "Grade 5 Teacher"; the School had no religious requirements for the position; and Biel never presented herself as a minister. *Id.* 10a-11a. Accordingly, the fact that Biel was required to "teach[] religion from a book required by the school and incorporat[e] religious themes into her other lessons" could not transform her into a minister. *Id.* 13a. Holding that such duties are enough to trigger the ministerial exception, the court of appeals concluded, would unmoor the doctrine from its historical concern with "high-level religious leaders" and require the courts to deny antidiscrimination protection to "every employee whose job has a religious component." *Id.* 16a.

2. *Agnes Morrissey-Berru*

a. Respondent Agnes Deirdre Morrissey-Berru received her Bachelor of Arts in English language arts with a minor in secondary education. JA 73. She then worked for 20 years at the Los Angeles Times as a copywriter and advertising salesperson. JA 74.

In 1998, Morrissey-Berru began working as a substitute teacher for Our Lady of Guadalupe School, a Catholic parish school in Hermosa Beach, California. OLG.App. 80a. The following year, the School offered

Morrissey-Berru a full-time position as a sixth-grade teacher. Morrissey-Berru held this position for 10 years, during which time she received her California teaching credential from Chapman University. JA 73. For the next six years, Morrissey-Berru taught fifth grade. JA 75.

Each year, Morrissey-Berru signed a "Faculty Employment Agreement" with the School. OLG.Resp.App. 1a. None of those employment contracts suggested that, by virtue of being a teacher at the School, Morrissey-Berru would be considered a Catholic "minister," or that she would be unable to enforce generally applicable employment laws. Rather, like the St. James employment agreement, the Our Lady of Guadalupe agreements referred to Morrissey-Berru as simply "Teacher," and directed Morrissey-Berru to the "Lay Employees Benefit Guide." JA 91-100, 127-164; OLG.App. 32a-42a. In addition, Our Lady of Guadalupe's Faculty Handbook expressly promised not to discriminate on the basis of any protected characteristic, including race, sex, disability, or age. OLG.ER 648.

Like St. James School, Our Lady of Guadalupe School "preferred" its teachers to be Catholic, but it did not insist upon that. JA 110.[4] Morrissey-Berru is

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[4] The School suggests that Our Lady of Guadalupe required lay teachers like Morrissey-Berru to be Catholic. *See* Petrs. Br. 10. But this matter is, at a minimum, a disputed factual issue that must be resolved at this stage in Morrissey-Berru's favor. Asked whether it is "a requirement that a teacher be Catholic in order to teach at the school," Principal Beuder initially answered, "It is preferred." JA 110. Beuder later asserted that "to teach religion at the school, you need to be a Catholic." *Id*. But

not a practicing Catholic. OLG.Resp.App. 2a. Nor did Our Lady of Guadalupe require teachers to have background, training, or schooling in religion or Catholic pedagogy; Morrissey-Berru had no such credentials at the time she was hired. Several years into her tenure, the School asked Morrissey-Berru to attend a catechist course on the history of the Catholic Church. OLG.App. 2a-3a, 85a. But the record does not indicate whether Morrissey-Berru ever completed the course.

Morrissey-Berru was tasked with teaching her fifth graders a broad range of academic subjects—reading, writing, math, grammar, vocabulary, science, social studies, and religion. JA 75. Like St. James, Our Lady of Guadalupe required Morrissey-Berru to follow a set curriculum from a pre-selected workbook when teaching religion modules. JA 79-80. Morrissey-Berru also performed sporadic duties in connection with the students' prayer-related activities. OLG.App. 82a-89a.

b. In 2014, when Morrissey-Berru was in her sixties, the School's principal, April Beuder, expressed dissatisfaction with Morrissey-Berru's classroom instruction and asked if she wanted to retire. JA 85;

Beuder then changed course again, stating that "[i]t is acceptable to hire someone who is not a Catholic if they are actively practicing their Christian faith, Christian versus Catholic," *Id.*; *see also* JA 112. Asked again for a straight answer, Beuder indicated a preference for Catholic teachers, with the caveat that "[e]xceptions can be made." JA 113. Morrissey-Berru's 2013-2014 employment contract, moreover, contemplates non-Catholic teachers, providing that a teacher "must be in good standing with the Church" only "if" she is Catholic. JA 144.

OLG.ER 994. After Morrissey-Berru said no, Beuder demoted her to a part-time position, assigning her to teach only social studies and religion. JA 85; OLG.App. 5a, 29a-31a. The school did not renew Morrissey-Berru's contract the following year. OLG.App. 30a-31a.

c. Morrissey-Berru filed a charge with the EEOC, alleging that the School terminated her in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq*. *See* JA 101-07. The EEOC issued a right-to-sue letter, and Morrissey-Berru filed suit in the United States District Court for the Central District of California. JA 1.

Like St. James, Our Lady of Guadalupe has never advanced a religious reason for firing Morrissey-Berru. Rather, Principal Beuder has claimed that the School eliminated the position due to "the budget and the changing needs of the students." OLG.App. 30a. Beuder also has asserted that Morrissey-Berru's teaching lacked "[a]cademic rigor." JA 33.

The district court never considered whether either of these was the real reason the School fired Morrissey-Berru. Instead, the district court granted summary judgment for the School, ruling that the ministerial exception bars her claim. OLG.App. 4a, 8a.

d. Following its decision in *Biel*, the Ninth Circuit issued a short opinion reversing and remanding for further proceedings. "Considering the totality of the circumstances in this case," the court of appeals explained, "the district court erred in concluding that Morrissey-Berru was a 'minister.'" OLG.App. 2a. Morrissey-Berru had no ecclesiastical title; she did

not have any significant "religious credential, training, or ministerial background"; and she "did not hold herself out to the public as a religious leader or minister." *Id.* 2a-3a. Though Morrissey-Berru had certain religious responsibilities as a teacher, those limited duties did not overcome these other factors. *Id.* 3a.

3. After the court of appeals denied rehearing en banc in both cases, StJ.App. 40a, the Court granted certiorari and consolidated them.[5]

SUMMARY OF ARGUMENT

The court of appeals correctly held that the ministerial exception does not bar respondents' employment discrimination claims.

I. In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), this Court recognized the ministerial exception and established a framework for assessing ministerial status. That framework—reflecting lower courts' decades of experience with the issue—focuses first and foremost on formal indicia of ministerial status, such as employees' titles, training, and whether they held themselves out as spiritual leaders. To ensure these legal assessments are not overly rigid, the framework also requires courts to consider employees' job duties.

[5] Last summer, after a five-year battle with breast cancer, Kristen Biel passed away. 19-348 Br. in Opp. 1 n.1. Her husband Darryl Biel, as personal representative of her estate, has been substituted in her case as the plaintiff. *Id.*

This Court should adhere to this multi-factor approach and reject the Schools' argument that performing "important religious functions" alone renders an employee a minister. The current framework minimizes entanglement in questions of religious doctrine, while promoting values of accountability and transparency. Officially designating particular people as spiritual leaders, based on special training and ecclesiastical attestations, sends a clear and powerful message that the church has put its faith in those persons' hands. At the same time, such designations give fair notice to employees that they are entering into distinctive relationships—ones that their employers believe are so central to the church's spiritual mission that they preclude enforcement of ordinary employment laws (or perhaps even of employment contracts themselves).

The Schools' function-only test, by contrast, is flawed on every level. It finds no support in the historical episodes the Schools reference, which dealt exclusively with titled clergy. It contravenes this Court's and lower court precedent predating *Hosanna-Tabor*, as well as *Hosanna-Tabor* itself. It also is unnecessary to effectuate the purpose of the ministerial exception, which is to ensure religious organizations have exclusive control over their spiritual hierarchies and internal affairs.

Perhaps most importantly, the Schools' function-only test would create profound problems in practice. Religious employers sincerely believe that virtually all of their employees perform important religious functions. A legal test making that the sole touch-

stone would therefore put courts in an impossible situation. Courts would either have to sort out whether, say, caring for the sick is important while feeding the hungry is not, or they would simply have to accept that millions of workers across the country are all now "ministers," newly exempt from our Nation's civil rights laws. Neither outcome would be desirable. Worse yet, courts would face serious pressure to extend religious employers' newfound immunity to other employment laws—ranging from wage-and-hour provisions to statutes protecting workers from retaliation for reporting criminal conduct or health-and-safety violations. Faced with such potentially cascading repercussions, the prudent course is to stick to the multi-factor framework and lower-court case law that has produced decades of stability.

II. Applying *Hosanna-Tabor*'s framework here dictates that the ministerial exception does not apply to respondents. Just as in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), and numerous lower court cases before *Hosanna-Tabor* unanimously holding that lay teachers in religious schools were not "ministers," respondents were not designated spiritual leaders. Nor did they need significant religious training—or even to be Catholic—to have their jobs. While a slice of their classroom time involved instruction about the Catholic religion, respondents performed this duty strictly from workbooks, not as preachers of the faith. And they spent the overwhelming majority of their time teaching secular subjects.

III. Affirming that lay teachers such as respondents are not "ministers" would not disturb other legal

protections that generally insulate religiously motivated employment decisions from judicial scrutiny. Unlike other employers, religious organizations may give preference to workers of particular faiths. Furthermore, when religious employers hire or fire employees—or otherwise establish terms and conditions of employment—for religious reasons, courts must generally accept those actions without further inquiry. Religious groups also retain the constitutional right to free association, a right that involves the ability to control who represents a church and communicates its views.

There is no doubt, in short, that religious employers have special concerns and should often be treated differently from other employers. All respondents ask the Court to hold is that lay teachers such as respondents are not "ministers," and therefore that they may pursue their employment discrimination claims subject to whatever other statutory and constitutional defenses their employers may properly raise.

ARGUMENT

I. THE COURT SHOULD ADHERE TO *HOSANNA-TABOR*'S MULTI-FACTOR TEST FOR DETERMINING MINISTERIAL STATUS.

A. *Hosanna-Tabor* Establishes A Multi-Factor Test.

1. Federal employment laws—including the Americans with Disabilities Act and the Age Discrimination in Employment Act—have "undoubtedly important" objectives. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196

(2012). And there is no dispute that these statutes apply, by their terms, to religious employers like the Schools. They cannot be enforced, however, in violation of the First Amendment.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These Religion Clauses "protect[] a religious group's right to shape its own faith and mission," including deciding "which individuals will minister to the faithful." *Id.* Accordingly, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision." *Id.* at 188. Such action impermissibly "interferes with the internal governance of the church." *Id.*

The ministerial exception is strong medicine. As the Schools themselves emphasize, the exception affords a blanket "immunity" to violate employment laws *regardless of any religious motivation*. Petrs. Br. 7; *see also Hosanna-Tabor*, 565 U.S. at 195-96. For instance, even if a church has no tenet speaking to such a matter, a religious organization can refuse to employ a ministerial employee because she is a black person, *cf. Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165 (4th Cir. 1985); because she is pregnant, *cf. Combs v. Cent. Tex. Annual Conference of United Methodist Church*, 173 F.3d 343, 344-45 (5th Cir. 1999); or because the employer believes that having a person in the workplace who is fighting cancer would somehow be unsettling. When the employment of "ministers" is at stake, no governmental interest is strong enough to overcome

the religious organization's exclusive prerogative "to choose those who will guide it on its way." *Hosanna-Tabor*, 565 U.S. at 196.

This extraordinary protection is justified where "the selection of those who will personify [a church's] beliefs" is at stake. *Id.* at 188. But that absolute immunity also creates "the potential for abuse." *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 n.3 (8th Cir. 1991). An unduly broad conception of the ministerial exception "may invite . . . the use of the First Amendment" to shield "otherwise prohibited employment decisions" from legitimate scrutiny. *Id.*

2. In *Hosanna-Tabor*, this Court eschewed any "rigid formula for deciding when an employee qualifies as a minister." 565 U.S. at 190. Instead, the Court held that multiple considerations relating to a plaintiff's employment determine whether she falls within the ministerial exception: First, whether the employee has been designated and held out by the organization "as a minister, with a role distinct from that of most of its members"; second, whether an employee's title reflected ministerial substance and training; third, whether the employee held herself out as a minister; and fourth, whether the employee's job duties included "important religious functions." *Id.* at 191-92.

This multi-factor inquiry—starting with the trio of formalistic, objective indicia of ministerial status—makes good sense.

For one thing, looking first and foremost to formal designations can provide clarity in an area in which

line-drawing is a highly fraught exercise. Under the Establishment Clause, courts must avoid "excessive entanglement" in religious matters. *Agostini v. Felton*, 521 U.S. 203, 232 (1997). Such entanglement results when legal tests require courts to resolve "controversies over religious doctrine and practice," lacking any "neutral principles of law" to govern the disputes. *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). Against this backdrop, *Hosanna-Tabor*'s first three considerations allow courts in the vast majority of cases essentially to defer to religious institutions' *ex ante* decisions as to who their ministers are.

For example, all can readily agree that pastors, rabbis, and nuns are "ministers." On the other hand, it would seem at a minimum that, to be a spiritual leader of a religious organization, the employee must be required to be a member of the faith. As this Court has put it, the question of ministerial status concerns whether the individual has been given some special role "distinct from that of most of [the organization's] members." 565 U.S. at 191. This formulation of *Hosanna-Tabor*'s first factor presupposes that the individual herself must be a member of the organization. Put another way, whether a religious organization requires a certain position to be filled by a member of the faith is a strong, objective indication of how important the organization believes that position is to its "faith and mission." *Id.* at 188; *see also Braun v. St. Pius X Par.*, 827 F. Supp. 2d 1312, 1319 (N.D. Okla. 2011) ("It is difficult to conceive that [a lay teacher] might properly be classified as a minister of

the Catholic faith when she is not even a member of that faith."), *aff'd*, 509 F. App'x 750 (10th Cir. 2013).

The *Hosanna-Tabor* Court similarly explained that the second factor—the training reflected in the employee's title—reveals whether "significant religious training and a recognized religious mission underlie the description of the employee's position." 565 U.S. at 193. If the position requires extensive religious training—as Cheryl Perich's did—that is an objective indication that the religious organization regards that position as involving "minister[ing] to the faithful." *Id.* at 195. So too with the third *Hosanna-Tabor* factor, which looks for objective indications whether, before litigation commenced, the employee viewed herself as holding such a position.

Looking to such formal indicia also promotes values of accountability and transparency. From the church's perspective, signaling to the outside world that an employee is one of its spiritual leaders is a powerful means of demonstrating that the organization has put its faith in the employee's hands. Employers ranging from corporations to academic institutions to governments similarly use titles to designate those who are truly in charge of carrying out their missions.

From the perspective of employees, such signaling is important in terms of fair notice. Teachers, nurses, and other workers often are in a position of choosing whether to take a job at a secular or religious institution. A ministerial-like title (or at least clear language in an employment contract) advises the employee up front that she is entering a distinctive rela-

tionship—namely, one in which the religious organization believes she is so central to the church's self-governance that she is exempt from the reach of employment laws. It made sense, for example, to deny Cheryl Perich the protections of federal employment laws because she had openly accepted a "formal call to religious service," and had held herself out both to her church and the IRS as participating in the church's "ministry." *Id.* at 191-92. In contrast, an employee should not discover on the day of her dismissal that her employer is entitled to fire her for becoming pregnant or sick—or just becoming older.

All that said, the test for ministerial status should not be entirely formalistic. In our pluralistic society, some churches have unorthodox hierarchies, and others may not use familiar titles or nomenclature. Others may use titles in unconventional ways. So it is critical to check the conclusion that the first three factors suggest against substantive realities by also looking to the nature of the "religious functions" the employee performs. *Id.* at 192; *see also id.* at 198-99 (Alito, J., concurring).

The Fourth Circuit's foundational opinion in *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), demonstrates the importance of this type of cross-check. There, a female member of the Seventh-day Adventist Church sued after being denied a position that was typically held by "ordained minister[s]." *Id.* at 1165. The position required "seminary training" and its duties "entailed teaching baptismal and Bible classes, pastoring the singles group, occasional preaching at [churches], and other evangelical, liturgical, and

counseling responsibilities." *Id.* But "in the Seventh-day Adventist Church women may not stand for ordination." *Id.* In such a case, the court explained, the ministerial exception should "not depend upon ordination but upon the function of the position." *Id.* at 1168; *see also EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (all faculty at Baptist seminary fell within ministerial exception regardless of whether formally ordained).

B. The Schools' Request To Focus On Whether The Employee Performs "Important Religious Functions" Is Flawed On Every Level.

The Schools argue that *Hosanna-Tabor*'s function factor is not so much a cross-check as a freestanding test. Specifically, the Schools ask this Court to hold that "the existence of important religious functions is *alone* sufficient" to render any employee a minister. Petrs. Br. 50 (emphasis added). That request is inconsistent with this Court's precedent. It also contravenes the history and purpose of the ministerial exception. Finally, it would lead to one of two problematic outcomes: It would either dramatically magnify entanglement concerns or would result in deeming virtually *all* employees of religious organizations ministers.

1. *Precedent.* To start, the Schools' approach is at odds with *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). Dayton Christian Schools ("DCS") operated an elementary school that was "a pervasively religious institution in which religious considerations permeate[d] all aspects of the educational process." *Dayton Christian*

Schs., Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 936-38 (6th Cir. 1985). When one of the school's lay teachers became pregnant, DCS refused to renew her contract, maintaining that "mothers should stay home with their preschool aged children." 477 U.S. at 623. The teacher then filed a complaint with the Ohio Civil Rights Commission alleging sex discrimination. *Id.* at 623.

The Sixth Circuit held that the First Amendment barred the Commission from pursuing the claim because of "the particularly sensitive role of the teacher in explicitly and implicitly fostering the religious beliefs and values" of the church. 766 F.2d at 961. DCS defended that holding in this Court, focusing on its right to exercise "without governmental interference, its core function of imparting its faith in its full integrity and to select those individuals to whom will be entrusted the responsibility of conveying that faith to a new generation." Resp. Br. 24, *Dayton Christian Schs.*, No. 85-488; *see also* Tr. of Oral Arg. at 44 (No. 85-488) (maintaining that the school's right "to choose those who are going to be carrying out its ministry" barred the lawsuit). In so arguing, the school stressed "the *religious functions* carried out by every teacher at DCS," including "conducting devotionals, providing direct instruction in Bible study, integrating Biblical precepts into every subject taught, and giving witness to religious truth by example and conduct." Resp. Br. 31, No. 85-488 (emphasis added; citations to record omitted).

To be sure, neither the Sixth Circuit nor DCS used the label "ministerial exception" to characterize the argument that the First Amendment immunized the

school from governmental inquiry into the teacher's firing. But as the Schools here note, that particular "judicial shorthand" had not yet taken hold in the mid-1980's and is something of a "misnomer" anyway. Petrs. Br. 6-7 n.1. "The term . . . 'ecclesiastical immunity' might be a better fit for the legal concept" involved here. *Id.* at 7 n.1; *compare Hosanna-Tabor*, 565 U.S. at 188-89 (explaining the constitutional protection in terms of "prohibit[ing] government involvement in such ecclesiastical decisions" or "interfere[nce] with the internal governance of the church"). And that is precisely how DCS framed its argument in *Dayton*, contending that the courts may not "question the freedom of religious institutions to act in matters of purely ecclesiastical concern." Resp. Br. 31, No. 85-488; *see also id.* at 19 ("the right of churches to self-governance stand[s] as a complete bar" to the teacher's claim).

Faced with this functional First Amendment argument for immunity from governmental interference—the very same argument the Schools make here—the Court unanimously rejected it. The Court explained that requiring a religious school under these circumstances to litigate a lay teacher's employment discrimination claim "violates no constitutional rights." 477 U.S. at 628. Because DCS's employment decisions respecting the teacher were not categorically "protected by the Constitution," *id.* at 625 n.1, the Sixth Circuit should have abstained from enjoining the administrative investigation, *id.* at 628.

The Schools' function-only test also conflicts with *Hosanna-Tabor*. There, a religious school again

asked the Court for exactly the rule the Schools request here—one in which an employee's ministerial status "is independently established by her important religious job functions." Petrs. Br. 45, *Hosanna-Tabor*, No. 10-553; *see also id.* at 2 ("The private plaintiff here is within the ministerial exception because she performed important religious functions."); *id.* at 37 (same); *see also* Tr. of Oral Arg. at 56 (No. 10-553) (same). The Court declined to accept that rule, instead adopting a four-part test that put function last. *See* 565 U.S. at 191-92. Yet the Schools now repeat the exact argument this Court refused to endorse.

Perhaps sensing that incongruity, the Schools repeatedly seek shelter in Justice Alito's *Hosanna-Tabor* concurrence. That concurrence, of course, is not the opinion of the Court. In any event, the concurrence's thrust is simply that the ministerial inquiry should not be overly formalistic. It explains that "formal ordination and designation as a 'minister'" should not always control the inquiry because some religions have "no clear counterpart" to "the concept of ordination as understood by most Christian churches." *Id.* at 198. Respondents have no objection to that proposition.

The concurrence also speaks in general terms about the importance to churches of "those who are entrusted with teaching and conveying the tenets of faith to the next generation." *Id.* at 200. But the overall message of the concurrence was that the Court should follow the "consensus" approach reflected in *Rayburn* and other lower court decisions. *Id.* at 203. In *Rayburn*, the Fourth Circuit recognized that "lay

church members" sometimes "serve in similar capacities in teaching and counseling." 772 F.2d at 1168. But Judge Wilkinson's opinion emphasized that an important religious function may not be sufficient on its own to trigger the ministerial exception: "Lay ministries, even in leadership roles within a congregation, do not compare to the institutional selection for hire of one member with special theological training to lead others." *Id.* Even more to the point, the consensus across the courts of appeals, including the Fourth Circuit, has long been that religious job duties of lay teachers such as respondents who teach primarily secular subjects do *not* make them ministers. *See supra* at 3-6 & n.1.

2. *History*. The Schools' function-only test is likewise inconsistent with the ministerial exception's historical underpinnings. All of the history the Court canvassed in *Hosanna-Tabor* involved a religious organization's freedom to select its *titled* clergy or other expressly designated spiritual leaders. *See* 565 U.S. at 182-87. The same is true with respect to this Court's older cases involving "disputes over church property." *Id.* at 185-87 (discussing *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952) (archbishop); *Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696 (1976) (bishop)). Neither the Schools nor their amici identify a single historical incident or case involving a lay employee, much less someone who did not need to be a co-religionist.[6]

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[6] The Solicitor General references historical interference with "religious education." U.S. Br. 10. Religious schools during

This history does not dictate that formal titles must always be dispositive. But it surely indicates that a lay "minister" should be the exception rather than the rule. Yet the Schools' test would create hundreds of thousands, if not millions, of lay employees who would be unable to claim basic employment protections. History supports no such dramatic result.

3. *Purpose.* The Schools' test also ignores the constitutional objective of the ministerial exception. The exception is designed to safeguard a religious group's ability to define its own tenets and to select "those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. Lay employees who exercise no judgment regarding religious dogma and perform primarily secular duties do not fit this bill.

That is all the more true where, as here, the employees at issue do not even have to be co-religionists. The ministerial exception embodies the Lockean view that "religious institutions must be free to control their membership and internal affairs." Br. of Douglas Laycock 6, 20-21; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1464-65 (1990) (First Amendment "allow[s] churches and other religious institutions to define" their own "membership" and internal "organization"). The employment of someone who need not even be a member of the faith

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the colonial era, however, were run by designated spiritual leaders. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part i: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2171-74 (2003).

does not implicate these interests. Even when a Jewish teacher in a Catholic school performs some important religious functions—such as teaching lessons from a Catholic textbook or leading the class in the Lord's Prayer—it makes no sense to call her a Catholic minister.

4. *Administrability*. Implementing the Schools' "important religious functions" test would also raise profound administrability problems. Both components of the Schools' test—(i) distinguishing "religious" from "secular" duties and (ii) identifying which religious functions are "important"—are laden with complications.

This Court has repeatedly observed that the line between religious and secular activities is "hardly a bright one." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987); *see also id.* at 343 (Brennan, J., concurring in the judgment) ("What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident."). Indeed, "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977).

The setting of sectarian schools aptly illustrates the point. "The very purpose of many of [these] schools is to provide an integrated secular and religious education." *Meek v. Pittenger*, 421 U.S. 349, 366 (1975). Consequently, "the secular education those schools provide goes hand in hand with the religious

mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Id.* (internal quotation marks and citation omitted); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979).

The second question on which the Schools would have courts concentrate—whether a particular religious duty or activity is "important"—seems even more fraught with difficulty. How are courts to determine what religious activities are "important"? The Schools never say. Instead, they offer a nonexhaustive list of general examples, saying that "[i]mportant religious functions include leadership, worship, ritual, and expression." Petrs. Br. 41.

The questions the Schools' partial list alone raises are dizzying. Start again with schools. If lay teachers are ministers whenever they instruct students in religious doctrine and participate in "religious expression, worship, and ritual with their students," Petrs. Br. 47, what about other teachers who do not directly teach religion as such, but are required to infuse their secular courses with religious ideas and themes, bear witness to the faith, and act as role models? Courts before and after *Hosanna-Tabor* have held that such obligations are not enough to confer ministerial status. *See, e.g., EEOC v. Miss. College*, 626 F.2d 477 (5th Cir. 1980); *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1145 (D. Or. 2017); *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014); *Dias v. Archdiocese of Cincinnati*, 2013 WL 360355, at *4 (S.D. Ohio. Jan. 30, 2013). But, if the ministerial status of employees were to turn solely on whether their religious duties

are important, the *only* way to reach this result would be to say that serving as a religious role model and showing how to integrate one's faith into daily learning and discussions are not "important" religious functions.

Furthermore, what about school employees who direct extracurricular activities, such as debate club or a sports team? A football coach's duties, for instance, "entail[] both teaching and serving as a role model and moral exemplar"; he may even lead or join students in prayer. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 825-27 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019). In fact, if the Court adopts the Schools' test, there is little doubt that religious organizations will argue that *every* lay employee who "work[s] in any type of elementary or secondary schools, whether as teachers, directors, administrators, or auxiliary staff" is performing a vital religious function. Sacred Congregation for Catholic Educ., *Lay Catholics in Schools: Witnesses to Faith* ¶ 1 (1982) (cited in Br. of National Catholic Educational Association); *see also* Br. of Church of God in Christ, Inc. et al. 15 (arguing that those who "coach sports" should fall within the exception because they "serve as role models for the students in their schools"); *Barrett v. Fontbonne Acad.*, 2015 WL 9682042, at *10-11 (Mass. Super. Ct. Dec. 16, 2015) (argument that food service director at Catholic preparatory school was a minister).

But schools would be just the beginning. Vast numbers of lay persons work in businesses and nonprofit entities run by religious organizations. Many such employees engage in periodic religious "worship,

ritual, and expression." Petrs. Br. 41. And experience shows that such employers sincerely believe that virtually all such employees perform important religious functions. For example:

- Writers, editors, and other employees of religious publishers help with communicating the faith. *See EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1277-78 (9th Cir. 1982) (rejecting argument that editorial secretary was minister); *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879, 884-85 (7th Cir. 1954) (rejecting First Amendment defense regarding employees at church-owned printing plant who produced, packaged, and distributed religious books, magazines, and leaflets).
- Counselors at religious summer camps lead prayers, teach lessons regarding the faith, and serve as role models in the faith. *See, e.g.*, The Salvation Army Three Trails Camp, *Summer Camp Counselor Job Description* (2019) (duties include "[d]aily devotions and instruction on 'what it means to be Christian'"); Episcopal Diocese of Arizona, *Chapel Rock Summer Camp Counselor Job Description* (2018) ("[k]ey [r]esponsibilities" include modeling a "Christian attitude" and "lead[ing] assigned camper group in nighttime prayers/devotionals").[7]

[7] https://perma.cc/QQ4B-62C2; https://perma.cc/GM85-RGRP.

- Nurses at Catholic and other religious hospitals are said to "carry out Christ's healing ministry by offering health, healing, and hope" to patients. *E.g.*, Catholic Medical Center, *History and Mission*.[8]

- Workers at counseling centers, soup kitchens and related social services centers not only carry out "an extension of the public ministry of Christ," Catholic Charities, *Catholic Social Ministries*,[9] but also regularly distribute religious literature, lead grace, and so on. *See, e.g.*, *Hall v. Salvation Army*, 261 N.Y. 110, 111 (1933) (New York's Workmen's Compensation Law applied to Salvation Army cook); Br. of Rutherford Inst. 26-27 (arguing workers in homeless shelter are ministers).

- In-house lawyers and public relations personnel for all manner of religious organizations may not be members of the church, but they convey and explain the church's beliefs to others on a daily basis.

- The duties of facilities and events managers at churches and similar establishments include setting up and maintaining places of worship. *See Davis v. Balt. Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (rejecting argument that such persons are ministers).

- Receptionists and secretaries are often required to express a religious organization's

[8] https://perma.cc/MN9W-TTAB.

[9] https://perma.cc/8V56-8WK2.

> principles, explain them to others, and to aid and participate in clergy members' work. *See Sw. Baptist Theological Seminary*, 651 F.2d at 283 (rejecting seminary's argument "that all of its [administrative and support staff] serve a ministerial function"); *Smith v. Raleigh Dist. of N.C. Conf. of United Methodist Church*, 63 F. Supp. 2d 694 (E.D.N.C. 1999) (same regarding church receptionist and pastor's secretary).

Given this range of permutations, it is one thing for courts to consult an employee's function to ensure that judicial analyses of ministerial status are not overly formalistic or insensitive to a minority religion's unusual structure. It is wholly another to pin the entire constitutional test on whether an employee serves an "important religious function." Are courts really prepared—or even equipped—to assess whether caring for the sick is as "important" a religious function as, say, feeding the hungry?

The Schools nowhere suggest they are. Nor does the Solicitor General. To the contrary, he maintains that courts are "not equipped to decide" these sorts of questions. U.S. Br. 28. According to the Solicitor General, therefore, courts should "prevent [the] uncertainty" a function-only test would create by "accepting a religious organization's sincere view" of whether "an employee's duties . . . relate to its employer's religious mission." *Id.* 20.

Whatever might be said for such deference as a means of avoiding entanglement, it is a recipe for *everyone* being a minster. Not only have religious employers argued in the past that all manner of employ-

ees are ministers because they serve important religious functions, *see supra* at 31-35, but they are being actively instructed to do so in the future. The Christian Legal Society, for instance, has created a guide instructing churches to require "regular prayer time at staff meetings, and other religious practices on a daily basis," to trigger broad application of the ministerial exception. CLS, *Church Guidance for Same-Sex Issues* (2015), at 10.[10] The Alliance Defending Freedom has circulated a similar publication to Christian schools and other religious employers looking to "avail themselves of the First Amendment's [ministerial] protection." ADF, *Protecting Your Ministry* (2015), at 9.[11] "Where feasible," the guide advises:

> [A] religious organization should assign its employees duties that involve ministerial, teaching, and other spiritual qualifications—duties that directly further the religious mission. For example, if the church receptionist answers the phone, the job description might detail how the receptionist is required to answer basic questions about the church's faith, provide religious resources, and pray with callers. Consider requiring all employees to participate in devotional or prayer time, or even lead these on occasion.

Id. at 11. One more example among the many: First Liberty instructs that one way to apply the ministerial exception to "most if not all of your organization

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[10] https://perma.cc/DKC2-HPXW.

[11] https://perma.cc/72Z5-XVEA.

employees"—including "counselor[s], manager[s], and receptionist[s]"—is to note in job descriptions that each "performs [an] important religious function for the ministry." First Liberty, *Religious Liberty Protection Kit for Ministries* (2016), at 32-34.[12]

Given the array of arguments and implications the Schools' test would unleash, prudence counsels adhering to the multi-factor test established in *Hosanna-Tabor* and the case law regarding lay employees that has developed and proven durable over the past several decades. Focusing on titles, special training, and related formal indicia of ecclesiastical status is not a perfect system for determining whether a religious organization regards an employee as a minister. But these benchmarks are at least transparent. Formal ways of identifying "ministers" also encourage religious organizations to pin down employees' status *before any litigation begins.* In an area of law as sensitive as this, the predictability and sensibility that methodology delivers should not be lightly discarded.

5. *Downstream Consequences.* The challenges the Schools' expansive conception of ministerial status would raise go far beyond hiring and firing decisions in contravention of antidiscrimination principles. Religious groups contend—and courts have held—that the ministerial exception extends to other forms of employment discrimination, including sexual harassment. *See Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010) (hostile

[12] https://perma.cc/JB5B-ZSPN.

work environment claim and Equal Pay Act claim); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (discriminatory terms and conditions of employment).

Furthermore, the Department of Labor takes the view that the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, does not apply to employees who fall under the ministerial exception. DOL, Opinion Letter, FLSA2018-29 (Dec. 21, 2018). Courts have adopted this position as well. *See Schleicher v. Salvation Army,* 518 F.3d 472, 476-78 (7th Cir. 2008) (same); *Su v. Stephen S. Wise Temple*, 32 Cal. App. 5th 1159 (2019) (analyzing ministerial status in context of state-law wage-and-hour claim), *cert. dismissed*, 140 S. Ct. 341 (2019). Some courts have additionally held that the ministerial exception bars breach of contract claims alleging wrongful termination. *See, e.g.*, *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 122-23 (3d Cir. 2018) (collecting case law from several circuits).

Conferring broad immunity on religious employers under the ministerial exception could also stifle a vital means of identifying and punishing grave wrongdoing. Federal and state anti-retaliation laws protect employees who report criminal behavior, *see, e.g.*, 18 U.S.C. § 1513(e); complain about health and safety violations, *see, e.g.*, 29 U.S.C. § 660(c); or testify in a legal proceeding, *see. e.g.*, 42 U.S.C. § 1985(2). But as the Court stressed in *Hosanna-Tabor*, the ministerial exception is categorical; it gives religious employers plenary authority to fire covered employees for any reason. 565 U.S. at 194-95.

To be sure, the Court in *Hosanna-Tabor* stopped short of holding that the ministerial exception applies beyond the employment law context. *See id.* at 196. But it is hard to see how it does not—especially now that the Court has made clear that governmental interests, no matter how compelling, cannot trump the exception. *See, e.g.*, *Ballaban v. Bloomington Jewish Community, Inc.*, 982 N.E.2d 329, 336-39 (Ind. App. 2013) (collecting case law holding that ministerial exception bars anti-retaliation claims based on reporting child abuse and similar whistleblowing activity). At a minimum, the current uncertainty over the exception's application in various retaliation contexts creates powerful incentives, for all employees of religious employers who might be deemed ministers, to refrain from reporting unlawful activity. If the Schools' expansive conception of ministerial status were adopted, this problem would be vastly amplified.

II. LAY TEACHERS SUCH AS BIEL AND MORRISSEY-BERRU ARE NOT "MINISTERS."

Just as in *Dayton Christian Schools* and the lower court cases forming the consensus before *Hosanna-Tabor* that lay teachers in religious schools are not "ministers," respondents had no spiritual designation and taught mainly secular subjects. They did not need special training or even have to be Catholic to have their jobs. Accordingly, respondents should not be deemed ministers.

A. None Of The Formal *Hosanna-Tabor* Factors Is Satisfied Here.

The court of appeals determined that no formal indicia of ministerial status is present in either case here. The Schools' cursory attempt (Br. 50-52) to challenge those conclusions is meritless.

1. *Titles.* "Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members." *Hosanna-Tabor*, 565 U.S. at 191. Specifically, the church conferred upon Perich a "diploma of vocation," according her the title "Minister of Religion, Commissioned." *Id.* And per her ministerial diploma, the congregation periodically reviewed Perich's "skills of ministry" and required her "continuing education as a professional person in the ministry of the Gospel." *Id.*

The Schools here, by contrast, did not accord respondents titles designating them as spiritual leaders. To the contrary, just like the teacher in *Dayton Christian Schools*, both Biel and Morrissey-Berru were lay employees in elementary schools, assigned in their contracts and otherwise the secular title of "teacher." *See* OLG.App. 32a-42a; JA 91-100, 127-164, 244-46, 320-329. Indeed, Biel had previously held the same position—elementary school teacher—in various non-Catholic Schools, including public schools and a Lutheran school. StJ.App. 4a; JA 244-46.

Our Lady of Guadalupe asserts that Morrissey-Berru had the additional title of "certified Catechist." Petrs. Br. 50. This claim overstates the record. While Morrissey-Berru did attend one catechist course

some thirteen years into her tenure at OLG, *see* JA 76-77, the record indicates that she progressed through only two phases of the three-phase catechist training program. *See* OLG.ER 41-42 (phase 1 of 3 "Progress Transcript"); OLG.ER 44-45 (phase 2 of 3 "Progress Transcript"). The record does not show that Morrissey-Berru ever completed the program or became a "certified Catechist." At any rate, the course at issue concerned "the history of the Catholic church," JA 76, not spiritual training.

That a parish priest signed off on Morrissey-Berru's (and Biel's) hiring, Petrs. Br. 50-51, is likewise immaterial. The ministerial exception is not concerned with whether the person who hired the plaintiff is a minister; the exception turns on whether *the plaintiff* is a spiritual leader. Moreover, the identity of the person who approved an employee's contract says nothing about whether the employer "held [] out" the employee to the public as a minister. *Hosanna-Tabor*, 565 U.S. at 191.

2. *Titles' Reflection of Training.* The minister in *Hosanna-Tabor* had a "significant degree of religious training" and "formal process of commissioning." 565 U.S. at 191. In particular, Perich spent *six years* fulfilling the requirements "[t]o be eligible to become a commissioned minister"—including (i) completing eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher; (ii) obtaining the endorsement of her local synod district through a petition that contained her academic transcripts, letters of recommendation, personal statements, and written answers to various ministry-related questions; and

(iii) passing an oral examination by a faculty committee at a Lutheran college. *Id*. And even once Perich fulfilled these requirements, "she was commissioned as a minister only upon election by the congregation, which recognized God's call to her to teach." *Id.*

Conversely, neither Biel nor Morrissey-Berru had *any* religious training prior to working at the Schools—and neither school required any such credential to be eligible for employment as an elementary school "teacher." When Biel started teaching at St. James, she had only a bachelor's degree in liberal studies and a secular teaching credential. StJ.App. 4a-5a; StJ.ER 210-212. When Morrissey-Berru started working at Our Lady of Guadalupe, she had a Bachelor of Arts in English language arts and a minor in secondary education. JA 73.

Nor did either School require its teachers to complete substantial on-the-job religious training. During Biel's tenure, she attended one conference that covered, among other things, "how to incorporate God into your lesson plans." JA 263. But the entire conference lasted "four or five hours," and "[o]ther classes showed us how to do art and make little pictures or things like that." JA 262. Every St. James elementary school teacher—including, for example, the computer teacher—attended. StJ.App. 4a-5a; JA 261-63.

Our Lady of Guadalupe did not require Morrissey-Berru to undergo any religious training during her first several years of teaching. In 2012, the School asked Morrissey-Berru to attend a catechist course regarding "the history of the Catholic Church." JA 76; *see also* OLG.App. 2a-3a. But, as noted above, a single (uncompleted) course regarding the history of the

church—as opposed to sustained training in spiritual leadership—does not bespeak ministerial status.

This is especially so in light of how easy it would be for religious employers to require nearly all employees—from teachers to football coaches to receptionists—to take a course or two. First Liberty, for example, encourages religious organizations interested in broadly invoking the ministerial exception to include, "as a condition of employment or volunteering," a "requirement to have or receive religious instruction or training." *Religious Liberty Protection Kit For Ministries*, *supra*, 36. A qualification so easy to require and so susceptible to manipulation is not the stuff with which the ministerial exception is concerned.

3. *Employees' Self-identifications.* An employee's representation of herself to the outside world sheds light on her actual status and place within a religious organization. *See Hosanna-Tabor*, 565 U.S. at 191. Perich, for instance, not only referred to herself in communications with Hosanna-Tabor as a minister, but even claimed a special housing allowance on her taxes available only to employees earning their compensation "in the exercise of the ministry." *Id.* at 191-92.

The opposite is true here. Consistent with their secular titles and lack of religious training, neither Biel nor Morrissey-Berru claimed to be a spiritual leader. Each held herself out as a fifth-grade teacher, nothing more. OLG.Resp.App. 1a-2a; StJ.App. 12a; JA 249-250. Neither claimed any benefits—governmental, ceremonial, or administrative—available

only to designated spiritual leaders. StJ.App. 12a; OLG.Resp.App. 1a-2a.

4. *Co-religionist Requirement.* Any doubt as to whether respondents were formally considered part of the Catholic Church's spiritual hierarchy should be resolved by the fact that the Schools did not even require teachers to be Catholic. *See* StJ.App. 4a; JA 110-14, 289. Religious groups do not "put their faith in the hands of" those who do not even need to practice their religions. *Hosanna-Tabor*, 565 U.S. at 188. And a position that need not even be held by a member of the group's religion cannot be a position of "fundamental importance to the spiritual mission of the Church." *Id.* at 203 (Alito, J., concurring) (quotation marks omitted).[13]

[13] The Government previously agreed that even when a school has a "pervasively religious atmosphere," its lay teachers cannot be considered ministers where "there is no requirement that its teachers even be members of [its] religious denomination." Br. of Appellee at 11, 29 n.17, *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (No. 84-2779). The Solicitor General now suggests, however, that "conditioning the ministerial requirement on membership" could in certain situations interfere with church autonomy. U.S. Br. 31-33. Even if the Solicitor General is correct that membership should not be categorically required to be a minister, there is no good reason to exclude consideration of that factor entirely. All it requires here is deference to the Schools' own assessments as to whether the jobs at issue were so important to their spiritual missions as to require them to be filled by members of the faith.

B. The Limited Religious Functions Respondents Performed Did Not Transform Them Into Ministers.

Respondents' job duties do not alter the conclusion that they were not ministers. Respondents had primarily secular duties and performed little to none of the ministerial functions that designated spiritual leaders perform.

1. Though not a matter that can be "resolved by a stopwatch[, t]he amount of time an employee spends on particular activities is relevant in assessing that employee's status." *Hosanna-Tabor*, 565 U.S. at 193-94. In keeping with their roles as lay elementary school teachers, both Biel and Morrissey-Berru—just like the teachers in *Dayton Christian Schools* and the lower court cases discussed above—had primarily secular duties. Respondents taught a range of subjects, including reading, writing, spelling, grammar, vocabulary, math, science, social studies, and geography. JA 75; StJ.ER 588. In doing so, they adhered to curriculum guidelines established by the State of California, just like any other teacher. StJ.App. 5a-6a; StJ.ER 587-88; JA 91-92.

At the same time, respondents performed hardly any of the ministerial functions that "called" teachers and other designated spiritual leaders perform. Biel did not initiate or lead devotional activities in her classroom. While Biel's students prayed in the classroom twice in a day, the School is wrong (Br. 49) that she "led" those prayers. They were "said mostly by the students" and led by student "prayer leaders." JA 252-53; StJ.App. 13a. Biel's role in school mass was likewise limited to accompanying her students to the

School's multi-purpose room, where it was held once a month. StJ.App. 5a, 13a; JA 256-57.

Morrissey-Berru, for her part, never led mass either, never delivered a sermon, and never selected the hymns for school mass. OLG.App. 89a. Occasionally, Morrissey-Berru would say a Hail Mary or a classroom prayer with the students for an ill parent. OLG.App. 86a-87a, 89a. Once a year, Morrissey-Berru brought her students to a cathedral to serve at the altar and, also once a year, she directed the school Easter play. OLG.App. 68a-69a, 95a-96a. Finally, Morrissey-Berru's contract in her final year (though not in previous years) directed her to "assist with Liturgy Planning for school mass." OLG.App. 42a.

These sporadic duties, however, are not enough to trigger the ministerial exception. The teachers in *Dayton Christian Schools* began each class with prayer, 766 F.2d at 937, 949 n.29, and "conduct[ed] devotionals," Resp. Br. 20, *Dayton Christian Schs.*, No. 85-488. Yet the Court found the teacher's sex discrimination claim could proceed. 477 U.S. at 628. Nurses in Catholic hospitals similarly accompany patients to hospital chapels and may occasionally pray with them. Administrative staff at religious homeless shelters select devotionals for daily grace. And counselors at summer camps regularly direct plays based on Biblical stories. Yet such duties have not traditionally been enough to render them ministers. Merely participating in—even periodically choosing—communications with religious content does not make someone a spiritual leader in the church.

The Schools also emphasize their general expectation that teachers model behavior in conformity

with Catholic teachings, and integrate Catholic values and symbols into their lessons. Petrs. Br. 47-48. Again, however, the same was true in *Dayton Christian Schools*. The lay teachers there were required to serve as "religious role models," 766 F.2d at 948, "giv[e] witness to religious truth by example and conduct," and "integrat[e] Biblical precepts into every subject taught," Resp. Br. 20, 30-31, *Dayton Christian Schs.*, No. 85-488, And they did so as part of DCS's effort to "guide the spiritual formation of their students." Petrs. Br. 48.

Just as in that case, respondents' obligations to serve as role models and incorporate religious values into their work did not transform them into ministers. Falling short of such generalized obligations might have provided cause for firing or discipline. But a mere requirement to bear witness to the faith or to set a good example is not the same as being required to "*minister* to the faithful." *Hosanna-Tabor*, 565 U.S. at 189 (emphasis added).

2. The Schools also stress that respondents taught regular modules of religion in the classroom. Petrs. Br. 45-47. But even in that role, respondents did not function as ministers.

Teaching religion cannot automatically dictate ministerial status; many teachers at wholly secular institutions teach religion. The pertinent inquiry, therefore, must be whether the teacher's job entails simply instruction about religion or, on the other hand, "conveying the Church's message and carrying out its mission." *Hosanna-Tabor*, 565 U.S. at 192; *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S.

203, 306-08 (1963) (Goldberg, J., concurring) (distinguishing between "teaching about religion" and "teaching of religion"). This Court recognized as much in *Dayton Christian Schools*. Every teacher at Dayton "provid[ed] direct instruction in Bible study." Resp. Br. 31, *Dayton Christian Schs.*, No. 85-488. Yet the Court rejected the school's argument that it had a constitutional right to hire and fire them for any reason.

Locke v. Davey, 540 U.S. 712 (2004), also dealt with a comparable problem in a similar manner. There, a state scholarship program allowed student recipients to take religion courses at "pervasively religious" colleges as part of a multi-faceted course of study. *Id.* at 724-25. But recipients were not allowed to pursue a major designed to "prepare [them] for the ministry." *Id.* at 719. This Court upheld the program. Writing for the Court, Chief Justice Rehnquist explained that the Establishment Clause treated the two situations differently, limiting state power only in the latter circumstance—where "[t]raining someone to lead a congregation" or to be a "church leader" is involved. *Id.* at 721-23.

The Schools here did not hire Biel or Morrissey-Berru to preach the Catholic Church's message or to be spiritual leaders. The Schools did not even require respondents to be Catholic—meaning the Schools themselves did not consider their religion-teaching responsibilities so central to the Church's spiritual mission as to require them to be members of the faith. And the Schools' policy choice was entirely understandable: Respondents were generalist teachers whose religious-instruction duties were limited to

teaching modules from pre-selected workbooks. StJ.App. 5a; JA 75, 79-80, 254-55.

In sum, just as teaching fifth-grade science out of textbooks did not render respondents scientists, teaching religion from a pre-set curriculum did not render them ministers. Each respondent was "a secular employee who happened to perform some religious duties," not "a spiritual employee who also performed some secular duties." *Scharon*, 929 F.2d at 362.

III. THE SCOPE OF THE MINISTERIAL EXCEPTION DOES NOT AFFECT THE ABILITY OF RELIGIOUS ORGANIZATIONS TO MAKE RELIGIOUSLY MOTIVATED EMPLOYMENT DECISIONS.

The Schools' proposed transformation of the ministerial exception is all the more unfounded because it is unnecessary. The Schools say that religious entities need to preserve the ability to exercise exclusive "control over religious functions"—in particular, to define and interpret their faith. Petrs. Br. 35; *see also id.* at 27-35; U.S. Br. 30-31 (need to preserve ability to make "religious judgment[s]"). Other doctrines, however, already adequately protect those interests where, as here, the employment of designated spiritual leaders is not at stake.

1. Federal and state antidiscrimination laws allow religious entities to fire (or refuse to hire) employees for violating religious tenets, insufficiently modeling religious values, or for other religious reasons. The statutes here are representative. The ADA per-

mits a religious employer to "require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. § 12113(d)(2). The statute prohibits adverse employment action only "on the basis of disability"—*i.e.*, "because of the disability of [an] applicant or employee." 42 U.S.C. § 12112(a), (b)(1). The ADEA likewise prohibits adverse action only "because of [an] individual's age." 29 U.S.C. § 623(a). If an employer fires an employee for a reason *other than* her disability or age, it does not violate either statute.

Moreover, as the court of appeals here recognized, courts must avoid questioning sincerely held religious beliefs and motivations. *See* StJ.App. 17a n.6. That is, courts may not scrutinize the "truth" of a religious tenet, *United States v. Seeger*, 380 U.S. 163, 184 (1965), or "whether a claimed doctrinal position [i]s valid or correct," *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171 (2d Cir. 1993). That being so, where a religious entity asserts it took an employment action for religious—as opposed to discriminatory—reasons, a court's inquiry is limited to "ascertain[ing] whether the ascribed religious-based reason was in fact the reason" for the action. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986); *see also Hernandez v. C.I.R.*, 490 U.S. 680, 693 (1989) (same limitation in context of religious exemptions from federal tax laws). If a "proffered religious reason actually motivated the employment action," then the case is at an end. *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 325 (3d Cir. 1993); *see also id.* at 329.

Indeed, the lower courts have not hesitated to dismiss employment claims where religious employers took employment actions for religious, as opposed to discriminatory, purposes. *See, e.g.*, *Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130, 139-40 (3d Cir. 2006); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 626 (6th Cir. 2000); *Geary*, 7 F.3d at 329. The lay teacher in *Geary*, for example, claimed she was fired in violation of the ADEA. The school responded that she had actually been fired because she transgressed church doctrine prohibiting remarriage after a divorce. Because the teacher plainly violated church doctrine and was unable to present evidence of pretext, her case was dismissed. *See* 7 F.3d at 329.

2. Even when no statutory defense is available, religious organizations can still raise a constitutional freedom-of-association defense to non-ministers' employment claims. The First Amendment confers on groups a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added). Indeed, associational rights are at their zenith in the religious context. As the Court has observed, "it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." *Emp't Div. v. Smith*, 494 U.S. 872, 882 (1990).

To be sure, the Court made clear in *Hosanna-Tabor* that religious groups need not depend on the right to associate when the "freedom to select [their] own ministers" is at stake. 565 U.S. at 189. But that does not mean the right to associate cannot provide

meaningful protection when personnel *other than ministers* are involved. It is well-settled that "[t]he forced inclusion of an unwanted person in a group" can infringe a group's freedom of association. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). And the person at issue need not have any particular position within the group, much less be a leader. *See Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 572-74 (1995). The right is infringed whenever "the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts*, 530 U.S. at 648.

Employment claims by lay teachers and other non-ministers will sometimes implicate that test. Indeed, the most natural way to think about the communicative and representational role lay teachers play is through the lens of the right to associate. Those who model and instruct others regarding tenets of the faith influence a religious organization's ability privately to advocate its viewpoints. The identity of people arranging and leading prayers in an institutional setting likewise can affect a religious organization's capacity to inspire or motivate others. Where the facts support such a defense, therefore, a religious school or other employer may defend an employment lawsuit by explaining that accepting a given person as an employee would have significantly compromised the employer's communication of its sectarian principles.

In contrast to the right to ecclesiastical self-governance that the ministerial exception safeguards, the right to associate is not absolute. *See Roberts*, 468 U.S. at 623. But employment laws cannot override

the right to associate absent a showing that enforcing the laws "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* The governmental interest in prohibiting race discrimination likely satisfies that standard. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). Other governmental interests might generate different analyses. *See, e.g.*, *Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805 (E.D. Mo. 2018) (right to associate forbade enforcement of law that would have required parochial school to make hiring decisions irrespective of employees' views on abortion). The bottom line, however, is that applying strict scrutiny to religiously motivated employment decisions regarding non-ministers is a powerful means of safeguarding religious liberty. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014) (explaining that the similar ends-means test in the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, provides "very broad protection for religious liberty").

3. In light of the alternative avenues for vindicating religiously motivated employment decisions, the real issue here concerns when religious organizations should enjoy immunity for employment actions where they advance *no* religious reason for taking the actions. Such immunity should be limited. For example, a court may, without treading on First Amendment freedoms, decide whether a lay teacher was fired for discriminatory reasons or merely for failing to maintain an orderly classroom. *See* StJ.App. 17a

n.6. Even certain aspects of that kind of disagreement may require a court to proceed with sensitivity. But our Nation's commitments to equality and justice—not to mention the employment statutes Congress and the States have enacted that expressly apply to cases like these—preclude a blanket rule requiring our judicial system to turn away such claims at the courthouse doors.

CONCLUSION

For the foregoing reasons, the decisions below should be affirmed.

Respectfully submitted,

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