

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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OUR LADY OF GUADALUPE SCHOOL,            )  
  Petitioner,                    )  
  v.                                    ) No. 19-267  
AGNES MORRISSEY-BERRU,                    )  
  Respondent.                    )

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ST. JAMES SCHOOL,                            )  
  Petitioner,                    )  
  v.                                    ) No. 19-348  
DARRYL BIEL, AS PERSONAL                    )  
REPRESENTATIVE OF THE ESTATE OF        )  
KRISTEN BIEL,                                    )  
  Respondents.                    )

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Pages: 1 through 100  
Place: Washington, D.C.  
Date: May 11, 2020

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3 OUR LADY OF GUADALUPE SCHOOL, )

4 Petitioner, )

5 v. ) No. 19-267

6 AGNES MORRISSEY-BERRU, )

7 Respondent. )

8 - - - - -

9 ST. JAMES SCHOOL, )

10 Petitioner, )

11 v. ) No. 19-348

12 DARRYL BIEL, AS PERSONAL )

13 REPRESENTATIVE OF THE ESTATE OF )

14 KRISTEN BIEL, )

15 Respondents. )

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17 Washington, D.C.

18 Monday, May 11, 2020

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20 The above-entitled matter came on for  
21 oral argument before the Supreme Court of the  
22 United States at 11:35 a.m.

23

24

25

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P R O C E E D I N G S

(11:35 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case Number 19-267, Our Lady of Guadalupe School versus Agnes Morrissey-Berru, and the consolidated case.

Mr. Rassbach.

ORAL ARGUMENT OF ERIC C. RASSBACH

ON BEHALF OF THE PETITIONERS

MR. RASSBACH: Mr. Chief Justice, and may it please the Court:

If separation of church and state means anything at all, it must mean the government cannot interfere with the church's decisions about who is authorized to teach its religion.

In this country, it is emphatically not the province of judges, juries, or government officials to decide who ought to teach Catholic fifth graders that Jesus is the son of God or who ought to teach Jewish preschoolers what it means to say: Hear, O Israel, the Lord your God, the Lord is one.

And at bottom, that is what these cases are about: who controls who teaches the

1 faith to schoolchildren.

2 Under Hosanna-Tabor, the answer is  
3 easy. Churches must choose those who "teach  
4 their faith." Indeed, that is one of the most  
5 important religious functions for any religious  
6 community, passing the faith on to the next  
7 generation.

8 And since the teachers here were the  
9 churches' primary agents for teaching the  
10 Catholic faith to fifth graders, teaching them  
11 for hours a week, much more than parish priests,  
12 they fall within the ministerial exception  
13 immunity.

14 Respondents would have the Court  
15 ignore all that, substituting a formalistic  
16 standard that relies first and foremost on the  
17 employees' title to determine whether the  
18 ministerial exception applies. That would  
19 wrongly elevate form over function and force  
20 judges to decide what titles sound religious  
21 enough to qualify, and it would hopelessly  
22 entangle church and state. Unsurprisingly, no  
23 court has ever adopted Respondents' title test.

24 If Respondent's arguments give some  
25 members of the Court d@jα vu all over again,

1 that is because Respondents have recycled many  
2 of the arguments the Court unanimously rejected  
3 eight years ago in Hosanna-Tabor. The pretext  
4 inquiry, the notice requirement, the idea that  
5 freedom of association makes freedom of religion  
6 entirely unnecessary all were raised in  
7 Hosanna-Tabor and rejected unanimously. Eight  
8 years later, Respondents' arguments are not any  
9 more convincing.

10 In short, there's no reason for  
11 government to get in the business of teaching  
12 religion. The Ninth Circuit should be reversed.

13 CHIEF JUSTICE ROBERTS: Counsel, you  
14 say in your brief that personnel is policy and  
15 that teachers, as part of their job, personify  
16 church values. Is that enough to trigger the  
17 exception in your case?

18 MR. RASSBACH: I -- I think, in -- in  
19 this case, I don't think that's something you  
20 have to address, and I don't think that it would  
21 -- personification --

22 CHIEF JUSTICE ROBERTS: Well, I don't  
23 -- I don't have to address it, but you do  
24 because I asked.

25 (Laughter.)

1           MR. RASSBACH: Yes, Your Honor. I --  
2 I think, on -- on the basis of personification  
3 alone, I don't -- I don't think that that would  
4 necessarily mean -- mean that we would win the  
5 case.

6           I think that the -- the right answer  
7 is that it's something -- they -- what functions  
8 were they performing, and those functions were  
9 to teach the faith for hours on end over the  
10 course of a week.

11          CHIEF JUSTICE ROBERTS: Does your  
12 argument, both with respect to personifying  
13 values as a factor and with the other functions  
14 that the teachers might perform, apply in the  
15 case of teachers who are not Catholic because  
16 many Catholic schools hire teachers who -- who  
17 aren't?

18          MR. RASSBACH: So -- so I -- I don't  
19 think it -- it does. Hosanna-Tabor rejected the  
20 idea that there was a problem with non-Lutherans  
21 teaching Lutheran doctrine to Lutheran kids at a  
22 Lutheran school. And, ultimately, religious  
23 bodies get to decide who best performs those  
24 important religious functions, and courts really  
25 shouldn't be in the business of second-guessing



1 that.

2 I would point the Court to some of the  
3 briefs, for example, the Stephen Wise Temple  
4 brief, which talks about how difficult it would  
5 be for Jewish entities if they could not hire  
6 non-coreligionists.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Thomas?

9 JUSTICE THOMAS: Yes, counsel, how  
10 would you -- how exactly would you go about, or  
11 a secular court go about, determining whether an  
12 employee's duties and functions are religious or  
13 whether they're important?

14 MR. RASSBACH: Well, I -- I think -- I  
15 think the -- the best way to think about it is,  
16 with respect to the religious part of it, I  
17 think you -- you have to -- you can look at the  
18 -- the list of things that this Court talked  
19 about in Hosanna-Tabor, so teaching, preaching,  
20 as well as the -- the list that was in the  
21 concurrence by Justice Alito, and look at those  
22 as a kind of safe harbor in terms of, if one of  
23 those things is present, then -- then it clearly  
24 is an important religious function.

25 But then, if you -- if you -- let's

1 say you have something where the church is -- or  
2 the religious defendant is raising some other  
3 thing as an important religious function, then I  
4 think you probably -- you -- you would -- you  
5 would have to look -- do some deference to the  
6 church's understanding of that.

7 So -- and -- and this is pointed out  
8 actually in the brief by Professor McConnell  
9 where he talks about substantial deference on  
10 both the importance question and the religious  
11 question.

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Ginsburg?

15 JUSTICE GINSBURG: I would appreciate  
16 your answers to two questions. One is, who  
17 among the religious schools' employees, who  
18 among them are not ministers?

19 The second question is one that the  
20 Chief already alluded to. You do not have to be  
21 Catholic to be a fifth or sixth grade teacher.  
22 How can a Jewish teacher be required to model  
23 Catholic faith, counter to his or her own  
24 beliefs -- how can a Jewish teacher be a  
25 Catholic minister?

1           MR. RASSBACH: So, to answer both of  
2 your questions, Your Honor, with respect to who  
3 is not covered, I -- I think it would include  
4 anyone who's not performing important religious  
5 functions, so, for example, the janitor. And  
6 there you have the Baltimore Hebrew Congregation  
7 case that we cite in our briefing, where the  
8 janitor, although he did explain what a Sukkah  
9 was to the schoolchildren, still did not -- did  
10 not want that to -- he -- that did not qualify  
11 him -- him as a minister. And that was cited  
12 under Hosanna-Tabor.

13           I think the same thing would be true  
14 of someone who, for example, is just doing the  
15 IT for the company or the school.

16           As for --

17           JUSTICE GINSBURG: Yes, whether  
18 coaches, the athletic coaches, they would be  
19 ministers too?

20           MR. RASSBACH: I don't -- I don't  
21 think a coach -- did you say coach, Your Honor?

22           JUSTICE GINSBURG: Uh-huh.

23           MR. RASSBACH: Yes, I don't think a  
24 coach would necessarily be one. It would really  
25 depend on whether the -- the person -- the

1 particular person is performing important  
2 religious function. If they're just a coach and  
3 don't do any kinds of functions, then they would  
4 not come in under the exception.

5 JUSTICE GINSBURG: Suppose they lead  
6 the -- the team in an opening prayer.

7 MR. RASSBACH: I think that if they do  
8 an opening prayer, you know, forget what I --  
9 you know, I think that there would be -- just  
10 saying that, just doing that would probably come  
11 within something like the Sukkah situation with  
12 the Baltimore Hebrew Congregation case where  
13 it's essentially de minimis. It's not something  
14 that -- that by itself does that.

15 I think, in reality, that's not going  
16 to be a very big class of cases because usually,  
17 if they're doing -- leading a prayer before the  
18 game, they're also doing a host of other kinds  
19 of activities --

20 CHIEF JUSTICE ROBERTS: Justice  
21 Breyer?

22 MR. RASSBACH: -- in that event.

23 JUSTICE BREYER: I think that the  
24 statute itself provides for a religious  
25 exemption for hiring the person of a particular

1 religion where that's connected with the  
2 carrying on of the religious organization's  
3 activities.

4           There is also the BFOQ, the Bona Fide  
5 Occupational Qualification. So I thought this  
6 case has to do where a religious organization  
7 might dismiss someone on the basis of race or  
8 religion or national origin where that isn't  
9 related to religious -- where that isn't related  
10 to the carrying on of the religious activity,  
11 for example, a person who's handicapped.

12           Now why should the minister -- isn't  
13 it enough to have the ministerial exemption  
14 apply to that kind of thing, that is, whether a  
15 person holds a position of religious leadership  
16 or authority? Well, there's different --  
17 different kinds of evidence that would show  
18 that.

19           So why do you need more than that?

20           MR. RASSBACH: Well, I think it's -- I  
21 think it's because of the Establishment Clause,  
22 Your Honor. The -- you know, this is not just a  
23 sort of bilateral interaction between the  
24 employer on one side and the employee on the  
25 other. There's also a third ox that's getting

1 gored here, which is the -- society's interest  
2 in not controlling religious functions.

3 You know, we have a -- a system of  
4 separation of church and state. And the process  
5 of teaching schoolchildren what to believe --

6 JUSTICE BREYER: On the basis -- I  
7 don't want to interrupt, but on the basis of  
8 what you say so far, I take it to my question,  
9 which is what do the religious organizations  
10 need other than the exception in the statute,  
11 the BFOQ, and the ministerial exemption as  
12 confined to leadership, and your answer seems to  
13 be they don't.

14 MR. RASSBACH: No, no, they --

15 JUSTICE BREYER: Rather, there's a --

16 MR. RASSBACH: -- they absolutely --  
17 they absolutely do, Justice Breyer. And --

18 JUSTICE BREYER: How?

19 MR. RASSBACH: -- and -- and --  
20 because -- because, to have control over what  
21 they are doing and to be able to control the  
22 performance of this important religious  
23 function, conveying the faith to younger kids,  
24 that -- that is a -- that is a free exercise  
25 right that they absolutely have and should have.

1                   And I don't think that the BFOQ  
2                   exception or Title VII or any of the other --

3                   JUSTICE BREYER: Religious exemptions  
4                   --

5                   MR. RASSBACH: -- statutes can  
6                   overrule that.

7                   CHIEF JUSTICE ROBERTS: Justice Alito?

8                   JUSTICE ALITO: Oh, let me follow up  
9                   on that question. The -- the religious  
10                  exemption, if it applied here, would permit the  
11                  school to hire only a Catholic to teach the --  
12                  this -- in this capacity, right? It would not  
13                  -- it would not address the question whether the  
14                  school could dismiss somebody who is a Catholic  
15                  because that person is not teaching the faith in  
16                  the way in which the school wants.

17                  Is that -- is that a correct  
18                  understanding?

19                  MR. RASSBACH: I -- I -- I think that  
20                  -- I think that you're right, Justice Alito,  
21                  in -- in this sense. Hiring and firing are  
22                  clearly covered by the ministerial exception,  
23                  but there are other kinds of religious autonomy  
24                  doctrines that might come to bear.

25                  If, for example, you know, the example

1 we used in our briefing of the employee of the  
2 synagogue school who starts wearing anti-Semitic  
3 T-shirts to school, that is -- that has to be  
4 covered by other kinds of religious autonomy and  
5 First Amendment doctrines, not just the  
6 ministerial exception.

7 So, even if the janitor did that, it  
8 would fall other one of those other kinds of  
9 doctrines, not under the ministerial exception  
10 itself.

11 JUSTICE ALITO: Well, I took Justice  
12 Breyer's question to mean why isn't the  
13 exemption in Title VII that allows religion to  
14 be a qualification for certain jobs sufficient  
15 to address the question of a teacher who teaches  
16 religion in a religiously affiliated school?

17 MR. RASSBACH: Right. So it is true,  
18 Your Honor, that the -- the -- if you -- if the  
19 person is -- is teaching -- is not -- if the --  
20 if the bona fide -- if the -- if the BFOQ  
21 exception applies here, it -- it -- it wouldn't  
22 actually cover most of the kinds of people that  
23 carry out the important religious functions. So  
24 there's a disjunct between the two things.

25 JUSTICE ALITO: Thank you.



1 CHIEF JUSTICE ROBERTS: Justice  
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Counsel, there's a  
4 difference between a teacher who teaches a  
5 religion class in a secular school and a teacher  
6 who teaches religion in a religious school, but  
7 I'm not sure what the difference is, meaning,  
8 can you point me to anything in the evidence  
9 that the teacher here was acting any differently  
10 working from a workbook for her religious class  
11 than a teacher does in a secular school? That's  
12 my first question.

13 My second question is, I think what's  
14 being confused here is that you're asking for an  
15 exception to law that's broader than the  
16 ministerial exception generally and broader than  
17 is necessary to protect the church.

18 The two teachers at issue here are not  
19 claiming that they were fired because the school  
20 thought they were teaching religion wrong. One  
21 says she was fired because she came down with  
22 cancer and was fired for a medical condition.  
23 The other claims it was because of age. She had  
24 been there for many, many years and had been  
25 very acceptable to the school, and all of a

1 sudden, she reaches a certain age and she's  
2 fired.

3 So you're asking for an exception to  
4 the Family and Medical Leave Act, to wage and  
5 hourly laws, to all sorts of laws, including  
6 breach of contract because at least one of the  
7 schools here, contract with the teacher says  
8 they won't discriminate because of the teacher's  
9 age or disability.

10 So you're asking for something broader  
11 than giving the -- the schools the power to hire  
12 or fire certain kinds of people because of how  
13 they teach the religion or don't teach it, and  
14 you haven't explained to me why it's necessary.

15 MR. RASSBACH: So --

16 JUSTICE SOTOMAYOR: I don't understand  
17 what leadership role or proselytizing role these  
18 teachers played in simply teaching about  
19 religion.

20 MR. RASSBACH: So -- so, Your Honor,  
21 they -- they absolutely were doing much more  
22 than teaching about religion. They were  
23 teaching it devotionally, and they were -- they  
24 were proselytizing. Their job, number one, and  
25 their overriding commitment was to -- to teach

1 these kids to become Catholic and to believe in  
2 the Catholic faith.

3           So I don't think that -- I just -- I'm  
4 not sure I agree with the premise of the  
5 question. With respect to, you know, religious  
6 reasons, first -- first of all, you know, the --  
7 Hosanna-Tabor rejected that -- that exact same  
8 argument and said it missed the point of the  
9 ministerial exception, and the reason it missed  
10 it was because it's inherently -- it's  
11 inherently entangling to transfer authority and  
12 control over a position that teaches the faith  
13 devotionally from church to state.

14           So the suggestion --

15           CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17           Justice Kagan?

18           JUSTICE KAGAN: Mr. Rassbach, I have a  
19 too-long list of hypotheticals, so I'm hoping  
20 that you can answer them in just a few words,  
21 like basically, yes, he qualifies, no, he  
22 doesn't qualify.

23           So here's the first one. A math  
24 teacher who is told to teach something about  
25 Judaism for 10 minutes a week.

1 MR. RASSBACH: And if he's teaching it  
2 devotionally?

3 JUSTICE KAGAN: Let's just say this is  
4 all -- that's all you know about him.

5 MR. RASSBACH: That's all I know about  
6 him. Then I -- then -- then I would -- then I  
7 would say probably not --

8 JUSTICE KAGAN: Okay.

9 MR. RASSBACH: -- because it would be  
10 de minimis.

11 JUSTICE KAGAN: A math teacher who  
12 comes in and you -- you mentioned the Shema at  
13 the beginning of your remarks, a very important  
14 pair, takes about 20 seconds to say, a math  
15 teacher who was told to begin every class with  
16 a -- leading the Shema.

17 MR. RASSBACH: I -- I -- I don't -- I  
18 don't think that that is likely to fall within  
19 it because I think it would, again, be de  
20 minimis under the --

21 JUSTICE KAGAN: Okay. A math teacher  
22 who was told to embody Jewish values and infuse  
23 instruction with Jewish values.

24 MR. RASSBACH: If it's that alone,  
25 probably not. But it really depends on how that

1 --

2 JUSTICE KAGAN: Okay.

3 MR. RASSBACH: -- cashes out in actual  
4 practice.

5 JUSTICE KAGAN: Yeah, okay. I really  
6 am asking -- asking these things alone.

7 MR. RASSBACH: Okay.

8 JUSTICE KAGAN: A nurse at a Catholic  
9 hospital who prays with sick patients and is  
10 told otherwise to tend to their religious needs.

11 MR. RASSBACH: I -- I think a nurse  
12 doing that kind of counseling and prayer may  
13 well fall within the exception.

14 JUSTICE KAGAN: May well fall within  
15 it? Okay.

16 MR. RASSBACH: Yes.

17 JUSTICE KAGAN: A press or a  
18 communications staffer who prepares press  
19 releases for a religious institution of all  
20 kinds that they need?

21 MR. RASSBACH: That -- that should  
22 fall within it because of communication under  
23 the Alicea-Hernandez case from the Seventh  
24 Circuit.

25 JUSTICE KAGAN: Okay. A counselor at

1 a church-affiliated rehab clinic who urges his  
2 patients to reconnect with their faith  
3 community?

4 MR. RASSBACH: That -- that would be a  
5 -- probably, but it depends on how much  
6 connecting there is.

7 JUSTICE KAGAN: Okay. An employee at  
8 a soup kitchen who distributes religious  
9 literature and leads grace before meals?

10 MR. RASSBACH: My guess is that that  
11 would be de minimis under the same kind of  
12 rubric as the Davis case that I mentioned  
13 earlier.

14 JUSTICE KAGAN: Okay. A church  
15 organist who provides musical accompaniment and  
16 selects hymns for services?

17 MR. RASSBACH: I think that that  
18 usually would fall within it because that's an  
19 important religious function and that's the main  
20 job.

21 JUSTICE KAGAN: Okay. A cook who's  
22 actually not Jewish but who prepares  
23 kosher-compliant meals for children at a Jewish  
24 school?

25 MR. RASSBACH: No.

1 JUSTICE KAGAN: No, okay. What's the  
2 -- you -- you got through them all. Thank you.  
3 What's the connection? What -- what are we  
4 supposed to draw from this?

5 MR. RASSBACH: Well, I -- again, I  
6 think it's -- I think we laid it out in our --  
7 in our briefing, and that is, what is -- what is  
8 it that this person is doing, performing on  
9 behalf of the religious body? So what is the --  
10 what is the function that they're performing on  
11 behalf of that body? It's not all religious  
12 exercise. It's a subset of the different kinds  
13 of religious exercise that are out there.

14 It is -- and it is the kinds of things  
15 that were listed in the Alito concurrence. It  
16 was listed as the sort of verbs that we teased  
17 out in the main opinion in Hosanna-Tabor, which  
18 is preaching, teaching, guiding, communicating,  
19 things like that that -- that are -- that are  
20 crucial to what you do as a religious  
21 organization. So I -- I think --

22 CHIEF JUSTICE ROBERTS: Justice  
23 Gorsuch?

24 JUSTICE GORSUCH: Counsel, I'd like to  
25 follow up on -- on Justice Kagan's line of

1 questioning. In response to a number of them,  
2 you indicated that you thought that the  
3 religious activities were de minimis and  
4 therefore wouldn't qualify.

5           You're asking a secular court to make  
6 that judgment. And even when some deference is  
7 given to a religious organization in a qualified  
8 immunity sort of way or otherwise, you're still  
9 asking us to make a judgment between who  
10 qualifies as a minister and who does not on the  
11 basis of our judgment that their activity with  
12 respect to a religion is de minimis.

13           And I -- I'm just wondering, does that  
14 pose some problems for you and for your clients  
15 in some of these cases? I -- I can easily see a  
16 school in which everybody takes a pledge that  
17 everything they're going to do is to help teach  
18 these kids to be part of the faith, and -- and  
19 churches believe, unlike some, that -- that  
20 every -- every member is a minister and not just  
21 a -- not just limited to clergy.

22           So what do we do about that? The next  
23 case is going to be a school in which a janitor  
24 takes a pledge, or the school bus driver or the  
25 coach, and they all believe sincerely that they



1 are ministers, and you're going to have us tell  
2 them, no, your active duties are too de minimis?

3 MR. RASSBACH: Well, I mean, I think  
4 this is part of -- part of the issue with --  
5 with the use of the word "minister." This is a  
6 kind of immunity that really goes to the kind --  
7 kinds of things that are done, that are the  
8 kinds of things you would never contemplate  
9 having a governmental entity do.

10 And so, therefore, you know, it's true  
11 that they may well be within their faith  
12 tradition a minister, but the term "minister,"  
13 as was, you know, explained in -- in the  
14 colloquy -- one of the colloquies that Justice  
15 Scalia had in Hosanna-Tabor, is that it -- that  
16 it's -- it's a legal term here. It's a -- and  
17 it was -- it arose in the 1985 Rayburn case.

18 So I think that there's a -- there's a  
19 real -- there's -- you have to see it as a  
20 subset of the kinds of things that are done on  
21 behalf of the religious community that make it  
22 distinctive. So it's not going to cover the gas  
23 station attendant or the -- the bus driver. It  
24 has to -- it has to go to those functions that  
25 make religious -- religious communities

1 distinctive within our society.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Thank you, Chief  
5 Justice.

6 Good morning, Mr. Rassbach. Do you  
7 think the exception applies to teachers who  
8 teach religious doctrine or teachers perhaps  
9 more broadly who teach religious values? How  
10 would you answer that question? Which of the  
11 two are you looking at?

12 MR. RASSBACH: Yes, so I -- I think if  
13 -- if they're -- if -- if a -- if a teacher is  
14 teaching religion devotionally, doctrine,  
15 values, what -- what have you, or just religious  
16 practices, then that teacher's going to come  
17 within the exception.

18 And one way to think about it is this  
19 is an Establishment Clause-rooted doctrine. So  
20 there's a -- there's a sort of heuristic here  
21 where, if it's something that you would start to  
22 feel nervous about having in a public school,  
23 done by public school teachers, then how can you  
24 turn around and reach into the religious --  
25 private religious school and have the government

1 tell them how to arrange those affairs?

2 So I think that --

3 JUSTICE KAVANAUGH: Well, I think a  
4 number of the questions so far have gone to the  
5 limits -- as it often happens, the limits if you  
6 were to win this case, and so we're thinking  
7 about where it would go.

8 And so say the English teacher who  
9 sprinkles in references to Matthew 25 and feed  
10 the hungry or the art teacher who talks -- talks  
11 about art in the Vatican or the football coach  
12 who says the Memorare before every practice and  
13 game, the basketball coach who says Our Lady of  
14 Victory, pray for us, those kinds of things are  
15 definitely instilling religious values.

16 Are those people therefore covered or  
17 not covered?

18 MR. RASSBACH: I -- I -- I think that  
19 -- that in -- in most cases, it's the -- they --  
20 they probably would -- if it's only that, if  
21 it's just doing the one thing, the sort of  
22 saying grace before meal situation, that -- that  
23 could be -- that that probably would fall  
24 outside the exception because it's not the --  
25 it's not at the -- the heart of what they're

1 doing. But I don't think that there's actually  
2 a whole lot of situations where that is -- is  
3 actually the only thing that such coaches or  
4 teachers or other --

5 JUSTICE KAVANAUGH: I'm -- I'm -- I'm  
6 not sure about that factually, and I guess the  
7 question that Justice Thomas and Justice Gorsuch  
8 asked is, are we going to have litigation over  
9 what particular students take out of particular  
10 coaches or particular teachers? I'm not sure  
11 how we do that if you were to win this case and  
12 then we go on to the next case.

13 MR. RASSBACH: I -- I think that the  
14 -- I think that your limiting principle is  
15 looking at, you know, what was laid out in  
16 Hosanna-Tabor. It's not just -- you know, the  
17 important religious functions are not just any  
18 religious exercise, but they're sort of a subset  
19 of religious functions that the person's  
20 performing as the agent of the religious  
21 community and that that's, you know, the main  
22 part of their job.

23 So it can't be something where it's --  
24 it's just, you know, something that you -- you  
25 know, you have the -- the physics teacher that

1 has a crucifix on the wall. That's one thing.  
2 If you have the physics teacher who adds a  
3 sermonette to every single class, that's a  
4 different one. And that is --

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Ms. Ratner? Ms. Ratner?

8 ORAL ARGUMENT OF MORGAN L. RATNER  
9 FOR THE UNITED STATES, AS AMICUS CURIAE,  
10 SUPPORTING THE PETITIONERS

11 MS. RATNER: Thank you, Mr. Chief  
12 Justice, and may it please the Court:

13 There are three proposed approaches to  
14 the ministerial exception on the table. First,  
15 in most lower courts, an employee's function has  
16 been central to the analysis.

17 Second, in the Ninth Circuit, an  
18 employer must check off one or more formalities  
19 even if an employee's religious function is  
20 clear.

21 And, third, in Respondents' view, this  
22 Court should go even further and make formality  
23 the key, with function serving just as a  
24 cross-check.

25 The first approach is the right one.

1 The touchstone of the ministerial exception  
2 should be whether an employee performs important  
3 religious functions. That's because function  
4 reflects the First Amendment interest at stake  
5 and because, critically, it's more neutral among  
6 different religions.

7 Here, we're talking about teachers of  
8 religious doctrine at a religious school. Under  
9 Hosanna-Tabor, those teachers are ministering to  
10 their students by teaching them how and why to  
11 be Catholic. So they should fall within the  
12 ministerial exception regardless of what the  
13 school calls them.

14 CHIEF JUSTICE ROBERTS: Counsel,  
15 Hosanna-Tabor looked at all of the factors in  
16 the case, and the issue now seems to be what  
17 emphasis you should put on one of those factors,  
18 religious function, and what emphasis on a  
19 different one, the ministerial title.

20 I guess, in addressing that question,  
21 I'd like to repeat Justice Gorsuch's question to  
22 you as a representative of the government. How  
23 is -- is a court supposed to determine what is a  
24 significant religious function and what is an  
25 insignificant one?

1           MS. RATNER: Well, Mr. Chief Justice,  
2 with respect to the first part of your question,  
3 we do think the Court left open in Hosanna-Tabor  
4 what is the appropriate methodology here. It  
5 said that expressly and repeatedly.

6           And we think the reason why the  
7 function is the best approach is, as I  
8 mentioned, it -- it advances the purposes  
9 identified in Hosanna-Tabor. The -- the way  
10 that one would determine whether this is an  
11 important religious function is first by looking  
12 to the categories set out in Hosanna-Tabor and  
13 particularly if the Court were to pick up the  
14 additional elaboration in Justice Alito's  
15 concurrence. Then we're talking about things  
16 like preaching, teaching, worship, leadership,  
17 and rituals.

18           You have a pretty defined set that we  
19 think would cover the mine run of cases in this  
20 area. So it's not going to be an exceptionally  
21 indeterminate analysis. Just to underscore  
22 that, this is a concept that has been around in  
23 the lower courts since the 1980s. And so,  
24 again, it's not something that we're invented --  
25 inventing here or that these courts are going to

1 significantly struggle with.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Thomas?

5 JUSTICE THOMAS: Yes. Counsel, my  
6 question is similar to that. I am perplexed as  
7 to what you do, for example, with the chemistry  
8 teacher who starts class with the Hail Mary or  
9 the theology teacher -- or the chemistry teacher  
10 who's a nun who starts class with -- chemistry  
11 class with the Hail Mary, or the lay teacher who  
12 teaches religion but does it in a very  
13 straightforward, objective way.

14 How would you handle those? I -- I  
15 don't see how -- what standards a secular court  
16 would use to determine which of those is a  
17 function, an important duty or function,  
18 religious duty or function.

19 MS. RATNER: Sure, Justice Thomas. So  
20 we think that the important religious functions  
21 are those of the type that I mentioned before,  
22 and then the question in some of these cases  
23 that have been hypothesized is just, is that  
24 really a meaningful part of a person's job or,  
25 as Petitioner's counsel called it, is that just



1 a de minimis part of a person's job?

2           If that job is in one of your  
3 hypotheticals teaching religion, then, of  
4 course, the answer is yes. If that job is  
5 teaching something secularly and we're talking  
6 about one prayer, then the -- the answer may not  
7 be yes.

8           But, if -- if I could give the Court  
9 some comfort on this, there really has been  
10 three main buckets of recurring claims since  
11 Hosanna-Tabor, and that's been principals and  
12 teachers of religious schools, worship  
13 musicians, and leaders of religious  
14 congregations. Those are the ministerial  
15 exception claims that we see again and again.

16           And we think all of those would be  
17 resolved or at least this Court would set a  
18 clear path forward if it were to adopt a  
19 function-focused approach.

20           JUSTICE THOMAS: Thank you.

21           CHIEF JUSTICE ROBERTS: Justice  
22 Ginsburg?

23           JUSTICE GINSBURG: The breadth of the  
24 exemption is staggering; that is, these people  
25 are exempt from all anti-discrimination laws.

1 So, to take a stark example, suppose a teacher  
2 who does everything the two teachers in -- in  
3 these cases do, as a faith leader, also reports  
4 a student's complaint of sexual harassment by a  
5 priest and is terminated. She has no remedy?

6 MS. RATNER: Justice Ginsburg, I think  
7 that question goes to the "what is covered by  
8 the ministerial exception" as opposed to the  
9 "who falls within it." And on the "what is  
10 covered," we're simply asking for the same thing  
11 that this Court decided in Hosanna-Tabor.

12 And the Court there specifically  
13 didn't decide whether things like retaliation  
14 for sexual abuse reporting would be covered.  
15 What it did decide was that employment  
16 discrimination claims that involve the hiring or  
17 firing of an employee necessarily go to a  
18 religious organization's ability to control who  
19 ministers to the faithful and that those claims  
20 are categorically precluded.

21 So we would apply the same rule here.  
22 And then the question is just what's the  
23 appropriate methodology for determining that a  
24 person is one who ministers to the faithful.

25 JUSTICE GINSBURG: Then her having

1 cancer has nothing to do with the performance of  
2 her religious functions. She needs time off and  
3 the government says she should have time off to  
4 take care of her disease.

5 MS. RATNER: Yes, Justice --

6 JUSTICE GINSBURG: Yes?

7 MS. RATNER: So, yes, Justice  
8 Ginsburg, that is the assertion, but, again,  
9 this Court said in Hosanna-Tabor that requiring  
10 a particular religious reason misses the point  
11 of the exemption and that it really is  
12 categorical once we're in the category of  
13 employment discrimination claims relating to  
14 hiring and firing.

15 JUSTICE GINSBURG: So, if it's  
16 categorical, why then doesn't it take care of  
17 the teacher who reports a student's claim of  
18 abuse by a priest?

19 MS. RATNER: So, again, I think that  
20 there may well be arguments that that type of  
21 retaliation claim would also have to be covered.  
22 My point is merely that the Court avoided  
23 deciding that in Hosanna-Tabor, and we think  
24 that it could continue to do so here.

25 JUSTICE GINSBURG: And it would be the

1 same if what was reported that the principal of  
2 the school, Sister Mary Margaret, had been  
3 stealing from the school, from the school's till  
4 regularly, to pay for her gambling excursions to  
5 Las Vegas. The teacher reports that, and she's  
6 terminated.

7 MS. RATNER: So, Justice Ginsburg,  
8 again, all of this relates to what is the  
9 potential scope, what are the types of claims,  
10 and, in particular, retaliation claims, for  
11 which the -- to which the ministerial exception  
12 would apply.

13 I think there are logical reasons why  
14 maybe some of those claims could come in, but we  
15 think the better approach -- excuse me, why  
16 maybe some of those claims would be covered by  
17 the ministerial exception, but we think the  
18 better approach is to continue to do what this  
19 Court did in Hosanna-Tabor and say we don't need  
20 to decide those sort of outlier cases right now,  
21 we're deciding things that relate to the  
22 employee/employer relationship and a  
23 hiring/firing claim under the employment --

24 CHIEF JUSTICE ROBERTS: Thank you.  
25 Thank you, counsel.

1 Justice Breyer?

2 JUSTICE BREYER: Counsel, I'd -- I'd  
3 like to ask you about the -- your categorical  
4 line thought. As I understand it, this is --  
5 the kinds of claims that are brought are not  
6 about religion.

7 There is a BFOQ and there is the  
8 religious exemption and taken together, where  
9 the organization does something related to  
10 religion, and that's why they dismissed the  
11 person, they're likely to win if the case is  
12 brought in the first place.

13 We're talking about the kinds of  
14 things anyway that Justice Ginsburg raised.  
15 That's the kind of thing. Should there be an  
16 immunity there? And I think the Court has  
17 previously decided yes, there should be when the  
18 person is a minister because, in that situation,  
19 don't even get into it, Court, don't even get  
20 into it.

21 So who falls within the minister? Now  
22 I can say easily a person of leadership or  
23 authority. That's not going to help that much.  
24 So, when you take your categorical approach,  
25 minister, person of leadership, person of

1 authority, what do you want to add?

2 How do we explain to people in your  
3 view what that should amount to?

4 MS. RATNER: Well, Your Honor, I  
5 think, at a minimum, you need to add the other  
6 categories that you discussed in Hosanna-Tabor.  
7 And it -- you specifically said this doesn't  
8 just apply to leaders of the congregation, it  
9 applies to other employees who preach their  
10 beliefs, teach their faith, and carry out their  
11 mission.

12 So we think that, at -- at a minimum,  
13 those teaching the faith during the week to  
14 schoolchildren and not just those preaching the  
15 faith on the weekend to adults are included  
16 within that category.

17 And then, when we're talking about  
18 what it means to carry out the religion's  
19 mission, then we -- we think that there are  
20 other categories, some helpfully laid out by  
21 Justice Alito's concurrence, like worship,  
22 leadership, and rituals that would also come in.

23 JUSTICE BREYER: Why? Why if it's a  
24 plain teacher and teaches religion too, why is  
25 it necessary to keep out of it entirely, even if

1 that teacher or whoever administrator is does  
2 discriminate on the basis of handicap?

3 MS. RATNER: Because, once you've made  
4 the decision that somebody is performing an  
5 important religious function, then this Court  
6 said in Hosanna-Tabor that getting into why they  
7 were dismissed misses the point because, at that  
8 point, the religious organization has to be  
9 capable of deciding who is going to minister to  
10 the faithful, who is going to fulfill that role  
11 of teaching Catholic schoolchildren that Jesus  
12 is the son of God and God created the world and  
13 this is the appropriate way to be Catholic.

14 JUSTICE BREYER: Thank you.

15 MS. RATNER: And --

16 CHIEF JUSTICE ROBERTS: Justice Alito?

17 JUSTICE ALITO: What do you think is  
18 the relevance of titles in this inquiry?

19 MS. RATNER: So, Justice Alito, we  
20 think that, of course, all the considerations  
21 that this Court mentioned in Hosanna-Tabor,  
22 including title, may be relevant. But the best  
23 way to think about them is that they may be  
24 relevant in illustrating whether someone  
25 performs an important religious function.

1           And I think, to do the opposite, to  
2     require a title as sort of a separate check box  
3     that needs to be ticked off, is going to create  
4     a real problem in terms of neutrality among  
5     religions.

6           Some faiths have those sorts of  
7     formalities. Some faiths don't. I think a  
8     particularly salient example is that the  
9     Lutheran Church in Hosanna-Tabor had available  
10    to it things like called teachers and  
11    commissioned ministers, and those types of  
12    non-ordained ministerial-sounding titles just  
13    aren't used by a lot of faiths, in particular,  
14    Catholicism, Judaism, and others.

15           And so that's why we think the title  
16    -- and to the title, the existence of it, can be  
17    used to help understand someone's religious role  
18    but not as a freestanding inquiry.

19           JUSTICE ALITO: Well, how does it even  
20    help to understand the person's role? Suppose  
21    you have two people who do exactly the same  
22    thing in two different religiously affiliated  
23    schools, but one has a title and the other one  
24    doesn't have a title other than the title of  
25    teacher.



1                   Why should the presence or absence of  
2 this title make any difference?

3                   MS. RATNER: So it shouldn't in the  
4 circumstance where we know clearly what  
5 individuals are doing. If it's a little harder  
6 to understand based on the facts whether someone  
7 does, in fact, play an important religious  
8 function and if the religion that we know gives  
9 out titles for different types of religious  
10 functions, then perhaps it could shed some light  
11 on the question. But -- but, no, in a  
12 circumstance like we have here where a teacher  
13 performs the exact same function that Ms. Perich  
14 did in Hosanna-Tabor, then we don't think the  
15 absence of a title should make any difference.

16                   JUSTICE ALITO: Thank you.

17                   CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19                   Justice Sotomayor?

20                   JUSTICE SOTOMAYOR: Counsel, in your  
21 brief, you're encouraging us not just to define  
22 who's a minister by important religious  
23 function, but you're asking us to defer to the  
24 religious organization's determination of what's  
25 an important religious function.

1           That's a recipe for saying the teacher  
2 who says a prayer at the beginning of a class,  
3 every teacher, whether it's a math teacher, a  
4 computer teacher, a gym teacher, they're doing  
5 an important religious function because all the  
6 -- all the school has to say is that's important  
7 to us, number one.

8           Number two, I thought what Hosanna,  
9 our prior case, was recognizing is that when  
10 you're talking about a leader, a -- a person who  
11 stewards a religion, that they are entitled to  
12 this absolution. You are now -- absolution from  
13 liability and law.

14           You are now suggesting that we as  
15 judges have an obligation to expand the  
16 exemption that we've created in law. I thought  
17 that was always Congress who would do that, not  
18 us, and as Justice Breyer indicated, they've  
19 already done it. You're asking us to -- to  
20 broaden that to anyone who does -- whose job is  
21 not primarily religious in any way.

22           And for decades, the lower courts,  
23 most of them, have not used any of the tests all  
24 of you are proposing. They've used the  
25 primarily religious -- not -- not important but

1 primarily religious functions.

2           And I don't think that lay teachers  
3 who are hired as lay teachers, not as religious  
4 teachers, it's hard to see how they qualify as  
5 primarily religious leaders.

6           MS. RATNER: So, Justice Sotomayor, on  
7 your first question, I want to be very clear.  
8 When we're talking about deferring to religious  
9 organizations, we think that this Court has  
10 already outlined sort of objectively what would  
11 be considered this class of important religious  
12 functions, and the deference we're talking about  
13 are in those rare cases where there's some  
14 dispute about whether someone actually performs  
15 those. There's a case where there was a  
16 question whether an organist is important to  
17 worship, whether a Hebrew teacher at a Jewish  
18 school is important to teaching the Jewish  
19 faith, things of that nature.

20           On your second question, we agree that  
21 the ministerial exception applies to those who  
22 lead and steward the religion and perform other  
23 functions involving stewardship and  
24 personification of the faith. And that's  
25 exactly what teachers do. It's -- the question

1 is really just of methodology. Is this based on  
2 what you do or on what you are called?

3 And it more --

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: Ms. Ratner, I was  
6 struck by the emphasis that your brief gave to  
7 the idea that it was not important whether an  
8 individual was a member of a particular faith.

9 As I understood it, that the central  
10 premise of the ministerial exception is that  
11 there are certain individuals within faith  
12 communities who have a particularly distinctive  
13 special role about how to propagate the faith.

14 And if a position can be filled by any  
15 old person, not by a member of a faith, isn't  
16 that a pretty good sign that the employee  
17 doesn't have that special role within the  
18 religious community?

19 MS. RATNER: No, Justice Kagan, I  
20 don't think so, and -- and there are really  
21 several reasons. The -- the most important one  
22 is that's essentially a religious judgment about  
23 who is qualified to perform certain important  
24 religious functions and how much of the creed of  
25 that religion you need to share to perform that

1 function.

2 The second is that this is a really  
3 entangling inquiry to engage in in practice.

4 And the third is that the result is  
5 going to have a disproportionate effect on  
6 minority religions.

7 And I don't -- I want to be clear here  
8 that these are not just abstract questions. One  
9 of the schools in this case, for example, said  
10 that it preferred Catholic teachers, but it  
11 would make exceptions for certain other  
12 Protestant religions, like Lutherans. I don't  
13 know how to -- whether to consider that, you  
14 know, a partial coreligionist requirement.

15 I don't know whether that's different  
16 from a Reformed Jewish school that would hire an  
17 Orthodox Jewish teacher. And I don't think that  
18 that's a road that the Court wants to go down  
19 on -- to go down, particularly if it has  
20 concerns about other potentially entangling  
21 parts of this analysis.

22 JUSTICE KAGAN: In -- in some of your  
23 answers, you've talked a lot about the language  
24 in Hosanna-Tabor, which is, you know, leading,  
25 preaching, teaching, and -- but, of course,

1 Hosanna-Tabor connected that up with the title,  
2 with the training, with the formal  
3 commissioning.

4 And when you take all of those things  
5 away and you're just left with those terms,  
6 "preaching" and "teaching," that's when you get  
7 into all the tricky questions like, how much  
8 preaching? How much teaching? Of what kind?  
9 Any -- any prayer that you say during the day?  
10 Any amount of teaching?

11 And -- and so how would we deal with  
12 that?

13 MS. RATNER: Again, I think the way to  
14 deal with that is by understanding there to be a  
15 baseline here that the religious functions of  
16 the type discussed in Hosanna-Tabor have to be a  
17 meaningful part of somebody's job duties. And  
18 so a lot of these kind of outlier hypotheticals  
19 that are suggested are not the circumstances  
20 where this even has arisen. The --

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Justice Gorsuch?

24 JUSTICE GORSUCH: Counsel, elsewhere  
25 in the First Amendment and under RFRA, we have

1 emphasized repeatedly that we do not inquire  
2 into how important the -- the plaintiff's  
3 religious belief is or how central it is to  
4 their faith. We protect any sincerely held  
5 religious belief precisely because we're afraid  
6 about entangling courts in making religious  
7 judgments and discriminating against minority  
8 religions that may have views about what's  
9 important that are unusual or different from our  
10 own.

11 Here, however, it seems to me, instead  
12 of pursuing that line of argument and suggesting  
13 that the sincerely held religious belief about  
14 who is a minister should control, you're asking  
15 this Court to involve itself in deciding for  
16 itself who is and who is not an important  
17 minister or just a de minimis, I think is the  
18 words you've -- you've used, person in -- in the  
19 teaching of religion.

20 Doesn't that create just exactly the  
21 sort of entanglement problems that we've tried  
22 to avoid elsewhere and discriminate potentially  
23 against minority religions that may have  
24 different views of ministers than -- than you or  
25 I may have?

1           And you -- you -- you reject all these  
2           hypotheticals as speculative or haven't yet  
3           arisen, but the very test you propose would seem  
4           to me to invite them.

5           MS. RATNER:   So, Justice Gorsuch, a  
6           couple points.  I think the first, the reason we  
7           have not advocated for a completely deferential  
8           approach is the reason Petitioners' counsel  
9           alluded to, and that's that the ministerial  
10          exception is really a legal term of art.  And so  
11          different religions may have different views on  
12          who constitutes a minister under that particular  
13          faith, but that's not necessarily going to map  
14          on to the sphere that this Court has said has to  
15          be left to religious organizations.

16          So we don't think that there's any way  
17          to entirely extricate yourself from this  
18          problem.  And so then the question just becomes,  
19          what is the methodology?  And if the worry is  
20          discriminating among religions and  
21          disadvantaging minority religions, then that's a  
22          significantly greater worry if we're talking  
23          about things like title and training than if  
24          we're using generalized functional -- a  
25          generalized functional approach that looks to



1 the types of things that religions usually  
2 operate with across the --

3 JUSTICE GORSUCH: Oh, well --

4 MS. RATNER: -- board.

5 JUSTICE GORSUCH: -- there -- there  
6 exactly is the problem, "usually." "Usually."  
7 And that -- that discriminates in favor of  
8 majority conceptions about religious doctrine  
9 and teaching.

10 Why couldn't we just simply say that a  
11 sincerely held religious belief about who is a  
12 minister should control, just like we do  
13 everywhere else in the First Amendment and in  
14 RFRA?

15 MS. RATNER: Again, Your Honor,  
16 everywhere else we're talking about sincerely  
17 held beliefs for purposes of, say, a free  
18 exercise claim or a RFRA claim. Here, we're  
19 talking about a -- a constitutional protection  
20 that this Court has said is limited to those who  
21 are ministering to the faithful or who personify  
22 the church, and we don't think that's  
23 necessarily going to map on to the particular  
24 definition of a minister that one organization  
25 may use.

1 And, of course --

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Thank you, Chief  
5 Justice.

6 Good afternoon, Ms. Ratner. Just want  
7 to confirm that your view that the roots of this  
8 exception are the Constitution and not statute.  
9 Professor Laycock refers to principle of  
10 religious autonomy rooted in the Free Exercise  
11 and Establishment Clause.

12 Is that correct?

13 MS. RATNER: I think that's correct.  
14 I don't see how you could read the Court's  
15 decision in Hosanna-Tabor to adopt some sort of  
16 statutory constitutional avoidance analysis in  
17 the same vein as Catholic Bishop. I think it's  
18 pretty clearly a -- a First Amendment holding in  
19 that case. So that's what --

20 JUSTICE KAVANAUGH: Okay.

21 MS. RATNER: -- we're --

22 JUSTICE KAVANAUGH: You used the  
23 phrase "teaching the faith." And, of course,  
24 looking ahead, if you -- your side were to  
25 prevail in this case, to -- to future cases,

1 what does "teaching the faith" mean, a similar  
2 question that I asked your colleague about  
3 instilling religious values, not just teaching  
4 specific doctrine.

5           You know, a school could have a creed  
6 of instilling the value of being a person for  
7 others in all its students, and all the teachers  
8 and coaches are told to underscore that message  
9 in how they go about instructing or coaching the  
10 students. That's the religious value, and  
11 they're all told to -- to pursue that in  
12 different ways.

13           How do we analyze a case like that?

14           MS. RATNER: So I think that those  
15 cases are obviously going to be more difficult.  
16 It's a heartland case when you're talking about  
17 the formal teaching of religious doctrine on a  
18 daily or near daily basis, as we have here and  
19 as the Court had in Hosanna-Tabor.

20           If we're talking about something that  
21 looks more like modeling the faith, I think  
22 you're going to have to do a more  
23 context-specific analysis about whether, in  
24 practice, this particular position is expected  
25 to transmit the faith through that way.

1 I certainly wouldn't say that  
2 categorically those individuals are -- are  
3 either out or in. It will depend on what that  
4 means in practice.

5 I just want to underscore here that  
6 the Ninth Circuit's decision is really the  
7 outlier decision. So, with respect to all of  
8 these concerns about the repercussions, we're  
9 just asking you to eliminate the decision that  
10 has deviated from the general focus in the lower  
11 courts on a function-based approach.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Mr. Rassbach, you have two minutes for  
15 rebuttal.

16 MR. RASSBACH: Your Honor --

17 CHIEF JUSTICE ROBERTS: You don't have  
18 anything to rebut just yet.

19 MR. RASSBACH: Yes, sorry.

20 CHIEF JUSTICE ROBERTS: Mr. Fisher?

21 ORAL ARGUMENT OF JEFFREY L. FISHER

22 ON BEHALF OF THE RESPONDENTS

23 MR. FISHER: Thank you. Thank you,

24 Mr. Chief Justice, and may it please the Court:

25 I think the first half of the argument

1 has illustrated the myriad problems with the  
2 important religious function test that's been  
3 proposed on the other side, both in terms of  
4 consequences. For example, Mr. Rassbach readily  
5 admitted that -- you know, that all nurses in  
6 Catholic hospitals, for example, would be  
7 covered, and in terms of theory, as Justice  
8 Gorsuch's questions illustrated.

9           So I think I want to focus on a  
10 narrower argument in this case that I hear the  
11 schools and the government making, which is that  
12 these particular teachers should be considered  
13 ministers, even though they did not have to be  
14 Catholic to have their job, simply because their  
15 job included teaching religion.

16           And our position is the Court should  
17 reject this contention for three reasons.  
18 First, the school's argument would strip more  
19 than 300,000 lay teachers in religious schools  
20 across the country of basic employment law  
21 protections, and necessarily included in this  
22 number are teachers who teach so-called secular  
23 classes.

24           This has been a focus of a lot of  
25 questioning this morning, so I want to emphasize

1 this. The Court itself in Catholic Bishop in  
2 many cases has said in no uncertain terms that  
3 there's no way to distinguish a teacher who  
4 teaches religion in a religious school from a  
5 teacher who teaches general curriculum or a  
6 secular course infused with religion.

7 And, in fact, the schools in amici  
8 from the U.S. Conference of Catholic Bishops to  
9 the American Jewish Committee in their amicus  
10 briefs are at absolute pains to underscore this  
11 reality. They emphasize that, "All teachers in  
12 religious schools infuse their instruction with  
13 religious doctrine" regardless of whether of  
14 they teach "religious or secular subjects, such  
15 as math and science."

16 And the concrete examples the Court  
17 has offered already I think make this readily  
18 apparent, but let me give you a couple more.  
19 Imagine the English teacher who teaches rhetoric  
20 using the Sermon on the Mount or the history  
21 teacher who during Passover describes the exodus  
22 from Egypt or who explores divine will through  
23 Lincoln's second inaugural address or the  
24 science teacher who teaches creationism or  
25 intelligent design.

1           I don't really understand what the  
2 other side means when they talk about de minimis  
3 teaching of religion or outlier, I think was the  
4 word Ms. Ratner used. All teachers in religious  
5 schools are in play in this case necessarily.

6           Secondly --

7           CHIEF JUSTICE ROBERTS: Mr. Fisher, I  
8 -- I think it's fair to describe your position  
9 compared to your friend's on the other side as  
10 more formalistic in using that word in a  
11 non-pejorative sense. You're -- you're much  
12 more focused on titles, I would think, than  
13 whether or not they're performing religious  
14 functions.

15           And my concern is -- it was one raised  
16 by the concurring opinion in Hosanna-Tabor, is  
17 that different faiths put different stock in --  
18 in titles. In some that are more hierarchal,  
19 they're important. In others, they're not.

20           And the second concern is that that's  
21 pretty manipulable. You know, if you want broad  
22 protection, you just start handing out titles to  
23 everybody, and then they would be covered.

24           I'd like your reaction to that.

25           MR. FISHER: Thank you, Mr. Chief

1 Justice. Just so that our position is to be  
2 absolutely clear is the Court should adhere to  
3 the multi-factor framework that Hosanna-Tabor  
4 laid out, which starts with what we would call  
5 objective factors.

6 Yes, one of those factors is the  
7 formal title of the individual but also things  
8 like the individual's training, whether the  
9 individual has to be of the same religion, et  
10 cetera, we think are good places for courts to  
11 start because, as the Court has mentioned, the  
12 entanglement problems here are extraordinary  
13 once a court turns to assessing religious  
14 doctrine and what is important and what -- how  
15 religious values come into play.

16 So, Mr. Chief Justice, you asked also  
17 about manipulation. I think you've actually had  
18 a little bit of a case study in the last eight  
19 years since Hosanna-Tabor was announced, and  
20 what you see in the guides that we cite at pages  
21 35 to 37 of our brief is religious employers  
22 looking to claim broad protection of the  
23 ministerial exception are being told to put  
24 things into their handbooks about the importance  
25 of the religious functions of the employees and



1 to assign them daily prayer activities and the  
2 like.

3 They're not being given special titles  
4 and the like, and we think the reason why is  
5 that titles themselves, even on their own terms,  
6 are meaningful things. You can look across all  
7 sectors of American society, including churches,  
8 to see that.

9 But, again, Mr. Chief Justice, we  
10 wouldn't rely solely on titles. We would just  
11 say it's an important thing to start with  
12 titles, just like the Court did in  
13 Hosanna-Tabor.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Thomas?

16 JUSTICE THOMAS: Yes. Thank you,  
17 Chief Justice.

18 Mr. Fisher, just first a just general  
19 question. Would exactly what these teachers  
20 were doing be a violation if they did it in a  
21 public school, be a violation of the  
22 Establishment Clause if they did it in a public  
23 school?

24 MR. FISHER: Well, Justice Thomas, I  
25 think there's a yes-and-no answer to that. I

1 think some of the religious teaching might step  
2 over the line, but, of course, it's commonplace  
3 for religion to be taught in public schools.

4           And let me -- let me clarify one thing  
5 that came up in the first half of the argument  
6 with Mr. Rassbach, for example, about teaching  
7 devotionally in a religious school. The  
8 document Lay Catholic -- Lay Teachers in  
9 Catholic Schools, which is cited in the other  
10 side's amicus briefs as kind of the touch point  
11 for what it means to teach Catholicism as a lay  
12 person, tells Catholic teachers that when  
13 they're -- even when they're in public schools,  
14 they should teach devotionally.

15           So it's not simply the idea that a  
16 Catholic person is supposed to be a witness of  
17 the faith or even try to persuade other people  
18 to become Catholic. That would be somehow  
19 different in a religious school --

20           JUSTICE THOMAS: Well, let's -- I  
21 don't want to cut you off, Mr. Fisher, but what  
22 if they -- it's my understanding they actually  
23 led them from time to time in prayer or took  
24 them to service, things like that.

25           That's what I mean. Just let's take

1 not the sort of the minimal performance of their  
2 duty but sort of their standard week-to-week  
3 performance, what could they do at the local  
4 public school?

5 MR. FISHER: I think, Justice Thomas,  
6 the answer to that is -- is no, the prayer and  
7 worship would step over the line. But I don't  
8 think that tells you anything meaningful for in  
9 terms of what a minister is, because if prayer  
10 and worship were enough, then you'd have not  
11 just the football coach or the administrator who  
12 gives the morning prayer over the loudspeaker in  
13 school, but you'd have the nurses in Catholic  
14 hospitals, you'd have the teenagers at summer  
15 camps who are camp counselors who lead their  
16 campers in a prayer every night.

17 So prayer is one thing to look at,  
18 but, Justice Thomas, we don't think it's enough  
19 to make somebody a minister.

20 JUSTICE THOMAS: But don't you think  
21 it's a bit odd that -- that things that would  
22 violate the Establishment Clause, when done in a  
23 public school, are not considered religious  
24 enough for free exercise protection when done in  
25 a parochial school?

1           MR. FISHER: Well, Justice Thomas, I  
2 wholeheartedly agree that free exercise  
3 protection is available in this case. And I  
4 want to make clear that any religious reason for  
5 firing these teachers or for otherwise  
6 regulating the teachers would be entitled to the  
7 highest free exercise protection.

8           But what the other side needs to prove  
9 is that there's an Establishment Clause  
10 violation in this case with -- going forward.  
11 And we think that is something that requires  
12 more than simply leading people in prayer or the  
13 like. It requires being a leader in the church.  
14 It requires not just being a member but a -- a  
15 person in who the stewardship of the  
16 congregation has been placed.

17           And that's what raises the kind of  
18 Establishment Clause problem we think the  
19 ministerial exception is concerned with.

20           JUSTICE THOMAS: So the -- you -- you  
21 rely somewhat on the, as the Chief Justice said  
22 in a non-pejorative way, ministerial  
23 designation. How would you determine that,  
24 especially when we look at these non-hierarchal  
25 religions that do not use priesthood or pastor

1 and that sort of a -- a designation?

2 MR. FISHER: Well, I think, Justice  
3 Thomas, the best way to do that in a -- in a  
4 religion that didn't use the kind of titles that  
5 the Catholic Church and the Lutheran Church use  
6 would be to do what Judge Wilkinson did in the  
7 Rayburn case, which is to say that if the person  
8 is performing all of the same things as -- as --  
9 as -- as what would typically come with a title,  
10 then that may well be quite relevant.

11 And I hasten to add, I just don't want  
12 to give the appearance that our test relies  
13 simply on title. The very next thing  
14 Hosanna-Tabor looked at was the training  
15 reflected in that title.

16 And so -- and so, even in a religion  
17 that isn't hierarchal, you're -- you're most  
18 likely going to have significant religious  
19 training of the kind Ms. Perich had in the  
20 Hosanna-Tabor case in play when you deal with a  
21 religious leader or the head of a congregation  
22 or the like. And so even --

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Justice Ginsburg?

1                   JUSTICE GINSBURG: I have the same  
2 question you were answering about discriminating  
3 against some hierarchical religions. And you're  
4 saying even those people may have special  
5 training that distinguishes them from the lay  
6 members of the congregation?

7                   MR. FISHER: I think that will be true  
8 quite often, Justice Ginsburg. As I said, I  
9 think the Rayburn case is a very good example in  
10 that respect, which is, of course, the  
11 foundational case for the concept of the  
12 ministerial exception.

13                   One other thing I'd like to add, which  
14 is I think it is correct, and we agree with the  
15 premise, that different religions ought to be  
16 treated equally. But there's nothing, I don't  
17 think, that should require the Court therefore  
18 to have all people who perform exactly the same  
19 functions across all religions be treated the  
20 same.

21                   And if I could offer a rough analogy.  
22 Think about the Eleventh Amendment immunity that  
23 applies to states. Different states structure  
24 their own government differently. They have  
25 different forms of administrative bodies. Some

1 have much bigger administrative bodies than  
2 others. And so different people in different  
3 states that perform roughly the same thing are  
4 sometimes going to get Eleventh -- are sometimes  
5 going to trigger Eleventh Amendment immunity and  
6 sometimes they're not.

7 We wouldn't say, therefore, that we're  
8 treating those states unequally. We would say  
9 we're respecting the decisions, those choices --  
10 those schools -- I'm sorry, those states have  
11 made.

12 And so too here, I think part of  
13 respecting religion and staying out of religion  
14 is respecting the ex ante decisions that  
15 churches themselves make about how to structure  
16 their hierarchies and who to give -- who -- who,  
17 as the words of Hosanna-Tabor put it, "in whom  
18 to put their faith."

19 JUSTICE GINSBURG: You don't seem to  
20 make much out of what I find very disturbing in  
21 all this, that the person can be fired or  
22 refused to be hired for a reason that has  
23 absolutely nothing to do with religion, like  
24 needing to take care of chemotherapy.

25 MR. FISHER: Justice Ginsburg, I don't

1 want to give that impression at all. We think  
2 that's actually the center of the case in terms  
3 of how this Court should think about it, and  
4 this also connects up, I think, with Justice  
5 Breyer's question.

6           It's not just that there's a exemption  
7 in the statute for hiring people of the same  
8 faith. It's that anytime a religion -- I'm  
9 sorry, anytime a religious employer wants to  
10 hire and fire or take other employment actions  
11 for religious reasons, the statutes themselves  
12 let them do that. And if -- and if for some  
13 reason even then the statute doesn't give them  
14 what they want, they can raise the Free Exercise  
15 Clause.

16           So the only place the ministerial  
17 exception really matters is in a case where the  
18 religion is not acting for religious reasons.  
19 And so that's this case, I think, Justice  
20 Ginsburg, as you have said, with Ms. Biel and  
21 her cancer treatments and with Morrissey-Berru  
22 being fired simply because, she alleges, she got  
23 too old, is that those are the cases where the  
24 ministerial exception matters.

25           And maybe this is the way I would say,



1 stripped of all the labels, I think, which can  
2 make the case sound more complicated than it is,  
3 I think the best way to think about this case is  
4 to say when does a church require or, sorry, I  
5 should say a religious employer require absolute  
6 categorical immunity to hire and fire people for  
7 whatever reason they want, whether it be race  
8 discrimination, whether it be any -- any other  
9 thing that doesn't have anything to do with  
10 their religion, and when, on the other hand, is  
11 it enough, with respect to an employee, to say,  
12 of course, you have an important stake in how  
13 they perform their religious functions and  
14 duties, and if you have a problem with that,  
15 you're allowed to fire them or discipline them  
16 or anything else, but you can't -- you just  
17 simply can't do it for non-religious reasons?

18           And our submission here, just to --  
19 just to finish that thought, is we think when it  
20 comes to lay teachers, the 300,000 lay teachers  
21 in Catholic schools and other religious schools  
22 across the country, not to mention the 1- or  
23 200,000 more teachers in religious universities  
24 and colleges, that we think when you talk about  
25 those people, it is enough to serve the

1 religions' legitimate interest to say if you  
2 have a problem with how they're teaching  
3 religion or how they're otherwise upholding  
4 themselves in light of your faith, you can hire  
5 or fire them. But you can't say, we don't care  
6 when you come in whether you're of our religion  
7 and we don't care when we fire you about  
8 anything to do with religion, but we still get  
9 immunity. We think that's a bridge too far.

10 JUSTICE GINSBURG: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Breyer?

13 JUSTICE BREYER: You said, counsel --  
14 thank you very much. You -- you said that what  
15 we're looking for is where is it courts should  
16 really stay out in respect to a religion that we  
17 will not even look if this defendant committed a  
18 violation of a statute that has nothing to do  
19 with religion. Justice Ginsburg went on about  
20 that.

21 All right. That's what the case does  
22 hold, Tabor. But who are those people? And we  
23 called them ministers. But they were people in  
24 positions of leadership or authority. But we  
25 know some religions, everyone has that kind of

1 position. Other religions, no. Some religions  
2 think people without education are the ones to  
3 be the ministers. Others might think vast  
4 education.

5 All right. Given that circumstance  
6 and the desire not to have us meddle too much  
7 and to keep the religion independent, what  
8 advice can you give us? What should we write in  
9 these -- I can -- you know, we can start by  
10 saying leadership or authority, but what else  
11 can we write that will -- or what -- what should  
12 we write to, say, guide the lower courts so they  
13 don't meddle too much?

14 MR. FISHER: Well, Justice Breyer, let  
15 me answer that in -- first in terms of theory  
16 and second in terms of the experience in the  
17 courts for the past several decades.

18 In terms of theory, I think you're  
19 absolutely right to be concerned about  
20 entanglement, and that's why we say the first  
21 thing you should write is the same thing you  
22 wrote at the beginning of Hosanna-Tabor, which  
23 is that to the extent that ministerial status  
24 can be gleaned from objective factors, that's  
25 where courts ought to look. They ought to look

1 to the ex ante designations that religions  
2 themselves make.

3           When that -- when that isn't a  
4 conclusive answer, yes, we can look at  
5 functions, but we have to be very careful when  
6 we do, and that ought not drive the analysis.

7           The other side's test, I don't think  
8 that even in the entire first half of the  
9 argument I ever -- ever heard a meaningful  
10 definition of what an important religious  
11 function is. And if that were the sole test, I  
12 -- I -- I respectfully submit you're going to  
13 have just impossible entanglement problems.

14           Even they concede the janitor, maybe  
15 the administrator, although that has been argued  
16 by other religious institutions in the past, but  
17 they seem to concede it. So there's going to  
18 have to be a line drawn in the way of what's the  
19 best path forward.

20           And so let me then tell you in terms  
21 of practical terms what I think is important,  
22 which is, before Hosanna-Tabor, as the Court and  
23 the concurrence by Justice Alito stressed, there  
24 had been several decades of the ministerial  
25 exception in the lower courts. The position

1 we're advocating today is consistent with the  
2 overwhelming weight of that authority.

3           So I can not only give you my theory  
4 today, but I can lend you the practical  
5 assurance that for several decades in the lower  
6 courts -- and this all -- these are all gathered  
7 in Footnote 1 of our red brief -- the courts  
8 consistently held that lay teachers in religious  
9 schools, even if they taught some religion, were  
10 outside the ministerial exception.

11           And so that line was durable and  
12 workable, and, indeed, the federal government  
13 brought many of those cases and established that  
14 rule and had that rule across several  
15 administrations for many decades.

16           So it's a little bit like the Maui  
17 case, Justice Breyer, where you have hard lines  
18 to draw, but you can take some comfort with  
19 decades of experience in lower courts and the  
20 government's own position that prevailed until  
21 the moment of this case right now.

22           So I think that actually should help  
23 bolster my position just in practical terms  
24 because, if you write an opinion that says all  
25 important religious functions trigger the

1 ministerial exception, I don't think there's  
2 just any way to escape you're going to have the  
3 cases with the nurses, you're going to have the  
4 cases with the football coaches, you're going to  
5 have the cases with the summer counselors.

6           The only thing the other side says to  
7 that in our brief is, well, those cases haven't  
8 been brought so much. But my answer to that is  
9 that just shows how revolutionary their case  
10 would be, because there's no good answer to  
11 those cases, and Mr. Rassbach himself said this  
12 morning that nurses would be covered.

13           We found several cases recently where  
14 nurses brought employment discrimination cases  
15 that weren't even -- the ministerial exception  
16 wasn't even raised in those cases. So now  
17 you're talking about hundreds of thousands of  
18 nurses being stripped of their employment law  
19 protections.

20           And this is the last thing I'd say in  
21 terms of practical consequences. Remember that  
22 we're not just talking about employment  
23 discrimination laws here. I know Hosanna-Tabor  
24 tailored the opinion that way, as Ms. Ratner  
25 properly said, but the lower courts have said

1 that the ministerial exception applies to the  
2 Fair Labor Standards Act, as has the federal  
3 government, Equal Pay Act, many other statutes,  
4 and also just ordinary state law credentialing.

5 Many state -- many states have laws  
6 that say teachers have to have a certain amount  
7 of education or training or that they have to  
8 have certain criminal background checks or -- or  
9 the like. I don't see how you can uphold the  
10 constitutionality of any of those laws or  
11 requirements under the other side's test, which  
12 the theory is that for all lay teachers in  
13 Catholic schools or other religious schools who  
14 are teaching religion, the government can have  
15 nothing to do with what reasons those people are  
16 hired or fired for or what their qualifications  
17 might be.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

19 JUSTICE ALITO: This issue can come up  
20 in many, many, many different contexts, as the  
21 questioning this morning has brought out, but  
22 what is before us is a very specific case or,  
23 rather, two very specific similar cases, and it  
24 has to do with teachers in a religiously  
25 affiliated elementary school.

1                   So suppose these teachers taught in a  
2 secondary school and they taught exactly one  
3 subject and that is religion. Students came for  
4 50 minutes a day and they had a religious class  
5 and it was taught by these teachers.

6                   Would they qualify?

7                   MR. FISHER: Justice Alito, is your  
8 assumption in that hypothetical that they --  
9 that those teachers have no other indicia of  
10 ministerial status, that they don't have any  
11 special training or title or the like?

12                   JUSTICE ALITO: Well, they have --  
13 they have the training that the school thinks is  
14 sufficient and they are not labeled minister.  
15 Do you appreciate that the very term, minister,  
16 treats different religions differently? It is a  
17 predominantly Christian/Protestant term. And as  
18 you apply it to other religions, it becomes --  
19 its application becomes less and less clear.

20                   So they do one thing, they teach  
21 religion, and they have the title of teacher of  
22 religion in a Catholic school.

23                   MR. FISHER: Well, Justice --

24                   JUSTICE ALITO: Do they qualify?

25                   MR. FISHER: -- Justice Alito, I think



1 it's -- the reason I ask, and I apologize, is  
2 that I think it's going to be an uncommon  
3 situation where that person is going to have no  
4 other formal indicia of ministerial status.

5 JUSTICE ALITO: Does now having --

6 MR. FISHER: But if you had that sort  
7 of a case -- I'm sorry.

8 JUSTICE ALITO: Go ahead.

9 MR. FISHER: Oh, I'm sorry. If you  
10 had that sort of a case, we think that person  
11 would probably not be a minister still, but you  
12 don't have to decide that here obviously.

13 JUSTICE ALITO: Why would that person  
14 not be a minister?

15 MR. FISHER: The person wouldn't be a  
16 minister in that case because I think -- at  
17 least arguably, because even then the person  
18 would not be assuming a person -- a place -- a  
19 position of spiritual leadership of the  
20 congregation. And we think that's what the core  
21 of the ministerial exception is about.

22 And, Justice Alito, maybe it helps --

23 JUSTICE ALITO: Why was that the core  
24 --

25 MR. FISHER: -- for me to --

1           JUSTICE ALITO: -- of the -- I would  
2 be more comfortable if we jettisoned the whole  
3 term "ministerial exception" because I do think  
4 it's discriminatory, but why is there less of a  
5 religious autonomy issue and why is there not a  
6 very central religious autonomy issue there?

7           The -- the function of teaching a  
8 religion to new generations is central.

9           MR. FISHER: Yeah, Justice Alito, I  
10 don't deny that for one minute, and I think that  
11 is why the schools have every -- every ability  
12 to make free exercise arguments because of the  
13 absolute centrality of that function.

14           But remember -- and I'm happy to  
15 jettison the "ministerial exception" label.  
16 What we're really talking about here is when are  
17 the schools or when are religious employers  
18 immune. When are they -- what does it -- when  
19 do they need absolute, what some courts call  
20 ecclesiastical immunity? And to get there, you  
21 need not just free exercise concerns in play but  
22 you need Establishment Clause concerns in play.

23           And I think, Justice Alito, with all  
24 fairness, you've identified what I would think  
25 of as the edge case, which is a case where

1 somebody teaches religion full-time as their job  
2 but doesn't have any other ministerial --

3 JUSTICE ALITO: Well, what is the  
4 difference --

5 MR. FISHER: -- considerations in  
6 play.

7 JUSTICE ALITO: -- what is the  
8 fundamental difference between that situation  
9 and the situation of an elementary school  
10 teacher who teaches everything, including  
11 religion? And for a school that is set up by a  
12 religious body, the teaching of religion is  
13 central.

14 That is why -- that's the very reason  
15 why these schools are set up. Otherwise, there  
16 would be no reason. The students could go to  
17 the -- to the public school and not have to pay  
18 any tuition. So it's central to their mission  
19 and the fact that it is done by -- in an  
20 elementary school by one teacher who teaches  
21 everything, including religion, why should that  
22 make a difference whether it's structured that  
23 way or it's structured as it might be in a  
24 secondary school?

25 MR. FISHER: I think the difference,

1 Justice Alito, is when somebody teaches only  
2 religion and nothing else, their stature is as  
3 more of an expert on the faith and a preacher of  
4 the faith.

5           When you have somebody who is a  
6 general curriculum teacher and who just happens  
7 to pick up the workbook for 40 minutes a day and  
8 teach religion during that segment of the day,  
9 that person isn't seen, I don't think, as -- as  
10 holding the same degree of position in -- in the  
11 church hierarchy in terms -- in terms of church  
12 leadership.

13           And remember, Justice Alito, I don't  
14 think there's any possible way to distinguish  
15 the general curriculum teacher who teaches  
16 religion 40 minutes a day from the science  
17 teacher, the history teacher, the English  
18 teacher, who probably, once you tally up the  
19 number of minutes in that day where religion  
20 comes into play, is teaching at least 40 minutes  
21 worth of religion if not anything more.

22           So just in terms of consequences,  
23 Justice Alito, you take a step from a very small  
24 group of teachers in schools to hundreds of  
25 thousands of teachers in K through 12 across the

1 country --

2 JUSTICE ALITO: Well, we may not --

3 MR. FISHER: -- and many hundreds of  
4 thousands more.

5 JUSTICE ALITO: -- we may or may not  
6 take the step, but that -- that -- those other  
7 teachers are not at issue here. What is at  
8 issue here is exactly -- is an elementary school  
9 teacher who teaches religion as well as other  
10 things.

11 MR. FISHER: Well, Justice Alito, just  
12 in terms of numbers, I think even there you  
13 have, I think, about 150,000 teachers in front  
14 of you in this case that as -- as the lower  
15 court case law developed for Hosanna-Tabor were  
16 never considered to be ministers.

17 And I don't -- as I said, just with  
18 all due respect, I don't think there's any  
19 meaningful way to distinguish, as the Catholic  
20 bishops brief says, as the American Jewish  
21 Committee brief says, as the Catholic colleges  
22 brief says, all these briefs are on the other  
23 side of the case of mine -- from me, they all  
24 stress there's no way to distinguish somebody  
25 who teaches a secular subject with religion

1       infused from somebody who teaches as my clients  
2       did in this case.

3                   CHIEF JUSTICE ROBERTS:   Justice  
4       Sotomayor?

5                   JUSTICE SOTOMAYOR:   Mr. Fisher, I  
6       understand the government supported Mrs. Biel  
7       just two years ago in the Ninth Circuit --

8                   MR. FISHER:   Correct.

9                   JUSTICE SOTOMAYOR:   -- and argued that  
10      merely teaching two hours per week, spent  
11      teaching religion, that that didn't qualify her  
12      as a minister.

13                   It's now said something -- Ms. Ratner  
14      said something that has taken me by surprise,  
15      which is she seems to be saying that the Ninth  
16      Circuit got this particular case wrong because  
17      they were using labels as talismanic.

18                   Did you understand that argument by  
19      her?  And, if you did, why is she wrong?

20                   MR. FISHER:   Well, I -- I -- I think  
21      just in terms of what the Ninth Circuit did, the  
22      court was at -- was clear to say that we're not  
23      simply resting this on the absence of the label  
24      minister, but we're looking at all the factors  
25      in Hosanna-Tabor itself and saying that,

1 overall, in the totality of the circumstances,  
2 there are not enough here.

3 The Ninth Circuit also said in its  
4 opinion that no other court has deemed teachers  
5 like these to be ministers ever before that had  
6 so little religious leadership as part of their  
7 -- their duties.

8 And they were -- the Ninth Circuit was  
9 right about that. They were right even after  
10 Hosanna-Tabor. There's only one case that's  
11 close, which is out of the Seventh Circuit, and  
12 the Ninth Circuit distinguished that case, but,  
13 more generally, as I said, the Ninth Circuit's  
14 outcome here was not just what the government  
15 asked for, it's what the government itself asked  
16 for for decades, going all the way back to the  
17 President Reagan administration, is that lay  
18 teachers who teach some religion are on one side  
19 of the scale, and other people who are core  
20 spiritual leaders in seminary schools and the  
21 like are on the other hand -- are on the other  
22 side of the scale.

23 So it really is a sea change -- even  
24 as to teachers, leaving everything else aside,  
25 it is truly a sea change that is being requested

1 by the other side here today in terms of how  
2 teachers in schools are classified and whether  
3 they have any employment rights at all or -- or,  
4 in fact, whether at least if you follow the way  
5 the lower courts have -- have implemented the  
6 ministerial exception, you basically have  
7 employment law-free zones in all religious  
8 schools.

9 JUSTICE SOTOMAYOR: The Fourth Circuit  
10 in Rayburn used the "primarily religious  
11 function" test. You haven't adopted that or  
12 even spoke about it in your brief.

13 Can you tell me what you think the  
14 strengths or limits of that test might be?

15 MR. FISHER: Justice Sotomayor, we  
16 think that Hosanna-Tabor is consistent with  
17 Rayburn and indeed -- and also consistent with  
18 our test. What Rayburn did is it dealt with a  
19 case where a -- a person applied for a position  
20 called a pastoral care position.

21 And even though the woman in that case  
22 who applied for the position didn't have a  
23 ministerial title, what Judge Wilkinson said is  
24 because of the way this church is structured, it  
25 was Seventh-day Adventist, doesn't give women



1 ordained titles, that cannot be determinative.

2           And we agree with that. We say that  
3 function should be a cross-check, function  
4 should be part of the analysis to make sure that  
5 you're not disadvantaging minority religions or  
6 otherwise being too formalistic in the analysis.  
7 So we agree with what Judge Wilkinson said.

8           I think what -- what might be the  
9 disconnect between what you're hearing from the  
10 different parties in this case is it's true that  
11 the other side can pull a quote out of Rayburn  
12 and pull a quote out of cases both before and  
13 after Hosanna-Tabor that say function should be  
14 what controls.

15           But I think what you find if you look  
16 at all those cases is those are all cases where  
17 there really truly was an exceptional  
18 circumstances at play, where there were special  
19 reasons, like in Rayburn, why the more objective  
20 factors didn't provide the right answer. And,  
21 again, we agree that then function does -- does  
22 have an enhanced role in that circumstance.

23           But another way to answer the  
24 question, Justice Sotomayor, is to say remember,  
25 we're asking for what lower courts have done on

1 the ground; just make it concrete and say what  
2 were lay teachers' status for the decades up to  
3 and even after Hosanna-Tabor.

4 And the status was non-ministers. And  
5 there's no way to reconcile those holdings,  
6 those concrete holdings, with the other side's  
7 view that, first of all, the controlling inquiry  
8 is whether somebody performs any important  
9 religious functions, and, secondly, what the  
10 government and now Petitioners themselves say,  
11 which is you defer to the religious employers  
12 themselves as to that question.

13 If that were the real test, you would  
14 have millions of people falling within the  
15 ministerial exception. And I don't see how you  
16 could make any sense of what the lower courts  
17 have done for decades if that were the test.

18 JUSTICE SOTOMAYOR: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: Mr. Fisher, I'd like  
21 to take you back to Justice Alito's questions,  
22 because some of what you said surprised me.

23 With respect to a teacher who is a  
24 full-time teacher of religion, teaching  
25 religious doctrine, teaching religious practice,

1 teaching religious texts, any of those things, I  
2 would have thought that Hosanna-Tabor, even  
3 though it has the thing about commissioning and  
4 title and so forth, you know, thinks of those  
5 people whose job it is to teach religion and to  
6 basically bring up the next generation in  
7 important understandings of religious doctrine  
8 and practice, that those people would be  
9 covered.

10 But you said no, and so I wanted to  
11 just sort of say why?

12 MR. FISHER: Justice Kagan, I think  
13 what I said is I think that's the hardest case  
14 for me. That's the edge case.

15 And I can make arguments both ways  
16 that I really wouldn't have to win here. I  
17 think what I really want to do is persuade you  
18 that those people are different from the lay  
19 teachers that I represent here.

20 But just to answer your question  
21 directly, I do think that somebody who did only  
22 that function and had no other training, title,  
23 or -- or even had to be of the same state to  
24 perform that job, I think that that person --  
25 you could still question whether that person is

1 central to the establishment of religion.

2 Remember, I think there would be very  
3 strong free exercise interests in play there,  
4 but that particular person, I don't think, is  
5 involved with establishing the church. But, as  
6 I said, Justice Kagan, I -- I -- I freely admit  
7 you can disagree with me on that and draw the  
8 line between people who teach religion full-time  
9 and people who are otherwise lay teachers  
10 teaching a general curriculum or teaching a  
11 secular subject with religion infused.

12 JUSTICE KAGAN: Well, where do we draw  
13 that line then? I mean, suppose that I think  
14 that the full-time religion teacher is -- is  
15 protected by this exemption.

16 Then I think Justice Alito raises a  
17 fair point here. It's like, well, in an  
18 elementary school, maybe you have to teach some  
19 other subjects too, so maybe it's a half-time  
20 religious teacher or maybe it's a quarter-time.

21 Where do we draw that line?

22 MR. FISHER: I think that line holds  
23 up pretty well, Justice Kagan just in terms of  
24 just the basic idea that somebody teaching  
25 religion all day is going to be different than

1 somebody teaching it just for a small part of  
2 the day as part of a general curriculum.

3           And maybe this is the way to think  
4 about it, Justice Kagan. This -- even if you  
5 strip away all the other objective factors, the  
6 school is going to hire somebody under slightly  
7 different criteria, with a different idea in  
8 mind to be the religion teacher in a school,  
9 compared to somebody who's going to be the  
10 general curriculum teacher.

11           So, yes, religion in a Catholic school  
12 or other religious school may be particularly  
13 important, but just like science and math and  
14 all the other subjects, the -- the school isn't  
15 necessarily going to think that this person  
16 needs to be a leader and an expert in that field  
17 to hold the position.

18           JUSTICE KAGAN: And -- and -- and what  
19 of the question of whether the person is a  
20 member of the faith? And, you know, as I  
21 suggested to Ms. Ratner, I was surprised by the  
22 emphasis that they put on that, but, on the  
23 other hand, I suppose I can think of there --  
24 there -- you know, a -- a -- a yeshiva says that  
25 there's a non-Jewish great Talmud scholar and --

1 and -- and hires that person. Why shouldn't  
2 that person count?

3 MR. FISHER: Justice Kagan, we do not  
4 think that -- that co-religion is an -- is an  
5 on/off switch. We just think it's a very, very  
6 strong objective factor in our column in this  
7 case, and it ought to be an important objective  
8 factor.

9 The way Hosanna-Tabor put it, and I  
10 think the way you put it earlier in the  
11 argument, was whether somebody was not just a  
12 member of the faith but a special person within  
13 the membership of the faith who -- who is -- has  
14 the stewardship over that congregation or that  
15 religion. And it's just a very, very odd thing  
16 to say that somebody who is not even a member of  
17 the faith and may fervently believe in a  
18 different faith is somehow a minister of that  
19 religion.

20 And, Justice Kagan, I think that  
21 hypothetical is what really does a good job of  
22 prying apart the two different strands of  
23 constitutional law in the First Amendment that  
24 are relevant here.

25 Absolutely, when a school hires a

1 teacher to, say, teach religion to our students,  
2 and even do it devotionally if you can, that is  
3 something on which the school has very, very  
4 strong free exercise interests in. And so they  
5 can immediately fire that person if they're not  
6 pleased with the way the person is teaching  
7 their religion or anything else.

8 But we just don't think that's an  
9 Establishment Clause question. It's a very odd  
10 thing to say the -- that the government is  
11 establishing religion by saying to a school, for  
12 positions where you don't even care whether the  
13 person is of your religion, and you hire and  
14 fire them for reasons that have nothing to do  
15 with your religion, you're entitled to  
16 categorical -- categorical immunity for those  
17 decisions because of the First Amendment. That  
18 just seems like an odd conclusion and I think  
19 tells you there's something wrong with the  
20 analysis on the other side.

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Gorsuch?

24 JUSTICE GORSUCH: Counsel, so we've  
25 gone from the full-time religion teacher to the

1 part-time religion teacher, and the line that  
2 I'm -- I'm trying to -- I'm struggling with that  
3 you're drawing there is the part-time teacher's  
4 less important, but what if the school can't  
5 afford one, a full-time teacher? Maybe they can  
6 only afford a part-time teacher.

7           You -- you mentioned that you thought  
8 it important that they be part of the faith, but  
9 then you withdrew from that a bit, recognizing  
10 that one could be part of another faith and also  
11 minister in this faith, Protestants, Catholics,  
12 different reform sort of Jews, whatever.

13           So where -- I'm struggling with where  
14 you draw the line and -- and how much  
15 entanglement you're -- you're going to get us --  
16 both sides are going to get us in here in  
17 deciding what's an important enough person in --  
18 in a particular faith and how we avoid that,  
19 that difficulty.

20           MR. FISHER: So, Justice Gorsuch, let  
21 me talk first about the part-time hypothetical  
22 and then the importance and entanglement.

23           On the part-time question, I -- I may  
24 not fully understand your hypothetical, but I --  
25 but I -- but I think that if a school said we're



1 limited funds, we want -- teaching religion in  
2 our school is very important to us, but we don't  
3 have the funds to hire a full-time religion  
4 teacher, we're just going to hire a part-time  
5 teacher, I think that whatever answer you would  
6 give to the full-time religion teacher who  
7 taught only religion would also apply to the  
8 part-time --

9 JUSTICE GORSUCH: Okay, let me change  
10 --

11 MR. FISHER: -- teacher.

12 JUSTICE GORSUCH: -- the hypothetical  
13 then. What if -- what if the members of the  
14 congregation believed that all persons are  
15 ministers of the faith, bishops maybe even, and  
16 that they are all equally capable of teaching  
17 religion and -- and that's something they all  
18 wish to do part-time while also teaching other  
19 subjects?

20 MR. FISHER: Well, Justice Gorsuch, I  
21 think that Hosanna-Tabor itself, you know, if  
22 you're talking about that in terms of a labeling  
23 exercise, Hosanna-Tabor itself said that -- that  
24 that would not be enough.

25 And I think that just again highlights

1 the real issue in front of the Court. It's not  
2 whom the religion considers to be its ministers  
3 or even whom the religion considers to be  
4 performing its most important religious  
5 functions.

6 It's who among employees of religious  
7 employers are performing such -- such vital  
8 duties to the establishment of the church that  
9 any qualification requirements or any legal  
10 enforcement having to do with their rights or --  
11 or qualifications would necessarily run afoul of  
12 the Establishment Clause?

13 And I think if we just get away from  
14 labels, I wholeheartedly agree there are  
15 enormous entanglement questions in asking what  
16 is important or -- or -- or even who -- who  
17 religions consider to be their minister.

18 I think the very problem with the  
19 other side's test, and if -- and you just read  
20 the materials that we've cited and they will  
21 tell you is it is very clear that the other --  
22 that -- that religious employers sincerely and  
23 deeply believe that all of their nurses, all of  
24 their teachers, even all of their administrators  
25 and janitors are performing important religious

1 functions in terms of the religious mission of  
2 that church, and so that can't be the question.

3 And so I think the question is the  
4 legal question arising from the First Amendment  
5 as to who is involved with the establishment of  
6 the church. That's the only way you can get to  
7 immunity.

8 And so I think perhaps a -- perhaps  
9 just that first principles approach or even that  
10 textual approach kind of helps shed some light  
11 on the situation and keep courts a little more  
12 on the law side of the line --

13 JUSTICE GORSUCH: Mr. Fisher --

14 MR. FISHER: -- and a little less on  
15 the religion.

16 JUSTICE GORSUCH: -- you say that we  
17 -- we -- we -- we -- we can't -- we can't -- we  
18 shouldn't focus on -- on their sincerely held  
19 religious beliefs, but that is what we do  
20 elsewhere in -- in First Amendment  
21 jurisprudence. We don't second-guess those  
22 sincerely held religious beliefs.

23 Why -- why would we do it here and  
24 second-guess who they deem a minister?

25 MR. FISHER: No, that's my point,

1 Justice Gorsuch. I don't think you should  
2 second-guess what -- well -- well, let me be  
3 clear here. I don't think you should  
4 second-guess what religious institutions define  
5 as their own religious beliefs or values.

6 I don't think you should second-guess  
7 whether they sincerely believe that employees  
8 perform important religious functions. But that  
9 just shows that that can't possibly be the right  
10 test here.

11 And I think your earlier questions  
12 pointed that out. And so you're exactly right,  
13 that courts should stay out of that business.  
14 And so what's the solution then? Well, we think  
15 what the solution is, is that these courts  
16 should look to the objective factors that are  
17 outlined in Hosanna-Tabor, the things that are  
18 more legalistic and the things that are more ex  
19 ante decisions of the church as to who to  
20 designate as its spiritual leaders.

21 And then ask that legal question about  
22 -- about function and duties through the lens of  
23 the Establishment Clause as a matter of first  
24 principles. We think it's telling, Justice  
25 Gorsuch, that for centuries of history that is

1 discussed on the other side of this case,  
2 there's not one single example of a person who  
3 was not a titled member of the clergy receiving  
4 the kind of protection they're being requested  
5 today.

6           We think if there were this deeply  
7 rooted First Amendment rule that they're  
8 describing, there would be thousands of cases,  
9 millions of cases because they're talking about  
10 expanding who is covered by the ministerial  
11 exception from primarily people that have  
12 objective indicia of ministerial status to  
13 making them truly the minority among a sea of  
14 employees, just -- just teachers alone, who have  
15 important religious duties but have never been  
16 thought to fall within the ministerial  
17 exception.

18           JUSTICE GORSUCH: Thank you.

19           CHIEF JUSTICE ROBERTS: Justice  
20 Kavanaugh?

21           JUSTICE KAVANAUGH: Thank you, Mr.  
22 Chief Justice.

23           And good afternoon and welcome, Mr.  
24 Fisher. I want to start with a question that  
25 comes from the amicus brief of the Milwaukee

1 Jewish Day School. They say that the Ninth  
2 Circuit's approach, the more formalistic or  
3 objective approach, means that, in their words,  
4 "Jewish schools have fared markedly worse" under  
5 that test, under the Ninth Circuit's formulation  
6 at least of that test.

7 I want to get your reaction to that  
8 and how we can prevent that.

9 MR. FISHER: Well, Justice Kavanaugh,  
10 I haven't seen any empirical proof for that  
11 statement, and we don't see why that would be  
12 the case.

13 Remember, the Ninth Circuit itself  
14 harmonized its decision with the Seventh  
15 Circuit's Grussgott case, which dealt with the  
16 Jewish Day School and said that even there, the  
17 teacher had special training to be teaching in  
18 that school and that teacher may well be  
19 different.

20 And -- and, Justice Kavanaugh, if I  
21 would just return you -- I know I've said this  
22 before, but the cases we cite in red brief -- in  
23 our red brief in Footnote 1 deal with schools of  
24 the Christian faith, of Jewish faith, and I  
25 think even some other faiths.

1                   And across the board, we see a  
2 consistent treatment of lay teachers like our  
3 clients here being outside of the ministerial  
4 exception. So --

5                   JUSTICE KAVANAUGH: Okay. The next  
6 question is: In terms of formulating the legal  
7 test, as the Court said in *Hosanna-Tabor*, it's  
8 enough in the first case just to list the  
9 factors. We may have to refine that in this  
10 case.

11                   If we refined it by adopting Justice  
12 Alito's concurrence, what would be the problems,  
13 if any, with that from your perspective?

14                   MR. FISHER: Well, I -- I think the --  
15 we agree with much of the concurrence, Justice  
16 Kavanaugh. We agree that title -- certainly,  
17 the -- certainly, the moniker minister but that  
18 titles more generally shouldn't be  
19 determinative.

20                   And we -- and we agree that function  
21 is important. And we further agree, as I was  
22 just saying, that what the Court ought to do,  
23 particularly if it wants to be careful in this  
24 highly sensitive area, is follow the vast  
25 experience of the lower courts.

1                   Now where I depart from the  
2                   concurrence -- and I -- and I -- and I just --  
3                   this is just my own difficulty understanding it,  
4                   is that concurrence leaves out all of the cases  
5                   that we cite in Footnote 1 of our -- of our  
6                   brief. So the concurrence on the one hand says  
7                   we're saying to be consistent with past law but  
8                   then suggests -- I think you're right, Justice  
9                   Kavanaugh, has some suggestions that perhaps --  
10                  perhaps a broader ministerial exception for  
11                  teachers would be appropriate.

12                  JUSTICE KAVANAUGH: Okay.

13                  MR. FISHER: And I think the way that  
14                  we would tell the Court --

15                  JUSTICE KAVANAUGH: I'm sorry to  
16                  interrupt, but I want to get another question or  
17                  two in.

18                  You mentioned earlier a religious  
19                  teacher who just picks up -- a religion teacher  
20                  who just picks up the handbook and you referred  
21                  to someone like that having no training.

22                  And I -- I guess I would question the  
23                  training point. There's no way to do this  
24                  empirically, but my guess is a lot of religion  
25                  teachers would say their life is their training.



1 MR. FISHER: Well, Justice Kavanaugh

2 --

3 JUSTICE KAVANAUGH: How would you  
4 respond to that?

5 MR. FISHER: Well, I -- I -- I think  
6 -- I think I'd respond to that by returning to  
7 one of Mr. Rassbach's own answers when he was  
8 asked is it enough to be a model or a witness.  
9 I think he said no.

10 And so I think there's something more  
11 than being a model of the faith or using your  
12 own personal experience because I don't see how  
13 you would distinguish the teachers in this case  
14 if that were the -- a proper touchstone from the  
15 hundreds of thousands or millions of other  
16 employees of religious institutions who are told  
17 in their handbooks, in their contracts, by their  
18 supervisors to carry out themselves during work  
19 hours and their lives according to the faith.

20 JUSTICE KAVANAUGH: Thank you very  
21 much, Mr. Fisher.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
23 Fisher. You have a minute or so to wrap up if  
24 you'd like.

25 MR. FISHER: Thank you. Did I hear

1 somebody else wanted to ask a question? Okay.

2 Thank -- thank you, Mr. Chief Justice.

3 With no other questions, I'll just simply return  
4 the Court to what I think is important to bear  
5 in mind as the overall question in this case,  
6 which is when is categorical immunity required  
7 on the one hand and when is it not enough to say  
8 you're -- you're entitled as a statutory matter  
9 to choose people of your own religion to work  
10 for you and you're also entitled as a statutory  
11 matter and as a free exercise matter to hire and  
12 fire and set their terms and conditions of  
13 employment according to your religious values.

14 And we think the lay teachers here  
15 fall on the latter side of the line. It is  
16 enough to give the schools in this case the  
17 ability to hire, fire, discipline, and otherwise  
18 set the terms and conditions of employment  
19 according to their religious values.

20 And it is too much and it would blow a  
21 hole in our nation's civil rights laws and our  
22 employment laws in general to say that  
23 categorical immunity applies and so schools can  
24 pay people different amounts, use race, sex,  
25 other private characteristics even when they

1 have nothing to do with the religion and the  
2 religious values at stake.

3 So we ask the Court to affirm.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Rassbach, two minutes for  
7 rebuttal.

8 REBUTTAL ARGUMENT OF ERIC C. RASSBACH

9 ON BEHALF OF THE PETITIONERS

10 MR. RASSBACH: Thank you, Mr. Chief  
11 Justice, and may it please the Court:

12 A -- a few points. The first is that  
13 the proof is in the pudding, and we have the  
14 pudding here. The ministerial exception has  
15 been working well for decades and has been using  
16 the functional consensus both before and after  
17 Hosanna-Tabor.

18 And you look at pages 8 through 9 of  
19 the yellow brief, we explain that there are  
20 other cases where lay teachers and -- and have  
21 been decided under -- under the functional test.

22 So there -- I would advert to the fact  
23 that the -- the federal government said there  
24 are three buckets, pastors, musicians, teachers.  
25 Teacher cases are common and they get decided

1 under the functional consensus all the time.

2 And I would say post-Hosanna-Tabor,  
3 there's been a real crystallization among the  
4 lower courts around the Alito concurrence in  
5 Hosanna-Tabor.

6 By contrast, the Respondents' test has  
7 never been used. And their claims of things  
8 like, you know, nurses, lots and lots of nurse  
9 cases -- there haven't been nurse cases in four  
10 decades. There's not going to start being a lot  
11 now.

12 There's no need to decide the  
13 co-religionist issue in this case. In this  
14 case, they -- they are -- they were  
15 co-religionists and both schools wanted their  
16 teachers to be Catholic, just like in  
17 Hosanna-Tabor, when there were non- -- not  
18 people from that same religion that were used --  
19 there were sometimes gap fillers employed.

20 And, finally, this is a heartland  
21 case. These teachers are the primary teacher of  
22 the faith. They are the stewards of the faith.  
23 They are the leaders of their classroom. They  
24 -- they -- the function of teaching the next  
25 generation is central, as Mr. Fisher just

1       conceded.  These -- these are the people who  
2       will teach the faith to the next generation.  If  
3       -- if they don't do it, no one else will.

4                 The decisions below would replace  
5       Hosanna-Tabor's well-designed framework for  
6       deciding delicate church/state questions with a  
7       constitutional thicket.  They should be  
8       reversed.

9                 Thank you.

10                CHIEF JUSTICE ROBERTS:  Thank you,  
11       counsel.  The case is submitted.

12                (Whereupon, at 1:14 p.m., the case was  
13       submitted.)

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## Official - Subject to Final Review

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