

SUPREME COURT OF THE UNITED STATES

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.)

- - - - -
ST. JAMES SCHOOL,)

Petitioner,)

v.) No. 19-348

DARRYL BIEL, AS PERSONAL)

REPRESENTATIVE OF THE ESTATE OF)

KRISTEN BIEL,)

Respondents.)

- - - - -
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4 Petitioner,)
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6 AGNES MORRISSEY-BERRU,)
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12 DARRYL BIEL, AS PERSONAL)
13 REPRESENTATIVE OF THE ESTATE OF)
14 KRISTEN BIEL,)
15 Respondents.)

16 - - - - -
17 Washington, D.C.
18 Monday, May 11, 2020

19
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.

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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 ever adopted Respondents' title test.

24 If Respondent's arguments give some
25 members of the Court déjà 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 that we would win the case.

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

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

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

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

6 CHIEF JUSTICE ROBERTS: Justice
7 Thomas?

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

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

24 But then, if you -- if you -- let's
25 say you have something where the church is -- or

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

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

11 JUSTICE THOMAS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Ginsburg?

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

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

25 MR. RASSBACH: So, to answer both of

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

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

15 As for --

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

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

21 JUSTICE GINSBURG: Uh-huh.

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

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer?

21 MR. RASSBACH: -- in that event.

22 JUSTICE BREYER: I think that the
23 statute itself provides for a religious
24 exemption for hiring the person of a particular
25 religion where that's connected with the

1 carrying on of the religious organization's
2 activities.

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

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

18 So why do you need more than that?

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

1 in not controlling religious functions.

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

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

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

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

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

17 JUSTICE BREYER: How?

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

25 And I don't think that the BFOQ

1 exception or Title VII or any of the other --

2 JUSTICE BREYER: Religious exemptions

3 --

4 MR. RASSBACH: -- statutes can

5 overrule that.

6 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

24 If, for example, you know, the example
25 we used in our briefing of the employee of the

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

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

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

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

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

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

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

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

1 fired.

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

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

14 MR. RASSBACH: So --

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

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

1 the Catholic faith.

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

13 So the suggestion --

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Kagan?

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

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

25 MR. RASSBACH: And if he's teaching it

1 devotionally?

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

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

7 JUSTICE KAGAN: Okay.

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

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

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

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

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

1 JUSTICE KAGAN: Okay.

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

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

6 MR. RASSBACH: Okay.

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

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

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

15 MR. RASSBACH: Yes.

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

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

24 JUSTICE KAGAN: Okay. A counselor at
25 a church-affiliated rehab clinic who urges his

1 patients to reconnect with their faith
2 community?

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

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

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

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

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

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

24 MR. RASSBACH: No.

25 JUSTICE KAGAN: No, okay. What's the

1 -- you -- you got through them all. Thank you.
2 What's the connection? What -- what are we
3 supposed to draw from this?

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

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

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 JUSTICE GORSUCH: Counsel, I'd like to
24 follow up on -- on Justice Kagan's line of
25 questioning. In response to a number of them,

1 you indicated that you thought that the
2 religious activities were de minimis and
3 therefore wouldn't qualify.

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

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

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

1 them no, your active duties are too de minimis?

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

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

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

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 JUSTICE KAVANAUGH: Thank you, Chief
4 Justice.

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

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

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

1 So I think that --

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

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

15 Are those people therefore covered or
16 not covered?

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

1 a whole lot of situations where that is -- is
2 actually the only thing that such coaches or
3 teachers or other --

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

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

22 So it can't be something where it's --
23 it's just, you know, something that you -- you
24 know, you have that -- the physics teacher that
25 has a crucifix on the wall. That's one thing.

1 If you have the physics teacher who adds a
2 sermonette to every single class, that's a
3 different one. And that is --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Ms. Ratner? Ms. Ratner?

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

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

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

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

20 And, third, in Respondents' view, this
21 Court should go even further and make
22 formalities the key, with function serving just
23 as a crosscheck.

24 The first approach is the right one.
25 The touchstone of the ministerial exception

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

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

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

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

25 MS. RATNER: Well, Mr. Chief Justice,

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas?

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

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

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

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

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

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

19 JUSTICE THOMAS: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Ginsburg?

22 JUSTICE GINSBURG: The breadth of the
23 exemption is staggering; that is, these people
24 are exempt from all antidiscrimination laws.
25 So, to take a stark example, suppose a teacher

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

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

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

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

24 JUSTICE GINSBURG: Then her having
25 cancer has nothing to do with the performance of

1 her religious functions. She needs time off and
2 the government says she should have time off to
3 take care of her disease.

4 MS. RATNER: Yes, Justice --

5 JUSTICE GINSBURG: Yes?

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

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

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

24 JUSTICE GINSBURG: And it would be the
25 same if what was reported that the principal of

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

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

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

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

25 Justice Breyer?

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

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

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

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

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

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

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

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

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

1 discriminate on the basis of handicap?

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

13 JUSTICE BREYER: Thank you.

14 MS. RATNER: And --

15 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

25 And I think, to do the opposite, to

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

5 Some faiths have those sorts of
6 formalities. Some faiths don't. I think a
7 particularly salient example is that the
8 Lutheran Church in Hosanna-Tabor had available
9 to it things like called teachers and
10 commissions ministers, and those types of
11 non-ordained ministerial-sounding titles just
12 aren't used by a lot of faiths, in particular
13 Catholicism, Judaism, and others. And so that's
14 why we think the title -- and to the title, the
15 existence of it, can be used to help understand
16 someone's religious role but not as a
17 freestanding inquiry.

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

25 Why should the presence or absence of

1 this title make any difference?

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

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Sotomayor?

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

25 That's a recipe for saying the teacher

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

7 Number 2, I thought what Hosanna, our
8 prior case, was recognizing is that when you're
9 talking about a leader, a -- a person who
10 stewards a religion, that they are entitled to
11 this absolution. You are now -- absolution from
12 liability and law.

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

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

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

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

19 On your second question, we agree that
20 the ministerial exception applies to those who
21 lead and stewards the religion and perform other
22 functions involving stewardship and
23 personification of the faith. And that's
24 exactly what teachers do. It's -- the question
25 is really just of methodology. Is this based on

1 what you do or on what you are called?

2 And it --

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

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

6 And I don't -- I want to be clear here
7 that these are not just abstract questions. One
8 of the schools in this case, for example, said
9 that it preferred Catholic teachers, but it
10 would make exceptions for certain other
11 Protestant religions like Lutherans. I don't
12 know how to -- whether to consider that, you
13 know, a partial co-religionist requirement. I
14 don't know whether that's different from a
15 Reform Jewish school that would hire an Orthodox
16 Jewish teacher. And I don't think that's a road
17 that the Court wants to go down on -- to go
18 down, particularly if it has concerns about
19 other potentially entangling parts of this
20 analysis.

21 JUSTICE KAGAN: In some of your
22 answers, you've talked a lot about the language
23 in Hosanna-Tabor, which is, you know, leading,
24 preaching, teaching. And -- but, of course,
25 Hosanna-Tabor connected that up with the title,

1 with the training, with the formal
2 commissioning.

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

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

12 MS. RATNER: Again, I think the way to
13 deal with that is by understanding there to be a
14 baseline here that the religious functions of
15 the type discussed in Hosanna-Tabor have to be a
16 meaningful part of somebody's job duties.

17 And so a lot of these kind of outlier
18 hypotheticals that are suggested are not these
19 circumstances where this even has arisen.
20 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 -- you've used, person in the -- in
19 the 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 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 differential
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 religion and disadvantaging
21 minority religions, then that's a significantly
22 greater worry if we're talking about things like
23 title and training than if we're using
24 generalized functional -- a generalized
25 functional approach that looks to the types of

1 things that religions usually operate with
2 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
11 the sincerely held religious belief about who is
12 a 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 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 necessarily
23 going to map on to the particular definition of
24 a minister that one organization may use.

25 And of course --

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 JUSTICE KAVANAUGH: Thank you, Chief
4 Justice. Good afternoon, Ms. Ratner.

5 Just want to confirm that your view
6 that the roots of this exception are the
7 constitution and not statute. Professor Laycock
8 refers to principle of religious autonomy rooted
9 in the Free Exercise and Establishment Clause.

10 Is that correct?

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

18 JUSTICE KAVANAUGH: Okay.

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

20 JUSTICE KAVANAUGH: You used the
21 phrase "teaching the faith." And of course
22 looking ahead, if you -- your side were to
23 prevail in this case to -- to future cases, what
24 does "teaching the faith" mean, a similar
25 question that I asked your colleague about

1 instilling religious values not just teaching
2 specific doctrine.

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

11 How do we analyze a case like that?

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

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

24 I certainly wouldn't say that
25 categorically those individuals are -- are

1 either out or in. It will depend on what that
2 means in practice.

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

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Rassbach, you have two minutes for
13 rebuttal.

14 MR. RASSBACH: Your Honor --

15 CHIEF JUSTICE ROBERTS: You don't have
16 anything to rebut just yet.

17 MR. RASSBACH: Yes, sorry.

18 CHIEF JUSTICE ROBERTS: Mr. Fisher?

19 ORAL ARGUMENT OF JEFFREY L. FISHER

20 ON BEHALF OF THE RESPONDENTS

21 MR. FISHER: Thank you. Thank you,
22 Mr. Chief Justice and may it please the Court:

23 I think the first half of the argument
24 has illustrated the myriad problems with the
25 important religious function test that's been

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

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

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

22 This has been a focus of a lot of
23 questioning this morning so I want to emphasize
24 this. The Court itself in Catholic Bishop in
25 many cases has said in no uncertain terms that

1 there's no way to distinguish a teacher who
2 teaches religion in a religious school from a
3 teacher who teaches general curriculum or a
4 secular course infused with religion.

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

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

24 I don't really understand what the
25 other side means when they talk about de minimis

1 teaching of religion or outlier -- I think was
2 the word Ms. Ratner used. All teachers in
3 religious schools are in play in this case
4 necessarily. Secondly --

5 CHIEF JUSTICE ROBERTS: Mr. Fisher, I
6 think it's fair to describe your position
7 compared to your friend's on the other side as
8 more formalistic in using that word in a
9 non-pejorative sense.

10 You're -- you're much more focused on
11 titles, I would think, than whether or not
12 they're performing religious functions.

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

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

22 I'd like your reaction to that.

23 MR. FISHER: Thank you, Mr. Chief
24 Justice.

25 Just so that our position is to be

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

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

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

1 the like.

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

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

12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas?

14 JUSTICE THOMAS: Yes. Thank you,
15 Chief Justice.

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

22 MR. FISHER: Well, Justice Thomas, I
23 think there is a yes-and-no answer to that. I
24 think some of the religious teaching might step
25 over the line, but of course it's commonplace

1 for religion to be taught in public schools.

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

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

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

23 That's what I mean, just let's take
24 not the sort of the minimal performance of their
25 duty but the -- sort of their standard

1 week-to-week performance, what could they do at
2 the local public school?

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

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

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

24 MR. FISHER: Well, Justice Thomas, I
25 wholeheartedly agree that free exercise

1 protection is available in this case. And I
2 want to make clear that any religious reason for
3 firing these teachers or for otherwise
4 regulating the teachers would be entitled to the
5 highest free exercise protection.

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

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

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

25 MR. FISHER: Well, I think, Justice

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Ginsburg?

24 JUSTICE GINSBURG: I have the same
25 question you were answering about discriminating

1 against some hierarchal religions. And you're
2 saying even those people, they have special
3 training that distinguishes them from the lay
4 members of the congregation?

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

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

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

1 states that perform roughly the same thing are
2 sometimes going to get Eleventh -- are sometimes
3 going to trigger Eleventh Amendment immunity and
4 sometimes they're not.

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

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

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

23 MR. FISHER: Justice Ginsburg, I don't
24 want to give that impression at all. We think
25 that's actually the center of the case in terms

1 of how this Court should think about it, and
2 this also connects up, I think, with Justice
3 Breyer's question.

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

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

23 And maybe this is the way I would say,
24 stripped of all the labels, I think, which can
25 make the case sound more complicated than it is,

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

16 And our submission here, just to --
17 just to finish that thought, is we think when it
18 comes to lay teachers, the 300,000 lay teachers
19 in Catholic schools and other religious schools
20 across the country, not to mention the 1- or
21 200,000 more teachers in religious universities
22 and colleges, that we think when you talk about
23 those people, it is enough to serve the
24 religions' legitimate interest to say if you
25 have a problem with how they're teaching

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

8 JUSTICE GINSBURG: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer?

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

19 All right. That's what the case does
20 hold, Tabor. But who are those people? And we
21 called them ministers. But they were people in
22 positions of leadership or authority. But we
23 know some religions, everyone has that kind of
24 position. Other religions, no. Some religions
25 think people without education are the ones to

1 be the ministers. Others might think vast
2 education.

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

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

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

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

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

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

18 And so let me then tell you in terms
19 of practical terms what I think is important,
20 which is, before Hosanna-Tabor, as the Court and
21 the concurrence by Justice Alito stressed, there
22 had been several decades of the ministerial
23 exception in the lower courts. The position
24 we're advocating today is consistent with the
25 overwhelming weight of that authority.

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

9 And so that line was durable and
10 workable, and, indeed, the federal government
11 brought many of those cases and established that
12 rule and had that rule across several
13 administrations for many decades, so it's a
14 little bit like the Maui case, Justice Breyer,
15 where you have hard lines to draw, but you can
16 take some comfort with decades of experience in
17 lower courts and the government's own position
18 that prevailed until the moment of this case
19 right now.

20 So I think that actually should help
21 bolster my position just in practical terms
22 because, if you write an opinion that says all
23 important religious functions trigger the
24 ministerial exception, I don't think there's
25 just any way to escape you're going to have the

1 cases with the nurses, you're going to have the
2 cases with the football coaches, you're going to
3 have the cases with the summer counselors.

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

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

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

1 government, Equal Pay Act, many other statutes,
2 and also just ordinary state law credentialing.

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

16 CHIEF JUSTICE ROBERTS: Justice Alito?

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

24 So suppose these teachers taught in a
25 secondary school and they taught exactly one

1 subject and that is religion. Students came for
2 50 minutes a day and they had a religious class
3 and it was taught by these teachers.

4 Would they qualify?

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

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

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

21 MR. FISHER: Well, Justice --

22 JUSTICE ALITO: Do they qualify?

23 MR. FISHER: -- Justice Alito, I think
24 it's -- the reason I ask, and I apologize, is
25 that I think it's going to be an uncommon

1 situation where that person is going to have no
2 other formal indicia of ministerial status.

3 JUSTICE ALITO: Does now having --

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

6 JUSTICE ALITO: Go ahead.

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

11 JUSTICE ALITO: Why would that person
12 not be a minister?

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

20 And, Justice Alito, maybe it helps --

21 JUSTICE ALITO: Why was that the core
22 --

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

24 JUSTICE ALITO: -- of the -- I would
25 be more comfortable if we jettisoned the whole

1 term "ministerial exception" because I do think
2 it's discriminatory, but why is there less of a
3 religious autonomy issue and why is there not a
4 very central religious autonomy issue there?

5 The -- the function of teaching a
6 religion to new generations is central.

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

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

21 And I think, Justice Alito, with all
22 fairness, you've identified what I would think
23 of as the edge case, which is a case where
24 somebody teaches religion full-time as their job
25 but doesn't have any other ministerial --

1 JUSTICE ALITO: Well, what is the
2 difference --

3 MR. FISHER: -- considerations in
4 play.

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

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

23 MR. FISHER: I think the difference,
24 Justice Alito, is when somebody teaches only
25 religion and nothing else, their stature is as

1 more of an expert on the faith and a preacher of
2 the faith.

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

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

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

25 JUSTICE ALITO: Well, we may not --

1 MR. FISHER: -- and many hundreds of
2 thousands more.

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

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

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

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

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

6 MR. FISHER: Correct.

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

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

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

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

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

6 And they were -- the Ninth Circuit was
7 right about that. They were right even after
8 Hosanna-Tabor. There's only one case that's
9 close, which is out of the Seventh Circuit, and
10 the Ninth Circuit distinguished that case, but,
11 more generally, as I said, the Ninth Circuit's
12 outcome here was not just what the government
13 asked for, it's what the government itself asked
14 for for decades, going all the way back to the
15 President Reagan administration.

16 Is that lay teachers who teach some
17 religion are on one side of the scale, and other
18 people who are core spiritual leaders in
19 seminary schools and the like are on the other
20 hand -- are on the other side of the scale.

21 So it really is a sea change -- even
22 as to teachers, leaving everything else aside,
23 it is truly a sea change that is being requested
24 by the other side here today in terms of how
25 teachers and schools are classified and whether

1 they have any employment rights at all or -- or,
2 in fact, whether at least if you follow the way
3 the lower courts have -- have implemented the
4 ministerial exception, you basically have
5 employment law-free zones in all religious
6 schools.

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

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

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

19 And even though the woman in that case
20 who applied for the position didn't have a
21 ministerial title, which Judge Wilkinson said is
22 because of the way this church is structured, it
23 was Seventh-day Adventist, doesn't give women
24 ordained titles, that cannot be determinative.

25 And we agree with that. We say that

1 function should be a crosscheck. Function
2 should be part of the analysis to make sure that
3 you're not disadvantaging minority religions or
4 otherwise being too formalistic in the analysis.
5 So we agree with what Judge Wilkinson said.

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

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

21 But another way to answer the
22 question, Justice Sotomayor, is to say remember,
23 we're asking for what lower courts have done on
24 the ground; just make it concrete and say what
25 were lay teachers' status for the decades up to

1 and even after Hosanna-Tabor.

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

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

17 JUSTICE SOTOMAYOR: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

22 With respect to a teacher who is a
23 full-time teacher of religion, teaching
24 religious doctrine, teaching religious practice,
25 teaching religious texts, any of those things, I

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

9 But you said no. And so I wanted to
10 just sort of say why?

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

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

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

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

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

15 Then I think Justice Alito raises a
16 fair point here. It's like, well, in an
17 elementary school, maybe you have to teach some
18 other subjects too. So maybe it's a half-time
19 religious teacher or maybe it's a quarter-time.
20 And where do we draw that line?

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

1 the day as part of a general curriculum.

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

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

17 JUSTICE KAGAN: And -- and -- and what
18 of the question of whether the person is a
19 member of the faith? And, you know, as I
20 suggested to Ms. Ratner, I was surprised by the
21 emphasis that they put on that, but, on the
22 other hand, I suppose I can think of there --
23 there -- you know, a -- a -- a yeshiva says that
24 there is a non-Jewish great Talmud scholar and
25 -- and -- and hires that person. Why shouldn't

1 that person count?

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

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

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

24 Absolutely, when a school hires the
25 teacher to, say, teach religion to our students,

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

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

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 JUSTICE GORSUCH: Counsel, so we've
24 gone from the full-time religion teacher to the
25 part-time religion teacher. And the line that

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

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

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

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

22 On the part-time question, I -- I may
23 not fully understand your hypothetical, but I --
24 but I -- but I think that if a school said we're
25 limited funds, we want -- teaching religion in

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

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

10 MR. FISHER: -- teacher.

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

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

24 And I think that just again highlights
25 the real issue in front of the Court. It's not

1 whom the religion considers to be its ministers
2 or even whom the religion considers to be
3 performing its most important religious
4 functions.

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

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

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

1 that church, and so that can't be the question.

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

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

12 JUSTICE GORSUCH: Mr. Fisher --

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

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

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

24 MR. FISHER: No, that's my point,
25 Justice Gorsuch. I don't think you should

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

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

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

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

1 is not one single example of a person who was
2 not a titled member of the clergy receiving the
3 kind of protection they're being requesting
4 today.

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

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

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

22 And good afternoon and welcome, Mr.
23 Fisher. I want to start with a question that
24 comes from the amicus brief of the Milwaukee
25 Jewish Day School. They say that the Ninth

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

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

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

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

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

25 And across the board, we see a

1 consistent treatment of lay teachers like our
2 clients here being outside of the ministerial
3 exception. So --

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

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

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

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

25 Now where I depart from the

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

11 JUSTICE KAVANAUGH: Okay.

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

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

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

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

25 MR. FISHER: Well, Justice Kavanaugh

1 --

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

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

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

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

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

24 MR. FISHER: Thank you. Did I hear
25 somebody else wanted to ask a question? Okay.

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

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

19 And it is too much and it would blow a
20 hole in our nation's civil rights laws and our
21 employment laws in general to say that
22 categorical immunity applies and so schools can
23 pay people different amounts, use race, sex,
24 other private characteristics even when they
25 have nothing to do with religion and the

1 religious values at stake.

2 So we ask the Court to affirm.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Rassbach, two minutes for
6 rebuttal.

7 REBUTTAL ARGUMENT OF ERIC C. RASSBACH
8 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

5 By contrast, the Respondents' test has
6 never been used.

7 And their claims of things like, you
8 know, nurses, lots and lots of nurse cases --
9 there haven't been nurse cases in four decades.
10 There's not going to start being a lot now.

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

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

1 will teach the faith to the next generation. If
2 -- if they don't do it, no one else will.

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

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 The case is submitted.

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

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1	actually ^[10] 9:7 15:21 21:21 26:25 27:2 42:13 55:16 57:20 62:25 68:20 add ^[4] 36:25 37:4 60:9 61:11 additional ^[1] 30:13 address ^[5] 6:20,23 14:12 15:14 53:21 addressing ^[1] 29:19 adds ^[1] 28:1 adhere ^[1] 55:1 administration ^[1] 78:15 administrations ^[1] 68:13 administrative ^[2] 61:23,24 administrator ^[3] 37:25 58:9 67:13 administrators ^[1] 89:23 admit ^[1] 83:5 admitted ^[1] 52:3 adopt ^[2] 32:17 49:13 adopted ^[2] 5:23 79:9 adopting ^[1] 94:10 adults ^[1] 37:14 advances ^[1] 30:7 Adventist ^[1] 79:23 advert ^[1] 98:21 advice ^[1] 66:6 advocated ^[1] 47:7 advocating ^[1] 67:24 affairs ^[1] 25:25 affiliated ^[3] 15:15 39:21 70:23 affirm ^[1] 98:2 afford ^[2] 87:4,5 afoul ^[1] 89:10 afraid ^[1] 46:5 afternoon ^[2] 49:4 92:22 age ^[3] 16:22,25 17:8 agent ^[1] 27:19 agents ^[1] 5:9 AGNES ^[2] 1:6 4:5 ago ^[2] 6:3 77:5 agree ^[12] 18:3 42:19 58:25 61:12 79:25 80:5,19 89:13 94:14,15,19,20 ahead ^[2] 49:22 72:6 Alicia-Hernandez ^[1] 20:22 Alito ^[37] 8:20 14:6,7,19 15:10,24 22:14 38:15,16,18 39:18 40:15 67:21 70:16,17 71:5,10,22,23 72:3,6,11,20,21,24 73:7,21 74:1,5,24 75:11,21,25 76:3,9 83:15 99:3 Alito's ^[4] 30:13 37:20 81:20 94:11 alleges ^[1] 63:20 allowed ^[1] 64:13 allows ^[1] 15:12 alluded ^[2] 9:19 47:9 alone ^[4] 7:3 19:23 20:5 92:13 already ^[4] 9:19 41:18 42:9 53:15 although ^[2] 10:7 67:13 Amendment ^[12] 15:4 29:3 45:25 48:13 49:16 61:20 62:3 85:22 86:16 90:3,19 92:6 American ^[3] 53:7 56:6 76:18 amici ^[1] 53:5 amicus ^[6] 2:7 3:7 28:8 53:7 57:8	92:24 among ^[8] 9:16,17 29:4 39:3 47:20 89:5 92:12 99:2 amount ^[3] 37:2 45:9 70:4 amounts ^[1] 97:23 analogy ^[1] 61:19 analysis ^[9] 28:15 30:20 44:20 49:14 50:21 67:4 80:2,4 86:19 analyze ^[1] 50:11 announced ^[1] 55:18 another ^[3] 80:21 87:9 95:15 answer ^[18] 5:2 7:5 9:25 13:11 18:19 25:9 32:3,5 56:23 58:4 66:13 67:2 69:6,8 80:18,21 82:19 88:4 answering ^[1] 60:25 answers ^[3] 9:15 44:22 96:6 ante ^[2] 62:12 66:24 anti-Semitic ^[1] 15:1 antidiscrimination ^[1] 32:24 anytime ^[2] 63:6,7 anyway ^[1] 36:13 apart ^[1] 85:21 apologize ^[1] 71:24 apparent ^[1] 53:16 appearance ^[1] 60:10 APPEARANCES ^[1] 2:1 application ^[1] 71:17 applied ^[3] 14:9 79:17,20 applies ^[8] 5:18 15:20 25:6 37:8 42:20 61:21 69:24 97:22 apply ^[7] 7:13 12:13 33:20 35:11 37:7 71:16 88:6 appreciate ^[2] 9:14 71:13 approach ^[13] 28:24 30:6 32:18 35:14,17 36:23 47:8,25 51:9 90:8,9 93:1,2 approaches ^[1] 28:12 appropriate ^[4] 30:3 33:22 38:12 95:10 area ^[2] 30:19 94:23 aren't ^[2] 7:16 39:12 arguably ^[1] 72:15 argued ^[2] 67:13 77:7 argument ^[20] 1:21 3:2,5,9,12 4:4,8 7:11 18:7 28:7 46:12 51:19,23 52:8,16 57:3 67:7 77:16 85:10 98:7 arguments ^[6] 5:24 6:2,8 34:19 73:10 82:14 arisen ^[2] 45:19 47:3 arising ^[1] 90:3 arose ^[1] 24:16 around ^[3] 25:23 30:21 99:3 arrange ^[1] 25:25 art ^[3] 26:9,10 47:10 aside ^[1] 78:22 assertion ^[1] 34:7 assessing ^[1] 55:12 assign ^[1] 55:25 Assistant ^[1] 2:4 association ^[1] 6:5 assuming ^[1] 72:16 assumption ^[1] 71:6 assurance ^[1] 68:3	athletic ^[1] 10:17 attendant ^[1] 24:22 authority ^[7] 12:15 18:10 36:22,25 65:22 66:8 67:25 authorized ^[1] 4:15 autonomy ^[5] 14:22 15:3 49:8 73:3,4 available ^[2] 39:8 59:1 avoid ^[2] 46:22 87:17 avoidance ^[1] 49:14 avoided ^[1] 34:21 away ^[3] 45:4 84:4 89:12
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