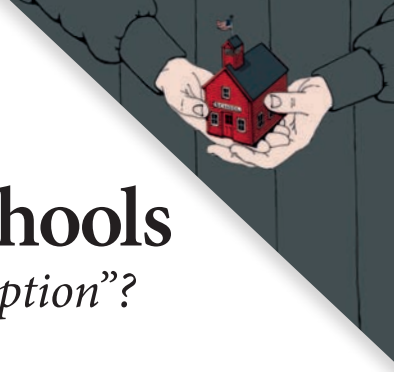

Justices Will Hear Catholic Schools

Which teachers qualify for the "ministerial exception"?

by JOSHUA DUNN

SHOULD ANTI-DISCRIMINATION LAWS require a religious school to employ teachers that it believes are compromising its religious mission? That's the central question in two upcoming Supreme Court cases, *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel.*

Both cases will hinge on how the court interprets the "ministerial exception" it first applied in 2012's *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission.* In that case, the court unanimously held that religious organizations have the freedom to "select their own ministers" under the First Amendment's Free Exercise Clause and that the government is "forbidden from appointing ministers" under the amendment's Establishment Clause.

The case involved a teacher, Cheryl Perich, who taught a range of subjects including math, gym, and religion. She also led students in prayer. After she went on leave for a medical disability, the school hired a replacement. When she tried to return to work midyear, the school informed her that it had another teacher under contract for the year. She then threatened to sue the school.

As part of the Missouri Lutheran Synod, the school makes a distinction between "called" and "lay" teachers. Called teachers must be Lutheran, are considered called by God, and are given the title "minister of religion." Perich was a called teacher.

After Perich's threat of legal action, the congregation rescinded her call and fired her. Perich then filed a claim with the Equal Employment Opportunity Commission, asserting that her rights under the Americans with Disabilities Act had been violated. The Supreme Court sided with the church and school, saying that a finding for Perich would be tantamount to forcing a church to "accept a minister it does not want." The First Amendment guarantees that "the authority to select and control who will minister to the faithful is the church's alone," the court ruled. Despite the broad sweep of the ruling, the court explicitly declined to offer a "rigid formula" for deciding who counts as a minister. That created an opening for the controversies in *Morrissey-Berru* and *Biel.*

Both cases involve teachers at Roman Catholic schools in the Los Angeles Archdiocese. Agnes Morrissey-Berru was a 5th-grade teacher who failed to implement new programs designed to improve the academic rigor of Our Lady of Guadalupe School. After being fired in 2015, she sued, claiming age discrimination. She lost on a motion for summary judgment in the district court, but a Ninth Circuit panel reversed. The appellate panel said that even though Morrissey-Berru had "significant religious responsibilities," her position was not sufficiently religious to warrant First Amendment protection for the school.

Similarly, Kristen Biel was a 5th-grade teacher, the only one at St. James School. Biel taught weekly religion classes, supervised students during Mass, and was responsible for inculcating the Catholic faith throughout the curriculum. She was hired in 2013, but the school quickly became concerned about her performance. After providing unsuccessful training to help her improve, the school declined to renew Biel's contract for the 2014–15 school year, shortly after she told the principal she had breast cancer. Biel sued, claiming the school violated her rights under the Americans with Disabilities Act. Like Morrissey-Berru, Biel lost at the district court level but succeeded before a Ninth Circuit panel.

In both cases, the courts relied on an alleged *Hosanna-Tabor* standard, essentially holding that because neither teacher was required to have the same religious "credentials, training, or ministerial background" as teaching ministers (in contrast to Perich), they could not be considered ministers, despite their religious duties. As well, their titles of teacher reflected "nothing 'religious.'"

Two problems emerge from these decisions. First, the Supreme Court had explicitly said in *Hosanna-Tabor* that it was not offering a "rigid formula" for determining who would count as a minister, yet the Ninth Circuit divined one anyway. Second, by invoking the same standards used to determine that Perich was a minister under Lutheran doctrine, the Ninth Circuit was requiring the Catholic church to mimic Lutheran policy. While many Protestant denominations use the title minister, other faiths rarely do. Certainly, religious freedom cannot mean that civil courts tell the Catholic Church to follow the same principles and nomenclature as Lutherans. Decisions over religious titles, central to church government, are decisions about religious doctrine. Catholics and Protestants have had disagreements, even wars, over such questions for centuries.

Thus, at the heart of these cases is the right of religious institutions to decide who qualifies to teach their faith. Some believe that horrible consequences will ensue if the Supreme Court sides with the schools—most significantly, that religious institutions might start labeling fully secular employees as ministers, thus immunizing themselves from anti-discrimination laws. However, the alternative seems worse, because it would allow the government, in this case the courts, to dictate religious doctrine. One expects the Supreme Court will decline to do so.

The court's acceptance of these cases indicates that at least four justices want to clarify its ruling in *Hosanna-Tabor* and remind lower court judges that other churches and schools don't have to ape Lutheranism when determining who counts as a minister. The court will hear oral argument this spring.

Joshua Dunn is professor of political science at the University of Colorado Colorado Springs.