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The (Un)Holy Shield: Rethinking the Ministerial Exception

Jeremy Weese

ABSTRACT

Does the First Amendment's protection of religious expression mean religious organizations are free to discriminate on the basis of sex, disability, or race in hiring and firing employees? In 2012, the Supreme Court answered this question with a unanimous yes, finding that religious organizations are immune from liability for discriminating against their employees, as long as those employees are "ministers." This broad protection from liability is called the "ministerial exception."

The decision in *Hosanna-Tabor* was wrong for three main reasons. First, the Court did not clearly answer the question of which employees count as ministers, leaving space for religious employers to argue almost any of their employees are ministers under the ministerial exception. Second, the ministerial exception uses First Amendment protections for religion to protect decisions and actions that were not based on religion, thus becoming unmoored from its constitutional support. Third, the ministerial exception hollows out hard-won protections against discrimination.

But the decision in *Hosanna-Tabor* was partly right—the First Amendment does and should protect the right to freely exercise religion. Choosing the leaders of a religious organization is one area deserving such protection. The Court in *Hosanna-Tabor* had some right instincts but went in the wrong direction.

This Comment seeks to chart a better course for the ministerial exception. First, by looking more broadly at Supreme Court interpretations of the Religion Clauses in the First Amendment, I show that the decision in *Hosanna-Tabor* is not required by precedent, and in fact goes against precedent. Second, in shaping a better ministerial exception, I recommend additional factors that must be considered in determining whether an employee counts as a minister under the ministerial exception. Third, I sketch out a narrower immunity for religious organizations: Even if an employee is a minister, the religious organization is not immune from liability unless the discriminatory decision to hire or fire was based on a religious belief. I call this defense the Bona Fide Religious Decision defense.

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INTRODUCTION

Picture these scenarios:[1]

Scenario 1:

You are in an executive team meeting about a crucial hire. As you put forward your top candidates, the CEO interrupts: "I don't want another woman in this position." You are shocked, not only because the previous occupant of the position, by all accounts an excellent director, was a woman, but because you are as well.

Scenario 2:

You are a director in your organization. You are transitioning to lead a new department; your organization hires a person to take over your old position. In the transition process, you learn that this person will not only be making over twice what you were originally given for the position, but also that they will also be coming in at a salary higher than your current salary. They have fewer qualifications and less experience; the only difference is that you are disabled, and they are not.

Scenario 3:

You take a leadership role in a new organization. Under your leadership, the organization is incredibly successful, increasing its market reach as well as profits. You oversee the hiring of a larger staff to keep up. A few years in, you meet with the head of the organization to discuss advancement. He tells you that, as a single woman, you have hit your limit not only in this organization but also in the field more broadly. If you got married, he tells you, maybe you could make a little more.

Scenario 4:

You are hired as a new member of the executive team. You take over the leadership of the largest division in the organization; you supervise more directors and either directly or indirectly oversee over half of the organization's employees. The organization has a 'black box' compensation policy. Over the first year, as you are involved in hiring and compensation decisions, however, you find out that you are compensated less than most of your fellow members on the executive team, and several of your direct reports even make significantly more than you do. You came in with multiple

1. These scenarios each use real life facts gathered from the author's experiences and conversations over the course of more than ten years in religious ministry, with the last six as a minister at a large church. Details have been combined and edited to hide identifying information.

graduate degrees and decades of experience; you are by far the most credentialed and experienced member of the executive team. The only difference is that you are an unmarried woman, and the employees paid more than you are married men.

Say one or more of these scenarios happen to you. After exhausting internal complaints, you begin to do research regarding your legal options.

You find the following on an Equal Employment Opportunity Commission (EEOC) Guidance Sheet:

> Compensation discrimination under Title VII, the [Age Discrimination in Employment Act of 1967 (ADEA)], or the [Americans With Disabilities Act of 1990 (ADA)] can occur in a variety of forms. For example:
>
> An employer pays an employee with a disability less than similarly situated employees without disabilities and the employer's explanation (if any) does not satisfactorily account for the differential.
>
> An employer sets the compensation for jobs predominately held by, for example, women or African-Americans below that suggested by the employer's job evaluation study, while the pay for jobs predominately held by men or whites is consistent with the level suggested by the job evaluation study.
>
> An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity. For example, if an employer provides extra compensation to employees who are the "head of household," i.e., married with dependents and the primary financial contributor to the household, the practice may have an unlawful disparate impact on women.[2]

You visit your local EEOC office for a consultation. After an encouraging start to the meeting, you get into the brass tacks. Almost immediately, the EEOC employee's face drops. She informs you that the EEOC will not take up your case. She says you will be free to sue, but are unlikely to get any relief. "Why?" You ask, pointing at the fact sheet. She points at your employer's name: "Because you work for a church."

2. *Facts About Equal Pay and Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 15, 1997), https://www.eeoc.gov/eeoc/publications/fs-epa.cfm [https://perma.cc/YEA6-RFFL].

In 2012, the U.S. Supreme Court unanimously upheld a "ministerial exception" from employment discrimination laws for religious organizations.[3] The Court held that a religious organization could not be held liable for employment discrimination as long as the plaintiff bringing the suit was considered a "minister" of the religious organization. It did not define the limits of which organizations count as religious organizations, nor did it define which employees can be considered ministers of the organization.[4] In doing so, the Court noted that every circuit has confirmed the existence of a ministerial exception.[5] After a meandering journey through the jurisprudence of the Free Exercise and Establishment Clauses of the First Amendment (collectively the "Religion Clauses"),[6] the Court concluded:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.[7]

While the Court's unanimity, along with the clear concurrence of the circuit courts, might lead one to think this decision was not controversial, the opinion has in fact stirred up large areas of disagreement among legal scholars. Much of the debate has been around *Hosanna-Tabor*'s unwillingness to provide clear definitions for "religious organization"[8] or for "minister."[9]

In fact, the problems with *Hosanna-Tabor* go deeper. First, in *Hosanna-Tabor* the Court claimed it relied on a line of cases interpreting the First Amendment's Religion Clauses to justify giving broad immunity to religious

3. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).
4. *See id.* at 188.
5. *Id.*
6. U.S. CONST. amend. I.
7. *Hosanna-Tabor*, 565 U.S. at 196.
8. *See, e.g.*, Brian M. Murray, *The Elephant in* Hosanna-Tabor, 10 GEO. J.L. & PUB. POL'Y 493 (2012); Zoë Robinson, *What Is a "Religious Institution"?*, 55 B.C. L. REV. 181 (2014).
9. *See, e.g.*, Lauren N. Woleslagle, Comment, *The United States Supreme Court Sanctifies the Ministerial Exception in* Hosanna-Tabor v. EEOC *Without Addressing Who Is a Minister: A Blessing for Religious Freedom or Is the Line Between Church and State Still Blurred?*, 50 DUQ. L. REV. 895 (2012); Katherine Hinkle, Case Note, *What's in a Name? The Definition of "Minister" in* Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 34 BERKELEY J. EMP. & LAB. L. 283 (2013).

organizations.[10] The Court, however, has historically avoided giving blanket deference to decisions by religious organizations, as a closer look at the Religion Clause jurisprudence shows.[11] This studious historical avoidance of affording blanket deference to religious organizations calls into question the wisdom of the Court's decision in *Hosanna-Tabor*. Additionally, by providing such broad immunity against discrimination claims, the Court diminishes the importance of preventing discrimination, a societal value that has been upheld and supported by previous Supreme Court decisions. Moreover, *Hosanna-Tabor*'s lack of clarity in defining religious organizations or "ministers" has caused confusion in the lower courts, leading to inconsistent results.[12] As a result of the lack of clarity around defining "ministers," employees who would not on first blush or even with a commonsense analysis be considered "ministers" have had their cases dismissed. Finally, the decision has allowed actions to be protected under the ministerial exception that were not based on religious belief, and thus should not be protected by the Religion Clauses of the First Amendment.

But there are alternatives. In *Hosanna-Tabor*, by granting a broad ministerial exception, the Supreme Court took the easy path. Rather than balancing our society's commitment to opposing discrimination with a strong commitment to preserving religious freedom, the Court merely prioritized the latter over the former. We can do better.

This Comment proceeds as follows: Part I begins with a short introduction setting the scene leading up to the Court's decision in *Hosanna-Tabor*. Seeing how the Court used the Religion Clauses in *Hosanna-Tabor* helps frame the immediately following discussion of the Religion Clauses in Subpart I.A. This is important to the analysis that follows, as I argue that the Court in *Hosanna-Tabor* did not appear to consider significant parts of the history and jurisprudence of the Religion Clauses. Subpart I.B looks at the facts and holdings of *Hosanna-Tabor* to detail the ministerial exception it crafted from its

10. *See infra* Subpart II.A.
11. *See, e.g.*, Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 120–21 (1952); *infra* Subpart II.A.
12. *See infra* Subpart III.B.1; *compare* Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 659–60 (7th Cir. 2018) (holding that a teacher at a Jewish elementary school who taught religious rituals and values and led class in prayer fell under the ministerial exception), *with* Su v. Stephen S. Wise Temple, 244 Cal. Rptr. 3d 546, 553 (Ct. App. 2019) (holding that a teacher at a Jewish elementary school who taught religious rituals and values and led class in prayer did not fall under the ministerial exception), *cert. dismissed*, 140 S. Ct. 341 (2019).

analysis of the Religion Clause jurisprudence. Subpart I.C shows how courts have applied the ministerial exception.

In Subpart II.A, using the analysis from our look at the Religion Clause jurisprudence, I highlight significant conceptual problems with the ministerial exception articulated by the Court in *Hosanna-Tabor*. In Subpart II.B, I point out significant problems with how the ministerial exception plays out in practice.

In Part III, I propose a narrower ministerial exception that better balances protection of freedom of religious expression with society's interest in preventing discrimination. The goal of this narrower ministerial exception is to increase the number of employees who can access remedies for discrimination they experience, while taking into account the legitimate religious freedom concerns of religious organizations. The inquiry involves several parts. In Subpart III.A, I propose adding two new factors to the *Hosanna-Tabor* test for minister, to reduce the overall number of false positives—people who are found to be ministers under the *Hosanna-Tabor* factors, but should not be considered ministers, based on the proposed definition. In Subpart III.B.1, I propose that courts should allow lawsuits even by ministers to proceed, unless the employment decision is traceable to an organization's religious belief, which I call a the Bona Fide Religious Decision defense. In Subpart III.B.2, I propose limiting the remedies for such suits by ministers to compensatory damages only in order to avoid possible entanglement concerns by remedies such as hiring, reinstatement, promotions, front pay, or punitive damages.

This narrower ministerial exception is slightly more complex than the broad immunity provided in *Hosanna-Tabor*. What it costs in simplicity is made up for in results: the protection of both the right to be free of discrimination and to the free exercise of religion.

I. *HOSANNA-TABOR* AND THE MINISTERIAL EXCEPTION

Cheryl Perich was terminated by Hosanna-Tabor Lutheran School in 2005.[13] She had taught at the school since 1999.[14] Before the 2004–2005 school year, Perich had been experiencing symptoms that made it impossible for her to teach; over the course of a few months and multiple diagnoses, she was diagnosed with narcolepsy.[15] Because of her illness, Perich was on disability

13. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 178–79 (2012).
14. *Id.* at 178.
15. *Id.*

leave from beginning of the 2004–2005 school year through February 2005.[16] When she attempted to return, the school did not allow her to teach, and instead asked for her resignation.[17] She refused, and notified the church that without a compromise, she would pursue her legal rights under the Americans with Disabilities Act of 1990 (ADA).[18] The school fired her soon afterwards. Perich sued Hosanna-Tabor for violating the ADA's provision against retaliation.[19]

After winding its way through the lower courts, Perich's case made it up to the Supreme Court.[20] In a unanimous decision, the Supreme Court decided that it did not matter whether Hosanna-Tabor had discriminated against Perich. Perich's case was dismissed because the Court held that religious organizations were immune from employment discrimination lawsuits brought by employees who were "ministers" of that organization, and Perich met those criteria.[21] This immunity is referred to, both in *Hosanna-Tabor* and more broadly in this discussion, as the "ministerial exception."[22]

The Court's holding in *Hosanna-Tabor* is broad. Imagine an organization fired an employee, and in the dismissal letter stated explicitly: "We have received complaints from several members and leaders because you are black, and we decided it would be best to part ways and hire a more racially appropriate person for your role." If this were nearly any employer, not only would the employer be liable for employment discrimination in violation of Title VII, but it would be a very easy case for the plaintiff to prove. If the employer were a religious organization, however, and could prove that the employee was a "minister" of the organization, the employer would not be liable at all despite its clear discrimination. Replace race with gender, disability, age—under the holding in *Hosanna-Tabor*, all of those cases would be dismissed.[23]

16. *Id.*
17. *Id.* at 178–79.
18. *Id.* at 179.
19. *Id.*
20. *Id.* at 180–81.
21. *Id.* at 194.
22. This name is unfortunate, as it gives the false impression that it only applies to religious organizations that have "ministers" as part of their structure, and that it only applies to employees that are specifically called "ministers." Despite these concerns, I use it for clarity's sake throughout, as it is the name from the opinion and the one used in the literature.
23. This situation is not as hypothetical as it sounds. In *Petruska v. Gannon University*, 462 F.3d 294 (2006), a ministerial exception case prior to *Hosanna-Tabor*, the supervisor "conceded that the proposed action was being taken on the basis of [plaintiff's] gender." *Id.* at 300.

For most readers, this holding is surprising. Given the value our society has placed on fighting discrimination, and the degree to which the Supreme Court has declared its support for preventing discrimination, creating such a large loophole seems out of accord with both societal values and the Court's own jurisprudence.[24] For example, the Court has not granted the federal government such broad immunity from discrimination claims,[25] nor has it given state or local governments immunity from discrimination claims.[26] Even intelligence agencies, who are usually given significant deference because of the sensitive nature of their work and the importance of national security, are liable for employment discrimination claims.[27]

Why did the Supreme Court come to this holding? Why, as the Court's unanimity suggests, was it such an apparently easy decision? The Court relied heavily on the Religion Clauses of the First Amendment, and a line of jurisprudence interpreting those clauses giving religious organizations broad deference. In Subpart I.A, I walk through the Religion Clauses of the First Amendment. This is important because an understanding of *Hosanna-Tabor's* foundation is necessary in order to effectively critique and replace its ministerial exception. More importantly, a proper critique requires understanding the key ways in which the Court deviated from, and ignored important nuances in, the Religion Clause jurisprudence.

A. The Religion Clauses

1. The First Amendment and Historical Background

The Religion Clauses are stated in the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[28]

Two clauses in the First Amendment focus on the interrelationship between the government and religion—"Congress shall make no law respecting an

24. *See infra* Subpart III.A.
25. *See* 42 U.S.C. § 2000e-16 (containing several carve-outs).
26. *See* Shawer v. Ind. Univ. of Pa., 602 F.2d 1161, 1163–64 (3d Cir. 1979).
27. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 604 (1988) (remarking that "Title VII claims attacking the hiring and promotion policies of the [Central Intelligence] Agency are routinely entertained in federal court").
28. U.S. CONST. amend. I.

establishment of religion," known as the Establishment Clause, " or prohibiting the free exercise thereof," known as the Free Exercise Clause (collectively, the Religion Clauses). *Hosanna-Tabor* expressly relied on both of the Religion Clauses in articulating the ministerial exception.[29] Understanding why we have the Religion Clauses, and thus the ministerial exception, requires beginning with the history that led to their inclusion in the First Amendment.[30]

In the Western world, since Christianity's rise to prominence in the third and fourth centuries, government and religion generally went hand in hand.[31] This was a tumultuous relationship—sometimes the secular authorities had the upper hand and would use their power to appoint bishops and even popes, while at other times popes asserted the right to crown kings and emperors.[32] In the sixteenth century, the Protestant Reformation caused a schism in the Roman Catholic Church. The emerging European states chose sides in the Roman Catholic versus Protestant debate, and each European state had an established official church.[33] As Justice Black explained in *Everson v. Board of Education*:

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.[34]

29. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012).
30. *See id.* at 183.
31. *See* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 962 (1989).
32. *Id.* at 962–63. In one famous incident, Pope Gregory VII excommunicated Henry IV, the Holy Roman Emperor, after Henry tried to depose him. The ensuing political struggle ended with the "Road to Canossa"—Henry on his knees in a blizzard, outside Gregory's castle, begging for forgiveness. *The Walk to Canossa: The Tale of an Emperor and a Pope*, MEDIEVALISTS.NET, http://www.medievalists.net/2017/08/walk-canossa-tale-emperor-pope [https://perma.cc/9MUE-AWMK] (last visited Feb. 7, 2020).
33. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 8–9 (1947).
34. *Id.*

The bloody religious conflicts in Europe affected the religious formation of the American colonies in several key ways. Colonists in New England opposed the established English church, and explicitly emigrated to the American continent to escape English control of their religious exercise.[35] Colonists in Virginia duplicated the European model of having an official established church, the English church, but sought to have more local government control of the established church, rather than looking to the English government.[36] In New York and New Jersey, colonists emigrated from different European countries, practicing diverse forms of Christianity, and as a result, a "policy of de facto religious toleration evolved."[37] Other colonies were created as "havens for religious dissenters" by persons seeking freedom to practice their religious beliefs.[38] In these havens, the colonists also extended freedom of religion to religious groups and practices beyond their own.[39] Consequently, the varying approaches of the colonies were essentially "laboratories for the exploration of different approaches to religion and government."[40]

At the end of the eighteenth century, following the American Revolution, there still was no consensus in the newly formed United States on an approach to the relationship between religion and government. Several of the Founders "approached the issue of church and state suspicious of institutional religion and its potential for corrupting government," and wanted a clear separation.[41] Others argued equally as forcefully for separation but were more concerned with government's influence on the purity of religion.[42] Most, however, saw religion as "an essential cornerstone for morality, civic virtue, and democratic government."[43] But even this group did not necessarily support a close integration of religion and government.

35. *Hosanna-Tabor*, 565 U.S. at 182–83 (specifically mentioning New England). Importantly, it was control by the English government, and not government generally, that seemed to be the issue. The founders of the Massachusetts Bay Colony, for example, quickly set up a "theocentric commonwealth premised on Old Testament law." Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1563 (1989).
36. *Hosanna-Tabor*, 565 U.S. at 183; Adams & Emmerich, *supra* note 35, at 1562–63.
37. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1424 (1990).
38. *Id.*
39. *Id.* at 1424–25 (speaking of Maryland, Rhode Island, Pennsylvania, and Delaware).
40. *Id.* at 1421.
41. Adams & Emmerich, *supra* note 35, at 1583 (listing Thomas Jefferson and James Madison as examples, in addition to Thomas Paine).
42. *See id.* at 1591.
43. *Id.* at 1588.

George Washington, the most prominent example, encouraged religion and morality, but believed that everyone should be free to worship "according to the dictates of their consciences."[44] It was in the middle of this mixed context with various motivations that the early Congress crafted the Religion Clauses in the First Amendment.

These varied approaches and motivations behind the Religion Clause show the nuanced interests that must be balanced in order to understand and apply the concept of religious freedom. The Founders could have given broad protections to religion and religious organizations—allowing them their own courts, justice systems, and sovereignty[45]—but the Founders' suspicion of the power of religion and their understanding of the excesses of religion-based conflict, caused them to avoid that path. At the same time, to prevent similar excesses imposed by the majority religion upon religious minorities, the Founders made sure to establish protections for religious expression as well as limits on governmental engagement with religions.

The Supreme Court has historically sought to balance and reflect the varied concerns of the Founders in its jurisprudence interpreting the Religion Clauses, seeking to navigate that middle path of protection without immunity.[46] Because the Court has most often analyzed the Religion Clauses separately, I address each clause separately in turn.

2. The Establishment Clause

The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion."[47] At the bare minimum, this prevents Congress from passing a law creating a state church or religion.[48] Since at least the passage

44. *Id.* (quoting Letter From George Washington to the General Assembly of Presbyterian Churches, *in* 30 THE WRITINGS OF WASHINGTON 336 n.12 (John Fitzpatrick ed., 1939)).
45. See, for example, the large role of ecclesiastical courts in Europe during the Middle Ages. *Ecclesiastical Court*, ENCYCLO. BRITTANICA, https://www.britannica.com/topic/ecclesiastical-court [https://perma.cc/3VBN-5VL7] ("The wide power of the church courts caused great controversy during the Middle Ages because many persons were able to claim that they were under the protection of the church and, therefore, were permitted to seek refuge in the church courts. These claimants included crusaders, students, widows, orphans, and, in some areas of the law, anyone who could read.").
46. *See infra* Subparts I.A.2–3.
47. U.S. CONST. amend. I.
48. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15 (1947). "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church." *Id.*

of the Fourteenth Amendment, state governments have also been prevented from doing the same.[49]

But there can be laws that fall far short of a government-created religious organization, and still give the appearance of establishing a religion. For example, if the government appears to endorse a particular religion by inviting a clergy member to pray at a school graduation, seeming to coerce the attendees to participate in a religious ceremony, that decision can violate the Establishment Clause.[50] The Supreme Court has been faced with multiple scenarios like these, each falling short of a state-established religious organization, but still running up against possible infringements of the Establishment Clause.[51] A few examples of when the Supreme Court has weighed in and found violations include: using public school property for religious meetings[52] and giving property tax exemptions to religious organizations for religious property.[53]

In navigating these diverse circumstances, the Court has not drawn a hard and fast rule. In some cases, the Court has allowed government and religion to intersect without finding a violation of the Establishment Clause. For example,

49. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Id.* Many states, however, had already included similar protections in their state constitutions. *See Everson*, 330 U.S. at 13–14.

50. *See* Lee v. Weisman, 505 U.S. 577, 590 (1992).

51. *E.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

> A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

Id.

52. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (holding that a school that rejected a religious organization's application to use the facilities after hours violated the organization's First Amendment rights, and that permitting the use for religious activities did not violate the Establishment Clause); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001). *But see* Bronx Household of Faith v. Bd. of Educ. of N.Y., 650 F.3d 30, 51 (2d Cir. 2011).

> [T]he use of New York City public schools for religious worship services—with a heavy predominance of Christian worship services because school buildings are most available for non-school use on Sundays—would create a very substantial appearance of governmental endorsement of religion and give the Board a strong basis to fear that permitting such use would violate the Establishment Clause.

Id.

53. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 680 (1970).

the Court has seen no violation when Congress opens its sessions with a prayer[54] and has allowed religious organizations to use public school facilities.[55] The Court has, however, found Establishment Clause violations in similar scenarios, particularly when public school children are involved. Schools cannot invite clergy to pray at graduations,[56] nor can they open football games with prayer by a student.[57] The one thing we can say for sure is that the mere possibility that a law or government action would intersect with religion or religious belief is not enough to trigger an Establishment Clause violation. As Chief Justice Berger eloquently stated in *Walz*:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[58]

The Supreme Court's Establishment Clause jurisprudence has been exactly that: finding the limits of this "room for play in the joints."[59] In *Lemon v. Kurtzman*, the Court highlighted three main "evils" that might be perpetrated by the government and that prompted the creation of the Establishment Clause: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[60] Examining its jurisprudence, the Court identified three elements, or prongs, to determine whether a law violates the Establishment Clause: (1) "the statute must have a secular legislative purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) "the statute must not foster 'an excessive government

54. *See* Marsh v. Chambers, 463 U.S. 783, 795 (1983).
55. *Good News Club*, 533 U.S. at 119.
56. *See* Lee v. Weisman, 505 U.S. 577, 590 (1992).
57. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000).
58. *Walz*, 397 U.S. at 669.
59. *Id.*
60. 403 U.S. 602, 612 (1971) (quoting *Walz*, 397 U.S. at 668). For helpful overviews of the *Lemon* test, see generally Amy J. Alexander, Outstanding Student Article, *When Life Gives You the* Lemon *Test: An Overview of the* Lemon *Test and Its Application*, 3 PHX. L. REV. 641, 648–49 (2010); Marcia S. Alembik, Note, *The Future of the* Lemon *Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1173–74 (2006); and David W. Cook, Comment, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11 TEX. WESLEYAN L. REV. 71, 99–101 (2004).

entanglement with religion.'"[61] A law that fails to satisfy all three of these prongs would be unconstitutional.

For example, in applying *Lemon*'s first prong, the Court found that the "government may not promote or affiliate itself with any religious doctrine or organization" because such affiliation does not have a secular legislative purpose.[62] A government may, however, support children's education, even if religious schools are part of the government program.[63]

In the second prong, the Court has found that giving a subsidy via a tax exemption to religious magazines that proselytize is an impermissible primary effect.[64] But a government program that gives aid via a school voucher, which is then used at religious schools for religious purposes, does not have an impermissible primary effect.[65]

Under the third prong, the Court has found that a law that gave churches veto power over liquor licenses granted within 500 feet of their property constituted excessive entanglement under the *Lemon* test.[66] Alternatively, a program that allowed public employees to provide remedial education on private, religious school grounds under Title I was found to not involve excessive entanglement, even though it involved monthly visits by government supervisors to ensure that the public employees were not inculcating religion.[67]

In practice, the *Lemon* test is far from clear. It is so abstract that lower courts, and even the Supreme Court, have struggled to apply it.[68] Yet, while

61. Lemon v. Kurtzman, 403 U.S. at 612–13 (quoting *Walz*, 397 U.S. at 674).
62. County of Allegheny v. ACLU, 492 U.S. 573, 590 (1989), *abrogated on other grounds by* Town of Greece v. Galloway, 572 U.S. 565, 566 (2014); *see also* Wallace v. Jaffree, 472 U.S. 38, 60–61 (1985) (holding an Alabama law that instituted a moment of silence for prayer at schools violated the Establishment Clause because the sole purpose of the law was to "characterize prayer as a favored practice").
63. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).
64. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14–15 (1989).
65. *See Zelman*, 536 U.S. at 652.
66. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982) (holding that the law "substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications").
67. Agostini v. Felton, 521 U.S. 203, 233–34 (1997).
68. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–81 (2019) ("As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them . . . [t]he test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars."). Some commentators argue that the *Lemon* test is so unhelpful that it should be discarded in

the Supreme Court has recognized the test's lack of clarity, it has not specifically overruled *Lemon*, and occasionally continues to cite it as applicable, or at least as a signpost.[69]

For the purposes of this Comment, the Establishment Clause jurisprudence shows that the Court is trying to walk a tight line—it does not automatically disqualify laws, even if religious organizations might benefit from them, or even if the state has to supervise the use of government granted funds. But there is a line where the state and the religious practice or organization become too closely connected, and thus the state is in violation of the Establishment Clause. This balanced approach is a far cry from the completely hands-off approach the Court in *Hosanna-Tabor* decided to take.[70]

3. The Free Exercise Clause

The Court in *Hosanna-Tabor* rested its decision on the Free Exercise Clause as well. The Free Exercise Clause states: "Congress shall make no law . . . prohibiting the free exercise [of religion]."[71]

What does it mean to freely exercise religion? The Supreme Court has held that free exercise of religion includes the "right to believe and profess whatever religious doctrine one desires."[72] In this, the free exercise of religion dovetails

favor of a better test. *See, e.g.*, Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 678–86 (1980). Justice Scalia had a slightly more cynical understanding of why the Court kept it around:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again . . . . The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will . . . . [W]hen we wish to uphold a practice it forbids, we ignore it entirely . . . sometimes, we take a middle course, calling its three prongs "no more than helpful signposts" . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Cook, *supra* note 60, at 88 (alterations in original) (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring)).

69. However, in *American Legion*, the Court specifically refused to use the *Lemon* test when analyzing historical monuments. 139 S. Ct. at 2081–82 (holding "the *Lemon* test presents particularly daunting problems in cases . . . that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations," and these problems "counsel against efforts to evaluate such cases under *Lemon*").
70. *See infra* Subpart II.B.
71. U.S. CONST. amend. I.
72. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 877 (1990).

with the idea of the individual's freedom of conscience.[73] The Framers, however, having both concepts available to them, chose "free exercise" over "freedom of conscience."[74] Free exercise taps into a broader meaning, to include not only thoughts and professions (both of which might be adequately covered under the Free Speech Clauses), but also religious actions (or religiously motivated inaction).[75] The Free Exercise Clause has been interpreted to protect religious expressions such as abstaining from work on Saturdays,[76] not sending children to school past the eighth grade,[77] and even ritual animal sacrifice.[78] Note that beliefs and expressions not connected to religion, however sincere, are not protected under the Free Exercise Clause.[79]

Given this definition, what does it mean for Congress to prohibit the Free Exercise of Religion?[80] Clearly, government cannot forbid or prevent a person from practicing a certain religion,[81] and cannot force participation in religious

73. *See* McConnell, *supra* note 37, at 1488.
74. *Id.*
75. *Smith*, 494 U.S. at 877; *see also* McConnell, *supra* note 37, at 1488 ("The least ambiguous difference [between 'freedom of conscience' and 'free exercise'] is that the term 'free exercise' makes clear that the clause protects religiously motivated conduct as well as belief.").
76. *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963).
77. *See* Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972).
78. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
79. *Yoder*, 406 U.S. at 216.

> Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Id.

80. To be clear, this protection extends beyond Congressional action to actions taken by the Executive and Judicial branches, as well as state governmental action that impinges on the free exercise of religion. For extension to other branches, see, for example, Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 HARV. L. REV. 701, 704 (1995). "If the President and federal courts cannot censor citizens with a congressional law, it would be odd to think they can do so without such a law." *Id.* *But cf.* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1222 (2010). "The United States Constitution restricts all different governmental actors. And it restricts these different actors differently." *Id.* (emphasis omitted). For incorporation of the First Amendment Religion Clauses into the Fourteenth Amendment, thus providing protection against state governmental action, see *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
81. We do not see this directly in the cases, but the Court has found that forcing a person to choose between their faith and the governmental benefit or right is prohibited by the Free Exercise Clause. *See* McDaniel v. Paty, 435 U.S. 618, 626 (1978) ("[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his

activities.[82] Less intuitively, however, it also means that government cannot withhold generally available benefits or privileges, even governmentally bestowed benefits, because of religious exercise.[83]

But what about facially neutral laws that infringe on a person's free exercise of religion? For example, while a law requiring all men to register for the draft does not prohibit religious exercise in its language, in practice it violates the religious exercise of a person whose religion requires pacifism.[84] Alternatively, what happens when a person's free exercise of religion runs right up against the laws of society? Consider, for example, a religion that uses drugs in its ceremonies that violate federal or state-controlled substances laws. In *Cantwell v. Connecticut*, Justice Roberts described this potential conflict: "[T]he [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[85] The Court has tried different approaches to balancing these conflicts between society's need to enforce its laws and the U.S. Constitution's guarantee of the Free Exercise of religion.

In the mid-1900s the Supreme Court approached this issue by granting exemptions for religious observers from generally applicable laws when appropriate.[86] As long as the person could show that their sincere religious exercise was burdened, the law would not be applied to them unless the government could show that its application served a compelling interest.[87] In *Sherbert*, for example, the Court held that a government decision denying the plaintiff unemployment benefits was unconstitutional because her reason for being unemployed was her religious conviction that kept her from working Saturdays.[88]

religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." (alterations in the original) (quoting *Sherbert*, 374 U.S. at 406)); *see also Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (striking down a city ordinance aimed at preventing ritual sacrifice, a part of the Santeria religion).

82. Lee v. Weisman, 505 U.S. 577, 587 (1992).
83. *Sherbert*, 374 U.S. at 404–05 ("Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").
84. The United States has tried to avoid this dilemma—see *United States v. Seeger* for the history on how the United States addressed the issue of conscientious objectors. 380 U.S. 163, 169–71 (1965).
85. *Cantwell*, 310 U.S. at 303–04.
86. *See*, *e.g.*, *Sherbert*, 374 U.S. at 410.
87. *See id.* at 403.
88. *See id.* at 410.

In *Yoder*, a Wisconsin state law required children to attend school until they were sixteen.[89] The defendants were Amish parents, convicted of taking their children out of school after the eighth grade, which they did because they believed their religion required it.[90] The Court noted that the State had stipulated to the sincerity of the parents' beliefs.[91] The Court then reviewed the record to make sure the Amish parents' claims were "rooted" in "religious beliefs" and not "secular considerations."[92] As a result of that review, the Court found that the State's interest in the education of the children was not compelling enough to justify the burden on the parents' free exercise of religion, and granted the parents an exemption from that requirement.[93]

In the years after *Sherbert* and *Yoder*, however, the Court was reticent to grant additional exemptions.[94] The exemption regime shifted in 1990. In *Employment Division v. Smith*, the Court held that the First Amendment did not require exemptions for an individual from complying with a "neutral law of general applicability."[95] To do so would be "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself.'"[96] In *Smith*, the plaintiffs sought relief from denial of an unemployment benefit by the State of Oregon, which was denied them because they had been fired for religious use of peyote in violation of Oregon's drug laws.[97] The Court upheld the denial of benefits, refusing to use the balancing test used in *Sherbert* and *Yoder*.[98] Thus, after *Smith*, if a law was a neutral law of general applicability (such as criminal laws and labor laws, among others), the Free Exercise Clause was not seen as requiring a religious exemption.

89. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).
90. *Id.* at 207–09.
91. *Id.* at 209.
92. *Id.* at 216–19.
93. *Id.* at 234. The Court did not, however, strike down the Wisconsin requirement or keep the state from imposing that requirement on other, non-Amish children. *Id.* at 236.
94. *See* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 883–84 (1990).
95. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).
96. *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).
97. *Id.* at 874.
98. *Id.* at 882–90.

In a modern-day battle of the branches, Congress passed the Religious Freedom Restoration Act (RFRA) soon after *Smith* was decided,[99] explicitly seeking to reimplement the balancing test from *Sherbert*. But the Court struck back (somewhat) in *City of Boerne v. Flores*, holding the RFRA unconstitutional as applied to states because it expanded beyond Congress's Fourteenth Amendment powers.[100] As it stands currently, the RFRA does not apply to state action,[101] but it is still applicable to federal laws.[102] To muddy the issue, many states have enacted their own versions of the RFRA. Under these laws, state courts must use the *Sherbert*/*Yoder* test and grant exceptions for religious exercise that passes muster.[103]

The Free Exercise Clause jurisprudence provides several important insights. First, in determining whether a person should be granted an exemption under the Free Exercise Clause, the Court considered the sincerity of the person's religious beliefs.[104] Second, as demonstrated by *Smith*, as well as the paucity of exemption cases before *Smith*, when the right of the government to regulate its citizens rubbed up against a citizen's free exercise of religion, in most cases the government's interests prevailed. This should have signaled to the Court to take more caution in *Hosanna-Tabor* when it carved out a broad area where no government regulation could reach. But the Court in *Hosanna-Tabor* drew on a particular line of cases in the Religion Clause jurisprudence to justify its decision: the Church Autonomy Doctrine.

4. The Church Autonomy Doctrine (Or, Ecclesiastical Abstention Doctrine)

The Court in *Hosanna-Tabor* narrowed its recounting of the Religion Clause cases to a doctrine known as the Church Autonomy Doctrine (or the Ecclesiastical Abstention Doctrine). This doctrine was worked out in a

99. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).
100. *Flores*, 521 U.S. at 536. "Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." *Id.*
101. But many states have enacted a RFRA-like standard. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 478 (2010).
102. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91 (2014).
103. *See* Lund, *supra* note 101, at 476.
104. *See supra* note 93 and accompanying text. An inquiry into the sincerity of religious beliefs was apparently not considered by the Court to violate the Establishment Clause. *See supra* note 94 and accompanying text. I return to this point in Part III, *infra*.

number of cases over time, often dealing with disputes over church property, between factions in churches each claiming to be the "true" church.[105] The first case addressing the issue of how to handle disputes over church property was *Watson v. Jones*,[106] where a church was divided between proslavery and antislavery factions.[107] Each side contested that it alone was the true church, and thus should have exclusive control and ownership of the church building.[108] After a series of misadventures in various courts, the dispute made its way to the Supreme Court.[109] The Court, looking back at the Religion Clauses, decided that courts should avoid arbitrating in disputes like these:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.[110]

This doctrine was rearticulated in *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*.[111] The Court in *Kedroff*

105. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 185–87 (2012); Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment After* Hosanna-Tabor, 11 STAN. J. C.R. & C.L. 89, 99–106 (2015); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 12–17 (2011).
106. 80 U.S. 679 (1872).
107. *Id.* at 684–94; *see also* Lund, *supra* note 105, at 12–13.
108. Lund, *supra* note 105, at 13.
109. *Watson*, 80 U.S. at 690–700.
110. *Id.* at 728–29.
111. 344 U.S. 94 (1952). "Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion." *Id.* at 120–21 (footnote omitted).

addressed clergy selection: "Freedom to select the clergy, *where no improper methods of choice are proven*, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."[112] The third major case addressing this issue is *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevich*.[113] There, the Illinois state court had reinstated a bishop after he brought a lawsuit against the Serbian Orthodox Church which had removed him.[114] The Illinois Supreme Court had found the church's action arbitrary, because the church did not follow its own procedures as interpreted by the court.[115] The Supreme Court reversed, holding that the First Amendment commands civil courts to decide church disputes "without resolving underlying controversies over religious doctrine."[116]

This deference to religious organizations when it comes to religious decisions does not mean courts take a completely hands-off approach to church decisions in general.[117] Courts do not stay out of all church disputes, but only those that require them to resolve "controversies over religious doctrine and practice."[118] In *Mary Blue Hull*, the Court noted that:

> [N]ot every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded.[119]

The court reaffirmed this in *Jones v. Wolf*,[120] upholding a Georgia law that applied "neutral principles of law" to church property disputes.[121]

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112. *Id.* at 116 (emphasis added) (footnote omitted). The Court in *Hosanna-Tabor* cites this portion of *Kedroff*. *See infra* Subpart II.B.2. The Court in *Hosanna-Tabor*, however, did not address what counts as the "improper methods of choice," which was a glaring mistake.
113. 426 U.S. 696 (1976).
114. *Id.* at 707.
115. *Id.* at 708.
116. *Id.* at 710 (quoting Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969)).
117. Lund, *supra* note 105, at 17.
118. *Mary Blue Hull*, 393 U.S. at 449.
119. *Id.*
120. 443 U.S. 595 (1979).
121. *Id.* at 604.

Recognizing that there may be places where religious concepts were incorporated into the deed or charter, the Court held that in those situations, the court "must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[122] Specifically refuting the dissent's insistence on complete deference, the Court continued: "We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved."[123]

Thus, even in the line of cases specifically relied on by the Court in *Hosanna-Tabor* to justify its broad deference, that deference was limited to religious decisions.

5. Summary of the Religion Clause Jurisprudence

Before we dive into *Hosanna-Tabor* and its progeny, it is worth pausing for a review. Let me point out one idea that may be fairly obvious, and yet will be vital for moving through the rest of the Comment.

The Supreme Court could have decided that the Religion Clauses granted broad immunity to religious organizations and religious exercise. But, as we have seen consistently throughout the jurisprudence, the Court was unwilling to give broad immunity to religious organizations; rather, it constantly sought a balance between acknowledging the sovereignty of the federal and state governments, while demarcating areas where the Constitution protected religious observers from governmental entanglement.

In marking the limits of the doctrine, the Supreme Court has highlighted various state interests that prevent courts from giving that broad immunity to religious observers: the rights of citizens to seek justice from the courts,[124] the importance of governments being able to prevent social harm,[125] the importance

122. *Id.*
123. *Id.* at 605.
124. "The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Id.* at 602.
125. "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 885 (1990) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

of preventing discrimination based on race,[126] and protecting children from the evils of child labor.[127] "To make accommodation between these freedoms and an exercise of state authority," the Court noted, "always is delicate."[128]

But in 2012, the Court in *Hosanna-Tabor* put aside that "delicate accommodation" in favor of a broad immunity.

B. The Ministerial Exception in *Hosanna-Tabor*[129]

The ministerial exception was first articulated as a defense to the newly-minted Title VII in *McClure v. Salvation Army*[130] by the Fifth Circuit in 1972.[131] Before the ministerial exception was addressed by the Supreme Court in *Hosanna-Tabor*, all the Circuits that had considered the question found some sort of ministerial exception, though the language used to explain the exception varied by court.[132]

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126. In *Bob Jones v. United States*, 461 U.S. 574 (1983), the U.S. Supreme Court upheld the IRS denial of tax exempt status to religious schools, even if it placed a burden on the exercise of their religious beliefs, because, as the Court stated:

> The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.

Id. at 604 (footnote omitted).

127. *See* Prince v. Massachusetts, 321 U.S. 158, 170 (1944). In *Prince*, the Court upheld a conviction for violating child labor laws of Jehovah's Witness parents who used their children to pass out tracts, soliciting a donation from recipients. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.*

128. *Id.* at 165.

129. For a fuller discussion of the case and its holdings, see generally Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839 (2012); Summer E. Allen, Comment, *Defining the Lifeblood: The Search for a Sensible Ministerial Exception Test*, 40 PEPP. L. REV. 645 (2013); Blair A. Crunk, Comment, *New Wine in an Old Chalice: The Ministerial Exception's Humble Roots*, 73 LA. L. REV. 1081 (2013); Woleslagle, *supra* note 9.

130. 460 F.2d 553 (5th Cir. 1972).

131. *See id.* at 560.

132. *See* Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002) (finding immunity for a church when a Youth minister brought a Title VII claim, but using the language of church autonomy rather than ministerial exception); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999) (applying the ministerial exception to a Title VII sex and pregnancy discrimination suit); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (applying the

As *Hosanna-Tabor* made its way before the Supreme Court, while the unanimity of the circuit courts boded well for some version of a ministerial exception, scholars and prognosticators were not certain how the Court would reconcile a ministerial exception with *Employment Division, Department of Human Resources v. Smith*.[133] As noted above, *Smith* held the Free Exercise Clause did not require providing religious exemptions for generally applicable laws. While *Smith*'s holding had been limited by the RFRA, the logic of *Smith* remained relevant as courts considered possible exemptions. The ADA was the federal law at issue in *Hosanna-Tabor*, and it, along with other federal antidiscrimination laws like Title VII, clearly are "generally applicable" laws. Thus, using the logic of *Smith*, the government should not be required to grant a religious exemption.[134] No one expected a unanimous decision.[135]

ministerial exception to dismiss complaint of a female professor who was refused tenure at Catholic University); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000) (applying ministerial exception to dismiss a sex discrimination claim of a female choir director); Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 961 (9th Cir. 2004) (noting that it "would offend the Free Exercise Clause simply to require the [C]hurch to articulate a religious justification for its personnel decisions" but not using the language of ministerial exception (alteration in the original) (quoting Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 946 (9th Cir. 1999))); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000) (applying the ministerial exception to a Title VII retaliation claim); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007) (applying ministerial exception to an ADA claim, and articulating that the ministerial exception applies when an employee's "primary duties" are religious functions (quoting Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985))), *abrogated by* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); Natal v. Christian & Missionary All., 878 F.2d 1575, 1576 (1st Cir. 1989) (dismissing a wrongful termination claim because "civil courts cannot adjudicate disputes turning on church policy . . . or on religious doctrine and practice"); Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006) (adopting the ministerial exception and using it to dismiss a sex discrimination lawsuit); Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008) (explicitly adopting the ministerial exception and dismissing a racial discrimination claim as a result); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991) (applying the *Lemon* test and holding that church personnel decisions are "*per se* religious matters" that "cannot be reviewed by civil courts"); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006) (applying the ministerial exception to dismiss an age discrimination lawsuit), *abrogated by Hosanna-Tabor*, 565 U.S. 171.

133. 494 U.S. 872 (1990).

134. *See* Laycock, *supra* note 129, at 854 (Laycock argued for Hosanna-Tabor, this is his reflection after the case); *see also* Lund, *supra* note 105, at 57–60 (written just before the Court heard the case).

135. *See* Laycock, *supra* note 129, at 840.

1. The Facts of the Case

Cheryl Perich was a fourth-grade teacher for Hosanna-Tabor Lutheran Church and School.[136] The Lutheran Church–Missouri Synod designates two types of teachers—"called" and "lay."[137] Called teachers are required to take extra theological classes, get a recommendation from the local Synod district, and pass an oral exam.[138] Once they complete these requirements, the whole local congregation votes to "call" the teacher to their school; if they do so, the teacher receives a title of "Minister of Religion, Commissioned," and cannot be fired except for cause and only by a supermajority of the congregation.[139] Perich was a called teacher for the fourth grade, teaching both religious and nonreligious subjects, such as math, language arts, social studies, science, gym, art, and music.[140] Additionally, she led devotional times for her students, as well as gave religious devotionals during a chapel time for the whole school.[141]

In June of 2004, Perich became ill and was unable to begin the 2004–2005 school year; her diagnosis kept changing,[142] but she was eventually diagnosed with narcolepsy.[143] The school kept her on the payroll for seven months, even combining classes to keep from having to hire a new teacher to replace her.[144] Eventually, they contracted with a lay teacher to replace Perich.[145] When Perich notified the school on January 27, 2005, that she could return to work in February, the principal let her know that they had contracted with the lay teacher through the end of the school year.[146] The school administrators were skeptical of Perich's ability to return to work the next year, and informed the church congregation of their skepticism at a congregational meeting on January 30.[147] The congregation

136. *Id.*
137. *Hosanna-Tabor*, 565 U.S. at 177.
138. *Id.*
139. *Id.*; *see also* Laycock, *supra* note 129, at 841. "In the Lutheran understanding, '[a] Christian teacher, for instance, is not merely a Christian who teaches but a servant of Christ and the church who, at the call of the church, is helping the called pastor to fulfill his mandate to teach the Gospel.'" *Id.* (quoting COMM'N ON THEOLOGY & CHURCH RELATIONS OF THE LUTHERAN CHURCH–MO. SYNOD, THE MINISTRY: OFFICES, PROCEDURES, AND NOMENCLATURE 27 (1981)).
140. *Hosanna-Tabor*, 565 U.S. at 178.
141. *Id.*
142. Laycock, *supra* note 129, at 842–43.
143. *Hosanna-Tabor*, 565 U.S. at 178.
144. Laycock, *supra* note 129, at 843.
145. *Hosanna-Tabor*, 565 U.S. at 178.
146. *Id.*
147. *Id.*

voted to peacefully release Perich—they would ask for her resignation, and offered to pay a portion of her health insurance premiums.[148]

Perich refused the offer, and refused to resign, offering a doctor's note that she would be able to return to work on February 22 of that year.[149] Perich showed up on February 22, but the school asked her to leave, as they no longer had a position for her.[150] When she returned home, the principal called her to inform her that she would likely be fired.[151] Perich responded that she had talked to a lawyer and intended to sue.[152] The principal reminded her that suing was in violation of Lutheran church teachings, which provided for an internal dispute resolution based on their understanding of scripture.[153] Perich refused to follow the internal process, and repeated her intention to sue.[154] At a congregational meeting on April 10, the congregation rescinded her call as a commissioned minister, and the school sent her a letter of termination the next day.[155] The EEOC filed suit against Hosanna-Tabor, and Perich intervened, claiming unlawful retaliation under the ADA for threatening to file an ADA lawsuit.[156] At the district court, Hosanna-Tabor argued that because the suit concerned the employment relationship between a church and one of its ministers, it was barred by the First Amendment.[157] The district court agreed.[158] The Sixth Circuit, however, disagreed and vacated the decision and remanded for trial.[159] The circuit court did not dispute that there was a ministerial exception, but rather held that Perich was not a minister, and thus the exception did not apply to her case.[160]

The Supreme Court granted certiorari.[161]

148. *Id.*
149. *Id.*
150. *Id.* at 179.
151. *Id.*
152. *Id.*
153. Laycock, *supra* note 129, at 844.
154. *Id.*
155. *Hosanna-Tabor*, 565 U.S. at 179.
156. *Id.* at 180. For the specific provision under the ADA, see 42 U.S.C. § 12203.
157. *Hosanna-Tabor*, 565 U.S. at 180.
158. *Id.* at 180–81.
159. *Id.* at 181.
160. *Id.*
161. *Id.* The question presented was not whether there should be a ministerial exception, but rather: "Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship." Petition for a Writ of Certiorari at i, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553), 2010 WL 4232645; *see also* Laycock, *supra* note 129, at 845–46.

2. The Holdings of the Case

The Court covered a lot of ground in this case. First, I discuss the general holdings about the ministerial exception, and then I examine how the Court applied the ministerial exception to Perich's case.

a. General Holdings

After a journey through the history of the Free Exercise and Establishment Clauses, the Court held that there is a ministerial exception, and that it arises out of both the Free Exercise and Establishment Clauses:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[162]

The Court dismissed *Employment Division v. Smith* relatively quickly, stating that *Smith* dealt with outward, physical acts, not internal church government.[163] The Court noted that applying the ADA, which it conceded was a neutral law of general applicability, to churches would do more than stop religious actions, it would interfere in the faith and mission of the church itself.[164] The Court also resolved a circuit split about whether the ministerial exception is a jurisdictional bar—holding that it was not a jurisdictional bar, but rather an affirmative defense.[165]

162. *Hosanna-Tabor*, 565 U.S. at 188–89. In doing so, it rejected the EEOC and Perich's arguments against the ministerial exception, claiming that the protections for religious organizations come instead from the Freedom of Association Clause: "[T]he First Amendment itself . . . gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers." *Id.* at 189.
163. *Id.* at 190. Multiple commentators, both supporting the overall decision and questioning it, have questioned the validity of this distinction. But Justice Scalia, the author of *Smith*, signaled his support of the distinction in oral arguments, saying "*Smith* didn't involve employment by a church. It had nothing to do with who the church could employ. I don't—I don't see how that has any relevance to this." Laycock, *supra* note 129, at 855 (quoting Transcript of Oral Argument at 38, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-533)).
164. *Hosanna-Tabor*, 565 U.S. at 190.
165. *Id.* at 195 n.4. This decision is significant—it is reserving courts the right to get to at least some of the merits of the case, rather than forcing them to dismiss for lack of jurisdiction. *See generally* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013).

While holding that there is a ministerial exception, the Supreme Court refused to adopt a rigid formula for when an employee qualifies as a minister.[166] Finally, the Court expressed no view, one way or another, whether the ministerial exception bars other types of suits (such as suits for breach of contract or tortious conduct) other than antidiscrimination suits.[167]

b. Specific Holdings

Having determined that there was a ministerial exception, the Court moved to considering whether Perich should count as a minister under the exception. The Court never explicitly held that Hosanna-Tabor was a religious organization, but seems to assume it throughout.[168] The Court held that Perich was a minister, considering "all the circumstances of her employment."[169] The Court noted four specific reasons for so finding. First, Perich was a minister because Hosanna-Tabor held her out as a minister.[170] The congregation extended her a "call," provided for periodic review of her "ministerial responsibilities," and provided for continuing education as a professional minister.[171] Second, Perich's title reflected a significant degree of religious training.[172] Third, Perich held herself out as a minister, not only in accepting the call, but in claiming a ministerial housing allowance and referring to herself as a minister when in correspondence with the Synod.[173] Finally, Perich's job duties "reflected a role in conveying the Church's message and carrying out its mission."[174]

166. *Hosanna-Tabor*, 565 U.S. at 190. Though its application to Perich's case has generated a formula with some rigidity. *See infra* Subpart III.B.
167. *Hosanna-Tabor*, 565 U.S. at 196. Although Perich's claim was under the ADA and Michigan antidiscrimination law, the Court clearly saw the logic of the decision extend to any employment discrimination lawsuit: "The case before us is an *employment discrimination* suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit." *Id.* (emphasis added).
168. *See id.* at 191. "To begin with, Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members." *Id.*
169. *Id.* at 190.
170. *Id.* at 191.
171. *Id.*
172. *Id.* The Court noted that the training took six years for Perich to complete. *Id.*
173. *Id.* at 191–92.
174. *Id.* at 192.

The Court noted three errors it found in the lower Sixth Circuit decision.[175] First, the Court of Appeals failed to see the appropriate relevance in Perich's title as commissioned minister.[176] Second, the Court of Appeals "gave too much weight to the fact" that lay teachers performed the same religious duties.[177] Third, the Court of Appeals "placed too much emphasis on Perich's performance of secular duties."[178]

c. Summary

Here is where *Hosanna-Tabor* left us: There is a ministerial exception, which is a complete defense to liability, and the suit stops once the court find it applies.[179] The ministerial exception applies when: (1) the employer is a religious organization, and (2) the plaintiff is found to be a minister of that religious organization.[180] Some gaps remain. For example, the Court assumes Hosanna-Tabor is a religious institution, but does not define the limits of what counts as a religious organization.[181] Nor does the Court give a clear definition of who counts as a minister, providing only its analysis of Perich's claim.[182]

C. Applying *Hosanna-Tabor*

Before exploring the problems with *Hosanna-Tabor*, I close this Subpart with a brief overview of how lower courts are applying the Court's decision.

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175. *Id.* at 192–93.
176. *Id.* at 193.
177. *Id.* The Court noted that this was certainly relevant, but not dispositive. *Id.* This is an important distinction, and I return to it in Part III, *infra*.
178. *Id.* The EEOC contended that ministerial exception should have been limited only to employees with exclusively religious functions. The Court rejected that argument, stating "we are unsure whether any such employees exist." *Id.*
179. *See id.* at 194–95.
180. *See id.* at 188.
181. *See* Brian M. Murray, *A Tale of Two Inquiries: The Ministerial Exception After* Hosanna-Tabor, 68 SMU L. REV. 1123, 1131 (2015). "*Hosanna-Tabor* rested on a massive assumption, namely that the school in question, affiliated with a church, was the type of religious entity capable of having ministers." *Id.*; *see also* Robinson, *supra* note 8, at 184–85 ("Lacking any guidance or coherent theory as to how to single out this newly specialized constitutional group among a sea of organizations that increasingly claim to be religious, courts are vacillating between identifying First Amendment religious institutions based on who they are, what they are doing, how they go about it, or why they want to—without any clear theoretical justification for their choices.").
182. *See Hosanna-Tabor*, 565 U.S. at 190.

The "proof is in the pudding," as they say,[183] and many of the problems with the Court's decision in *Hosanna-Tabor* are illustrated by its use.

Following *Hosanna-Tabor*, lower courts have struggled to apply the broad standards the Court laid out in the opinion in a manner that leads to consistent results.[184] The inquiries focus on two main questions: first, whether the defendant is a "religious organization," and second, whether the plaintiff is a "minister."

1. What is a Religious Organization?[185]

The ministerial exception is only available to defendants who are "religious institution[s]."[186] The Court, never defined which organizations count as religious institutions.[187] Certain parts of the opinion zero in on a traditional understanding of church or its equivalent: "Requiring a *church* to accept or retain an unwanted minister, or punishing a *church* for failing to do so, intrudes upon more than a mere employment decision."[188] But the Court quickly broadens its language just two sentences later: "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a *religious group's* right to shape its own faith and mission through its appointments."[189] This ambiguity has led

183. And by "they," I mean an American coopting of a slightly different British proverb—"the proof of the pudding is in the eating." *The Origin of 'Proof Is in the Pudding'*, NPR (Aug. 24, 2012, 4:00 AM), https://www.npr.org/2012/08/24/159975466/corrections-and-comments-to-stories [https://perma.cc/YH6M-2RVQ].

184. Several articles have provided a more thorough dive through the lower court decisions than I take up here. *See generally* Murray, *supra* note 181; Jessica L. Waters, *Testing* Hosanna-Tabor*: The Implications for Pregnancy Discrimination Claims and Employees' Reproductive Rights*, 9 STAN. J. C.R. & C.L. 47 (2013); Caroline O. DeHaan, Dias v. Archdiocese of Cincinnati*: Deciphering the Ministerial Exception to Title VII Post-*Hosanna-Tabor, 21 WM. & MARY J. WOMEN & L. 473 (2015); Jarod S. Gonzalez, *At the Intersection of Religious Organization Missions and Employment Laws: The Case of Minister Employment Suits*, 65 CATH. U. L. REV. 303 (2015); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183 (2014).

185. As noted below in Part III, *infra*, while I believe the question of which organizations are "religious organizations" under the ministerial exception is important, for the sake of focus, my proposal does not seek to answer that question, nor does the redefined ministerial exception depend on a particular answer to the question. This brief Part is merely intended to provide clarity.

186. *See Hosanna-Tabor*, 565 U.S. at 188.

187. The Court was not consistent even internally in its nomenclature. It used multiple terms synonymously, "interchanging church, religious group, religious organization, religious institution, and religious employer." Murray, *supra* note 181, at 1131–32.

188. *Hosanna-Tabor*, 565 U.S. at 188 (emphasis added).

189. *Id.* (emphasis added); *see also* Murray, *supra* note 181, at 1132 (helpfully pointing to this language switch).

to a large number of different types of organizations falling into the ministerial exception, as the Kentucky Supreme Court notes in *Kirby v. Lexington Theological Seminary*[190]: "Importantly, the scope of 'religious institution' is not so narrow that only traditional faith communities qualify. Across the federal circuits, the ministerial exception has been applied to religiously affiliated hospitals, schools, and corporations because they were sufficiently within the understanding of 'religious institution.'"[191] The court in *Kirby* went on to explain its definition of a religious institution: "An entity, allegedly religiously affiliated, will be considered a 'religious institution' for purposes of the ministerial exception 'whenever that entity's mission is marked by clear or obvious religious characteristics.'"[192] Not only is this definition not universally acknowledged,[193] however, it is not clear how to determine whether an entity's mission is marked by religious characteristics.[194]

2. Who is a Minister?

As noted above, in *Hosanna-Tabor* the Court refused to adopt a "rigid formula for deciding when an employee qualifies as a minister."[195] Rather, in determining whether Perich counted as a minister, the Court considered four factors: (1) the formal title given by the church; (2) the substance reflected in that title; (3) Perich's use of that title; and (4) the important religious functions she performed for the church.[196] Despite the Court's disavowal of formulas, lower courts have routinely analyzed the question using those factors, and only those factors, described in *Hosanna-Tabor*.[197] The use of those factors by lower courts has resulted in inconsistent, contradictory results.[198]

190. 426 S.W.3d 597 (Ky. 2014).
191. *Id.* at 609 (footnote omitted).
192. *Id.* (quoting Hollins v. Methodist Healthcare Inc., 474 F.3d 223, 226 (6th Cir. 2007), *abrogated on other grounds by Hosanna-Tabor*, 565 U.S. 171). The court went on to find that the defendant seminary was a religious institution for the purposes of the ministerial exception. *Id.*
193. *See* Murray, *supra* note 181, at 1145–46.
194. *See id.* at 1146. Murray notes that a cemetery was allowed to invoke the exception in *Fisher v. Archdiocese of Cincinnati*, 6 N.E.3d 1254 (Ohio Ct. App. 2014).
195. *Hosanna-Tabor*, 565 U.S. at 190.
196. *See id.* at 191–92.
197. *See, e.g.*, Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 834–35 (6th Cir. 2015); Biel v. St. James Sch., 911 F.3d 603, 607–08 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 680 (2019).
198. This inconsistency was recently recognized by the Supreme Court, just as this Comment was put into production, when the Supreme Court granted certiorari to a pair of Ninth

Having considered the Court's decision in *Hosanna-Tabor* in its full and proper context, the significant problems with the decision become clear—both in how the Court reasons its way to its conclusion, and in the practical problems that arise from applying the decision.

II. THE PROBLEMS OF *HOSANNA-TABOR*

A. The Conceptual Problems

For a unanimous decision, *Hosanna-Tabor* has evoked a large amount of criticism.[199] In addition to the concerns detailed above—namely the lack of clarity regarding which organizations can invoke the defense, and the ambiguity of which employees are considered as ministers—there are three additional large conceptual holes in the reasoning of *Hosanna-Tabor* that demonstrate the problems with the Court's articulation of the ministerial exception: (1) the decision ignores a significant part of the Religion Clause jurisprudence; (2) it diminishes the importance of preventing discrimination; and (3) it provides an unnecessarily broad immunity.

1. *Hosanna-Tabor* Ignores a Significant Part of the Religion Clause Jurisprudence

Hosanna-Tabor does accurately portray much of the jurisprudence from Religion Clauses. But, as demonstrated above, the Court in *Hosanna-Tabor* failed to present the nuances found in the Religion Clause jurisprudence. Referring to the ministerial exception, Chief Justice Roberts closes the opinion, stating: "[T]he First Amendment has struck the balance for us."[200] But Chief Justice Roberts is wrong—the First Amendment has not struck the

Circuit decisions that conflicted with other circuit court decisions. Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 679 (2019); *Biel*, 911 F.3d 603, *cert. granted*, 140 S. Ct. 680 (2019). *Compare* Su v. Stephen S. Wise Temple, 244 Cal. Rptr. 3d 546, 553 (Ct. App. 2019) (holding that even though teachers at the Jewish school "are responsible for implementing the school's Judaic curriculum by teaching Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services . . . . [T]hey are not its ministers"), *cert. dismissed*, 140 S. Ct. 341 (2019), *with* Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 660 (7th Cir. 2018) (holding teacher at Jewish school was a minister because she "undisputedly taught her students about Jewish holidays, prayer, and the weekly Torah readings").

199. *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 20 LEWIS & CLARK L. REV. 1265, 1292 (2017).

200. *Hosanna-Tabor*, 565 U.S. at 196.

balance. As explained above, the Supreme Court repeatedly had the option to read the First Amendment in a way that allowed the Court to grant broad immunity to religious organizations. It did not, and each time the Court chose to walk a fine line in protecting First Amendment rights while giving the federal and state governments power to act in the ways they believe best to promote the welfare of *all* of their citizens.

It could be argued that the decision made by the Court in *Hosanna-Tabor* was a result of walking that line—that if the Religion Clause jurisprudence is a story of the Court determining where to draw the line, this line was a result of that same balancing act. However, while the Court in *Hosanna-Tabor* is certainly drawing a line, it is a line that is wholly unlike any drawn before in the Religion Clause jurisprudence. First, the Court in *Hosanna-Tabor* cordons off a large amount of immunity for religion from a law of general applicability, whereas *Smith* and the Free Exercise Clause jurisprudence demonstrate that the government's interests, not individual religious practice, usually won out when a generally applicable law was at issue. Second, the Court creates an area where there is a "compulsory deference to religious authority," which is out of place with its prior holdings.[201]

2. *Hosanna-Tabor* Diminishes the Importance of Preventing Discrimination

Chief Justice Roberts acknowledges that there is a strong interest in preventing discrimination: "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[202] But he is understating the significance of the interest in enforcing laws against employment discrimination. The Court has repeatedly held that the interest in preventing discrimination is stronger than important. Preventing racial discrimination

201. Jones v. Wolf, 443 U.S. 595, 605 (1979). In fact, as noted in Subpart I.A.4, *infra*, the Supreme Court, in the line of cases articulating the Church Autonomy Doctrine (the very cases used by the Court in *Hosanna-Tabor* to bolster its holding), explicitly declined to grant broad deference to religious organizations. *See, e.g.*, Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("[N]ot every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property.").

202. *Hosanna-Tabor*, 565 U.S. at 196.

is a "compelling" governmental interest.[203] Gender discrimination is evaluated under some level of intermediate scrutiny, requiring a demonstration of an "exceedingly persuasive justification."[204] To be fair, however, both age discrimination and disability discrimination fall under the "rational basis" standard.[205] Yet for race, national origin, and sex, at least, society's interest is stronger than merely important. The Court in *Hosanna-Tabor*, other than its passing statement above, gives surprisingly little weight to such an important interest.

By contrast, the Court has held in other cases that even a state interest that is merely legitimate, when placed against the First Amendment Religion Clauses, does not call for complete deference to the religious organization.[206] Thus, even when discrimination is based on disability or age, the types of discrimination with the lowest scrutiny, the state's interest is weighty enough to at least be considered in the balance. And, if the issue is sex, race, or national origin discrimination, complete deference certainly should not be used, given the importance of the countervailing societal interest in preventing those types of invidious discrimination.

3. *Hosanna-Tabor* Provides an Unnecessarily Broad Immunity

Finally, as noted above, the Court in the past sought to balance society's interests and the freedoms granted by the Religion Clauses in a delicate accommodation.[207] There is nothing delicate or accommodating about the ministerial exception in *Hosanna-Tabor*. The Court, hearing the plaintiff's contention that the religious reason given for termination was pretextual, held that the pretextual nature of the reasoning did not matter because the ministerial exception barred Perich's claim regardless.[208] This deference to

203. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).
204. United States v. Virginia, 518 U.S. 515, 531 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).
205. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (age discrimination under rational basis); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (disability discrimination under rational basis). Note that *Cleburne* in particular seemed to be a higher level of scrutiny in practice, what some commentators have called "rational basis with teeth." *See* Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 540 (2014).
206. *Jones*, 443 U.S. at 602. "The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Id.*
207. Prince v. Massachusetts, 321 U.S. 158, 165 (1944).
208. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194–95 (2012).

religious organizations by the Court in *Hosanna-Tabor* is a far cry from the Court's prior holdings. Remember in *Kedroff*, the Court explicitly noted that the "[f]reedom to select clergy" had "federal constitutional protection," but qualified that statement by limiting it to instances "where no improper methods of choice are proven."[209] The *Hosanna-Tabor* Court's deference to religious organizations, even in the face of possible unlawful conduct, is out of accord with the very cases it used to support its holdings.[210]

There should be some form of a ministerial exception. The Court in *Hosanna-Tabor* was right that decisions involving ministers of a religious organization may often involve courts getting too entangled in decisions of religious controversy. But not always, and not so often as to require complete immunity. *Hosanna-Tabor* goes too far; in the memorable words of Justice Blackmun: "Today the Court launches a missile to kill a mouse."[211] There can be a more narrowly tailored solution. A solution that protects religious decisions, yet also gives relief to persons who have experienced discrimination by religious organizations.[212]

B. The Practical Problems

Before we get to the solution there is an important question: Does it matter? Are the problems merely theoretical? Or is there real-world harm caused by the Court's decision in *Hosanna-Tabor*?

Scholars have pointed out the significant impact of *Hosanna-Tabor*'s decision on a large number of groups whose claims are either completely barred or made incredibly difficult.[213] In denying these claims from even being heard, persons who have lost their jobs, allegedly because of discrimination that violates the law in Title VII, have no source of relief. In this Part, I highlight three main practical problems raised by *Hosanna-Tabor*'s ministerial exception definition that illustrate its harmfulness.

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209. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).
210. *See Hosanna-Tabor*, 565 U.S. at 186 (citing *Kedroff*, yet ignoring the qualifier *Kedroff* gives regarding "improper choice").
211. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).
212. *See infra* Part III.
213. *See generally* Levinson, *supra* note 105 (analyzing possible difficulties employees may have in bringing sexual harassment claims in light of *Hosanna-Tabor*); Waters, *supra* note 184, at 78 (noting the effect of *Hosanna-Tabor* on claims of pregnancy discrimination); DeHaan, *supra* note 184, at 496 (demonstrating how *Hosanna-Tabor* was applied in one lower court case).

1. *Hosanna-Tabor* Has Led to Inconsistent Results in Lower Courts

As noted above, the Court in *Hosanna-Tabor* explicitly eschewed defining a minister, or even providing a test.[214] The Court, recall, considered four factors: (1) the formal title given by the school; (2) the substance reflected in that title; (3) Perich's use of that title; and (4) the important religious functions she performed for the school.[215] Lower courts, however, needed a standard to apply, and created a version of a factor test based only on the factors examined by the Court in *Hosanna-Tabor*.[216] Yet, because of the small number of factors and the lack of clarity on how to weigh the factors, courts have come out on opposite ends of who counts as a minister even with nearly identical facts.

For example, consider an elementary school teacher at a Jewish school who taught Jewish rituals, values and holidays, and led prayer in class and attended weekly Shabbat services. In *Grussgott*, the Seventh Circuit held that those practices informed both the "substance reflected in [the] job title" factor, as well as the "perform[ing] important religious functions" factor.[217] The court found that the facts of the case were sufficient to establish Grussgott was a minister, and affirmed the district court's grant of summary judgment to the defendant.[218] Alternatively, in considering a teacher with a similar position in *Su*, a court found that the teacher's involvement impacted only the fourth factor from *Hosanna-Tabor*.[219] Weighing the factors, the court found that the circumstances of the case did not allow use of the ministerial exception.[220]

Or, consider the case of a teacher at a Christian university. While the university is explicitly religious in its affiliation, the curriculum includes secular topics. While not giving all teachers explicitly religious duties, the school has a policy that requires faculty to live in conformity with the values of the school, namely Christianity. The teacher at issue teaches a secular topic. In *Richardson v. Northwest Christian University*,[221] the court held that,

214. *Hosanna-Tabor*, 565 U.S. at 190.
215. *Id.* at 191–92.
216. *See, e.g.*, Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 834–35 (6th Cir. 2015); Biel v. St. James Sch., 911 F.3d 603, 607–08 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 680 (2019).
217. Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 659–60 (7th Cir. 2018) (quoting *Hosanna-Tabor*, 565 U.S. at 192).
218. *Id.* at 662.
219. *See* Su v. Stephen S. Wise Temple, 244 Cal. Rptr. 3d 546, 553 (Ct. App. 2019), *cert. dismissed*, 140 S. Ct. 341 (2019).
220. *Id.* at 553.
221. 242 F. Supp. 3d 1132 (D. Or. 2017).

although the plaintiff performed some important functions as a professor where she was expected to integrate her Christianity into her teaching and exhibit a "maturing Christian faith," the religious functions were secondary to her primary teaching function, and thus the ministerial exception did not apply.[222] But in *Lishu Yin v. Columbia International University*,[223] the court held that an English as a second language (TEFL-ESL) teacher at a Christian university was a minister for purposes of the ministerial exception, in spite of her secular job title and responsibilities, because she was called to "embody" the purpose of the university in her teaching and because she was expected to "live, teach, and promote a life of godly choices and Christian growth."[224]

These are just a few of the inconsistencies appearing in the lower courts. Granted, inconsistent results are not unheard of from lower court applications of a Supreme Court decision, nor from an analysis that is fact intensive. Still, these differing results on similar fact patterns suggest that the current ministerial exception is unwieldy, leading to an inconsistent application of justice.[225]

2. *Hosanna-Tabor* Creates a Large Number of "Minister" False Positives

In both *Richardson* and *Lishu Yin* above, the Christian university included religious language in its job descriptions and policies: exhibit a "maturing Christian faith" and "live, teach, and promote a life of godly choices and Christian growth."[226] This language was a large factor for at least one court to place a person inside the ministerial exception, even though her only responsibilities were teaching English as a second language.

Now this type of language is strategically being added to religious organizations' policies to immunize them under the ministerial exception.[227]

222. *Id.* at 1145.
223. 335 F. Supp. 3d 803 (D.S.C. 2018).
224. *Id.* at 815–16, 818.
225. In fact, the Supreme Court itself recently acknowledged this inconsistency by granting certiorari to a pair of Ninth Circuit decisions. *See* Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 679 (2019); Biel v. St. James Sch., 911 F.3d 603 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 680 (2019). The petitioners claimed the Ninth Circuit was out of accord with other circuits. Petition for a Writ of Certiorari at i, Our Lady of Guadalupe Sch. v. Morrissey-Berru, No. 19-267 (U.S. Aug. 28, 2019), 2019 WL 4131225.
226. *Richardson*, 242 F. Supp. 3d at 1145; *Lishu Yin*, 335 F. Supp. 3d at 806.
227. *See, e.g.*, Mark Dance, *Four Key Areas for Protecting Your Ministry From Lawsuits*, FACTS & TRENDS (Aug. 27, 2015), https://factsandtrends.net/2015/08/27/four-keys-areas-for-protecting-your-ministry-from-lawsuits [https://perma.cc/N3XY-2PQ8].

In fact, the Southern Baptist Convention—the largest protestant denomination in the United States[228]—teamed up with the Alliance Defending Freedom to publish a guide for churches to protect themselves from discrimination-based lawsuits.[229]

This gaming of the system by a broad use of religious language in employee job descriptions for religious organizations can expand the ministerial exception to cover nearly every employee in those organizations.[230] Now, if all of those employees were in fact ministers, this would not be a problem. But holding that an ESL teacher is a minister stretches the imagination of even those of us who grew up within a religion under ministers.[231]

This problem is exacerbated in the largest American churches, known as megachurches.[232] These large churches are home to thousands of members across multiple campuses.[233] These churches, in order to maintain their massive size, have large numbers of employees. Many of these employees perform functions that are equivalent in nonreligious large organizations—administrative assistants, information technology, security.[234] Yet built into the requirements and job descriptions are religious phrases like the ones in *Richardson* and

228. *Fifteen Largest Protestant Denominations*, PEW RSCH. CTR. (May 7, 2015), https://www.pewforum.org/2015/05/12/chapter-1-the-changing-religious-composition-of-the-u-s/pr_15-05-12_rls_chapter1-03 [https://perma.cc/5NS4-RM48].

229. ALL. DEFENDING FREEDOM & ETHICS & RELIGIOUS LIBERTY COMM'N, S. BAPTIST CONVENTION, PROTECTING YOUR MINISTRY FROM SEXUAL ORIENTATION GENDER IDENTITY LAWSUITS (2015) [hereinafter PROTECTING YOUR MINISTRY], http://www.thewhiteheadfirm.com/uploads/Protecting_Your_Ministry_ADF_ERLC.pdf [https://perma.cc/6XHK-FHAD].

230. This is one of the concerns highlighted by the court in *Richardson*: "If plaintiff was a minister, it is hard to see how any teacher at a religious school would fall outside the exception. Courts have properly rejected such a broad reading of *Hosanna-Tabor*, which would permit the ministerial exception to swallow the rule that religious employers must follow federal and state employment laws." *Richardson*, 242 F. Supp. 3d at 1145–46.

231. A large piece of this is how we should define ministers. See the discussion in Subpart III.A, *infra*.

232. For a discussion of megachurches in general and their impact on local communities, see, for example, Jason Wollschleger & Jeremy R. Porter, *A 'WalMartization' of Religion? The Ecological Impact of Megachurches on the Local and Extra-Local Religious Economy*, 53 REV. RELIGIOUS RSCH. 279 (2011); Mark Chaves, *All Creatures Great and Small: Megachurches in Context*, 47 REV. RELIGIOUS RSCH. 329 (2006).

233. *See* Scott Thumma, *Exploring the Megachurch Phenomena: Their Characteristics and Cultural Context*, HARTFORD INST. FOR RELIGION RSCH., http://hirr.hartsem.edu/bookshelf/thumma_article2.html [https://perma.cc/AXX4-JURS]; *see also* Wollschleger & Porter, *supra* note 232, at 280 (describing megachurches).

234. For example, a recent search of one of the more well-known megachurches—Rick Warren's Saddleback Church—showed multiple positions open, including IT and Security. *Search Results*, SADDLEBACK CHURCH, https://chp.tbe.taleo.net/chp03/ats/careers/searchResults.jsp?org=SADDLEBACK&cws=1 [https://perma.cc/X5QH-Z478].

Lishu Yin, which make it easier for courts to find even these nonministerial jobs to fall within the ministerial exception.[235] One way churches, large and small, build this language in is by requiring staff to become members of the church. As members, the staff commit to the "values" of the church, and often sign "membership covenants" that include religious language and expectations.[236]

This practice allows churches and religious organizations to wedge in nearly all their hiring decisions under the protections of the ministerial exception, causing the ministerial exception to "swallow the rule that religious employers must follow federal and state employment laws."[237] In fact, in *Hosanna-Tabor*, the Court dismissed the EEOC and Perich's concerns of an expanding ministerial exception as a "parade of horribles," citing the church's claim that the exception would not "bar government enforcement of general laws restricting eligibility for employment, because the exception applies only to suits by or on behalf of ministers themselves."[238] But if everyone hired by a religious employer has religious language and/or membership requirements in their job description, and that language has been specifically found by courts to trigger the ministerial exception, *Hosanna-Tabor* actually does bar government enforcement of general employment laws against religious employers. This makes the "parade of horribles" much less hypothetical. After *Hosanna-Tabor*, religious organizations are being given far greater deference over a wider array of employment decisions. Many of those employment decisions are not based on any religious doctrine, and thus should be covered by generally applicable laws and not be protected by the

235. *See, e.g.*, *Christ Lutheran Church: Job Description—Church Administrator*, ELCA.ORG, https://www.elca.org/-/media/Files/Careers/Church-Administrator-Job-Description-Revised.ashx?la=en&hash=931DDEA61828F3A2790854B99C2C6000BDEBABBF [https://perma.cc/ZRS3-HGSZ]; FIRST UNITED METHODIST CHURCH OF WAMEGO, POSITION DESCRIPTION: CHURCH ADMINISTRATOR (2017), https://www.greatplainsumc.org/files/gpconnect/2017/01.25.17/job+description+church+administrator+2017.pdf [https://perma.cc/ TM9A-TN3Y].

236. For example, Saddleback Church requires all applicants to be members of Saddleback or "a local church that shares the vision and values of Saddleback." If hired, an individual, along with their spouse, is expected to become a Saddleback member. *Career Opportunities*, SADDLEBACK CHURCH, https://saddleback.com/visit/jobs [https://perma.cc/W698-6T3T]. The Membership Covenant includes language seen in both *Richardson* and *Lishu Yin*. *See* Rick Warren, *One Way to Increase the Commitment Level of Your Members*, PASTORS.COM (Dec. 12, 2017), https://pastors.com/one-way-to-increase-the-commitment-level-of-your-members [https://perma.cc/572C-7QZD]; *see also* PROTECTING YOUR MINISTRY, *supra* note 229, at 33–35 (providing a sample church membership agreement that includes a provision authorizing church discipline on a member who "practices or affirms a doctrine or conduct" contrary to church teaching).

237. Richardson v. Nw. Christian Univ., 242 F. Supp. 3d 1132, 1146 (D. Or. 2017).

238. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195–96 (2012).

Religion Clauses. Yet the ministerial exception articulated by the Court in *Hosanna-Tabor* protects precisely those nonreligious decisions.

3. *Hosanna-Tabor* Protects Decisions That Are Not Religious

Remember that the point of the ministerial exception, derived from the Religion Clauses, is to allow religious organizations the freedom to exercise their religious beliefs, and to keep the government from involving itself in controversies regarding doctrine.[239] *Hosanna-Tabor*'s decision, however, gives such a broad immunity to religious organizations, that it protects not only doctrinal issues and religious exercise, but also actions that do not fall in those categories. The first clear example is described above—employment decisions regarding employees who are not ministers but who fall into *Hosanna-Tabor*'s broad ministerial exception.

The second, less clear example, occurs when ministers are involved, but the actions taken by the employer are not religious. For example, one of the justifications for a ministerial exception noted by both the Court and by the plaintiffs in *Hosanna-Tabor* is the acknowledgment that some religious organizations discriminate on the basis of sex because of their religious beliefs, like the Catholic church, which denies the priesthood to women, and requires priests to be celibate.[240] That, admittedly, is an exercise of a religious belief. Such a belief may be out of accord with current values, but just as the First Amendment protects secular speech and ideas some might find offensive, it also protects *religious* speech, ideas, and actions one might find offensive. But what about actions that are discriminatory or harmful that are not based on religious beliefs? Should they be protected by the First Amendment merely because they are practiced by a religious organization? Even supporters of the ministerial exception recognize it has limits: "[T]he ministerial exception does not rest upon any general immunity of religious employers from civil law governing the employment relationship. These employers must comply with wage and hour laws, workplace safety rules, and—in most circumstances—prohibitions on employment discrimination based on race, national origin, or sex."[241]

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239. *See supra* Part I.
240. *Hosanna-Tabor*, 565 U.S. at 189.
241. Ira C. Lupu & Robert W. Tuttle, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims By Clergy and the First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 249, 287 (2019) (footnote omitted).

But, for example, suppose a church hired a female minister, and there was nothing in their religious statements or policies that demarcated a difference between men and women in their ability to serve as ministers. Consider two scenarios. First, the employees at the church created a hostile work environment for the female minister based on her gender. Even scholars that support the current ministerial exception acknowledge the importance of (and even recommend) allowing suits for hostile work environment claims.[242] But say, the church fired the minister for clearly discriminatory reasons, based on her gender (for example, she got pregnant and they did not want to deal with maternity leave). Even though discrimination based on gender has no basis in religious beliefs, the church would be protected from liability because the employee was a minister.

This general immunity of a religious organization in regard to its ministers is troubling. The Court in *Hosanna-Tabor* acknowledges it and is not deterred.[243] Scholars supporting the ministerial exception, while allowing that it protects decisions made for any reason, rational or not, continue to defend the immunity.[244] But this general immunity should trouble us. Recall *Watson v. Jones*,[245] the early Church Autonomy case which *Hosanna-Tabor* relied on.[246] There, the Court justified its deference to church decisions because they were made by organizations which were formed around religious beliefs, and that "[a]ll who unite themselves to such a body do so with an implied consent to this government."[247] But if the decisions are not made out of religious belief, what kind of consent can really be implied? The female minister in our hypothetical thought she was joining an organization that treated her equally with men, based on shared religious beliefs. The discrimination did not arise out of religious beliefs thus it should not be protected by the Religion Clauses.

242. *Id.* at 288.

> In contrast, the presence of a persistent hostile environment—whether it affects clergy, lay employees, or both—can be remedied through recognition of a right of action for the environmental harms. This does not involve the state in dictating the status of particular members of the clergy. It does involve imposing limits on mistreatment of employees, and corresponding liability for the tortious harms that religious communities may inflict on those within their employ.

Id.

243. *See Hosanna-Tabor*, 565 U.S. at 194–95.
244. *See* Lupu & Tuttle, *supra* note 241, at 288.
245. 80 U.S. 679 (1872).
246. *Hosanna-Tabor*, 565 U.S at 185–86.
247. *Watson*, 80 U.S. at 729.

III. A BETTER MINISTERIAL EXCEPTION

Thus far, I have developed two major themes. First, the Religion Clauses of the First Amendment do require courts to give a certain level of deference to religious organizations' decisions regarding its "ministers." In this the Court in *Hosanna-Tabor* was partially right. But partially right is still partially wrong: The ministerial exception as conceived by the Court in *Hosanna-Tabor* is far too broad in its immunizing sweep. The exception should only extend as far as the *reason* for the exception extends. Remember, the reason the Court's jurisprudence gives deference to religious organizations in certain areas is not that religious organizations are sovereign within their own sphere, but that courts must not make religious decisions. The Court in *Hosanna-Tabor* bracketed off employment discrimination decisions regarding a minister as implicating religious decisions, and thus courts cannot get involved. But, as demonstrated above, not every employment decision that falls within the scope articulated by the Court in *Hosanna-Tabor* is in fact a religious decision. Given that, alongside the important societal value in preventing and remedying discrimination, it is worth the effort to narrow the ministerial exception so that it is more likely to be restricted to actual religious decisions.

In the rest of this Part, I propose two ways to narrow the ministerial exception. First, I add additional factors to the evaluation of *which* employees count as "ministers" under *Hosanna-Tabor* to reduce the number of employees wrongly labelled as "ministers." This will expand the number of persons not barred by the ministerial exception, so their discrimination cases can go forward. I discuss this in Subpart III.A, below.

Second, I propose that, even should a person be found a "minister," employment discrimination lawsuits should be allowed, but narrowed in two ways. If the religious organization can show that the employment decision is traceable to a religious belief, the lawsuit is automatically dismissed. And, in any case involving a minister, certain remedies such as reinstatement should not be available. This provides a backstop to prevent courts from imposing a minister on a religious organization (and thus arguably making a religious decision). This is discussed in Subpart III.B, below.[248]

248. This Comment, for the sake of brevity and clarity, does not address the question of what constitutes a religious organization. For a good discussion of the current jurisprudence regarding this issue after *Hosanna-Tabor*, and for a helpful stab at revision, see Brian M. Murray, *supra* note 181, at 1131–33; Robinson, *supra* note 8, at 184–85; and Zoë

A. Better Defining "Who is a Minister?"

The Supreme Court in *Hosanna-Tabor* considered four factors in its minister determination: (1) the formal title given by the church; (2) the substance reflected in that title; (3) Perich's use of that title; and (4) the important religious functions she performed for the church.[249] The Court specifically refused to adopt a "rigid formula for deciding when an employee qualifies as a minister," merely highlighting the factors it found most relevant in Perich's case.[250] Despite the Court's disavowal of formulas, lower courts have routinely analyzed the question using those factors, and often *only* those factors, described in *Hosanna-Tabor*.[251] As demonstrated above in Part III, a determination based on these factors alone is often overinclusive—it captures persons who are not "ministers."

The question at the heart of the inquiry is: Who is a minister? We have to acknowledge that a large number of religions and religious organizations do not use the title "minister" for the persons holding religious office, and this has complicated the analysis.[252] The Court in *Hosanna-Tabor* gave two characteristics of ministers: persons in whose hands "the members of a religious group put their faith"; and persons selected by the church "to personify its beliefs."[253] *Watson* also gives direction on determining a minister, by noting that a religious organization is a voluntary religious association—a group of people coming together to express and disseminate religious doctrine.[254] Putting those two aspects together, a minister is an officer chosen by the consent of the membership of a religious organization,

Robinson, Hosanna-Tabor *After* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 173 (Micah Schwartzman et al. eds., 2016).

249. *Hosanna-Tabor*, 565 U.S. at 191–92.
250. *Id.* at 190.
251. *See*, *e.g.*, Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 460–61 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 679 (2019). The Ninth Circuit noted there was no formula, and that it was a totality of the circumstances, and yet merely used the four *Hosanna-Tabor* factors. *See id.; see also* Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 834 (6th Cir. 2015) (applying only the four factors articulated in *Hosanna-Tabor*); Biel v. St. James Sch., 911 F.3d 603, 607 (9th Cir. 2018) (same), *cert. granted*, 140 S. Ct. 680 (2019).
252. It is a bit like being told to find a rabbit, being given no picture and just four factors: (1) long ears; (2) brown; (3) soft fur, (4) fluffy tail. While those factors will help you catch rabbits, other animals could also fit easily within that definition—certain dogs, and, depending on how you define fluffy tails, maybe even a donkey or two.
253. *Hosanna-Tabor*, 565 U.S. at 188.
254. *See* Watson v. Jones, 80 U.S. 679, 728–29 (1872).

for the purpose of personifying its beliefs, and expressing and disseminating its religious doctrine. The minister's job does not have to be limited to exclusively religious functions.[255] To find an employee to be a minister, a court does, however, need to be able to trace the selection of the minister to a decision made by the members of the organization.[256]

Thus, I propose adding two additional factors, alongside the *Hosanna-Tabor* factors, to correctly identify the "ministers" of a religious organization.[257] These would be part of the "totality of the circumstances" test and, like the other factors, would not individually be dispositive.[258]

1. The "Religious Decisionmaker" Factor

Courts, in determining who is a minister, should consider: (5) whether the employee's hiring was made in the same manner as other religious decisions and by the same body of the organization responsible for making religious decisions.

255. *See Hosanna-Tabor*, 565 U.S. at 193. "We are unsure whether any such employees [with exclusively religious functions] exist." *Id.*

256. Different organizations choose different decisionmaking structures—some religious organizations have all the members vote (like Perich in *Hosanna-Tabor*); others vote on representatives to make decisions. The central question is: How does the organization make religious decisions, and did the selection of the minister arise out of the same process?

257. Justice Thomas, in his concurrence in *Hosanna-Tabor*, preferred to "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring). That is a bridge too far. Religious organizations, like any defendant in a lawsuit, can provide post-hoc justifications for their decisions. Given that a broad swath of American evangelical churches professes that "every person is a minister," the ministerial exception could swallow the rule under Justice Thomas's framework. *See, e.g.*, Czarina Ong, *Every Christian Is a Minister, and Here's Why*, CHRISTIANITY TODAY (Jan. 4, 2017, 5:55 PM), https://www.christiantoday.com/article/every-christian-is-a-minister-and-heres-why/103574.htm [https://perma.cc/X9SJ-6KN5]; Tim Challies, *You, Yes You, Are a Minister!*, CHALLIES (May 21, 2017), https://www.challies.com/articles/you-yes-you-are-a-minister [https://perma.cc/6ULW-XQU4].

258. As this Comment entered production, the Supreme Court granted certiorari to a pair of Ninth Circuit decisions regarding the ministerial exception. *See* Morrissey-Berru v. Our Lady of Guadelupe Sch., 769 F. App'x 460 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 679 (2019); Biel v. St. James Sch., 911 F.3d 603 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 680 (2019). In their brief, petitioners argued that the Ninth Circuit erred by holding that religious functions alone were never enough for the ministerial exception to apply, which was in conflict with the decisions of other courts and circuits. *See* Brief for Petitioners at 24, Our Lady of Guadalupe Sch. v. Morrissey-Berru, Nos. 19-267 & 19-348 (U.S. Feb. 3, 2020), 2020 WL 583726. Regardless of how the Court rules on that particular dispute, I believe an analysis that fails to consider the additional factors I outline in this Part is insufficient (and thus would take as much issue with the new decision as the Court's decision in *Hosanna-Tabor*).

In larger religious organizations, employees are often not chosen by the membership of the religious organization. For example, in some churches, employees are hired to manage large groups of congregants. These employees often have no religious training or background; additionally, the decision to hire them is not made by the representative leadership of the organization. The hiring is often done behind the scenes, as is the firing. During their employment, they do a lot of the same tasks a minister would do—meet with the congregants, lead religious discussions, and more. Assuming the title given them uses sufficiently religious wording,[259] under the *Hosanna-Tabor* factors these employees would often be found to be ministers. But the reasoning undergirding the *Hosanna-Tabor* ministerial exception is lacking in this type of case. These employees were not called by a religious community to "personify [their] beliefs";[260] they were not chosen by the membership. Thus, a court's examination of their hiring or firing decision is less likely trigger an impermissible interference with the internal governance of the church.[261]

Because the choosing of a minister is a religious decision, and thus should be free from government interference, by determining whether the person or group ordinarily entrusted to make religious decisions was the person or group who decided to hire the plaintiff, a court can better determine if this person is a minister.[262]

2. The "Exclusively Religious Functions" Factor

Second, I propose a sixth factor for courts examining the totality of circumstances: (6) whether the organization reserves the "religious" functions performed by the plaintiff to a specific group of persons based on religious justifications. Are the religious duties performed by the plaintiff ordinarily reserved for a minister? For example, in a ministerial exception case, an

259. Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 834–35 (6th Cir. 2015). "Beyond that, courts need only determine whether the wording of the title conveys a religious—as opposed to secular—meaning. The word 'spiritual' is such an identifying term." *Id.*
260. *Hosanna-Tabor*, 565 U.S. at 188.
261. As noted above, *Hosanna-Tabor* did not preclude religious organizations from being held liable in breach of contract claims, or other claims, even though those claims do technically interfere in internal church governance. There is a threshold, then, of permissible interference.
262. The religious decisionmaking body will be different from organization to organization. Some organizations entrust decisions to a single person; others have boards of elders elected as representatives; others use congregational meetings of members.

organist for a Catholic parish was found to be a minister within the definition of *Hosanna-Tabor* because he played music as part of the mass on Sundays.[263] On its face, involvement in a worship service would seem to fall exactly within the category of persons selected to "personify [the organization's] beliefs."[264] But playing the organ (and other instruments) is a skill that can be rare in a community; as a result, religious organizations at times hire performers who are not members of their community, and sometimes not even of the same religious beliefs, to be involved in the musical portion of the worship service.[265] The same can be true of employees for other Sunday activities—such as workers for the childcare provided at the worship, janitors, security guards, and more.

This is an important factor for evaluating whether the functions the organization cites as designating the plaintiff a "minister" are actually reserved by the church for persons it considers "ministers." If the organization fires a conductor, for example, and then hires a conductor who is of a different religion, even though the conductor's presence may be part of a religious service, it is unlikely the organization realistically considers a person in that role a "minister."[266]

With these two additional factors, courts will be better able to analyze whether a plaintiff falls within the "minister" box, which will decrease the number of false positives created under the use of the current factors. This will increase the number of persons able to seek remedies for the discrimination they experienced.

263. *See* Sterlinski v. Catholic Bishop of Chi., 319 F. Supp. 3d 940, 946 (N.D. Ill. 2018), *aff'd*, 934 F.3d 568 (7th Cir. 2019).
264. *Hosanna-Tabor*, 565 U.S. at 188.
265. *See, e.g.*, Blake Adams, *3 Views: Is It Okay to Hire Non-Christians Onto My Worship Team?*, PUSHPAY (June 30, 2017), https://pushpay.com/blog/should-i-hire-non-christians [https://perma.cc/4A6G-MRJ6]; Collin Hansen, *TGC Asks: Do Non-Believers Play a Public Role in Your Church Services?*, TGC (Dec. 2, 2010), https://www.thegospelcoalition.org/article/tgc-asks-do-non-believers-play-a-public-role-in-your-church-services [https://perma.cc/NN77-KF3M].
266. This factor seems to be similar to the reasoning of the Sixth Circuit in Perich's case. *See* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 781 (6th Cir. 2010), *rev'd*, 565 U.S. 171 (2012). The Supreme Court felt that the Sixth Circuit put too much emphasis on this factor, but affirmed that it was certainly relevant, just not dispositive. *Hosanna-Tabor*, 565 U.S. at 193. Lower courts have missed this signaling of relevance by the Supreme Court.

3. Addressing Possible Concerns Regarding the Additional Factors

Two questions arise after adding these factors. First, does adding this level of inquiry to the ministerial determination itself create too much entanglement or religious decisions on the part of the courts? According to the Court in *Hosanna-Tabor*, it does not. Remember that the Court refused to create a rigid test; it called for an analysis of the totality of the circumstances. The problem is that, since then, lower courts have restricted themselves to only using the factors described in *Hosanna-Tabor*. This proposal merely encourages courts to do a broader totality of the circumstances analysis. Additionally, the Court has stated that examining the interior workings of a church does not violate the First Amendment, as long as the court is not resolving a religious controversy.[267] Since the Court in *Hosanna-Tabor* specifically tried to determine whether Perich was a minister, that type of examination clearly does not count as resolving a religious controversy.

Second, by leaving out a number of employees from the ministerial exception, including some that do perform religious functions, employment discrimination lawsuits can go forward in those cases. However, would analysis of their claims, even if they fall out of my working definition of minister, implicate the First Amendment concerns that gave rise to the ministerial exception? Perhaps, but not automatically. Because they would not be considered ministers, there is no automatic presumption that hearing their claims would violate the First Amendment. As courts have recognized in a number of situations, however, a particular claim might implicate First Amendment concerns; if so, the court could dismiss it under the Church Autonomy Doctrine. Recall that before courts crafted the ministerial exception, there was a broader doctrine called the Church Autonomy Doctrine (also referred to as the Ecclesiastical Abstention Doctrine) that courts used to determine whether the First Amendment prevented them from hearing a claim.[268] The Church Autonomy Doctrine was used for claims brought against a religious organization, and asked whether the resolution of the claim requires resolving "controversies over religious doctrine and practice."[269] Consistent with this precedent, a court could still decide, upon hearing the claims of these nonministers, that the claim itself would implicate

267. *See* Jones v. Wolf, 443 U.S. 595, 604 (1979).
268. *See supra* Part I.
269. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

First Amendment concerns and dismiss it.[270] The main difference is that the court would examine the claim itself, not the status of the employee, to make this determination.

B. Removing the Absolute Bar of the Ministerial Exception

Under *Hosanna-Tabor*, once a plaintiff is determined to be a minister of a religious organization, their suit against the organization with regard to discrimination is dismissed.[271] Instead of that immediate dismissal, I propose that if an employee is found to be a minister and thus fall within the ministerial exception, the lawsuit can go forward, but it is limited in two main ways to protect religious freedom. First, if the religious organization can show that the discriminatory employment decision was traceable to a religious belief, then the suit must be dismissed. I refer to this as the Bona Fide Religious Decision (BFRD) defense. Second, if an employee is a minister, and the suit is not dismissed under the BFRD, even should the employee win, the remedies available would be limited.

1. Bona Fide Religious Decision Defense

The First Amendment protects the Free Exercise of religion. Some religious groups and organizations have beliefs and practices that are discriminatory. For example, the Catholic church, as well as many Protestant churches, bar women from holding a priest or pastor position. Some synagogues or mosques may have national origin limitations for their religious leadership as well. For these organizations, the burden of discrimination lawsuits can become significant very quickly, to the point where there is no practical choice but to either close their doors or be forced to change their religious beliefs. It is this issue that most commentators zero in on when analyzing the ministerial exception.[272] A broad ministerial

270. For an example of when the Church Autonomy Doctrine prevented a court from hearing a claim, see *Dermody v. Presbyterian Church (U.S.A.)*, 530 S.W.3d 467 (Ky. Ct. App. 2017). "We have carefully examined the issue and have determined we cannot provide Dermody the relief he seeks without excessive government entanglement into an ecclesiastical controversy . . . ." *Id.* at 474.

271. *See Hosanna-Tabor*, 565 U.S. at 194.

272. *E.g.*, Ashutosh Bhagwat, *Religious Associations:* Hosanna-Tabor *and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73, 75 (2014) (citing the decision in *Hosanna-Tabor*, followed by: "This result *must* be correct. After all, it is unthinkable that the Catholic Church could be legally required to hire women as priests."). Even the

exception, as defined by the Court in *Hosanna-Tabor*, will certainly protect against this forced choice for religious organizations. But simply because the broad exception works, it does not mean it is the only means, or even the best means to accomplish that protection.

An analogy may help. Imagine that the Constitution forbids the use of red inside the Capitol building. One way to accomplish that would be to require everything within the Capitol to be blue. That broad prohibition would certainly protect the Constitutional mandate, but so would a narrower prohibition, such as banning red and pink and purple to be safe. That would allow for the use of not only blue, but also green, yellow, and other colors as well. Of course, the broad prohibition would be clearer and easier to enforce. But the societal value of having multiple colors might be worth the added cost of enforcement to choose the narrower prohibition.

To bring this back to our problem, the First Amendment does prohibit the government from meddling in the internal governance of a church. A broad ministerial exception accomplishes that goal. In fact, a broad immunity to religious organizations would accomplish the goal efficiently, just like requiring the Capitol interior to be only blue efficiently keeps out the red. But that is different than saying the ministerial exception, as defined by the Court in *Hosanna-Tabor*, is *required* by the Constitution. We can choose a more narrowly defined exception. It may be less efficient to enforce, but "the prime objective of the First Amendment is not efficiency."[273] As shown above, in the Religion Clause jurisprudence, the Court has consistently avoided the easy path. Rather than keeping courts out of church property suits altogether, the Supreme Court reserved the right of courts to be involved where neutral principles could be applied.[274] If the Court was willing to protect litigants' rights to be heard in a property suit, how much more should the Court be willing to protect litigants' rights in discrimination cases?[275] Our society's commitment to preventing discrimination requires us to choose the more narrowly defined exception, even if it is less efficient.

plaintiffs in *Hosanna-Tabor* conceded that discrimination law applied to force the Catholic church or an Orthodox Jewish seminary to ordain women as priests would violate the First Amendment. *See Hosanna-Tabor*, 565 U.S. at 189.

273. McCullen v. Coakley, 573 U.S. 464, 495 (2014).

274. *See* Jones v. Wolf, 443 U.S. 595, 605 (1979).

275. "But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice." Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983).

Therefore, I propose a Bona Fide Religious Decision (BFRD) defense for the ministerial exception.[276] If a minister sues the church for discrimination based on a protected characteristic under an antidiscrimination law, the church can avoid liability if it can show the decision was traceable to a religious belief. Thus, if a minister experiences discrimination on the basis of her sex—for example, if a Catholic church refuses to hire a female priest because of her sex—when the church can show its decision was traceable to its religious beliefs, there would be no liability.

The BFRD defense, while new, operates similarly and alongside current existing protections for persons and organizations. None of the following defenses adequately substitutes for the protections needed. But, adding in the BFRD to these other limited defenses will provide the protections called for by the Religion Clauses without providing the unlimited immunity the Court in *Hosanna-Tabor* granted.

a. The Freedom of Association Defense

The beliefs of an organization, even beliefs counter to discrimination law, have been protected under the Constitution. For example, in *Boy Scouts of America v. Dale*,[277] the Supreme Court held that New Jersey's public accommodations law could not be used to force the Boy Scouts to reinstate Dale, an adult scoutmaster who was ejected for being gay.[278] The Court held that the state interests in New Jersey's law did not justify "such a severe intrusion" on the Boy Scouts' First Amendment freedom of expressive association.[279] The extent of such a freedom of association defense has not yet been tested, in part because of courts' reliance on the ministerial exception. In fact, Perich and the EEOC in *Hosanna-Tabor*, in arguing against the ministerial exception, stated that the right of the Catholic church to hire only male priests is better supported by the freedom of association defense.[280] Moreover, several scholars post–*Hosanna-Tabor* have argued that the case would have

276. I owe this terminology to my advisor, David Simson, who coined it in one of our conversations discussing these ideas.
277. 530 U.S. 640 (2000).
278. *See id.* at 659, 661.
279. *Id.* at 659. The Court noted that "'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" *Id.* at 647 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)).
280. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012).

been better decided on freedom of association grounds.[281] This right of expressive association, added to the "special solicitude to the rights of religious organizations" noted by the Court in *Hosanna-Tabor* creates support for an idea like the BFRD defense.[282] The First Amendment Religion Clauses could exercise that special solicitude in putting an extra thumb on the scale in the freedom of association balancing.[283]

b. Title VII § 702—Defense for Religious Organizations

Title VII itself was revised in 1972 to create protection for religious organizations for discrimination based on their religious beliefs. Under Section 702: "This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[284] Section 702 has been interpreted as protecting a religious organization's employment decisions not only when it comes to employing a person from a different religion, but also protecting a religious organization's employment decisions regarding an employee whose conduct

281. *See, e.g.*, Bhagwat, *supra* note 272; NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 80–97 (2017).

282. *Hosanna-Tabor*, 565 U.S. at 189.

283. This option finds support in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990).

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . . And it is *easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns*.

Id. at 881–82 (1990) (emphasis added) (citations omitted). *See also* Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 1019 (2013).

> Another advantage is that, because freedom of association protects expressive association, it forces organizations to be clear about their membership rules and about what membership in their organizations represents and expresses. It would be better to force religious organizations to state openly their willingness to discriminate on the basis of race, gender, disabilities, sexual orientation, national origin, and age than to give them the free pass to disobey the laws for any reason that the Court awarded them in *Hosanna-Tabor*.

Id. (footnotes omitted).

284. 42 U.S.C. § 2000e-1(a), *amended by* Act of Mar. 24, 1972, Pub. L. No. 92-261, 86 Stat. 103.

or religious beliefs are inconsistent with the organization.[285] Hypothetically, using this provision, were a woman to sue the Catholic church for refusing to hire her as a priest when she applied, the church could justify its decision not to hire her because her religious beliefs were inconsistent with those of the Catholic church. By applying to be a priest, she would implicitly express the belief that a woman could be a priest; that would be a religious belief inconsistent with that of the Catholic church, and thus under Section 702 Title VII would not apply.[286]

But this provision has not been used in precisely that way. The ministerial exception was created by the Fifth Circuit in *McClure v. Salvation Army*[287] in that same year,[288] giving courts an easier path to dismiss cases for Constitutional reasons, rather than relying on an uncertain statutory interpretation. In any event, this provision, and the values behind it, support the principle articulated more clearly by the BFRD defense.

c. The Bona Fide Occupational Qualification

Title VII also includes a provision that allows all organizations, religious or not, to discriminate in select situations—the Bona Fide Occupational Qualification (BFOQ) defense.[289] Title VII allows employers to choose to hire (and thus choose not to hire) based on "religion, sex, or national origin in

285. Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) ("The decision to employ individuals 'of a particular religion' under § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."); Little v. Wuerl, 929 F.2d 944, 950 (3d Cir. 1991).

286. *See Wuerl*, 929 F.2d at 950; *see also* Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997).

> Plaintiff is not allowed to teach at the divinity school of a religious educational institution because his religious beliefs—as Plaintiff frankly admits—differ from those of the school's dean, the person selected by the religious educational institution to apply its policy and to lead the faculty at the divinity school. The Section 702 exemption's purpose and words easily encompass Plaintiff's case; the exemption allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities.

Id.

287. 460 F.2d 553 (1972).

288. *See id.* at 560–61.

289. *See* 42 U.S.C. § 2000e-2(e); Griffin, *supra* note 283, at 1017–18. Leslie Griffin is the only scholar I have found to address the BFOQ at any length in discussing the ministerial exception post–*Hosanna-Tabor*.

those certain instances where religion, sex, or national origin is a *bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise."[290] The BFOQ defense would not suffice itself as a protection for religious organizations for several reasons.[291]

First, the Court has generally read the BFOQ defense narrowly.[292] Most of the approved uses of it involve qualifications in place for the safety of customers and other employees,[293] or other strong considerations such as therapeutic care and privacy for abuse victims.[294] Additionally, Title VII deliberately denies a BFOQ defense for a policy that facially discriminates on the basis of race.[295] There are many groups that would fall within the definition of religious organizations that have in the past explicitly discriminated on the basis of race (such as the Mormon church),[296] or currently explicitly discriminate on the basis of race.[297] Several of these groups discriminate because of theological beliefs regarding the origins of races of people. For example, many Christian groups believed that Africans were descended from Noah's (of Ark fame) son Ham,[298] who Noah cursed to serve his brothers. Hypothetically, discrimination based on this belief might be categorized as discrimination based on national origin, for which the BFOQ is a defense.[299]

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290. 42 U.S.C. § 2000e-2 (emphasis added).
291. *See* Lupu & Tuttle, *supra* note 241, at 1311 n.231.
292. UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991).
293. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 336–37 (1977); W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 414 (1985).
294. *See* Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132–33 (3d Cir. 1996).
295. *See* Griffin, *supra* note 283, at 1018.
296. *See* Brady McCombs, *Mormons Grapple With Race Decades After Ban on Black Leaders*, FOX NEWS (June 2, 2018), https://www.foxnews.com/us/mormons-grapple-with-race-decades-after-ban-on-black-leaders [https://perma.cc/J6JH-6U5P]; Matthew Bowman, *Mormons Confront a History of Church Racism*, CONVERSATION (May 29, 2018, 6:40 AM), https://theconversation.com/mormons-confront-a-history-of-church-racism-95328 [https://perma.cc/48RR-S3L4].
297. These include Christian Identity groups, for example, or the Nation of Islam. *See Christian Identity*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/ideology/christian-identity [https://perma.cc/3YQU-AMQ8]; *Nation of Islam*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/nation-islam [http://perma.cc/4357-5Y3C].
298. Felicia R. Lee, *From Noah's Curse to Slavery's Rationale*, N.Y. TIMES (Nov. 1, 2003), https://www.nytimes.com/2003/11/01/arts/from-noah-s-curse-to-slavery-s-rationale.html?auth=link-dismiss-google1tap [https://perma.cc/U4US-6F2F].
299. See *Kanaji v. Children's Hospital of Philadelphia*, 276 F. Supp. 2d 399, 402 (E.D. Pa. 2003), defining national origin discrimination.

> These considerations lend strong support to the notion that one's "national origin" need not be linked directly to a particular nation. Moreover, the guideline directs decision makers to scrutinize situations where an individual

However, that reasoning is a stretch.[300] This gap in the BFOQ's protections makes it an insufficient safeguard for a religious organization's First Amendment rights.[301] The BFOQ demonstrates, however, that Congress recognized that there may be rare times where other interests outweigh society's interest in preventing discrimination, and gave a remedy in those situations. This lends credibility to adding a BFRD defense.

d. Dealing With Potential Pitfalls of the BFRD Defense

Using a BFRD defense rather than broad immunity might raise some concerns. First, by tracing a decision to a religious belief, is the court interfering with religion or the religious organization in an impermissible way? Not at all. The Court's jurisprudence on this is relatively clear. While courts cannot inquire into whether religious beliefs make sense or are internally consistent[302] or true,[303] they can inquire into whether a belief is sincerely held.[304] There are no clear guidelines on what determining sincerity must look

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> has certain traits or "characteristics of a national origin group," which the Court believes is consistent with the reality of this form of discrimination . . . .

Id.

300. Similarly, the Mormon Church, for example, considered black skin to be a curse on the children of Cain (a character from the book of Genesis). *See* Bowman, *supra* note 296. Certainly, framing that belief under national origin discrimination would stretch the distinction between race and national origin to near meaninglessness.
301. While I personally am opposed to religiously motivated racial discrimination (or racial discrimination regardless of the motivation), it is important to protect even those beliefs or speech with which we disagree. *See* Barenblatt v. United States, 360 U.S. 109, 144 (1959) (Black, J., dissenting) ("It is this right, the right to err politically, which keeps us strong as a Nation. For no number of laws against communism can have as much effect as the personal conviction which comes from having heard its arguments and rejected them . . . ."); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("Although the practice of animal sacrifice may seem abhorrent to some, 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.' Given the historical association between animal sacrifice and religious worship, petitioners' assertion that animal sacrifice is an integral part of their religion 'cannot be deemed bizarre or incredible.' Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim." (first quoting Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981); then quoting Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 834 n.2 (1989)) (citations omitted)).
302. *See Thomas*, 450 U.S. at 715.
303. *See* United States v. Ballard, 322 U.S. 78, 87 (1944).
304. *See id.* at 88; *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 651 (2000) (inquiring into the record to determine the sincerity of the Boy Scouts' assertion that it "teach[es] that homosexual conduct is not morally straight" (alteration in the original)).

like in Religion Clause cases, but *Dale* is instructive. There, the Court looked into the record, and pointed out multiple independent statements of the belief.[305] The Court also noted consistency over time.[306] As long as courts cabin themselves away from deciding religious controversies, asking a defendant church to show evidence in support of a BFRD defense does not violate the Religion Clauses. For example, in proving whether a person is even a minister in the first place necessitated the Court in *Hosanna-Tabor* to address the distinction the Lutheran church made between "called" ministers and "lay" ministers.[307] The Court there obviously did not see this inquiry by courts as impermissible.

A second significant concern arises during the second part of the *McDonnell Douglas Corp. v. Green*[308] analysis in employment discrimination claims, where the defendant articulates a legitimate, nondiscriminatory reason for its employment decision.[309] In a case involving a minister, what if the religious organization raises a legitimate, nondiscriminatory reason for its decision based on a different religious belief rather than a BFRD defense? For example, in *Hosanna-Tabor*, the church's reason for firing Perich was because she threatened a lawsuit, in violation of church principles and understandings of their scriptures.[310] Perich claimed this reason was pretextual; the Court in *Hosanna-Tabor* dismissed it because its version of the ministerial exception cut off the analysis as soon as Perich was proven to be a "minister."[311] With the proposed narrowed ministerial exception, the lawsuit would move forward. This gets courts into the dangerous situation foreseen by Justices Alito and Kagan in their concurrence in *Hosanna-Tabor*:

> For civil courts to engage in the pretext inquiry that respondent and the Solicitor General urge us to sanction would dangerously undermine the religious autonomy that lower court case law has now protected for nearly four decades. In order to probe the *real reason* for respondent's firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine. The credibility of Hosanna-Tabor's asserted reason for terminating respondent's employment could not be assessed without taking into account both the importance that the Lutheran Church attaches to

305. *See Dale*, 530 U.S. at 651–53.
306. *See id.* at 652.
307. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 191–92 (2012).
308. 411 U.S. 792 (1973).
309. *Id.* at 802 (establishing the burden shifting analysis for Title VII claims).
310. Laycock, *supra* note 129, at 844.
311. *Hosanna-Tabor*, 565 U.S. at 194–95.

> the doctrine of internal dispute resolution and the degree to which that tenet compromised respondent's religious function. If it could be shown that this belief is an obscure and minor part of Lutheran doctrine, it would be much more plausible for respondent to argue that this doctrine was not the real reason for her firing. If, on the other hand, the doctrine is a central and universally known tenet of Lutheranism, then the church's asserted reason for her discharge would seem much more likely to be nonpretextual. But whatever the truth of the matter might be, the mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission.[312]

A similar concern is raised by Laycock, who argued the case for Hosanna-Tabor in front of the Supreme Court.[313] Often the legitimate, nondiscriminatory reason given by an employer is that the employee was not fit for the position (whether they were not hired, fired, or passed over for promotion). The discussion regarding pretext will then center around the plaintiff's fitness for the role. Laycock notes: "Even if there is no doctrinal issue at stake, the evaluation of a minister's performance is a decision reserved to the church."[314] If a jury does not like the criteria the church uses to evaluate its ministers, or thinks they are insufficient, it is likely to find there was discrimination.[315] But that level of evaluation has historically been seen as outside the competence of the courts.[316] Thus, one of benefits of the broad ministerial exception articulated in *Hosanna-Tabor* is that it protects the court from even approaching that determination.[317]

312. *Id.* at 205–06 (Alito, J., concurring).
313. Laycock, after oral arguments, subsequently addressed the Federalist Society about the case and, after the decision was released, edited the speech for publication. *See* Laycock, *supra* note 129, at 849.
314. *Id.* at 849.
315. *See id.* at 850.
316. Lupu & Tuttle, *supra* note 241, at 1283–84. "Courts cannot decide whether a congregation has engaged in discriminatory conduct toward a ministerial employee without first determining a set of qualifications for holding the role, or a standard of performance within the role, and then measuring the employee's conduct . . . against these standards. Such acts of measurement are beyond the state's adjudicative competence." *Id.* (alteration in the original) (quoting Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 144 (2009)).
317. *Hosanna-Tabor*, 565 U.S. at 194–95.

While these concerns are certainly valid, they do not invalidate the narrowed ministerial exception and the BFRD defense I propose. For one, not every discrimination case necessarily comes down to evaluating pretext. Some cases have such clear and direct evidence, like statements expressing discriminatory intent or stereotyping, that the *McDonnell Douglas* balancing formula is unnecessary.[318]

If a case were to go to the pretext inquiry, the court can take steps to ensure the decision is being made by the judge or jury using neutral principles and not on the basis of evaluating or making a religious decision. The court can give limiting instructions to the jury that they must not consider the truth or validity of a religious belief, but merely whether it was sincerely held. In fact, that exact jury instruction was upheld as constitutional in *Ballard*.[319] As noted above, Justice Alito's concurrence asserts that a pretext inquiry will always take into account the centrality of the belief to the church as part of the weighing.[320] But that does not necessarily follow. The jury can be instructed not to evaluate whether a belief is central to a religious organization's faith,[321] and limit its analysis to the sincerity determination as demonstrated in *Dale*.[322] Finally, contrary to Justice Alito's assertion, the pretext inquiry more often focuses on completely different factors (such as the timing of the employment decision and statements made by decisionmakers before and after the decision, among others), thus the religious issues will not arise as often as he predicts.

> The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical,"—is the church's alone.

Id. (citation omitted) (quoting Kedroff v. Saint Nicholas Cathedral of the Russian Church in N. Am., 344 U.S. 94, 119 (1952)).

318. *See, e.g.*, Slack v. Havens, No. 72-59-GT, 1973 WL 339, at *5 (S.D. Cal. May 15, 1973), *aff'd and remanded*, 522 F.2d 1091 (9th Cir. 1975).
319. *See* United States v. Ballard, 322 U.S. 78, 88 (1944).
320. *See Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, J., concurring).
321. *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989). "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* And the entire judicial system's credibility depends on juries reliably following limiting instructions. *See* Richardson v. Marsh, 481 U.S. 200, 211 (1987).
322. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 651–53 (2000); *see also* Laycock, *supra* note 129.

And, if those safeguards are not enough, courts can always decide that the inquiry itself would involve too much entanglement, in violation of the Church Autonomy Doctrine.[323] This doctrine, grounded in the Religion Clauses, allows courts to decide, on evaluation of the merits of the case, that the examination would entangle the courts too closely in matters of doctrine and theology.[324]

Thus, by using the more limited BFRD defense alongside existing defenses and limits, there are sufficient protections in place to prevent courts from making religious decisions for religious organizations, without a need to resort to a broad ministerial exception like the one articulated in *Hosanna-Tabor*.

2. Limiting the Remedies

An additional concern of employment discrimination lawsuits was raised by the Court in *Hosanna-Tabor* at the end of the decision. In employment discrimination cases, one possible remedy is reinstatement for the employee who was discriminated against (or hiring or promotion of the plaintiff, as the facts of the case dictate).[325] If a court were to impose such an equitable remedy, then the concerns raised by the Court are triggered—the court, a state power, by requiring a church to reinstate, hire, or promote a minister, is determining "which individuals will minister to the faithful."[326] This concern can be addressed rather easily by limiting the remedies to compensatory damages only, once an employee is determined to be a minister of the religious organization. The Court addresses this possibility only briefly at the end of *Hosanna-Tabor*:

> Perich no longer seeks reinstatement, having abandoned that relief before this Court. But that is immaterial. Perich continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and

323. *See supra* Part I.
324. *See* discussion *infra*, Subpart III.A.3. For an example of when a court did not find a claim barred by the Church Autonomy Doctrine, see *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 619–21 (Ky. 2014). For an example of when the Church Autonomy Doctrine prevented a court from hearing a claim, see *Dermody v. Presbyterian Church (U.S.A.)*, 530 S.W.3d 467 (Ky. Ct. App. 2017). "We have carefully examined the issue and have determined we cannot provide Dermody the relief he seeks without excessive government entanglement into an ecclesiastical controversy . . . ." *Id.* at 474.
325. *See* 42 U.S.C. § 2000e-5(g)(1).
326. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012).

> would be no less prohibited by the First Amendment than an order overturning the termination. Such relief would depend on a determination that *Hosanna-Tabor* was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception.[327]

Here, the Court's reasoning begs the question. The First Amendment does not require a broadly defined ministerial exception—just one that does not allow the state to select a minister for a religious organization. The means to accomplish that goal can vary. In *Hosanna-Tabor* the Court chooses a broad ministerial exception, and then argues that compensatory damages would violate its chosen exception. But compensatory damages do not, per se, violate the Constitution.

A helpful case to demonstrate this is *Bob Jones University v. United States*.[328] There, a religious college had a policy that prohibited interracial dating or marriages, based on its religious beliefs. The IRS took away the college's charitable status as a result. In the subsequent court proceedings, the school raised First Amendment Free Exercise arguments. The Supreme Court rejected those arguments:

> The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.[329]

The Court also noted that, while "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools," the decision "will not prevent those schools from observing their religious tenets."[330]

In a similar way, allowing compensatory damages for discrimination may have some impact on a religious organization's free exercise of its religion in choosing its ministers, but it will not prevent them from observing their religious tenets, nor will the state be choosing a minister for them.

By limiting recovery to compensatory damages only (not allowing reinstatement, hiring, promotion, front pay, punitive damages, or attorney's fees), the plaintiff will still have an opportunity to recover for harm done to

327. *Id.* at 194 (citation omitted).
328. 461 U.S. 574 (1983).
329. *Id.* at 604 (footnote omitted).
330. *Id.* at 603–04.

him or her, yet the potential burden on the religious organization is de minimis (especially in comparison to the tax liability allowed by the Court in *Bob Jones*).

Freedom to select a minister of its choice according to its religious beliefs should not give the religious organization the additional freedom to harm a minister it has selected. When a religious organization discriminates against its employees, even its ministers, it should not be free from liability. By limiting the damages to avoid violating the Religion Clauses, a narrower ministerial exception provides protection and recovery for persons who, under current law, are completely left without either.

3. Understanding the Impact of the Narrower Ministerial Exception

To summarize the scope and impact of the new, narrower ministerial exception: Implementing a narrower ministerial exception will offer greater protections for employees and potential employees, while still avoiding First Amendment violations.

a. Evaluating More Factors Will Lead to Fewer False Positives

It will be harder for defendants to show that a plaintiff is a minister within the definition of the ministerial exception. By adding additional factors, courts will be able to discern more clearly whether a religious organization truly treated the plaintiff as a minister—a person called by the religious community of the organization, to serve in a ministerial capacity.

b. Narrowing the Defense Will Lead to Fewer Dismissals

A plaintiff falling within the ministerial exception is a necessary but not sufficient condition for dismissal of the case. The defendant religious organization will need to additionally show that the discrimination claimed in the complaint is protected by proving that the employment decision regarding the minister was traceable to a BFRD. Otherwise, unless the court determines that the trial would cause too much entanglement under the Ecclesiastical Abstention Doctrine, the case would go forward.

c. Limiting Damages Avoids First Amendment Violations While Allowing Recovery

By removing hiring, promotion, reinstatement, front pay, punitive damages, and attorney's fees, the narrower exception avoids the possible First

Amendment violations raised by the Court in *Hosanna-Tabor* by limiting the burden on the religious organization. Giving even limited recovery for plaintiffs who have been harmed by discrimination is superior to the complete absence of recovery for plaintiffs under the current ministerial exception.

CONCLUSION

Hosanna-Tabor stands in a line of cases marking the boundaries of the interaction of church autonomy and state sovereignty. The broad immunity the Court provides is a bridge too far. In its reasoning, the Court relied too much on the deference given to religious organizations in the case law without also noting where the deference ends. Because of that narrowed scope, the Court crafts a ministerial exception that in both theory and practice provides too broad an immunity to religious organizations, and consequently too narrow of a protection for employees against discrimination.

In crafting a better ministerial exception, this proposal stays true to the Religion Clauses of the First Amendment, as well as the jurisprudence of the Court over time—to balance that "delicate accommodation" between the freedoms protected by the First Amendment, while allowing the government to faithfully fulfill its role of providing for the general welfare of all those within its borders.

It is, perhaps, a quixotic quest to question the ministerial exception, given that it was widely used by the circuit courts and unanimously affirmed by the Supreme Court in *Hosanna-Tabor*. But ideas with near universal affirmation can still be wrong. And quests pursuing justice, however quixotic, are always worthy.