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## The Ministerial Exception: Seeking Clarity and Precision Amid Inconsistent Application of the Hosanna-Tabor Framework

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# **THE MINISTERIAL EXCEPTION: SEEKING CLARITY AND PRECISION AMID INCONSISTENT APPLICATION OF THE *HOSANNA-TABOR* FRAMEWORK**

## **ABSTRACT**

*Supported by statute and the Constitution, the ministerial exception bars employees who are deemed “ministers” from bringing discrimination claims against their religious employer. Religious employers—whether a religious association, corporation, educational institution, or society—are exempted from Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating on the basis of religion. The ministerial exception is no longer limited to religious discrimination and has been expanded to apply in cases of gender, race, age, and disability discrimination.*

*In 2012, the Supreme Court affirmed that a constitutional ministerial exception existed and was supported by the Free Exercise and Establishment Clauses of the First Amendment. The Court set forth a four-factor test by which an employee’s “ministerial status” was to be assessed: (1) whether the religious institution held the employee out as a minister; (2) whether the employee’s title reflected a certain degree of religious training; (3) whether the employee used that title and held herself out to be a minister; and (4) whether the employee’s duties reflected a role in conveying and carrying out the mission of the church. The Court declined to adopt a rigid formula, leaving lower courts to interpret for themselves how these factors should be applied. Thus, lower courts were not only inconsistent in their analyses of subsequent cases, but also demonstrated a tendency toward favoring the religious employer. In 2020, the Supreme Court again addressed the ministerial exception, emphasizing function as key and broadening the exception’s potential application.*

*This Comment proposes a solution for the inconsistencies and ambiguities that have resulted from the Court’s four-factor test for classifying “ministers” who then fall within the “ministerial exception,” and thereby suggests that the Court’s most recent holding failed to properly contain the exception. First, the proposed solution requires a balance of function and title based upon a reasonable construction of the surrounding factual circumstances. Function should be given the greatest weight if satisfied, but factors relating to title should not be ignored. Second, the proposed solution requires an analysis into the religious importance of the employee and the circumstances proffered to support or refute that importance. The analysis must be conducted with an eye toward the purpose of the exception: avoiding government interference with*

*employment decisions relating to those employees whose functions are essential to the employer's religious mission.*

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## INTRODUCTION

Most employers in the United States are prohibited from engaging in discrimination based on religion, race, sex, disability, or national origin—such is the norm and thus the expectation of most employees. Most employers, however, are not religious employers. Religious employers, contrary to what may seem a key tenet of modern American jurisprudence, are not always subject to antidiscrimination laws. This apparent anomaly stems from Title VII of the Civil Rights Act of 1964, which states that the prohibition on employers with more than fifteen employees from discriminating on the basis of religion does not apply to “any religious corporation, association, educational institution, or society” that hires individuals of the associated religion to perform work connected with the activities of that religion.<sup>1</sup> In 1987, the Supreme Court upheld this exemption for religious organizations in *Presiding Bishop v. Amos*, holding that the exemption served the permissible goal of preventing significant or excessive governmental interference in matters of church governance.<sup>2</sup>

Over time, courts expanded their understanding of the statutory exemption to extend to forms of discrimination other than religious.<sup>3</sup> In 2012, the Supreme Court elevated this statutory accommodation into a constitutional mandate under the First Amendment, affirming the existence of a constitutional ministerial exception.<sup>4</sup> In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court held that a Lutheran school teacher, Cheryl Perich, was a minister and thus barred from bringing a discrimination claim against her employer.<sup>5</sup> Perich was a “called” teacher with significant religious training and background, who taught both secular and religious subjects, led her students in prayer, and led a school-wide chapel service about twice a year.<sup>6</sup> Perich brought suit, alleging she was terminated in retaliation for threatening to file a claim under the Americans with Disabilities Act (ADA)—a suit her employer argued was barred by the ministerial exception.<sup>7</sup> The Court adopted a four-factor test to determine whether the employee was a minister: (1) whether the religious institution held the employee out as a minister; (2) whether the employee’s title reflected a certain degree of religious training; (3) whether the employee used

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<sup>1</sup> 42 U.S.C. § 2000e-1.

<sup>2</sup> Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987).

<sup>3</sup> See, e.g., McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); *infra* note 59.

<sup>4</sup> Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 178. The Court explained that a “called” teacher is one “regarded as having been called to their vocation by God.” *Id.* at 177.

<sup>7</sup> *Id.* at 180.

that title and held herself out to be a minister; and (4) whether the employee's duties reflected a role in conveying and carrying out the mission of the church.<sup>8</sup> The Court held that the circumstances surrounding each of these factors indicated that the employee was a minister, though it declined to adopt a rigid formula that would define the correct balance of factors and a threshold of what is or is not enough to signify a minister.<sup>9</sup>

Until 2012, various circuits had applied different methods for determining whether an employee was a minister for purposes of the exception.<sup>10</sup> The most widely applied approach was the "primary duties test," which looked to whether the employee's duties consisted primarily of administering religion and serving the religious mission of the church.<sup>11</sup> Another version of that test balanced religious duties with non-religious duties.<sup>12</sup> Meanwhile, some circuits adopted a three-part test that considered (1) the criteria upon which the employment decision was made, (2) the employee's religious qualifications, and (3) whether the employee engaged in traditionally ecclesiastical activities.<sup>13</sup> The Second Circuit modified this test by adding a sliding scale where the more pervasively religious a religious institution was, the less religious an employee's role had to be to qualify as ministerial.<sup>14</sup> Though *Hosanna-Tabor* is precedent, its flexibility left lower courts with much discretion in deciding how they would interpret the test and to what extent they would adopt and apply the Court's four-factor analysis—leading to inconsistency in application and results.<sup>15</sup> While the employee's function, the fourth factor, has been generally accepted as the most

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<sup>8</sup> *Id.* at 191–92.

<sup>9</sup> *Id.* at 190.

<sup>10</sup> *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008); *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

<sup>11</sup> *Rayburn*, 772 F.2d at 1169; *accord* *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1243–44 (10th Cir. 2010); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 778 (6th Cir. 2010); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007); *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007).

<sup>12</sup> *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991); *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006).

<sup>13</sup> *Starkman*, 198 F.3d at 176–77; *accord* *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1039–41 (7th Cir. 2006); *Musante v. Notre Dame of Easton Church, No. 3:01CV2352(MRK)*, 2004 U.S. Dist. LEXIS 5611, at \*15–18 (D. Conn. Mar. 30, 2004).

<sup>14</sup> *Rweyemamu*, 520 F.3d at 208.

<sup>15</sup> *Aparicio v. Christian Union, Inc.*, 18-CV-0592(ALC), 2019 U.S. Dist. LEXIS 55938, at \*18–19 (2d Cir. Mar. 29, 2019) (holding that the Director of Public Affairs was not a minister). *Compare* *Fratello v. Roman Cath. Archdiocese of N.Y.*, 863 F.3d 190, 210 (2d Cir. 2017) (holding that the school principal was a minister), *and* *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 662 (7th Cir. 2018) (holding that the school teacher was a minister), *with* *Biel v. St. James Sch.*, 911 F.3d 603, 610–11 (9th Cir. 2018) (holding that the school teacher was not a minister).

important consideration,<sup>16</sup> courts have diverged on how much weight should be given to the first three factors, with some courts choosing to ignore them altogether.<sup>17</sup> Circuits have also varied on how many of the four factors should be present and how strongly each factor must weigh in favor of applying the exception.<sup>18</sup>

The ministerial exception is alive and well today, and its ambiguities once again carried it to the Supreme Court in the 2020 case *Our Lady of Guadalupe School v. Morrissey-Berru*, which originated in the Ninth Circuit.<sup>19</sup> The circuit court in *Morrissey-Berru* held that the four *Hosanna-Tabor* factors favored the conclusion that the employee was not a minister.<sup>20</sup> However, where most courts would have likely held that the extensive nature of the employee's religious functions sufficed to prove ministerial status, the Ninth Circuit focused primarily on the lack of any titular proof of ministerial status rather than the existence of highly significant religious functions.<sup>21</sup> By taking such a unique approach, the Ninth Circuit gave the Supreme Court the opportunity to revisit the guidance it had given in *Hosanna-Tabor*. The Supreme Court consolidated the case with *Biel v. St. James School*, another Ninth Circuit case, and certified the issue of whether adjudication of a claim is barred by the ministerial exception when an employee carries out important religious functions.<sup>22</sup> The Court held that the plaintiffs in both cases should have qualified under the exception,<sup>23</sup> that the Ninth Circuit had erred in treating the *Hosanna-Tabor* factors as necessary elements of a checklist,<sup>24</sup> and that the First Amendment bars the adjudication of such employment-discrimination claims.<sup>25</sup>

Based on the great level of discretion given to lower courts, now made broader by the Supreme Court,<sup>26</sup> it may become more difficult to contain

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<sup>16</sup> *Fratello*, 863 F.3d at 205; *Grussgott*, 882 F.3d at 661; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 198 (2012) (Alito, J., concurring).

<sup>17</sup> *Fratello*, 863 F.3d at 205 (giving little to no weight to title); *Grussgott*, 882 F.3d at 661 (noting that at most two *Hosanna-Tabor* factors were satisfied, and that function outweighed the more formalistic factors); *Biel*, 911 F.3d at 608 (adopting a reasonable construction in balancing function and title); *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, No. 17-56624, 769 F. App'x 460, 461 (9th Cir. 2019) (requiring satisfaction of both function and title).

<sup>18</sup> *See supra* note 17.

<sup>19</sup> *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

<sup>20</sup> *Morrissey-Berru*, 769 F. App'x at 460.

<sup>21</sup> *Id.*

<sup>22</sup> *Morrissey-Berru*, 140 S. Ct. at 2055–58 (2020).

<sup>23</sup> *Id.* at 2066–67.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2069.

<sup>26</sup> *Id.* at 2071–72 (Sotomayor, J., dissenting).

application of the ministerial exception to employees who serve the core religious purpose of the employer. The range of employees to whom the ministerial exception has been extended demonstrates the broad and perhaps improper application of the exception, which will only be furthered by the Court's decision in *Morrissey-Berru*. This broad application is particularly evident in cases involving teachers who have been tasked with teaching a secular subject, but who also have religious duties ranging from minor to predominant. While presumably a teacher with negligible religious duties should be differentiated from a teacher with significant and constant religious duties, many courts have not taken this approach, in part due to the subjectivity of what the religious employer itself would consider to be negligible versus significant and courts' fear of intruding on church autonomy in that expectation. Balancing facts in whichever way they see fit, courts have expanded the definition of "minister," and the lack of clear guidance by the Supreme Court prior to *Morrissey-Berru* and ambiguity in the statutory language permitted this expansion. The ministerial exception by its nature provides great freedom to religious employers in their employment decisions,<sup>27</sup> and courts have been extremely deferential to this freedom, tending to favor the religious employer.<sup>28</sup> While religious freedom is a positive and key tenet of the Constitution,<sup>29</sup> it cannot be extended so far as to impinge entirely on more recent—but also key—principles and rights, such as freedom from discrimination. Therefore, rather than broaden the exception even further, as was done in *Morrissey-Berru*, the test set forth by *Hosanna-Tabor* must be better defined to contain its application to employees who are ministerial to an extent that the exemption's purpose is served. Thus, this Comment proposes a solution that seeks to provide a clarified mode of analysis that limits application of the ministerial exception to employees whose functions are truly essential to fulfilling the religious mission of the employer.

Part I of this Comment provides the constitutional, statutory, and case law background that led to *Hosanna-Tabor*, the decision and analysis of the Court in *Hosanna-Tabor*, the lower courts' interpretations of the four-factor test, and the Supreme Court's 2020 reinterpretation of *Hosanna-Tabor*. Part II discusses the already proposed solutions to the criticized application of both the *Hosanna-Tabor* factors and the ministerial exception in general. Finally, Part III proposes a clarification of the four-factor analysis based on pre- and post-*Hosanna-Tabor*

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<sup>27</sup> 42 U.S.C. § 2000e-1.

<sup>28</sup> *Fratello v. Roman Cath. Archdiocese of N.Y.*, 863 F.3d 190, 210 (2d Cir. 2017); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 662 (7th Cir. 2018); *Penn v. N.Y. Methodist Hosp.*, 158 F. Supp. 3d 177, 182 (2d Cir. 2016).

<sup>29</sup> U.S. CONST. amend. I.

modes of analysis and based on the concerns raised by *Hosanna-Tabor*, the dissent in *Morrissey-Berru*, and the ministerial exception as a whole.

## I. BACKGROUND TO THE MINISTERIAL EXCEPTION

The principles of religious freedom protected by the First Amendment were key protections the founders sought to safeguard.<sup>30</sup> Despite their fundamental importance to the U.S. Constitution, there has been much debate as to how these principles, namely freedom to exercise and freedom from establishment, should be applied in cases involving religious institutions and their ministers.<sup>31</sup> This Part will serve as a primer to the most current discussion surrounding the exception, in four sections. Section A discusses the history of the ministerial exception. Section B analyzes *Hosanna-Tabor*, the case that elevated the ministerial exception to a constitutional mandate. Section C examines the current circuit splits regarding the application of *Hosanna-Tabor*, and how the predictions of both the critics and champions of *Hosanna-Tabor* have come to fruition in those cases. Finally, Section D addresses the Supreme Court's most recent decision surrounding the ministerial exception: *Morrissey-Berru*.

### A. History of the Ministerial Exception

The ministerial exception has its roots in the First Amendment of the Constitution<sup>32</sup> and has been further informed by statute,<sup>33</sup> along with various cases.<sup>34</sup> As it exists today, the exemption is understood to allow a religious institution to hire or fire their “ministers” free from interference by the state, even if those decisions violate state or federal antidiscrimination laws.<sup>35</sup> A secular court's involvement is limited to determining whether the employee bringing a claim is a “minister” and therefore covered by the exemption.<sup>36</sup> This section will first address the statutory basis for the exception, followed by the constitutional bases for the exception and the resulting case law.

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<sup>30</sup> JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 41 (4th ed. 2016).

<sup>31</sup> *Id.* at 235–38.

<sup>32</sup> U.S. CONST. amend. I.

<sup>33</sup> 42 U.S.C. § 2000e-1.

<sup>34</sup> See *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169–71 (4th Cir. 1985); *Alcazar v. Corp. of the Cath. Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010).

<sup>35</sup> See, e.g., *McClure*, 460 F.2d at 553; *Rayburn*, 772 F.2d at 1169–71; *Alcazar*, 627 F.3d at 1292.

<sup>36</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

### 1. *Statutory Basis*

The Civil Rights Act of 1964 “prohibits employers with more than fifteen employees from discriminating on the basis of religion.”<sup>37</sup> However, section 702 of Title VII of the Act provides that this prohibition does not apply to “any religious corporation, association, educational institution, or society” that hires individuals of the associated religion to perform work connected with the activities of that religion.<sup>38</sup> The exemption to section 702 was upheld in 1987 by the Court in *Presiding Bishop v. Amos*.<sup>39</sup> In *Amos*, a building engineer for a gymnasium subunit of The Church of Jesus Christ of Latter-day Saints was terminated because he failed to meet the qualifications for membership in the church.<sup>40</sup> The employee brought a claim under the Civil Rights Act of 1964, alleging discrimination on the basis of religion.<sup>41</sup> The Church defended its decision based on section 702 of Title VII.<sup>42</sup> The employee engineer argued that section 702 did not apply and claimed that if section 702 was construed to permit religious discrimination by religious employers against employees in nonreligious positions, it would violate the Establishment Clause and unjustifiably favor religion.<sup>43</sup> The Court, however, disagreed with the employee’s argument.<sup>44</sup> It held that “applying section 702’s exemption to religious organizations’ secular activities does not violate the Establishment Clause,”<sup>45</sup> and that applying the section 702 exemption is “not unconstitutional simply because it allows churches to advance religion” as long as the government has not itself “advanced religion through its own activities and influence.”<sup>46</sup> Such “benevolent neutrality” serves the “permissible legislative purpose . . . [of] alleviat[ing] significant governmental interference with the ability of religious institutions to define and carry out their religious missions.”<sup>47</sup>

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<sup>37</sup> WITTE & NICHOLS, *supra* note 30, at 234.

<sup>38</sup> 42 U.S.C. § 2000e-1; *see* WITTE & NICHOLS, *supra* note 30, at 234.

<sup>39</sup> *Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1985).

<sup>40</sup> *Id.* at 330.

<sup>41</sup> *Id.* at 331.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; *see* WITTE & NICHOLS, *supra* note 30, at 235.

<sup>44</sup> *Amos*, 483 U.S. at 339.

<sup>45</sup> *Id.* at 336.

<sup>46</sup> *Id.* at 337 (stating that government interference that advances religion through its own activities and influence is the type of interference that would have the forbidden “effects” set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which applied a three-part test to determine whether a challenged law serves a “secular legislative purpose”).

<sup>47</sup> *Id.* at 334, 335 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)).

While section 702 ensures a primarily religious institution's ability to choose its employees, it "only allows such organizations to favor employees who share their religion" and does not address discrimination on any other basis.<sup>48</sup> Section 702 thus provides background to the development of the ministerial exception, but it does not provide an answer to the question of who qualifies as a minister and whether religious institutions could discriminate on bases other than religion itself. The ministerial exception, therefore, built upon the exemption from Title VII and developed further in response to Title VII's ambiguities.<sup>49</sup>

## 2. *Constitutional Bases in Pre-Hosanna-Tabor Case Law*

A constitutional justification for the ministerial exception based on the First Amendment arose for the first time in 1972, when the Fifth Circuit articulated that the ministerial exception, as an exemption to Title VII, applied in instances of discrimination outside of just religious discrimination.<sup>50</sup> The holding in *McClure v. Salvation Army*<sup>51</sup> arose out of allegations of gender discrimination asserted by McClure, a female minister, against her employer, the Salvation Army Church.<sup>52</sup> McClure alleged that she had received a lower salary and fewer benefits than her male counterparts, and that she had been discharged because of her complaints to superiors and to the Equal Employment Opportunity Commission (EEOC).<sup>53</sup> The Salvation Army moved to dismiss, claiming that it was covered by the religious exemption of Title VII.<sup>54</sup> Agreeing with the Salvation Army, the court reasoned that applying Title VII to the employment relationship between church and minister would require an investigation into church practices, even if administrative, chipping at the wall of separation between church and state.<sup>55</sup> To allow such regulation by the government would unconstitutionally impinge on the religious freedom guaranteed by the First Amendment.<sup>56</sup> Therefore, the court determined that, despite the unspecific wording of section 702 of Title VII, "Congress did not intend . . . to regulate the employment relationship between church and minister."<sup>57</sup> *McClure* thus extended the Title VII exemption to cases of employment discrimination outside

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<sup>48</sup> WITTE & NICHOLS, *supra* note 30, at 234.

<sup>49</sup> *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 558, 560.

<sup>52</sup> *Id.* at 555.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 555–56.

<sup>55</sup> *Id.* at 560.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 560–61.

the realm of religion.<sup>58</sup> Thereafter, every lower federal court adopted *McClure*'s interpretation of the ministerial exception, extending it to cases of employment discrimination based on race, gender, age, and disability, and calling on the Free Exercise and Establishment Clauses of the First Amendment for support.<sup>59</sup>

Subsequent case law built upon the constitutional and statutory ministerial exception to develop standards to answer resulting ambiguities surrounding the exception. One early test was adopted by the Fifth Circuit in *Starkman v. Evans* in 1999,<sup>60</sup> and it was later followed by courts in the Second and Seventh Circuits.<sup>61</sup> The test called for the consideration of several factors to determine whether an employee qualified as a minister within the meaning of the exception, and it was articulated in three parts.<sup>62</sup> First, *Starkman*, which involved the employment of a Choirmaster and Director of Music at a Methodist church, required an examination of the hiring criteria.<sup>63</sup> Second, it required consideration of the employee's qualifications and authorization to "perform the ceremonies of the Church."<sup>64</sup> Last, it looked to whether the employee engaged in

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<sup>58</sup> *Id.*

<sup>59</sup> *Rockwell v. Roman Cath. Archdiocese*, 02-239-M, 2002 U.S. Dist. LEXIS 20992, at \*8-9 (1st Cir. Oct. 30, 2002) (gender); *Rweyemamu v. Cote*, 520 F.3d 198, 208-09 (2d Cir. 2008) (race); *Petruska v. Gannon Univ.*, 1:04-cv-80, 2008 U.S. Dist. LEXIS 54884, at \*24-26 (3d Cir. Mar. 31, 2008) (gender); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169-71 (4th Cir. 1985) (gender and race); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (disability); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225-26 (6th Cir. 2007) (disability); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 776-77 (6th Cir. 2010) (disability); *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1039-41 (7th Cir. 2006) (age); *McNeil v. Missouri Ann. Conf. of the United Methodist Church*, 2-10-cv-04154-NKL, 2010 U.S. Dist. LEXIS 98184, at \*10-12 (8th Cir. Sept. 20, 2010) (disability); *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1278 (9th Cir. 1982) (gender); *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010) (gender and age); *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007) (race); *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996) (gender).

<sup>60</sup> *Starkman*, 198 F.3d at 176-77.

<sup>61</sup> See *Tomic*, 442 F.3d at 1039-41; *Musante v. Notre Dame of Easton Church*, No. 3:01CV2352(MRK), 2004 U.S. Dist. LEXIS 5611, at \*15-18 (D. Conn. Mar. 30, 2004).

<sup>62</sup> *Starkman*, 198 F.3d at 176-77.

<sup>63</sup> *Id.* at 176. For example, was the hiring decision based upon the employee's religious background and experience, and upon the employee's ability to apply that experience to the position in question? Here, to be qualified for her role, the employee was required to have a master's degree in music and "extensive course work in Church Music in Theory and Practice, Choral Conducting, Worship, Choral Vocal Methods, Hymnology, Bible, Theology, Christian Education, and United Methodist History, Doctrine and Polity." *Id.* The job description for her position stated, "[T]he Director of Music is responsible for the planning, recruiting, implementing and evaluating of music and congregational participation in all aspects of the ministry at [the Church]." *Id.* The parties also did not dispute that religious music played an important role in the spiritual mission of the church. *Id.*

<sup>64</sup> *Id.* Here, the court found that the employee's duties of planning worship liturgy, "coordinat[ing] church and worship activities relating to the church's Music Ministry," rehearsing and conducting choirs, hiring "musicians and lower level music ministry directors, and writing articles about the church's Music Ministry for the weekly church bulletin" made her "qualified and authorized to perform the ceremonies of the church." *Id.*

traditionally ecclesiastical or religious activities, “including whether [she] ‘attend[ed] to the religious needs of the faithful.’”<sup>65</sup> The *Starkman* test asked clear questions to guide this analysis of ministerial status—clarity missing from some later cases that feared too much government involvement could arise from a court’s determination of what qualifies as “traditionally ecclesiastical or religious.”<sup>66</sup>

While the three-part *Starkman* test guided the Fifth, Second, and Seventh Circuits, the Second Circuit also recognized a sliding-scale analysis, referenced in *Rweyemamu v. Cote*, to determine whether an employee was a minister who fit within the exception.<sup>67</sup> While the “sliding-scale” approach was only later applied in *Penn v. N.Y. Methodist Hospital*, *Rweyemamu* was the first case to bring forth the idea.<sup>68</sup> The court in *Rweyemamu* held that a priest was barred under the statutory ministerial exception from bringing a race discrimination claim against his diocese and bishop.<sup>69</sup> While not the foundation of the court’s holding, the court recognized the “sliding-scale” and noted that “the more ‘pervasively religious’ the relationship between an employee and his employer, the more salient the free exercise concern becomes.”<sup>70</sup> Thus, the more religious an employer institution is, the less religious an employee’s role must be to qualify as a minister; the more religious an employee’s role is, the less religious the employer institution need be.<sup>71</sup> Through applying this scale, the court clarified that, while it believed courts should consider an employee’s function over his or her title or ordination status, that function test alone was “too rigid” an approach as it “failed to consider the nature of the dispute.”<sup>72</sup>

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<sup>65</sup> *Id.* at 176 (quoting EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980)). In *Starkman*, the employee claimed that “she [had been] designated to be a ‘ministerial presence’ to ailing parishioners on occasion” and that “for her and her congregation, music constitutes a form of prayer that is an integral part of worship services and Scripture readings.” *Id.* at 176; see EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 285 (5th Cir. Unit A July 1981) (noting that traditionally ecclesiastical or religious tasks are those that are “essential to the propagation of [the church’s] doctrine”).

<sup>66</sup> *Starkman*, 198 F.3d at 175 (quoting *Sw. Baptist*, 651 F.2d at 284).

<sup>67</sup> *Penn v. N.Y. Methodist Hosp.*, 158 F. Supp. 3d 177, 182 (2d Cir. 2016) (first framing the analysis as a “sliding-scale”); *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (citing Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539–40 (1979)); Bagni, *supra* (introducing the idea of what came to be called the sliding-scale analysis stemming from the idea that there is a “spiritual epicenter” of a church, “which must be outside the scope of civil regulation because otherwise there would invariably be too great an infringement of free-exercise rights[;]” however, once the church “acts outside this epicenter and moves closer to the purely secular world, it subjects itself to secular regulation proportionate to the degree of secularity of its activities and relationships”).

<sup>68</sup> *Rweyemamu*, 520 F.3d at 208 (citing Bagni, *supra* note 67, at 1514); *Penn*, 158 F. Supp. 3d at 182.

<sup>69</sup> *Rweyemamu*, 520 F.3d at 200, 210.

<sup>70</sup> *Id.* at 208 (citing Bagni, *supra* note 67, at 1514).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* The court also stated that even a discrimination suit by a lay employee could interfere with the

The most widely applied test prior to 2012 was the “primary duties test” set forth by the Fourth Circuit in *Rayburn v. General Conference of Seventh-Day Adventists* and later adopted by the Sixth, Tenth, and Eleventh Circuits.<sup>73</sup> This test stated that, “as a general rule, if the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered ‘clergy.’”<sup>74</sup> This analysis also involves a determination of whether a “position is important to the spiritual and pastoral mission of the church.”<sup>75</sup> Other circuits, though not expressly, adopted a version of the “primary duties” test, which interpreted primary duties in the following manner: if an employee’s duties are primarily religious in relation to his or her duties as a whole, that employee will be considered a minister; if the employee’s duties are not primarily religious, that employee is not a minister.<sup>76</sup> Both interpretations

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Constitution if the relationship was so “pervasively religious” that judicial interference could “run afoul of the Constitution.” *Id.*

<sup>73</sup> *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *accord* *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1243–44 (10th Cir. 2010); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 778 (6th Cir. 2010); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007); *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007). *Rayburn* derived this “primary duties test” from the same *Columbia Law Review* article *Rweyemamu* referenced. *See Rayburn*, 772 F.2d at 1169; *Bagni*, *supra* note 67, at 1545. Some circuits, such as the Ninth, declined to adopt any uniform test of “general applicability” and instead applied a “reasonable construction of the ministerial exception.” *Alcazar v. Corp. of the Cath. Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010). In *Alcazar*, the court cites to a prior Ninth Circuit case to support its holding. *Id.* at 1291. In *EEOC v. Pacific Press Publishing Ass’n*, the court analogized to a Fifth Circuit case in which the employee, a secretary, was “insufficiently like a minister to trigger the exception” as her role “did not ‘go to the heart of the church’s function in the manner of a minister or a seminary teacher’ and . . . was not the type of critically sensitive position within the church that *McClure* sought to protect.” 676 F.2d 1272, 1278 (1982) (citing *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283–85 (5th Cir. Unit A July 1981)). In *Alcazar*, the plaintiff “affirmatively allege[d] he was a seminarian,” and “under any reasonable construction of the ministerial exception,” he met the definition of a minister. 627 F.3d at 1292. The facts demonstrated a position of the sort *McClure* sought to protect and was in stark contrast with the secretarial position at issue in *Pacific Press*. Therefore, the court determined it was unnecessary to conduct an in-depth analysis of the scope of the ministerial exception. *Id.*

<sup>74</sup> *Rayburn*, 772 F.2d at 1169 (quoting *Bagni*, *supra* note 67, at 1545). In *Rayburn*, the court found that the following duties of the employee, an associate in pastoral care, were primarily religious: “the associate in pastoral care at [the Church] was pastoral advisor to the Sabbath School that introduces children to the life of the church,” led Bible study groups, served as a counselor and pastor to the singles group as liaison between the church and those receiving its message, led the congregation in services and solemn rites, and occasionally preached from the pulpit. *Id.* at 1168. The court also discussed the sensitivity requirements of the position, and the presumptive need people have for spiritual leadership when they turn to a pastor for help—engaging in what may be too ecclesiastical for the *Hosanna-Tabor* Court. *Id.*

<sup>75</sup> *Id.* at 1169.

<sup>76</sup> *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991); *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006). In *Redhead*, the court found that a teacher who taught one hour of Bible study each day, attended worship services with her students, but otherwise taught purely secular subjects, was not a minister. *Redhead*, 440 F. Supp. 2d. at 221; *see also* Katherine Hinkle, Comment, *What’s in a Name? The Definition of “Minister” in Hosanna-Tabor Evangelical Lutheran Church*

of the “primary duties” test provided a fairly clear mode of analysis—the employee is a minister if either (1) religious duties outweigh secular duties; or (2) the employee’s duties consist of those laid out in *Rayburn*, and the employee’s role is of spiritual or pastoral importance to the church’s mission.<sup>77</sup> The “primary duties” test implies in name a balancing of secular and religious duties in some manner, and it places its entire emphasis on function.

### B. Hosanna-Tabor and Its Reception

In the 2012 case *Hosanna-Tabor v. EEOC*, the Supreme Court made the ministerial exception a constitutional command and set forth an analytical framework by which to determine when an employee qualifies as a minister for purposes of the exception.<sup>78</sup> *Hosanna-Tabor* arose after respondent Cheryl Perich, a “called”<sup>79</sup> teacher at Hosanna-Tabor Evangelical Lutheran Church and School, was terminated for what she alleged was retaliation for threatening to file an ADA claim.<sup>80</sup> Hosanna-Tabor hired Perich as a “called” teacher after she had completed her training, upon which Perich was “designat[ed as] a commissioned minister.”<sup>81</sup> Her duties included teaching secular subjects, teaching a religion class, leading her students in daily prayer and devotional exercises, taking her students to a weekly school-wide chapel service, and leading the chapel service about twice a year.<sup>82</sup> After five years of teaching at Hosanna-Tabor, Perich developed narcolepsy and spent the first part of the 2004–05 school year on disability leave.<sup>83</sup> She alerted the school in January 2005 that she would be able to return the following month.<sup>84</sup> The school notified Perich that her position had been filled by a lay teacher for the remainder of the

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and Sch. v. EEOC, 34 BERKELEY J. EMP. & LAB. L. 283, 305–07 (2013) (citing *Rayburn*, 772 F.2d at 1169). *But see* Clapper v. Chesapeake Conf. of Seventh-Day Adventists, No. 97-2648, 1998 U.S. App. LEXIS 32554 (4th Cir. 1998) (focusing on the employee’s primary duties in the context of the school’s overall religious purpose, rather than the amount of time spent on religious and secular duties each day, respectively, and holding that an employee who taught elementary school, led students in prayer, conducted ten minutes of worship daily, and taught Bible study was a minister fulfilling the goal of the church).

<sup>77</sup> *Scharon*, 929 F.2d at 362–63; *Rayburn*, 772 F.2d at 1169; *Clapper*, 1998 U.S. App. LEXIS 32554, at \*18–21; *Ross*, 471 F. Supp. 2d at 1311.

<sup>78</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 173 (2012).

<sup>79</sup> The school in *Hosanna-Tabor* classifies its teachers as either “called” or “lay.” The court explains, “[c]alled’ teachers are regarded as having been called to their vocation by God. To be eligible . . . a teacher must complete certain academic requirements, including a course of theological study. Once called, a teacher receives the formal title ‘Minister of Religion, Commissioned.’” *Id.* at 177. A lay teacher does not require said training and need not be Lutheran, but generally performs the same duties as a called teacher. *Id.*

<sup>80</sup> *Id.* at 179.

<sup>81</sup> *Id.* at 178.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

school year, expressed concern that Perich was not ready to reassume her role, and offered to pay a portion of Perich's health insurance premiums in exchange for her resignation as a "called" teacher.<sup>85</sup> Perich refused this offer, instead reporting to school and refusing to leave until she received written documentation stating that she had returned to work.<sup>86</sup> The principal then informed Perich she would likely be fired.<sup>87</sup>

Perich subsequently stated her intent to assert her legal rights, and she was soon terminated for "insubordination and disruptive behavior" along with the "damage she had done to her 'working relationship' with the school by 'threatening to take legal action.'"<sup>88</sup> The foregoing violated the church's requirement for internal dispute resolution—a requirement core to Lutheran Church doctrine.<sup>89</sup> Perich then filed a charge with the EEOC claiming retaliatory termination in violation of the ADA, and the EEOC brought suit against Hosanna-Tabor.<sup>90</sup> Hosanna-Tabor argued that, based on the ministerial exception, this suit was barred.<sup>91</sup> The district court agreed and granted summary judgment for Hosanna-Tabor.<sup>92</sup> However, the Sixth Circuit vacated and remanded, holding that Perich did not qualify as a minister under the exception.<sup>93</sup> Both the district court and Sixth Circuit court applied the primary duties test in their analyses, but the Sixth Circuit contended that the district court had erred in its legal conclusion relying on Perich's title.<sup>94</sup>

By granting certiorari, the Supreme Court for the first time addressed the issues of whether the ministerial exception was implicated in an employment discrimination suit, and if so, what the analytical framework should be when applying the exception.<sup>95</sup> The Court held that the exception was implicated, as the present case "concern[ed] government interference with an internal church decision that affect[ed] the faith and mission of the church itself."<sup>96</sup> It also

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 178–79.

<sup>87</sup> *Id.* at 179.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 180.

<sup>90</sup> *Id.* at 179–80.

<sup>91</sup> *Id.* at 180.

<sup>92</sup> EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 892 (E.D. Mich. 2008).

<sup>93</sup> EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 782 (6th Cir. 2010).

<sup>94</sup> *Id.* at 778–81.

<sup>95</sup> *Hosanna-Tabor*, 565 U.S. at 188.

<sup>96</sup> *Id.* at 190. *Contra* Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (holding that government regulation of outward, physical acts done for sacramental purpose but in violation of "a valid and neutral law of general applicability" was permitted). Here, while the ADA's prohibition on retaliation is "a

looked to the purpose of the exception in Title VII in support of its holding that the exception applied, noting that

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. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs . . . infring[ing] the Free Exercise Clause . . . [and] the Establishment Clause.<sup>97</sup>

The Court made clear its reluctance to infringe, in any way, on internal church decision-making in fear of infringing on the church's First Amendment rights.<sup>98</sup> It reasoned that the risk of infringement calls for the application of the ministerial exception.<sup>99</sup>

This case affirmed that the First Amendment's Free Exercise and Establishment Clauses support the ministerial exception.<sup>100</sup> The Free Exercise Clause, the Court held, protects "a religious group's right to shape its own faith and mission through its appointments,"<sup>101</sup> and prevents the state from interfering with a religious group's freedom to select its own ministers.<sup>102</sup> Thus, by imposing an unwanted minister on a religious organization, the state infringes on the Free Exercise Clause.<sup>103</sup> Demonstrating the weight of this right, the Supreme Court noted in *Sherbert v. Verner* that "only the gravest abuses, endangering paramount interests" could justify infringement by the government on an individual's free exercise of religion.<sup>104</sup> *Sherbert* established that not only would a law that discriminates on the basis of religion violate the Free Exercise Clause, but so, too, would "purely secular legislation [such as the ADA] that imposes unintended burdens upon the free exercise of religion."<sup>105</sup>

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion."<sup>106</sup> In the context of a religious

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valid and neutral law of general applicability," the case is distinct because it concerns internal church affairs. *Hosanna-Tabor*, 565 U.S. at 190.

<sup>97</sup> *Hosanna-Tabor*, 565 U.S. at 188–89.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 184.

<sup>101</sup> *Id.* at 188.

<sup>102</sup> *Id.* at 184.

<sup>103</sup> *Id.* at 188.

<sup>104</sup> *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

<sup>105</sup> Hinkle, *supra* note 76, at 291 n.37.

<sup>106</sup> U.S. CONST. amend. I. In *Amos*, the Court held that a ministerial exception under section 702 did not violate the Establishment Clause after the employee argued it did so by unjustifiably favoring religion. Corp. of

institution and its employees, *Hosanna-Tabor* stated that the Establishment Clause “prevents the Government from appointing ministers.”<sup>107</sup> The Court stated that if it applied antidiscrimination laws to religious organizations, it would in turn give “the state the power to determine which individuals will minister to the faithful.”<sup>108</sup> Such would be an act of “ecclesiastical decision[-making]” in violation of the Establishment Clause.<sup>109</sup>

The EEOC argued that *Hosanna-Tabor*’s strongly discretionary approach diverged from precedent set in *Employment Division v. Smith*, a 1990 case that called for weak neutrality regarding the Free Exercise and Establishment Clauses.<sup>110</sup> *Smith* weakened the Free Exercise and Establishment Clauses by deviating from the strict level of scrutiny set forth in *Sherbert*.<sup>111</sup> The *Smith* Court held the ADA to be a “valid and neutral law of general applicability and therefore applicable to the Church, even if it imposed a ‘substantial burden’ on the Church school’s operation.”<sup>112</sup> While the Court in *Smith* held, consistent with prior cases, that an individual cannot claim a religious exemption from general criminal laws, it went further in shaping the standard of review to be used in free exercise cases.<sup>113</sup> *Smith* represented a shift from the strict protection of religious liberty to a weak neutrality approach.<sup>114</sup>

Contrary to the approach in *Smith*, *Hosanna-Tabor* set a precedent of strong deference to religious institutions in their decisions to terminate employees for any reason, and it held that a secular court cannot question those reasons.<sup>115</sup> In response to the EEOC, the Court distinguished the two cases to justify its divergence from *Smith*, which otherwise may not have supported holding in favor of such strong religious deference.<sup>116</sup> All nine justices unanimously agreed that there was a “ministerial exception grounded in the Religion Clauses of the

Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987).

<sup>107</sup> *Hosanna-Tabor*, 565 U.S. at 184.

<sup>108</sup> *Id.* at 188–89.

<sup>109</sup> *Id.*; WITTE & NICHOLS, *supra* note 30, at 223, 237.

<sup>110</sup> *Hosanna-Tabor*, 565 U.S. at 190.

<sup>111</sup> *Emp. Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877–78 (1990).

<sup>112</sup> WITTE & NICHOLS, *supra* note 30, at 237. In *Smith*, an individual’s ingestion of peyote as a sacramental religious practice neither prohibited the termination of his employment, nor his disqualification from state unemployment compensation. *Id.* (citing *Smith*, 494 U.S. at 877–79).

<sup>113</sup> *Id.* at 147.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 237–38 (explaining that the reason for termination need not be religious).

<sup>116</sup> *Id.* at 237; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). In *Hosanna-Tabor*, the Court stated that, while *Smith* “involved government regulation of ‘outward physical acts’ (ingesting peyote) . . . the *Hosanna-Tabor* facts concerned ‘an internal church decision that affects the faith and mission of the church itself.’” *Id.* By making this distinction, the Court justified giving a different level of deference to religious institutions in cases like *Hosanna-Tabor* than in cases like *Smith*.

First Amendment,” and that a court’s involvement in employment discrimination suits against religious institutions was limited to a non-ecclesiastical analysis of whether the employee is a “minister.”<sup>117</sup>

After determining the applicability of the ministerial exception, the Court proceeded to analyze the specific facts of the case.

### *1. Analytical Framework*

The Court in *Hosanna-Tabor* set forth a four-part test to determine whether an employee is a minister for purposes of the ministerial exception: (1) whether the religious institution held the employee out as a minister; (2) whether the employee’s title reflected a certain degree of religious training; (3) whether the employee used the title and held herself out to be a minister; and (4) whether the employee’s job duties reflected a role in conveying and carrying out the mission of the church.<sup>118</sup> The Court declined to adopt a “rigid formula” and instead called for consideration of all the circumstances of Perich’s employment.<sup>119</sup> The resulting test takes into account both the title and function of the employee in question, the first three factors falling under the category of “title” and the fourth under “function.”<sup>120</sup> This subsection conducts a detailed discussion of each part to clarify the factors under consideration, and later analyzes whether their application by lower courts has achieved the Supreme Court’s purpose or whether they require further definition.

First, the Court asked whether the religious institution held the employee out as a minister.<sup>121</sup> Here, *Hosanna-Tabor* did hold Perich out to be a minister—with a role distinct from most of its members—in the following ways: *Hosanna-Tabor* issued Perich a “diploma of vocation” entitling her “Minister of Religion, Commissioned”; it tasked Perich with performing her office “according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures”; the congregation prayed for her “ministrations” to be blessed by God; and the congregation periodically reviewed Perich’s ministerial skills and responsibilities and provided for her continuing education.<sup>122</sup>

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<sup>117</sup> *Hosanna-Tabor*, 565 U.S. at 190; WITTE & NICHOLS, *supra* note 30, at 236.

<sup>118</sup> *Hosanna-Tabor*, 565 U.S. at 191–92.

<sup>119</sup> *Id.* at 190.

<sup>120</sup> *Id.* at 191–92.

<sup>121</sup> *Id.* at 191.

<sup>122</sup> *Id.*

Second, the Court looked to the employee's title and asked whether that title reflected a certain degree of religious training.<sup>123</sup> Here, the Court held that Perich's title as "Minister of Religion, Commissioned" did reflect "a significant degree of religious training followed by a formal process of commissioning."<sup>124</sup> It so held because "to become a commissioned minister, Perich had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher."<sup>125</sup> She was required to petition for and obtain the endorsement of her local Synod,<sup>126</sup> answer a series of ministry-related questions, and pass an oral examination administered by a Lutheran college faculty committee.<sup>127</sup> It took Perich six years to fulfill these requirements, and after fulfilling them, she was still only commissioned upon election by the congregation in recognition of "God's call to her to teach."<sup>128</sup> Thereafter, Perich could only have her call rescinded by "a supermajority vote of the congregation—a protection designed to allow her to 'preach the Word of God boldly.'"<sup>129</sup>

Third, the Court looked to the employee's own use of the title and asked whether she held herself out as a minister.<sup>130</sup> Here, Perich held herself out as a minister of the church by accepting the formal call to religious service, "claiming a special housing allowance on her taxes only available to employees earning their compensation 'in the exercise of the ministry,'" and indicating in a form she submitted to the Synod after termination that she hoped to rejoin the teaching ministry.<sup>131</sup>

Fourth, the Court looked to the employee's job duties and asked whether those duties reflected a role in conveying and carrying out the mission of the church.<sup>132</sup> Here, Perich was expressly charged with fulfilling the mission of the church,<sup>133</sup> and in doing so her responsibilities included teaching religion to her

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 174.

<sup>125</sup> *Id.* at 191.

<sup>126</sup> A synod is a regional or national organization of Lutheran congregations. *Synod*, MERRIAM-WEBSTER, <https://merriam-webster.com/dictionary/synod> (last visited Nov. 20, 2020). Here, the term refers to the Missouri Synod, the second-largest Lutheran denomination in America, of which Hosanna-Tabor is a member. *Hosanna-Tabor*, 565 U.S. at 191.

<sup>127</sup> *Hosanna-Tabor*, 565 U.S. at 191.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 192 (internal quotations omitted). Perich also stated, "I feel that God is leading me to serve in the teaching ministry . . . I am anxious to be in the teaching ministry again soon." *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* Perich was charged with "lead[ing] others toward Christian maturity" and "teach[ing] faithfully the

students four days a week, leading them in prayer three times a day, taking them to a school-wide chapel service once a week, leading and curating that service about twice a year, and leading her students in brief devotional exercises each morning.<sup>134</sup> Based on the foregoing facts, the Court held that, “as a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation.”<sup>135</sup>

The Court found that Perich merited ministerial status under each of the four factors of analysis: the Hosanna-Tabor church and school held her out to be a minister, her title reflected ministerial status, she held herself out to be a minister, and her job duties reflected ministerial function.<sup>136</sup> Though not all four factors were or are necessary for ministerial status to be found, the Court stated they were all met here.<sup>137</sup> Thus, the Court provided guidance to lower courts in the form of a four-factor test, but did so in a manner so averse to rigidity that it left lower courts with wide discretion to interpret as they saw fit.

## 2. Critics and Champions

*Hosanna-Tabor* evoked both support and criticism. Such a result did not take long, beginning with Justice Alito’s concurrence in *Hosanna-Tabor*, which was joined by Justice Kagan.<sup>138</sup> While Justice Alito agreed with the Court’s opinion, he addressed the complexity of the term “minister”<sup>139</sup> and the variable definitions of “ordination” among religions<sup>140</sup>—both of which complicate the analysis set forth in *Hosanna-Tabor*.<sup>141</sup> Further, he noted that some faiths consider a large percentage of their members to be part of the ministry as a whole, blurring any line of distinction among employees of the religious institution.<sup>142</sup> Justice Alito argued that, based on this wide variability, ordination and title have not and should not be determinative of an employee’s status.<sup>143</sup>

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Word of God, the Sacred Scripture, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church.” *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 191–92.

<sup>138</sup> *Id.* at 198 (Alito, J., concurring).

<sup>139</sup> *Id.* (noting that the term “minister” is common in Protestant denominations to refer to members of their clergy, but rarely used among other religious groups, such as Catholics, Jews, Muslims, Hindus, and Buddhists).

<sup>140</sup> *Id.* (noting that ordination has similar significance in most Christian churches and Judaism, but no counterpart in some Christian denominations and other religions).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 202.

<sup>143</sup> *Id.* Justice Alito also cites to *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. Unit A July 1981), to exemplify the longstanding standard that formal ordination is not necessary for the ministerial

Rather, the ministerial exception should apply to

[a] general category of ‘employees’ whose functions are essential to the independence of practically all religious groups . . . includ[ing] those who serve in positions of leadership . . . perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.<sup>144</sup>

If the religious institution finds that such an employee is no longer able to perform these key religious functions, then the institution has the right to remove the employee with the protections of the First Amendment.<sup>145</sup> Justice Alito aimed to make clear that it was Perich’s religious function, rather than her ordination status, that made her the type of employee a church must be free to appoint or dismiss under the First Amendment and who is subject to the internal dispute resolution doctrine of the Lutheran Church.<sup>146</sup>

Justice Thomas also concurred in the decision in *Hosanna-Tabor*, but for a different reason than Justices Alito and Kagan.<sup>147</sup> He expressed a fear that judicial creation of any multifactor analysis or test would disadvantage religions “whose beliefs, practices, and membership are outside of the ‘Mainstream’ or unpalatable to some” and possibly pressure religious groups to “conform its beliefs and practices regarding ‘ministers’ to the prevailing secular understanding” out of fear of liability.<sup>148</sup> Thus, he argued, evidence demonstrating that a religious organization sincerely considers an employee to be a minister should be sufficient to conclude the employee is covered by the ministerial exception.<sup>149</sup>

One scholarly criticism of the *Hosanna-Tabor* test is that the Supreme Court’s decision fails to provide adequate guidance to lower courts, paving the way for “excessive entanglement with religion in violation of the Establishment Clause.”<sup>150</sup> Such entanglement could arise if lower courts have to delve too deeply into specific religious beliefs and doctrines to determine whether an employee plays a role in worship or faith-spreading that merits ministerial

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exception to apply. Lower courts, he argues, should keep “an eye toward the function of the position,” the label serving as “merely a shorthand.” WITTE & NICHOLS, *supra* note 30, at 238.

<sup>144</sup> *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

<sup>145</sup> *Id.* at 199.

<sup>146</sup> *Id.* at 206.

<sup>147</sup> *Id.* at 196–98 (Thomas, J., concurring).

<sup>148</sup> *Id.* at 197.

<sup>149</sup> *Id.* at 197–98.

<sup>150</sup> Hinkle, *supra* note 76, at 337.

function status.<sup>151</sup> Another argument criticizes the Supreme Court’s rejection of the primary duties test through an overemphasis on the importance of title<sup>152</sup> and a lack of balancing between religious and secular duties.<sup>153</sup> *Hosanna-Tabor* deviated from the primary duties test, noting that even if secular duties occupy more time than religious duties, some religious duty combined with title or outward representation can indicate “minister.”<sup>154</sup> The variation among circuits regarding which factors weigh heaviest has led to inconsistent application of the test among different courts in cases with similar facts.<sup>155</sup>

Finally, the *Hosanna-Tabor* decision represents a “shift in the prioritization of the value of antidiscrimination laws.”<sup>156</sup> Despite legislation demonstrating a commitment to preventing discrimination, the Court indicated a deeper commitment to religious freedom.<sup>157</sup> In turn, this shift could lead to increased discrimination against employees of religious institutions—a concern raised by scholars and religious leaders alike.<sup>158</sup> Fear of excessive entanglement gave rise to the prioritization of religious freedom over antidiscrimination law, likely creating pressure to follow precedent that will percolate throughout the lower courts.<sup>159</sup> The failure to better define the standard for who is a minister therefore arises again: in seeking to conform with precedent, lower courts may tend to side with the religious institution over the employee due to the unclear class of covered individuals.<sup>160</sup> If this is the case, perhaps the goals of flexibility announced with the test are not being properly served.

Not all reactions to the test set forth by *Hosanna-Tabor* were negative. One argument in its favor comes from *Cannata v. Catholic Diocese of Austin*, where the Fifth Circuit stated that the lack of any bright line test makes room for

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 335–36; *see also Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring) (noting that, while title is relevant, function is more probative in the analysis).

<sup>153</sup> Hinkle, *supra* note 76, at 335–36.

<sup>154</sup> *Hosanna-Tabor*, 565 U.S. at 193.

<sup>155</sup> *See Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018); *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018); *infra* Part I.C.4.

<sup>156</sup> Hinkle, *supra* note 76, at 342.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 343; John H. Cushman Jr., *Religious Groups Greet Ruling with Satisfaction*, N.Y. TIMES (Jan. 11, 2012), [https://www.nytimes.com/2012/01/12/us/hosanna-tabor-ruling-welcomed-by-religious-groups.html?\\_r=4&](https://www.nytimes.com/2012/01/12/us/hosanna-tabor-ruling-welcomed-by-religious-groups.html?_r=4&). Reverend Barry W. Lynn—executive Director of Americans United for Separation of Church and State—expressed fear that the Court’s ruling would make it more difficult to combat “blatant discrimination.” *Id.* Similarly, Professor Paul Horwitz of the University of Alabama School of Law deemed it our “scholarly and moral obligation to think about what happens next . . . [to] acknowledge[] the dangers as well as the value of church autonomy.” *Id.*

<sup>159</sup> Hinkle, *supra* note 76, at 343.

<sup>160</sup> *Id.* at 345.

religious pluralism, whereas a more rigid test would stifle lower courts' abilities to recognize differences among religions.<sup>161</sup> This argument champions the ability of lower courts to consider religious polity to determine whether an employee has a function that is key to faith-spreading and worship, instead of disparaging such consideration as "excessive entanglement."<sup>162</sup> Law professors Ira Lupu and Robert Tuttle also offer a defense of *Hosanna-Tabor*.<sup>163</sup> They both acknowledge and embrace the "expected" variations in lower courts' application of the *Hosanna-Tabor* test.<sup>164</sup> Further, they laud the Court's consistency with the Establishment Clause and its "long-standing constitutional commitment to sharply delimit the state's involvement with religion and religious institutions."<sup>165</sup> Finally, many religious and religious liberty groups championed the Court's holding as a "huge victory for religious freedom."<sup>166</sup> Professor Marci A. Hamilton of Cardozo School of Law expressed relief that the holding was applied narrowly to discrimination suits, thereby rejecting potential claims by religious institutions that they have complete autonomy even in sexual harassment cases.<sup>167</sup> Nathan Diament of the Orthodox Union, an organization which had "joined in an amicus brief with the U.S. Conference of Catholic Bishops, the Mormon Church, and the [P]residing [B]ishop of the Episcopal Church," also expressed appreciation for the "expansive freedom of religion" this decision preserved.<sup>168</sup>

It is most likely that *Hosanna-Tabor* has had both positive and negative effects, resulting precisely from the reasons set forth by its critics and its champions. In the years following *Hosanna-Tabor*, courts have consistently applied the factors set forth by *Hosanna-Tabor* itself, provided for by the test's flexibility.<sup>169</sup> What courts have not done, however, is apply these factors consistently with one another.<sup>170</sup> Courts have tended to favor the religious employer in these cases, whether as a result of a precedential pressure for which

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<sup>161</sup> *Cannata v. Cath. Diocese of Austin*, 700 F.3d 169, 175–76 (5th Cir. 2012).

<sup>162</sup> Hinkle, *supra* note 76, at 337.

<sup>163</sup> See Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1280 (2017).

<sup>164</sup> *Id.* at 1288.

<sup>165</sup> *Id.* at 1280.

<sup>166</sup> Cushman, *supra* note 158.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See *Fratello v. Roman Cath. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017); *Aparicio v. Christian Union, Inc.*, 18-CV-0592(ALC), 2019 U.S. Dist. LEXIS 55938 (S.D.N.Y. Mar. 29, 2019); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018); *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018).

<sup>170</sup> See *Fratello*, 863 F.3d at 205; *Grussgott*, 882 F.3d at 661; *Biel*, 911 F.3d at 608; *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460, 461 (9th Cir. 2019).

critics have expressed concern or merely based on the facts of each individual case.<sup>171</sup> Discretion and flexibility have allowed courts to delineate their own interpretations and their own methods of analysis. The main concern is that flexibility often yields uncertainty: uncertainty in the scope of the exception, uncertainty in weight given to each factor under consideration, and uncertainty in whether the four factors must be considered at all. The following cases illustrate this wide variability in applying the *Hosanna-Tabor* factors.

### C. *Circuit Splits—How Courts Have Adapted the Vague Hosanna-Tabor Analysis*

For better or worse, the Court’s flexible, four-part *Hosanna-Tabor* test has led lower courts to determine largely for themselves how to balance the factors under consideration. Whether lower court interpretations and analyses can be characterized as “excessive entanglement” rather than fulfilling the needs of a pluralistic society is questionable, and arguments can be made for both.<sup>172</sup> It is also unclear whether courts have felt pressure to prioritize religious freedom and favor the employer based on the results of *Hosanna-Tabor* or whether the facts of these cases have truly tended to favor the employer.<sup>173</sup> What is certain, however, is that lower courts have applied the test in a variety of ways, often inconsistently with one another. The inconsistencies among and debates within circuits indicate that the *Hosanna-Tabor* tests should be better defined to allow plaintiffs the same chance of success regardless of jurisdiction, despite the risks of rigidity the Court sought to avoid.

#### 1. *Overview of Varied Analyses*

The four-factor test enumerated in *Hosanna-Tabor* has been pared down to two main elements for consideration: title and function.<sup>174</sup> The first three factors—whether the religious institution held the employee out as a minister, whether the employee used the title, and whether the employee held herself or himself out to be a minister—fall under “title” more generally. The employee’s job duties and whether those duties reflected a role in conveying and carrying out the mission of the church fall under “function.” While the Supreme Court indicated that an employee’s title is not determinative and that an employee’s secular duties, among religious duties, do not detract from ministerial status, it

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<sup>171</sup> See *Fratello*, 863 F.3d 190; *Aparicio*, 2019 U.S. Dist. LEXIS 55938; *Grussgott*, 882 F.3d 655.

<sup>172</sup> See *Cannata v. Cath. Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012); Hinkle, *supra* note 76, at 302.

<sup>173</sup> See Hinkle, *supra* note 76, at 283, 343.

<sup>174</sup> See *Fratello*, 863 F.3d at 205; *Grussgott*, 882 F.3d at 658, 661.

did not provide lower courts with a clear standard by which to balance the factors.<sup>175</sup> Thus, the Second, Sixth, Seventh, and Ninth Circuits have formed their own interpretations and balancing tests within the scope of the *Hosanna-Tabor* analysis, leading up to the 2020 Supreme Court case: *Morrissey-Berru*.<sup>176</sup>

## 2. *The Second Circuit*

One addition the Second Circuit has made to the *Hosanna-Tabor* analysis is its earlier idea of a sliding scale, where “the more religious the employer institution is, the less religious the employee’s functions must be to qualify [as a minister],” and vice versa.<sup>177</sup> Nowhere in *Hosanna-Tabor* was such a scale proposed. Rather, this sliding scale idea stems from the pre-*Hosanna-Tabor* Second Circuit precedent in *Rweyemamu*,<sup>178</sup> which the Second Circuit applied in *Penn v. N.Y. Methodist Hospital* to determine that the ministerial exception applied to a “pervasively religious”<sup>179</sup> employee in the context of his almost entirely secular employer.<sup>180</sup> In *Penn*, the court, on a motion for summary judgment, did not question its earlier finding that the employee chaplain was a minister for purposes of the exception.<sup>181</sup> The employee’s role was “pervasively religious,” as he worked in the Department of Pastoral Care and was responsible for ministry to patients and their families.<sup>182</sup> The hospital was a “non-sectarian”<sup>183</sup> institution; however, it maintained a connection with the United Methodist Church, and its mission statement “emphasize[d] an ecumenical program of pastoral care.”<sup>184</sup> Thus, the court held that the hospital was acting as a religious organization, even though it was in reality a secular institution.<sup>185</sup>

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<sup>175</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 193 (2012) (noting that even the “heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation’s finances, supervising purely secular personnel, and overseeing the upkeep of facilities”).

<sup>176</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

<sup>177</sup> *Aparicio v. Christian Union, Inc.*, 18-CV-0592(ALC), 2019 U.S. Dist. LEXIS 55938, at \*14 (S.D.N.Y. Mar. 29, 2019) (citing *Penn v. N.Y. Methodist Hosp.*, 158 F. Supp. 3d 177, 182, 184 (2d Cir. 2016)). *Penn* held that a chaplain at a now-secular hospital was a minister for purposes of the exception because he had an “exceedingly ministerial role,” he worked in the Department of Pastoral Care, and the hospital’s mission statement “emphasize[d] an ‘ecumenical program of pastoral care.’” 158 F. Supp. 3d at 182, 184.

<sup>178</sup> *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008).

<sup>179</sup> *Id.* at 208.

<sup>180</sup> *Penn*, 158 F. Supp. 3d at 182.

<sup>181</sup> *Id.* at 181.

<sup>182</sup> *Id.* at 179–82.

<sup>183</sup> *Id.* at 178.

<sup>184</sup> *Id.* at 184.

<sup>185</sup> *Id.*

Another standard that continues to permeate Second Circuit cases is the idea that the “substance of [an] employee’s responsibilities . . . is far more important” than title—an exaggerated version of *Hosanna-Tabor*’s majority holding.<sup>186</sup> In *Fratello v. Roman Catholic Archdiocese of New York*, the court held that the principal of a Catholic school was a minister under the exception, though her title was not “inherently religious,” and, as a woman, she could not have been ordained in the Catholic Church.<sup>187</sup> The court still found her to be a minister for purposes of the ministerial exception based on the many religious functions she performed to carry out the school’s religious mission, as well as her holding herself out as a spiritual leader of the school.<sup>188</sup> The Second Circuit has focused “principally” on the functions of the employee, which it indicated was the correct approach years earlier in *Rweyemamu*.<sup>189</sup> It also interpreted *Hosanna-Tabor* as an instruction “only as to what [courts] *might* take into account as relevant, including the four considerations on which it relied; it neither limits the inquiry to those considerations nor requires their application in every case.”<sup>190</sup>

Another Second Circuit case, *Aparicio v. Christian Union, Inc.*, applied the *Hosanna-Tabor* factors and acknowledged the sliding-scale approach, but, significantly, decided against application of the ministerial exception.<sup>191</sup> In *Aparicio*, the employee alleged that his religious employer had a gender-biased policy and that he was discriminatorily terminated for vocally opposing that policy.<sup>192</sup> The employee’s title was Director of Public Affairs, but pre-employment documents stated he was “part of a ministry,” and his offer letter stated that the employer was “seeking employees who view their work as a calling.”<sup>193</sup> The employee claimed he was not required to complete any rigorous religious training to be considered for the position, and he only completed a

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<sup>186</sup> *Fratello v. Roman Cath. Archdiocese of N.Y.*, 863 F.3d 190, 207 (2d Cir. 2017). *Hosanna-Tabor* did not specify what weight should be given to each factor under consideration. However, Justice Alito argued that Perich’s functional importance was the most important consideration, while the other factors were probative but not determinative. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 206 (Alito, J., concurring).

<sup>187</sup> *Fratello*, 863 F.3d at 210; see Angela Giuffrida, ‘Save Catholic Church’ by Lifting Ban on Female Priests, *Activists Say*, *GUARDIAN* (Oct. 22, 2019, 1:23 PM), <https://www.theguardian.com/world/2019/oct/22/catholic-church-lift-ban-on-female-priests-activists-say> (“[T]he topic of [women] becoming priests is still very much taboo.”).

<sup>188</sup> *Fratello*, 863 F.3d at 208–10.

<sup>189</sup> *Id.* at 202.

<sup>190</sup> *Id.* at 204–05.

<sup>191</sup> *Aparicio v. Christian Union, Inc.*, 18-CV-0592(ALC), 2019 U.S. Dist. LEXIS 55938, at \*14–19 (S.D.N.Y. Mar. 29, 2019).

<sup>192</sup> *Id.* at \*4–5.

<sup>193</sup> *Id.* at \*14–15.

required training on theological topics that he claimed were irrelevant to him.<sup>194</sup> Functionally, the employee's job duties focused solely on raising funds for the organization and dealing with donors, and such was set forth in his offer letter.<sup>195</sup> Based on the facts of the case and under the four *Hosanna-Tabor* factors, the court found that the employee was not a minister.<sup>196</sup> The court placed little to no emphasis on the employee's secular title, nor on the fact that his pre-employment documents explicitly stated he was joining a ministry.<sup>197</sup> After finding the facts insufficient to make a conclusion on the second two factors, the court based its final decision on *Fratello's* interpretation of the *Hosanna-Tabor* test, focusing on the fourth factor—function—as the most important consideration, and held that the employee did not satisfy it and was therefore not a minister.<sup>198</sup> *Aparicio* involved a more clearly secular employee, making the analysis slightly easier than in *Fratello* or in the following cases.

### 3. *The Sixth Circuit*

The Sixth Circuit has taken a less extreme approach than the Second Circuit, acknowledging that the determination of ministerial status should be a balance between function and title, while simultaneously indicating what that balance should be more clearly than *Hosanna-Tabor*. In *Conlon v. Intervarsity Christian Fellowship*, the Sixth Circuit employed a reasonable approach based on *Hosanna-Tabor's* flexible factors: “where both factors—formal title and religious function—are present, the ministerial exception clearly applies.”<sup>199</sup> The employee in *Conlon* brought a claim of gender discrimination, alleging she was terminated for “failing to reconcile her marriage” when similarly situated male employees who had divorced during employment were neither disciplined nor terminated.<sup>200</sup> The court held that both factors, title and function, weighed in favor of applying the ministerial exception to this employee, the spiritual director of an “evangelical campus mission.”<sup>201</sup> The employee's formal title was either “spiritual director” or “Spiritual Formation Specialist”—both of which contain wording that conveys a religious meaning.<sup>202</sup> Functionally, the

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<sup>194</sup> *Id.* at \*16.

<sup>195</sup> *Id.* at \*18.

<sup>196</sup> *Id.* at \*19.

<sup>197</sup> *Id.* at \*14–15.

<sup>198</sup> *Id.* at \*18–19. The court found that the employee's job seemed to center solely on raising funds for the organization and dealing with donors, duties that were also stated in his offer letter. *Id.* Further, his performance reviews and evaluations centered only on fundraising success, workplace attitude, and efficiency. *Id.*

<sup>199</sup> *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 853 (6th Cir. 2015).

<sup>200</sup> *Id.* at 832.

<sup>201</sup> *Id.* at 831, 835.

<sup>202</sup> *Id.* at 834–35.

employee's duties included helping others cultivate "intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines."<sup>203</sup> As to the substance reflected in the employee's title, the court held that the employee's certification in "spiritual direction"—with no further information as to what that entailed, compared to Perich's training in *Hosanna-Tabor*—did not set the employee apart from lay employees.<sup>204</sup> Thus, the factor was not satisfied.<sup>205</sup> Finally, the employee did not hold herself out as a minister through her own use of the ministerial title because "nothing in the pleadings suggest[ed] that [she] had the sort of public role of interacting with the community as an ambassador to the faith that rises to the level of Perich's leadership role within her church, school, and community."<sup>206</sup> While the court did not resolve the ambiguity as to whether function or title alone would suffice, its approach in comparing the facts to those of *Hosanna-Tabor*—where all four factors were satisfied—is well reasoned.<sup>207</sup>

#### 4. *The Seventh and Ninth Circuits: A Comparison*

In the aftermath of *Hosanna-Tabor*, both the Seventh and Ninth Circuits were presented with cases involving teachers whose balance of religious and secular duties were similar in scope.<sup>208</sup> The circuits diverged, however, on their outcomes, possibly based on minor factual differences, but perhaps also as a result of a difference in analysis. This difference largely pares down to two questions: (1) how much religious function is enough to favor application of the ministerial exception; and (2) when a factor is satisfied to an extent that it significantly weighs on the analysis.

In the 2018 Seventh Circuit case *Grussgott v. Milwaukee*,<sup>209</sup> a teacher at a private Jewish day school brought an ADA claim against the school, asserting that she had been terminated because of cognitive issues she suffered as a result of her brain tumor.<sup>210</sup> The school moved for summary judgment on the grounds

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<sup>203</sup> *Id.* at 835 (internal quotation marks omitted).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 836.

<sup>209</sup> *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018).

<sup>210</sup> *Id.* at 657. *Grussgott* ceased working during her recovery. After receiving treatment, she suffered from memory and other cognitive issues. *Id.* Just under a year after returning to work, *Grussgott* was "taunted . . . about her memory problems" by a parent during a phone call in which she was unable to remember an event. *Id.* Subsequently, *Grussgott's* husband sent an email from *Grussgott's* work email address "criticizing the parent for being disrespectful." *Id.* *Grussgott* was terminated thereafter. *Id.*

that the ministerial exception barred Grussgott's lawsuit.<sup>211</sup> Thus, the court conducted the *Hosanna-Tabor* analysis,<sup>212</sup> looking to the employee's formal title, the substance reflected in that title, the employee's use of that title, and the important religious functions she performed for the religious institution.<sup>213</sup> However, the court expressly stated that the factors are examined "because they provide a useful framework," and that it is important to recognize that not all four considerations are necessary in every case.<sup>214</sup>

First, the court concluded that Grussgott's title indicated that her role was not ministerial.<sup>215</sup> She identified her role as "grade school teacher,"<sup>216</sup> and even if her title was "Hebrew teacher," as that was the subject she taught, this title would not alone prove a religious role.<sup>217</sup> As to the second part of the analysis, the court found that the substance reflected in Grussgott's job title did weigh in favor of applying the exception.<sup>218</sup> "[T]eachers at the school were not required to complete rigorous religious requirements comparable to [Perich] in *Hosanna-Tabor*," and, although Grussgott obtained the required Tal Am certification,<sup>219</sup> the lack of description of what the certification required did not indicate any strong religious substance in her role as a teacher.<sup>220</sup> However, the Hebrew teachers at the school were expected to incorporate religious teachings into their lessons, per the unified Tal Am curriculum.<sup>221</sup> Grussgott's resume demonstrated "significant religious teaching experience, which the former principal said was a critical factor in the school hiring her."<sup>222</sup> Therefore, the court found that the substance reflected in Grussgott's title, both as conveyed to her by the school's

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 658. Outside of the *Hosanna-Tabor* analysis as to whether Grussgott was a minister, the court also looked to whether the school was a religious institution. The court held that "the school's nondiscrimination policy [did] not constitute a waiver of the ministerial exception's protections." *Id.* A school may be an equal-opportunity employer and need not exclude members of other faiths to be deemed a religious institution. *Id.*

<sup>213</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012).

<sup>214</sup> *Grusgott*, 882 F.3d at 658–59.

<sup>215</sup> *Id.* at 659.

<sup>216</sup> *Id.* The court notes how this title is distinct from Perich's role as a "called teacher" and formal title of "Minister of Religion, Commissioned" in *Hosanna-Tabor*. *Id.* (citing *Hosanna-Tabor*, 565 U.S. at 178, 191).

<sup>217</sup> *Grusgott*, 882 F.3d at 659. The court's reasoning stemmed from the fact that a teacher at a public school with a purely secular job may have the same title (such as Hebrew teacher, Spanish teacher, or French teacher). *Id.* The school argued that Hebrew is taught, in this context, as a religious exercise. *Id.* However, this argument did not change the court's finding as to title. *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* Tal Am is the integrated Hebrew and Jewish Studies curriculum from which Grussgott taught Hebrew. *Id.* Grussgott could have obtained the required certification to teach this curriculum by completing seminars in either the United States or Israel. *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

requirement that she follow the Tal Am curriculum and as perceived by others in hiring her based on past religious experience, “entail[ed] the teaching of the Jewish religion to students” and supported the application of the ministerial exception.<sup>223</sup> However, the court found that Grussgott’s own use of her title, the third factor, cut against applying the ministerial exception, after “examin[ing] how [she] presented herself to the public.”<sup>224</sup>

As to the fourth factor of the analysis, the Seventh Circuit found that Grussgott did perform “important religious functions” for the school, supporting application of the ministerial exception.<sup>225</sup> The discussion surrounding this factor stemmed from the differing viewpoints of Grussgott and the school as to the significance of the subject matter she taught.<sup>226</sup> Grussgott argued that teaching her students about prayer, the Torah, and Jewish holidays was a choice of topic rather than a charge from the school.<sup>227</sup> However, the court still determined that “it [was] sufficient that the school clearly intended for her role to be connected to the school’s Jewish mission,”<sup>228</sup> countering her discretionary planning argument.<sup>229</sup> The school’s expectation that Grussgott followed the Tal Am curriculum “combined with the importance of [her] Judaic teaching experience in her being hired, confirm[ed] that the school expected her to play an important role in ‘transmitting the [Jewish] faith to the next generation.’”<sup>230</sup> Even if Grussgott did not know these were the school’s expectations of her, “the purpose of the ministerial exception is to allow religious organizations the freedom to hire or fire those who shape their faith,”<sup>231</sup> and therefore it is the

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<sup>223</sup> *Id.* at 660.

<sup>224</sup> *Id.* at 659. The court found that there was no evidence that Grussgott “held herself out to the community as an ambassador of the Jewish faith, nor that she understood that her role would be perceived as a religious leader.” *Id.* She consistently defined her role as a teacher of the “historical, cultural, and secular, rather than the religious.” *Id.*

<sup>225</sup> *Id.* at 660.

<sup>226</sup> *Id.* It is undisputed that Grussgott taught her students about Jewish holidays, prayer, and the Torah, and she practiced religion alongside her students. *Id.* She distinguished practicing and teaching prayer from leading prayer, and distinguished teaching from a cultural perspective from a religious perspective. *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* The court compared the facts in *Hosanna-Tabor*, where the Court considered it important that Perich was “expressly charged” with “lead[ing] others to Christian maturity,” with the school’s expectation here that Grussgott follow its “expressly religious mission and to teach the Tal Am curriculum . . . designed to ‘develop Jewish knowledge and identity in [its] learners.’” *Id.* at 660–61 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012)); see *Mission*, HEBREW AND HERITAGE CURRICULA FOR JEWISH SCHOOLS, <http://www.talam.org/mission.html> (last visited Nov. 20, 2020).

<sup>229</sup> *Id.* at 660.

<sup>230</sup> *Id.* at 661 (citing *Hosanna-Tabor*, 565 U.S. at 192). The court here also noted that, although Grussgott claimed that any religious tasks she performed were voluntary, there was evidence she had occasionally been given religious tasks, such as taking second grade students to study a Torah portion. *Id.*

<sup>231</sup> *Id.*

school's expectations of religious teaching that matters.<sup>232</sup> To avoid excessive entanglement, the court "defer[red] to the organization in situations like this one, where there is no sign of subterfuge."<sup>233</sup> Thus, the fourth factor weighed in favor of the school.<sup>234</sup>

While the court in *Grussgott* concluded that at most two of the four *Hosanna-Tabor* factors were present, the duties and functions of Grussgott's position outweighed the formalistic factors like her title and her own use of that title.<sup>235</sup> "Her job entailed many functions that simply would not be part of a secular teacher's job at a secular institution,"<sup>236</sup> and, despite a few factual disputes in the case, the court held that Grussgott's own admissions about her job were enough to establish coverage by the ministerial exception.<sup>237</sup>

In comparison with the Seventh Circuit, the Ninth Circuit, in two separate cases, gave greater analytical weight to title and employees' use of that title, but only found that one of the four factors—function—favored ministerial status, as opposed to the (at most) two factors found in *Grussgott*.<sup>238</sup> The Ninth Circuit demonstrated a wariness of uniform tests and a propensity to narrowly define a minister in the pre-*Hosanna-Tabor* era.<sup>239</sup> In the case of *Biel v. St. James School*, the court held for Biel, a fifth grade teacher at St. James Catholic school who brought a disability discrimination claim for violation of the ADA against her employer.<sup>240</sup> She brought this claim after she had informed her employer she would have to miss work to undergo chemotherapy, and she was subsequently terminated.<sup>241</sup> The district court granted summary judgment for St. James on the grounds that the ministerial exception barred Biel's claim.<sup>242</sup> Biel appealed to the Ninth Circuit, which conducted the *Hosanna-Tabor* analysis to determine

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 660. The court noted that this approach does not mean they may "never question a religious organization's designation of what constitutes religious activity." *Id.* However, in situations where religious line drawing, especially between "teaching religion" and "teaching about religion," is extremely difficult and would excessively entangle the government in religious affairs, deference is given to the organization. *Id.*; see *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

<sup>234</sup> *Grussgott*, 882 F.3d at 660.

<sup>235</sup> *Id.* at 661.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See *id.*; *Biel v. St. James Sch.*, 911 F.3d 603, 608 (9th Cir. 2018); *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460 (9th Cir. 2019). These cases were later consolidated by the Supreme Court, but for purposes of Part I.C.4, the lower court decisions are discussed to illustrate the development of circuit splits.

<sup>239</sup> *Alcazar v. Corp. of the Cath. Archbishop of Seattle*, 627 F.3d 1288, 1291–92 (9th Cir. 2010).

<sup>240</sup> *Biel*, 911 F.3d at 605.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 605, 607.

whether Biel qualified as a minister under the exception.<sup>243</sup> In doing so, the court conducted a side-by-side analysis comparing the facts supporting each part of the test in *Hosanna-Tabor* with those in *Biel*.<sup>244</sup> The court also reiterated that “the determination of who is a minister is a totality of the circumstances test [by which the court must] consider ‘all the circumstances of [Biel’s] employment’ in the assessment of her role.”<sup>245</sup>

As to the first and second parts of the test, St. James did not hold Biel out as a minister, nor did Biel’s title reflect ministerial substance or training.<sup>246</sup> Biel’s title was “Grade 5 Teacher,” which reflects no religious meaning.<sup>247</sup> In contrast to Perich, who could only be terminated by a supermajority vote of the congregation, Biel’s employment was at-will and on a renewable contract.<sup>248</sup> Biel “ha[d] none of Perich’s credentials, training, or ministerial background.”<sup>249</sup> Biel received a liberal arts degree, and her position at St. James required no religious background.<sup>250</sup> The only training she received was a half-day conference that taught attendees how to incorporate religious teachings into daily lessons, along with techniques for teaching secular subjects, like art.<sup>251</sup> Finally, the court noted that Biel’s past work for tutoring companies, public schools, another Catholic school, and a Lutheran school indicated no commitment to the religious aspects of a teaching role and was no indication that she saw teaching ministry as a calling.<sup>252</sup> The court also noted that nothing in the record indicated that Biel considered or held herself out as a minister, as “[s]he described herself as a teacher and claimed no benefits available only to ministers.”<sup>253</sup>

The only indication of ministerial function, the court found, was with respect to the fourth consideration: “whether the employee’s job duties included ‘important religious functions.’”<sup>254</sup> Biel taught lessons on Catholicism for thirty

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 608–09.

<sup>245</sup> *Id.* at 619; *see also* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (“It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 608.

<sup>248</sup> *Id.* at 608–09.

<sup>249</sup> *Id.* at 608.

<sup>250</sup> *Id.* at 605, 608.

<sup>251</sup> *Id.* at 605.

<sup>252</sup> *Id.* at 608.

<sup>253</sup> *Id.* at 609.

<sup>254</sup> *Id.* at 607 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012)).

minutes a day, four days a week.<sup>255</sup> These lessons, however, came from a book required by the school.<sup>256</sup> She incorporated religious themes and symbols into her classroom environment and curriculum, also required by the school.<sup>257</sup> Biel's students led class prayers, and Biel joined them in prayer but did not teach, lead, or plan them herself.<sup>258</sup> These facts directly contrast with those surrounding Perich, who planned the daily prayers for her students.<sup>259</sup> Biel was also required to accompany her students to monthly mass and to make sure they were well-behaved, while Perich curated and led religious services for the school throughout the year.<sup>260</sup> The tasks St. James gave to Biel, the court held, "[id] not amount to the kind of close guidance and involvement that Perich had in her students' spiritual lives."<sup>261</sup>

In keeping with the constitutional and policy considerations underlying the decision in *Hosanna-Tabor*, the court in *Biel* found that, in viewing all circumstances holistically, Biel was not a minister and therefore was not barred by the ministerial exception from bringing a claim against St. James.<sup>262</sup> Only one of the four *Hosanna-Tabor* factors even had the potential to weigh in favor of St. James, and one was not enough.<sup>263</sup> The court reversed the district court's decision, stating that "we cannot read *Hosanna-Tabor* to exempt from federal employment law all those who intermingle religious and secular duties but who do not 'preach [their employers'] beliefs, teach their faith, . . . carry out their mission . . . [and] guide [their religious organization] on its way."<sup>264</sup>

In *Biel*, the court mentioned an argument made by St. James that a contrary conclusion should have been reached based on the Seventh Circuit's decision in *Grussgott v. Milwaukee*.<sup>265</sup> The court responded that, "assuming *Grussgott* was correctly decided, . . . the plaintiff in *Grussgott* more closely resembled Perich than Biel."<sup>266</sup> *Grussgott*'s religious functions were slightly more significant than

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<sup>255</sup> *Id.* at 605.

<sup>256</sup> *Id.* at 609.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Hosanna-Tabor*, 565 U.S. at 192.

<sup>260</sup> *Id.*; *Biel*, 911 F.3d at 609.

<sup>261</sup> *Biel*, 911 F.3d at 609.

<sup>262</sup> *Id.* at 610. Here, the Ninth Circuit seemingly continued the "reasonable construction" approach it had in place prior to *Hosanna-Tabor*, looking at the factors under consideration holistically. *Id.*; *Alcazar v. Corp. of the Cath. Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010). As a result, it stayed consistent with *Hosanna-Tabor* while not forcing itself to reach the same employer-favoring result. *Biel*, 911 F.3d at 611.

<sup>263</sup> *Biel*, 911 F.3d at 610.

<sup>264</sup> *Id.* at 611.

<sup>265</sup> *Id.* at 609 (citing *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018)).

<sup>266</sup> *Id.*

Biel's, in part by virtue of the subjects she taught and their easy conflation with administration of religion, along with her "significant religious teaching experience."<sup>267</sup> Functional similarities between Perich, Grussgott, and Biel existed in the requirement that they each taught religion at some point throughout the day or week, but each teacher's role diverged on how prevalent religious teaching was to be.<sup>268</sup> Of note is the question the Ninth Circuit posed of whether *Grussgott* was decided correctly.<sup>269</sup> This question became a subject of debate among various circuits, scholars, and attorneys. Was *Grussgott* wrong and *Biel* correct? Was *Biel* wrong and *Grussgott* correct? Were both correct based on the flexibility of the *Hosanna-Tabor* analysis and thus a predicate for the inconsistencies to come? Regardless, the Supreme Court would soon take a stance, deeming the *Biel* decision incorrect.<sup>270</sup>

Shortly after *Biel*, the Ninth Circuit again had the opportunity to address the ministerial exception in *Morrissey-Berru v. Our Lady of Guadalupe School*.<sup>271</sup> While it found the same factor—function—to be the only one indicative of ministerial status, the facts were significantly more indicative of ministerial status, perhaps to an extent greater than in *Grussgott*.<sup>272</sup> *Morrissey-Berru*, a teacher at Our Lady of Guadalupe School, brought a claim against the school under the Age Discrimination in Employment Act, alleging she was moved from a full-time contract to a part-time contract because of her age.<sup>273</sup> After the lower court held that *Morrissey-Berru*'s claim was barred by the ministerial exception, the Ninth Circuit reversed and held that the employee was not a minister for the following reasons: her formal title was "Teacher," she had no religious credentials, training, or ministerial background outside of taking one course on the history of the Catholic Church, she did not hold herself out to be a minister, and her religious functions, though significant, were not on their own sufficient to apply the exception.<sup>274</sup> The "significant religious responsibilities" to which the court referred were that "[*Morrissey-Berru*] was committed to incorporating Catholic values and teachings into her curriculum, [she] led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and

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<sup>267</sup> *Grussgott*, 882 F.3d at 659.

<sup>268</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 204 (2012); *Biel*, 911 F.3d at 609; *Grussgott*, 882 F.3d at 656.

<sup>269</sup> *Biel*, 911 F.3d at 609.

<sup>270</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

<sup>271</sup> *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460, 460 (9th Cir. 2019).

<sup>272</sup> *Id.* at 461.

<sup>273</sup> *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 16-cv-09353-SVW-AFM, 2017 U.S. Dist. LEXIS 217504, at \*1–2 (C.D. Cal. Sept. 27, 2017).

<sup>274</sup> *Morrissey-Berru*, 769 F. App'x at 461.

produced [an annual Easter performance].”<sup>275</sup> These religious functions are significantly greater than those in *Biel*, and by holding that Morrissey-Berru was not a minister, the court limited application of the exception to a unique extent.<sup>276</sup>

While it is not certain whether the individual plaintiffs in *Grusgott*, *Biel*, and *Morrissey-Berru* would have fared differently had their jurisdictions been swapped, the distinct modes of analysis employed in both circuits indicate that, perhaps, they could have. *Morrissey-Berru*, in particular, would likely have faced the opposite result if analyzed by the *Grusgott* Court. The inconsistencies among circuits and intra-circuit debate between majority and dissenting opinions stemmed from the flexibility of the *Hosanna-Tabor* four-factor analysis, and left both employers and employees not knowing where they stand.<sup>277</sup> However, the Supreme Court has now made clear that the Ninth Circuit’s approach was wrong, emphasizing the immense significance of religious function and frequent insignificance of the other three factors.<sup>278</sup>

#### D. Morrissey-Berru: A Broad Reframing of Hosanna-Tabor

In 2020, the ministerial exception once again made its way to the Supreme Court with the consolidated cases of *Morrissey-Berru* and *Biel*.<sup>279</sup> Whereas the factual backgrounds of these two cases have been discussed above, this Comment now turns to the Court’s particular analysis of these facts.<sup>280</sup> The Supreme Court held that both *Morrissey-Berru* and *Biel* were ministers under the exception, and that in holding otherwise, the Ninth Circuit “misunderstood”

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<sup>275</sup> *Id.*

<sup>276</sup> *Id.*; see *Biel v. St. James Sch.*, 911 F.3d 603, 608 (9th Cir. 2018). In *Biel*, the Ninth Circuit advocated for a totality of the circumstances analysis as set forth by *Hosanna-Tabor*, which led them to hold that *Biel* was not a minister. *Id.* In comparison to the teacher in *Morrissey-Berru*, *Biel*’s religious functions were minimal. In its analysis in *Morrissey-Berru*, however, the Ninth Circuit seemed to conduct a different analysis, holding that a teacher was not a minister when the facts, more so than in *Biel*, indicated she was. Though it purported to look at the totality of the circumstances, the court seemingly looked at the totality of the four *Hosanna-Tabor* factors and disregarded the fact that *Morrissey-Berru*’s functions may have been significant enough to tip the scale toward ministerial status. *Morrissey-Berru*, 769 F. App’x at 460. The court sought satisfaction of more than one factor, rather than satisfaction that the totality of the circumstances, which may have pointed toward a finding of ministerial status.

<sup>277</sup> See *Biel*, 911 F.3d at 608 (“The dissent’s analysis of *Biel*’s title focuses on her duties at the school— as opposed to her education, qualifications, and employment arrangement—and thus improperly collapses considerations that the Supreme Court treated separately.”).

<sup>278</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 (2020).

<sup>279</sup> *Id.* at 2056.

<sup>280</sup> *Id.* at 2066. Significantly, the Court did not formally conduct the *Hosanna-Tabor* four-factor analysis as lower courts had done. For example, it did not specifically address the third factor: how the employees held themselves out. See *id.* at 2066–67.

*Hosanna-Tabor* by treating its four factors as a checklist, thus distorting the analysis.<sup>281</sup> As to title, the Court held that the Ninth Circuit “invested undue significance in the fact that Morrissey-Berru and Biel did not have clerical titles.”<sup>282</sup> Instead, the Court noted that the fact that they were Catholic school teachers meant they were their students’ primary religious teachers, and that this “concept of a teacher of religion [was] loaded with religious significance.”<sup>283</sup>

Next, the Court noted that the Ninth Circuit gave “too much weight to the fact that Morrissey-Berru and Biel had less formal religious schooling than Perich.”<sup>284</sup> It stated that the significance of formal training will often depend on the level of schooling—for example, whether the position was at an elementary school versus a divinity school—as well as the school’s judgment regarding whether such training is necessary.<sup>285</sup> Here, because the schools thought Morrissey-Berru and Biel had sufficient understanding of Catholicism to teach their students, the Court held that it was in no position to question the schools’ judgments.<sup>286</sup>

Third, the Court noted that the Ninth Circuit “inappropriately diminished the significance of Biel’s duties” by emphasizing that “[she] merely taught ‘religion from a book required by the school,’ ‘joined’ students in prayer, and accompanied students to Mass in order to keep them ‘quiet and in their seats.’”<sup>287</sup> The Court held that this analysis misrepresented the record and its significance, that many teachers teach closely to textbooks, and that “many faith traditions prioritize teaching from authoritative texts.”<sup>288</sup> Biel “prayed with her students, taught them prayers, supervised the prayers led by students, prepared them for Mass, accompanied them to Mass, and prayed with them there.”<sup>289</sup> Regarding Morrissey-Berru, the Court held that her assertion that she was not a practicing Catholic did not disqualify her under the exception, and, further, that requiring courts to more deeply explore what being a practicing Catholic meant would “put [religious employers] in an impossible position.”<sup>290</sup> Beyond this analysis, the Court did not delve deeper into Morrissey-Berru’s functions, likely because

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 2067.

<sup>283</sup> *Id.* The Court supports this idea with the fact that the term “rabbi” means “teacher” and that Jesus was often referred to as “rabbi.” *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 2067–68.

<sup>286</sup> *Id.* at 2068.

<sup>287</sup> *Id.* (citing *Biel v. St. James Sch.*, 911 F.3d 603, 609 (9th Cir. 2018)).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 2069.

the lower court seemed to indicate that her religious functions would have qualified her under the exception, had the other factors been satisfied.<sup>291</sup> The Court held that neither title nor the academic requirements of a positions are always important, and that “what matters, at bottom, is what an employee does,” effectively adopting Justice Alito’s concurrence from *Hosanna-Tabor*.<sup>292</sup> “[I]t is sufficient,” the Court held, “to decide the cases before us” without adopting a rigid formula.<sup>293</sup>

Justice Thomas’s concurrence in *Morrissey-Berru* argues that the majority’s decision was a “step in the right direction,” but further emphasizes the importance of deferring to religious groups’ “good-faith understandings of which individuals are charged with carrying out the organizations’ religious missions.”<sup>294</sup> Such deference will allow courts to avoid governmental interference into the right of a religious group “to shape its own faith and mission through its appointments.”<sup>295</sup> The concurrence looked to the record in this case, including faculty handbooks and teaching contracts, stating that it “confirms the sincerity of petitioners’ claims” that Biel and Morrissey-Berru held ministerial roles, despite being lay teachers.<sup>296</sup>

Finally, Justice Sotomayor’s dissent—which Justice Ginsberg joined—argued that the majority, “in foreclosing the teachers’ claims . . . skew[ed] the facts, ignore[d] the applicable standard of review, and collapse[d] *Hosanna-Tabor*’s careful analysis into a single consideration: whether a church thinks its employees play an important religious role.”<sup>297</sup> While the majority—and to a greater extent, the concurrence—emphasized the importance of deference to the religious institution and a broad exception to achieve that deference, the dissent emphasized the importance of a narrow exception to account for the exception’s “stark departure from antidiscrimination law” and “potential for abuse.”<sup>298</sup> The dissent argued that under the true *Hosanna-Tabor* approach and common sense, the teachers in this case were not ministers, especially because the employers

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<sup>291</sup> See *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App’x 460, 461 (9th Cir. 2019) (“*Morrissey-Berru* did have significant religious responsibilities . . . . However, an employee’s duties alone are not dispositive under *Hosanna-Tabor*’s framework.”).

<sup>292</sup> *Morrissey-Berru*, 140 S. Ct. at 2064; see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200 (2012) (Alito, J., concurring).

<sup>293</sup> *Morrissey-Berru*, 140 S. Ct. at 2069. The Court noted that lower courts had been applying the ministerial exception for years “without such a formula.” *Id.* The Court was correct, despite that application being short of consistent.

<sup>294</sup> *Id.* at 2070–71 (Thomas, J., concurring).

<sup>295</sup> *Id.* at 2071 (Thomas, J., concurring) (quoting *Hosanna-Tabor*, 565 U.S. at 173).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 2072 (Sotomayor, J., dissenting).

<sup>298</sup> *Id.* at 2072–73.

sought summary judgment and thus the facts must be viewed in the light most favorable to the employees.<sup>299</sup>

In conducting its own analysis, the dissent noted that, in addition to language about the religious mission of the schools, the employment contracts also referred to Biel and Morrissey-Berru as “teacher” and directed them to the benefits guides for “Lay Employees.”<sup>300</sup> This “lay teacher” status, the dissent stated, has been long recognized as a “mark” of non-ministerial status.<sup>301</sup> Further, the dissent deemed irrelevant the majority’s argument that “attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal.”<sup>302</sup> It did so because the cases at hand were not about such “less formal” religions but rather about the Catholic Church, which has a “publicized and undisputedly ‘formal organizational structure.’”<sup>303</sup> The dissent then noted, as to the third factor of the *Hosanna-Tabor* analysis, that neither teacher had significant degrees of religious training and that neither teacher held herself out as a leader in the faith community.<sup>304</sup> It also criticized the majority for failing to “grapple with this third component of the *Hosanna-Tabor* inquiry” at all.<sup>305</sup> Lastly, the dissent looked to Biel and Morrissey-Berru’s functions, noting that the amount of time they spent on secular subjects surpassed their time teaching religion, and that their more specific religious roles were not sufficient to make them ministers.<sup>306</sup> The dissent argued that, if teaching religion alone dictated ministerial status, then *Hosanna-Tabor* “wasted precious pages discussing titles, training, and other objective indicia.”<sup>307</sup> Warning of the repercussions this result posed, the dissent cautioned that the majority’s conclusion puts not only secular teachers in religious schools at risk, but also subjects “coaches, camp counselors, nurses, social-service workers, in-house lawyers . . . and many others who work for religious institutions” to discrimination for reasons unrelated to religion.<sup>308</sup>

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<sup>299</sup> *Id.* at 2076.

<sup>300</sup> *Id.* at 2077.

<sup>301</sup> *Id.* at 2079.

<sup>302</sup> *Id.* at 2064, 2079.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 2080. The dissent noted that the employees did not claim any benefits available only to spiritual leaders and did not hold themselves out as anything other than a fifth-grade teacher. *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 2081.

<sup>308</sup> *Id.* at 2082 (“Little if nothing appears left of the statutory exemptions after today’s constitutional broadside. So long as the employer determines that an employee’s ‘duties’ are ‘vital’ to ‘carrying out the mission of the church,’ then today’s *laissez faire* analysis appears to allow that employer to make employment decisions [for discriminatory reasons] having nothing to do with religion.”).

While *Morrissey-Berru* did provide a reframed *Hosanna-Tabor* analysis focused on function and deference to the religious institution, the dissent may be correct in fearing that the Court opened the exception up for greater abuse, thus posing a new challenge for lower courts apart from inconsistency. The better solution still may have been to clarify *Hosanna-Tabor* in a way that encourages courts to look to the purpose of the exception through each factor. Part II briefly addresses the solutions that have already been adopted by courts or proposed by scholars in response to *Hosanna-Tabor*'s ambiguities.

## II. APPROACHES PROPOSED IN THE POST-*HOSANNA-TABOR* ERA

*Hosanna-Tabor* left lower courts with great discretion in the analysis it provided. Most courts have construed the test broadly and have made a finding of ministerial status where religious function is present. The Ninth Circuit took a narrower approach and, while the result in *Biel* may seem attractive in light of discrimination policy concerns, the result likely would have been different in another circuit. Section A addresses the solutions that have been adopted and proposed—by courts and scholars alike—regarding the appropriate balance of function and title. It further discusses the approaches that have been put into practice by courts,<sup>309</sup> but which are either inadequate or have departed too far from precedent to garner circuit-wide application. Section B then summarizes an approach that calls for a clear bifurcation of the employee's secular and religious functions.

### A. *Function Versus Title*

Different circuits have formulated different adaptations of *Hosanna-Tabor* that turn upon the balance of function and title.<sup>310</sup> These adaptations include the Second Circuit's "sliding-scale,"<sup>311</sup> the Second Circuit's substance- and

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<sup>309</sup> See *supra* Part I.C.

<sup>310</sup> *Aparicio v. Christian Union, Inc.*, 18-CV-0592(ALC), 2019 U.S. Dist. LEXIS 55938, at \*14–15 (2d Cir. Mar. 29, 2019); *Penn. v. N.Y. Methodist Hosp.*, 158 F. Supp. 3d 177, 182 (S.D.N.Y. 2016); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) (citing *Cannata v. Cath. Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012)); *Fratello v. Roman Cath. Archdiocese of N.Y.*, 863 F.3d 190, 202 (2d Cir. 2017).

<sup>311</sup> *Aparicio*, 2019 U.S. Dist. LEXIS 55938, at \*14–15; *Penn.*, 158 F. Supp. 3d at 182.

function-over-title approach,<sup>312</sup> and the Seventh and Ninth Circuits' slightly varied function and title balancing approach.<sup>313</sup>

The sliding-scale approach illustrated by *Penn v. New York Methodist Hospital* argued that, where an employee's role is extensively religious, that employee can be deemed a minister even if the employer institution is almost fully secular.<sup>314</sup> Such a sliding-scale brings up an issue of line-drawing that may be so difficult that it renders the approach both unmanageable and an affront to antidiscrimination laws. Though the employee in *Penn* was arguably a minister in the most fundamental sense, the employer had affirmatively become non-sectarian.<sup>315</sup> Therefore, *Penn* represented a case of the ministerial exception being offered to a non-religious employer—a far jump from the exemption's core purpose under Title VII and the Constitution.<sup>316</sup> Further, it is unclear how the sliding-scale approach would function practically in the opposite direction, as it could encourage a finding of ministerial status for a highly secular employee in the context of a clearly religious organization. Such a result may allow courts to extend the exception to any employee who conducts a minor religious task or shares a minor religious characteristic akin to the secular hospital's mission statement.

The Second Circuit's decision in *Fratello* illustrates a function-over-title approach reminiscent of the primary duties test.<sup>317</sup> The *Fratello* approach first gave a great deal of deference to lower courts in allowing them to apply all, some, or none of the four *Hosanna-Tabor* factors.<sup>318</sup> While it went through the four-factor analysis and concluded, perhaps correctly based on the facts, that the employee was a minister, its immediate posture was that function is key, and the other factors are mere recommendations.<sup>319</sup> Taking a similar function-over-title approach, the Seventh Circuit in *Grussgott* held that satisfaction of two factors—the employee's function, and the substance reflected by the employee's title—was consistent with *Hosanna-Tabor* and sufficient to find the employee was a

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<sup>312</sup> *Fratello*, 863 F.3d at 202. This approach mirrors Justice Alito's concurrence in *Hosanna-Tabor*, and his statement that the lower courts should keep an eye toward function in making their determination of who is or is not a minister for purposes of the exception. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 203 (2012) (Alito, J., concurring). The employee's label served merely as shorthand for the more important function and substance reflected therein. *Id.* at 202–03.

<sup>313</sup> *Grussgott*, 882 F.3d at 661.

<sup>314</sup> *Penn*, 158 F. Supp. 3d at 182.

<sup>315</sup> *Id.* at 182–83.

<sup>316</sup> U.S. CONST. amend. I; 42 U.S.C. § 2000e-1(a).

<sup>317</sup> *Fratello*, 863 F.3d at 205, 209; *see supra* Part I.C.

<sup>318</sup> *Fratello*, 863 F.3d at 204–05.

<sup>319</sup> *Id.* at 205–06.

minister under the exception.<sup>320</sup> Though the Seventh Circuit acknowledged that not all four factors must be present in every case, it considered them a framework under which each factor should be considered.<sup>321</sup> Ultimately affirming a most extreme function-over-title approach, the Supreme Court held in *Morrissey-Berru* that “what matters, at bottom, is what an employee does,” that function alone is sufficient, and that circumstances relating to title may have far less significance in some cases.<sup>322</sup>

The idea of functional separation is also reflected in a more radical proposition: limiting the exception to instances of religious motivation.<sup>323</sup> A religious motivation limitation effectively calls for a return to the plain language of section 702 of Title VII, which explicitly exempts religious organizations only from the prohibition on employment discrimination for religious purposes, with no specification as to any other discriminatory purpose.<sup>324</sup> Commentators like Katherine Hinkle and Benton Martin have called for this approach.<sup>325</sup> This approach asks courts to look only to whether the employment decision “was motivated by a sincerely held religious belief.”<sup>326</sup> The religious employer would

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<sup>320</sup> *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660–61 (7th Cir. 2018).

<sup>321</sup> *Id.* at 658–59; *cf. Fratello*, 863 F.3d at 204–05 (interpreting *Hosanna-Tabor* to be an instruction “only as to what [courts] *might* take into account as relevant, including the four considerations on which it relied . . . [but which neither] limits the inquiry to those considerations nor requires their application in every case”).

<sup>322</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063–64 (2020). The Ninth Circuit in *Morrissey-Berru*, in contrast, reasoned that religious function alone, even if significant, is not enough for a court to conclude an employee is a minister. *Morrissey-Berru*, 769 F. App’x. at 461. It took this idea from *Biel*, but perhaps did so incorrectly, as the religious duties of the employee in *Biel* were significantly less than those in *Morrissey-Berru*. *Id.*; *Biel v. St. James Sch.*, 911 F.3d 603, 608 (9th Cir. 2018). It is not clear whether *Biel* required more than one of the four factors to be satisfied or whether function alone did not suffice based on the minimal religious duties. *Id.* at 610. However, the Ninth Circuit’s *Morrissey-Berru* interpretation did not employ a reasonable construction of the exception. *Morrissey-Berru*, 769 F. App’x at 461; *see supra* text accompanying note 76.

<sup>323</sup> Hinkle, *supra* note 76, at 338.

<sup>324</sup> 42 U.S.C. § 2000e-1 (indicating that the prohibition on employers with more than fifteen employees from religious discrimination does not apply to “any religious corporation, association, educational institution, or society” that hires individuals of the associated religion to perform work connected with the activities of that religion).

<sup>325</sup> Hinkle, *supra* note 76, at 338; Benton Martin, Comment, *Protecting Preachers from Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII*, 59 EMORY L.J. 1297, 1334 (2010). Notably, Martin’s comment was written prior to *Hosanna-Tabor*; however, Hinkle’s reiteration of the idea in the post-*Hosanna-Tabor* era indicates that it is still a proposition that many consider.

<sup>326</sup> Hinkle, *supra* note 76, at 340; *see also* Martin, *supra* note 325, at 1334–35 (“[A] new paragraph should be added . . . that shifts to religious organizations the burden of producing a religious justification for their alleged employment discrimination. . . . If no such religious justification is produced, the court can proceed in evaluating the minister’s claim. . . . If a religious justification is produced, the court’s inquiry will be limited to determining whether the evidence proves that the religious justification is merely pretext.”).

carry the burden of providing this religious justification,<sup>327</sup> and the court, if satisfied with the justification, would then be barred from hearing the case further.<sup>328</sup> If the court is not satisfied with the religious justification, it should proceed in evaluating the claim.<sup>329</sup> However, since the *McClure* case in 1972, which affirmed that the ministerial exception applied in cases of gender discrimination, the exception's application to all varieties of discrimination has been continually reiterated.<sup>330</sup> In 2012, the Supreme Court affirmed that the exception and its wide scope were rooted in the Constitution,<sup>331</sup> and now that the Supreme Court has once again affirmed an even broader exception,<sup>332</sup> it is unlikely the Court would return to a religious motivation limitation as proposed in both Hinkle and Martin's scholarship.<sup>333</sup>

### B. *Bifurcation of Secular and Religious Duties*

Two common questions pervade each case in which an employee has both religious and secular duties: first, how are these distinct duties balanced; and second, at what point does one so outweigh the other so as to strike the balance in its favor? The courts have acknowledged that the existence of secular duties among a slew of religious duties does not detract from the religiosity of an employee's position nor his or her ministerial status.<sup>334</sup> However, commentators have voiced a concern for fairness regarding cases in which an employee, whose role is largely secular, is deemed a "minister" based on the relatively minor religious roles that the employee undertakes.<sup>335</sup> These commentators have called for, instead, a bifurcation or "disaggregat[ion]" of the religious and secular roles of employees.<sup>336</sup>

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<sup>327</sup> Martin, *supra* note 325, at 1334–35. Martin argues that this approach could be solidified with an amendment to Title VII explicitly shifting the burden of proving a religious justification to the employer. *Id.* at 1334.

<sup>328</sup> Hinkle, *supra* note 76, at 340–41. Hinkle is unclear regarding whether a court should proceed with the *Hosanna-Tabor* analysis or a *Hosanna-Tabor*-type analysis after it has concluded that a religious motivation exists, or whether existence of a good faith religious motivation is enough to bar the case completely. *Id.*

<sup>329</sup> *Id.* at 340. Hinkle is again unclear as to whether, if no religious motivation exists, a court should hear the claim as it would any other employment discrimination case, or whether a *Hosanna-Tabor* analysis should be conducted. *Id.* at 340–41.

<sup>330</sup> *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972).

<sup>331</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189–90, 194–95 (2012).

<sup>332</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

<sup>333</sup> See Hinkle, *supra* note 76, at 338; Martin, *supra* note 325, at 1334.

<sup>334</sup> *Hosanna-Tabor*, 565 U.S. at 193.

<sup>335</sup> See, e.g., Jed Glickstein, Note, *Should the Ministerial Exception Apply to Functions, Not Persons?*, 122 YALE L.J. 1964, 1977 (2013).

<sup>336</sup> *Id.* at 1975; Interview with Michael J. Broyde, Professor of Law, Emory Univ. Sch. of L. (Oct. 7, 2019) (on file with author).

The basic idea behind this approach is that “the same employee can function ministerially at one moment, but nonministerially the next,” and that an employee who serves a blend of both functions should be able to claim damages on the portion of their position that was not ministerial.<sup>337</sup> Jed Glickstein best illustrates the reason for this approach, which he calls a “blended approach,” through a hypothetical involving two employees, Jane and John, a brother and sister who both work as janitors for a church.<sup>338</sup> The only difference between the siblings is that six months into her tenure, Jane is asked to work as a part-time organist for the church in addition to her role as a janitor.<sup>339</sup> The following hypothetical illustrates this approach:

[A]s organist, Jane regularly performs at church services under the supervision of the local pastor, but for the other twenty hours she continues to perform the same duties as her brother. Six more months pass, until the church suddenly fires both John and Jane on the same day and in an identical manner. Based on some overheard comments and circumstantial evidence, the siblings come to believe they were both fired on account of their race. After filing the appropriate notices with the EEOC, they sue.<sup>340</sup>

Glickstein argues that, under existing law, a court would likely find Jane to be a minister covered by the exception and thus barred from bringing her claim, while John could likely proceed with his.<sup>341</sup> This disparity is what the blended or bifurcated approach seeks to address.<sup>342</sup> At its core, the approach critiques the idea that if one is a minister at all, then one is a minister always.<sup>343</sup> It requires us to look at an employee’s position—which may consist of multiple roles and duties, both ecclesiastical and non-ecclesiastical—and examine what portion of the employee’s job can be characterized as secular for purposes of bringing suit.<sup>344</sup>

The difficulty of bifurcating the roles of an employee under this approach would vary based on the legal claim and remedies sought.<sup>345</sup> For example, in the case of an employee seeking purely monetary damages, the court would have to

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<sup>337</sup> Glickstein, *supra* note 335, at 1974–75.

<sup>338</sup> *Id.* at 1972, 1974.

<sup>339</sup> *Id.* at 1972.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* Glickstein states that such an outcome, where “two people who are, in important ways, similarly situated and similarly harmed” receive disparate treatment, is deeply unintuitive. *Id.*

<sup>342</sup> *Id.* at 1973–74.

<sup>343</sup> *Id.* at 1974.

<sup>344</sup> *Id.* at 1974–75.

<sup>345</sup> *Id.* at 1975.

determine what portion of the employee's salary was earned from his or her secular role, and the church would face liability to the employee only for that portion of his or her role.<sup>346</sup> Reinstatement would be a more complex issue, as it more deeply roots the government in the hiring decisions of the religious institution—contrary to the purpose of the exception.<sup>347</sup>

While this blended approach, in its rejection of all factors outside of function, somewhat aligns with the Supreme Court's analysis in *Morrissey-Berru*, it does not account for instances where those first three factors—whether the religious institution held the employee out as a minister, whether the employee's title reflected a certain degree of religious training, and whether the employee used the title and held herself out to be a minister—may be informative.<sup>348</sup> Even under the function-focused precedent of *Morrissey-Berru*, to completely ignore all these indicia of ministerial status and focus purely on the day-to-day duties of an employee for remedy calculation may too severely simplify the ministerial exception and its purpose, especially in cases where the formal factors play a key role.<sup>349</sup> Further, the approach diverges from *Morrissey-Berru* and Justice Alito's concurrence in *Hosanna-Tabor* in that it would diminish “the constitutional protection of religious teachers . . . when they take on secular functions in addition to their religious ones.”<sup>350</sup>

### III. CREATING A MORE CONSISTENT LANDSCAPE AND AVOIDING ABUSE: CLARIFYING AND NARROWING THE *HOSANNA-TABOR* FRAMEWORK

The ministerial exception implicates two key areas of American jurisprudence: religious freedom and employment discrimination. For this reason, it is clear why creating the fairest and clearest mode of analysis is no simple task. What has also become clear, however, is that the *Hosanna-Tabor* test does not address some of the significant concerns surrounding the

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<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 1975–76. Returning to the hypothetical situation of the part-time organist and janitor, Glickstein notes that, if Jane were to be reinstated to her janitor role and not her organist role, it would pose two issues. *Id.* at 1976. First, it would run contrary to the usual mode of employment decisions, which are made at the individual employee level and not individual function level. *Id.* Second, it may economically burden the church if the reason it employed Jane part-time in each role is because it could not afford to employ full-time employees for each, or even because it did not want to. *Id.* Reinstatement thus poses too much risk of infringement by the government and runs too contrary to the goals of the exception and the First Amendment more generally, to ever likely be accepted. *Id.*

<sup>348</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066–67 (2020).

<sup>349</sup> Glickstein, *supra* note 335, at 1978–79.

<sup>350</sup> *Id.* at 1981 (“Admittedly, no court has yet suggested a blended approach to the ministerial exception, and those that have skirted the edges do not seem positively inclined.”).

ministerial exception and that *Morrissey-Berru* may have exacerbated the need for addressing those concerns. Part III proposes a solution to *Hosanna-Tabor*'s ambiguities by drawing upon pre-*Hosanna-Tabor* cases, *Hosanna-Tabor* itself, and subsequent cases, including *Morrissey-Berru*. This Part first addresses the foundations upon which the proposal is based. Section A then clarifies how function and title should be balanced, while section B explains how religious importance should be analyzed in the context of case-specific facts.

A tendency toward favoring the religious employer has become evident in post-*Hosanna-Tabor* case law, and while courts have reasoned their way to this more common result, an air of result-chasing still lingers.<sup>351</sup> This result-driven analysis is clear in the majority's framing of the facts in *Morrissey-Berru*.<sup>352</sup> Even if courts are not motivated by result, the extension of the ministerial exception in most circuits since 2012 has been very broad, resulting in holdings that mirror the Court's in *Hosanna-Tabor*.<sup>353</sup> While this broad application is consistent with *Hosanna-Tabor*, based on *Hosanna-Tabor*'s sheer scope and deference to lower courts, reasoning among courts and among circuits has varied widely but has suspiciously resulted in identical outcomes for unique cases.<sup>354</sup> Perhaps dangerously, *Morrissey-Berru* confirmed and singled out the function-focused analysis these lower courts had put into practice.<sup>355</sup>

*Hosanna-Tabor*, in comparison with later circuit cases involving teachers, presented a fairly clear case of a minister.<sup>356</sup> Perich had a ministerial title, the school held her out to be a minister and required significant religious training for her position, she claimed a special ministerial housing allowance on her taxes, and she served significant religious functions.<sup>357</sup> She met all four factors, so the Court did not need to specify how each should be weighed.<sup>358</sup> Given this lack of guidance and the fairly straightforward case surrounding Perich, lower courts should not have felt as confident as they did in applying *Hosanna-Tabor*

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<sup>351</sup> See, e.g., *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018); *Fratello v. Roman Cath. Archdiocese of N.Y.*, 863 F.3d 190, 202 (2d Cir. 2017); *Cannata v. Cath. Diocese of Austin*, 700 F.3d 169, 175–76 (5th Cir. 2012).

<sup>352</sup> *Morrissey-Berru*, 140 S. Ct. at 2077–78, 2080 (Sotomayor, J., dissenting) (noting that the majority asserted facts without citation and relied on disputed factual assertions in defiance of the summary judgment standard, which resulted in a holding favorable to the religious employer).

<sup>353</sup> See *Grussgott*, 882 F.3d at 660–61; *Fratello*, 863 F.3d at 205–06; *Cannata*, 700 F.3d at 179–80.

<sup>354</sup> See *Grussgott*, 882 F.3d at 660–61; *Fratello*, 863 F.3d at 205–06; *Cannata*, 700 F.3d at 179–80. This is not true of all courts, as the Ninth Circuit demonstrated by its employee-favoring holding in *Biel*. *Biel v. St. James Sch.*, 911 F.3d 603, 605 (9th Cir. 2018).

<sup>355</sup> *Morrissey-Berru*, 140 S. Ct. at 2064.

<sup>356</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 191–92 (2012).

<sup>357</sup> *Id.*

<sup>358</sup> See *id.* at 190–92.

in later cases of less clarity. The proposed new framework more specifically addresses how function and title should be balanced and how the religious importance of an employee should be analyzed based upon which facts, if introduced, carry the most weight in affirming or refuting ministerial status.

Deriving from a similar concern about result-driven analyses, in 1959, Herbert Wechsler introduced his concept of “neutral principles.”<sup>359</sup> Wechsler had become concerned about what seemed to him “an understandable judicial desire to produce specific results, principally in the area of race, [that] had begun to produce decisions [he] could not relate to a defensible rationale of interpretation or development.”<sup>360</sup> Judges, he observed, were result-driven rather than process-driven—a troubling pattern in the wake of important race-related cases that deserved consistency in the judicial process.<sup>361</sup> The neutral principles idea, he described, was not to be thought of as “a formula to guide or produce the decision of hard cases.”<sup>362</sup> Rather, it was a “negative test . . . to be applied by a judge” in which that judge must consider “whether he is being adequately consistent in the process of adjudication, in reaching a particular type of result in a particular type of case.”<sup>363</sup>

Thus, the proposed approach for ministerial exception cases shares a similar goal to Wechsler’s neutral principals: to urge consistency in judicial reasoning based on what makes sense, rather than based on achieving certain results.<sup>364</sup> This proposed approach seeks to achieve that goal, however, by more clearly defining the *Hosanna-Tabor* analysis based on prior case law, objective standards, and elements of contract law, rather than based fully on an existing body of secular law. The following approach also balances deference to religious organizations with judicial reasoning designed to objectively analyze and avoid unconstitutional interference.<sup>365</sup>

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<sup>359</sup> Norman I. Silber & Geoffrey Miller, *Toward “Neutral Principles” in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 924–25 (1993) (citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, n.† (1959)).

<sup>360</sup> *Id.* at 924.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at 925.

<sup>363</sup> *Id.* In other words, Wechsler says that a judge must ask himself or herself, “Would I reach the same result if the substantive interests were otherwise?” *Id.* (internal quotation marks omitted).

<sup>364</sup> *Id.* at 924–25.

<sup>365</sup> *Id.* This approach seeks to strike a balance similar to that in church property disputes: a civil court does not violate the First Amendment if it applies neutral principles of law to cases involving religious organizations, and if it defers to the church court for the resolution of religious doctrine. WITTE & NICHOLS, *supra* note 30, at 235. Here, the neutral principles idea will be replaced by a set of standards derived from case law with an eye toward fairness, careful balancing, and avoiding any unconstitutional interference.

Further, the proposed framework seeks to avoid the slippery slope of an expanding ministerial exception. From the enactment of the Civil Rights Act of 1964 and Title VII through the present, the ministerial exception, at its core, has protected religious discrimination by religious institutions against the most obvious ministers of those religious institutions—the clergy.<sup>366</sup> What has evolved over time is the judicial interpretation of the constitutional exception and the expansion of what and who is covered in its penumbra. Since *McClure*, and as affirmed in *Hosanna-Tabor*, courts have applied the exception to cases involving all forms of discrimination<sup>367</sup> and to employees in a variety of roles—from priest to choral leader to called teacher to lay principal to lay teacher.<sup>368</sup>

The open-endedness of the *Hosanna-Tabor* factors, combined with the pressure to favor the employer, raises the question of how far the exception may be extended over time, a question *Morrissey-Berru* answered, in a way. Lay teachers tasked with relatively minor religious duties, when compared with their secular duties, seem to be one of the grayer areas that courts, over the past eight years, have been navigating.<sup>369</sup> This gray area risks preventing employees from knowing their rights in relation to their religious employers. However, based on the Supreme Court’s decision in *Morrissey-Berru*, it seems that courts may be able, and may even be encouraged, to reason their way to ministerial status in cases involving any employee—so long as that employee in some way furthers the mission of the religious institution.<sup>370</sup> This result would stray too far from the core purpose of the exception.<sup>371</sup> While the following proposal does not aim to limit the exception to its core subjects—religious discrimination and obvious

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<sup>366</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2071–72 (2020) (Sotomayor, J., dissenting) (noting that there are obvious and “commonsense” examples of ministers like a member of the Christian clergy or a rabbi).

<sup>367</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 179, 190 (2012) (disability discrimination); *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972) (gender discrimination). While the ministerial exception has been applied to all forms of discrimination, it will not be applied in sex discrimination cases involving sexual harassment. See *infra* note 426.

<sup>368</sup> See *Hosanna-Tabor*, 565 U.S. at 178, 190 (involving a kindergarten and fourth grade teacher at an Evangelical Lutheran school); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 659, 662 (7th Cir. 2018) (involving a grade school teacher at a private Jewish day school); *Fratello v. Roman Cath. Archdiocese of N.Y.*, 863 F.3d 190, 206 (2d Cir. 2017) (involving the principal of a Roman Catholic School); *Cannata v. Cath. Diocese of Austin*, 700 F.3d 169, 176–77 (5th Cir. 2012) (involving the music director of a Catholic church).

<sup>369</sup> Compare *Biel v. St. James Sch.*, 911 F.3d 603, 609–10 (9th Cir. 2018) (quoting *Hosanna-Tabor*, 565 U.S. at 196), with *Grussgott*, 882 F.3d at 660–62 (demonstrating the varied consideration and weight courts give to each circumstance of a teacher’s functions when those functions are both secular and religious).

<sup>370</sup> See, e.g., *McClure*, 460 F.2d at 559–60.

<sup>371</sup> *Hosanna-Tabor*, 565 U.S. at 194–95 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)) (noting that the exception ensures “that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone”).

ministers—it does aim to contain *Hosanna-Tabor* reasonably and with a concern for rights outside of just freedom of religion. It attempts to refine the *Hosanna-Tabor* analysis to achieve more equitable results among circuits and avoid an application of the test so broad that the fundamental right to religious autonomy absolutely trumps other fundamental and statutory rights.

An overarching question pervades each ministerial exception case: is the employee’s role important enough to the religious organization’s mission of transmitting the faith that interfering with the hiring or firing of that employee would unconstitutionally infringe on the religious organization’s free-exercise right?<sup>372</sup> Most people have a general idea of what “transmitting the faith” may entail,<sup>373</sup> and thus, upon hearing the facts of ministerial exception cases, would have an “immediate reaction[.]” as to whether the employee-plaintiff plays an important role in fulfilling that mission.<sup>374</sup> While the broadness of *Hosanna-Tabor* has led to inconsistent and sometimes unintuitive interpretations, it also encourages an approach that looks at all circumstances objectively and reasonably and that balances those circumstances in a holistic manner.<sup>375</sup> This new framework addresses, first, how to balance function and title, and second, how the religious importance of an employee should be analyzed considering the facts introduced.

#### A. *Balancing Function and Title*

Function is the most important of the four *Hosanna-Tabor* factors, as argued by Justice Alito in *Hosanna-Tabor*,<sup>376</sup> many of the lower courts,<sup>377</sup> and the Supreme Court in *Morrissey-Berru*.<sup>378</sup> However, *Hosanna-Tabor* expressly refused to adopt a “rigid formula,” indicate the weight of each factor in relation to one another, and indicate how many factors, if satisfied, were determinative of ministerial status.<sup>379</sup> In the case of Perich in *Hosanna-Tabor*, the circumstances of both her title and function sufficed to prove she was a minister,

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<sup>372</sup> *Hosanna-Tabor*, 565 U.S. at 188–89.

<sup>373</sup> *Id.* at 192.

<sup>374</sup> Silber & Miller, *supra* note 359, at 925.

<sup>375</sup> *Hosanna-Tabor*, 565 U.S. at 190–92. This holistic analysis is unlike the analysis proffered later by the Supreme Court in *Morrissey-Berru*, which the dissent argued was unnecessarily broad in its deference to the religious employer and dismissive of any factor other than function. *See* 140 S. Ct. 2049, 2071–72 (2020) (Sotomayor, J., dissenting).

<sup>376</sup> *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

<sup>377</sup> *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018); *Fratello v. Roman Cath. Archdiocese of N.Y.*, 863 F.3d 190, 202 (2d Cir. 2017).

<sup>378</sup> *Morrissey-Berru*, 140 S. Ct. at 2064, 2066, 2069.

<sup>379</sup> *Hosanna-Tabor*, 565 U.S. at 190.

and that conclusion is all the Court left to lower courts as guidance.<sup>380</sup> Therefore, lower courts took liberties in creating distinct modes of analyses, often focusing solely on function.<sup>381</sup>

*Morrissey-Berru* took this a step further, deeming the *Hosanna-Tabor* factors outside the scope of function flexible to the point of insignificance, stating that “our recognition of the significance of those factors in Perich’s case did not mean that they must be met—or even that they are necessarily important—in all other cases.”<sup>382</sup> This jump from a “non-rigid formula” to effectively making *Hosanna-Tabor*’s entire discussion of non-function factors a waste of “precious pages” cannot be right, especially when the reason for a balanced test is to provide some limit to the exception.<sup>383</sup>

Contrary to these lower court interpretations and to the Supreme Court’s new stance, courts cannot choose to focus solely on function when more is at play and cannot simply ignore the fact that every one of the four factors in *Hosanna-Tabor* was satisfied when the Court held Perich was a minister.<sup>384</sup> The other three factors can be indicative, though not determinative, of ministerial status, and the desire to defer to the religious employer should not make courts blind to the employee.<sup>385</sup> Function is most often key, and when function is so significant as to clearly meet the purpose of the exception, it can, and perhaps should, outweigh the lack of the other three more formal considerations.<sup>386</sup> Exceedingly religious function should not just be ignored as it was in the Ninth Circuit’s analysis of *Morrissey-Berru*.<sup>387</sup> There, the Supreme Court fairly concluded that the employee was a minister under *Hosanna-Tabor* based on the very strong functional indicators that she was transmitting the faith.<sup>388</sup>

Similarly, however, courts should not be reluctant to acknowledge when there is a lesser showing of religious function,<sup>389</sup> instead of simply “trading legal analysis for a rubber stamp” of automatic ministerial status.<sup>390</sup> A holistic analysis

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<sup>380</sup> *Id.* at 190–92.

<sup>381</sup> *See Fratello*, 863 F.3d at 202.

<sup>382</sup> *Morrissey-Berru*, 140 S. Ct. at 2063.

<sup>383</sup> *Id.* at 2081 (Sotomayor, J., dissenting).

<sup>384</sup> *Hosanna-Tabor*, 565 U.S. at 192.

<sup>385</sup> *Id.* at 202 (Alito, J., concurring).

<sup>386</sup> *Id.* at 198–99.

<sup>387</sup> *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App’x 460, 461 (9th Cir. 2019).

<sup>388</sup> *Morrissey-Berru*, 140 S. Ct. at 2066–69.

<sup>389</sup> *See id.* The Court, for example, basically equated the weight of function-related facts in *Biel* to those in *Morrissey-Berru*, when in reality the facts in *Biel* were quite less indicative of ministerial status.

<sup>390</sup> *Id.* at 2076 (Sotomayor, J., dissenting).

should still be employed.<sup>391</sup> Even in *Aparicio*, where the Southern District of New York held the employee was not a minister, the court was extremely hesitant to come to a conclusion as to any of the four *Hosanna-Tabor* factors aside from function.<sup>392</sup> When one of the four factors pointed largely toward granting ministerial status, the smallest religious aspects pressed the court to disregard the factor entirely.<sup>393</sup> By allotting a certain weight to each factor and to the circumstances within each factor, courts may feel more comfortable acknowledging factors outside of function, and if those factors are not strong indicators, they may receive less weight.

Prior to *Hosanna-Tabor*, and arguably even in *Biel*, the Ninth Circuit adopted a reasonable construction as a guiding force in the context of the ministerial exception.<sup>394</sup> This idea supports a reasonable balancing of the factors, depending on the circumstances supporting their application in each case. If, for example, factor three (whether the employee held herself out to be a minister or perceived herself that way), demonstrated a strong leaning against ministerial status, and title weighed only slightly more toward ministerial status than not, this would weigh against applying the exception. The Sixth Circuit's analysis in *Conlon* employed a seemingly reasonable approach as well, serving as a model for the "reasonableness" aspect of the proposed analysis here.<sup>395</sup> It held that two factors, title and function, weighed in favor of applying the ministerial exception.<sup>396</sup> As to the other two factors—the substance reflected in the title and the employee's use of the title—the evidence was either insufficient or unconvincing in relation to *Hosanna-Tabor*.<sup>397</sup> In that case, it was a reasonable approach to understand religious title and religious function, if individually satisfied, to be sufficient when combined.<sup>398</sup> By contrast, the Ninth Circuit's decision in *Morrissey-Berru* illustrates a failure to apply a reasonable construction.<sup>399</sup> Conceptualizing the analysis as a point system, the court basically allotted a single point per factor satisfied, when a better approach would have been to allot a few points to a factor if it was significantly satisfied,

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<sup>391</sup> *Aparicio v. Christian Union, Inc.*, No. 18-CV-0592, 2019 U.S. Dist. LEXIS 55938, at \*14–15 n.4 (S.D.N.Y. Mar. 29, 2019).

<sup>392</sup> *Id.* at \*14–19.

<sup>393</sup> *See id.*

<sup>394</sup> *Alcazar v. Corp. of the Cath. Archbishop of Seattle*, 627 F.3d 1288, 1291–92 (9th Cir. 2010). While the idea of a "reasonable construction" does not give a clear test, it does provide a more overarching idea of balance—which may be key to this kind of big implication analysis.

<sup>395</sup> *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 834–835 (6th Cir. 2015).

<sup>396</sup> *Id.* at 835.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460, 461 (9th Cir. 2019).

and a single point if it was only slightly or vaguely satisfied.<sup>400</sup> Further, the court failed to acknowledge that function does merit greater weight than the other three factors individually.<sup>401</sup>

One of the main issues that has surrounded the four *Hosanna-Tabor* factors is not the factors themselves, but rather the lower court decisions, and now Supreme Court decision, to view individual factors as optional. Therefore, the four factors should remain in place but with a clearer instruction on how they should be balanced. Religious function should always be present for an employee to be considered a minister, in turn making it a requirement. Without any practical religious function, any intended religious importance becomes moot. Further, function alone may suffice to prove ministerial status if that function indicates a predominantly ministerial and functionally essential employee. Characterizing what types of functions and attributes indicate an employee “whose functions are essential to the independence of practically all religious groups” will also help guide the analysis more consistently.<sup>402</sup>

The other three factors—the employee’s title, the substance reflected in that title, and the employee’s own perception of his or her role—must be considered and may be probative of ministerial status or a lack thereof, as held in *Hosanna-Tabor*.<sup>403</sup> Minimal religious function may be significantly supplemented by a title that reflects religious importance, the employer’s expectation that the employee transmit the faith, or an employee’s own use of their status as a minister. Minimal religious function, without any of the aforementioned formal factors, should not alone suffice. While a court may find, after analysis of these three factors, that they are not indicative of ministerial status, a court cannot simply choose to ignore all three.<sup>404</sup> Title means little without any function to support it, as does the substance reflected in that title if not put into practice at all. Instances of an employee holding himself or herself out to be a minister, however, may hold greater weight, and as such demonstrate an embracing of ministerial status. Still, each factor depends on the facts proffered to support it, and which of those facts should reasonably be given significance.

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<sup>400</sup> *See id.* The court found only function was satisfied, but instead of giving that significant weight (as the employee’s functions were largely ministerial), the court found satisfaction of function to be insufficient by virtue of it being only a single factor. *See id.*

<sup>401</sup> *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2068 (2020).

<sup>402</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200 (2012) (Alito, J., concurring); *see supra* Part II.B.2.

<sup>403</sup> *Hosanna-Tabor*, 565 U.S. at 192, 194.

<sup>404</sup> *See Fratello v. Roman Cath. Archdiocese of N.Y.*, 863 F.3d 190, 204–05 (2d Cir. 2017).

*B. Analyzing Religious Importance in the Context of Significant Facts*

Characterizing what types of functions and attributes indicate an employee “whose functions are essential to the independence of practically all religious groups” will also help guide the analysis more consistently.<sup>405</sup> Further, characterizing what attributes indicate religious importance in an employee’s title, the substance reflected in that title, and the employee’s own perception of their role, are key to determining whether the factors other than function are satisfied. Both *Starkman* and Justice Alito’s concurrence in *Hosanna-Tabor* provide beneficial insight into what these attributes may be.<sup>406</sup>

Religious importance is, in large part, demonstrated by the functional essentiality of an employee.<sup>407</sup> Functionally essential employees may be characterized as “those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.”<sup>408</sup> If all of these are met, weight should be allocated to function, perhaps alone sufficient to indicate ministerial status. If only one is met, such as teaching the faith to the next generation, then less—but still significant—weight should be given toward ministerial status, depending on the extent to which the employee spreads the faith. Generally, facts that may indicate this functional importance include teaching a religious class beyond a historical perspective, *leading* prayer, and planning or *leading* multiple religious services monthly or even annually.<sup>409</sup>

Ambiguity still exists, especially as to what “perform[ing] important functions in worship services and in the performance of religious ceremonies and rituals” means.<sup>410</sup> Interpreted narrowly, it may mean the performance of functions that are literally a part of the formal religious service or ritual. More broadly, it may be interpreted to mean any function important to furthering the religious service or ritual—including keeping young students well-behaved.<sup>411</sup>

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<sup>405</sup> *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

<sup>406</sup> *Starkman v. Evans*, 198 F.3d 173, 176–77 (5th Cir. 1999); *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

<sup>407</sup> *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

<sup>408</sup> *Id.*

<sup>409</sup> See *Hosanna-Tabor*, 565 U.S. at 192; *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018); *Biel v. St. James Sch.*, 911 F.3d 603, 609 (9th Cir. 2018); *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App’x 460, 461 (9th Cir. 2019).

<sup>410</sup> *Hosanna-Tabor*, 565 U.S. at 200.

<sup>411</sup> See *id.*; *Biel*, 911 F.3d at 609. The Supreme Court in *Morrissey-Berru* takes this broader approach, equating *Biel*, an employee who accompanied her students to Mass and participated when they led prayer, to *Morrissey-Berru* or *Perich*, employees who, for example, led Masses, led their students in prayer, and directed

Keeping an eye toward the purpose of the exception as well as the purpose of this proposal, the narrower interpretation is more appropriate, despite potentially requiring courts to look, albeit at a surface level, at matters of religious doctrine.<sup>412</sup> In that regard, *Starkman* also adds that if the employee “engaged in activities traditionally considered ecclesiastical or religious,” the employee’s function should balance in favor of the exception.<sup>413</sup> Determining what is “traditionally ecclesiastical or religious,” however, may be a difficult task for the court to engage in without delving too deeply into religion.<sup>414</sup>

Next, the employment decisions surrounding the employee’s position, if made “largely on religious criteria,” should point toward religious importance.<sup>415</sup> Certain facts indicate an express expectation of religiosity and should be given significant weight in the ministerial analysis. A key example would be a contract expressly allocating to an employee a religious title or consistent religious duties. Another example may be an offer letter expressing that past professional experience administering religion was the employer’s reason for hiring the employee. In conjunction with incidental facts of an employee’s actual religious duties, reputation, self-perception, and title, these formal expressions demonstrate an agreed-upon level of religiosity.

Even more persuasive would be a contract expressly stating that the employee is a minister and thus subject to the ministerial exception, indicating a mutual understanding of and an agreement to its implications. Still, these types of documents alone would not suffice to prove ministerial status and would require a showing of ministerial function. If, for example, such a contract was to be taken at face value, even if the employee was in no practical way a minister, an employer could abuse the ministerial exception by including such a provision in all of its contracts. In *Morrissey-Berru*, for example, the Supreme Court majority relied heavily on the employment agreements stating that faculty were expected to help carry out the school’s core mission of “educating and forming students in the Catholic faith.”<sup>416</sup> While this mission would provide context for employees’ subsequent religious functions, those functions must still then be weighed: Did the employee go above and beyond in fulfilling that mission? Did

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Easter plays. 140 S. Ct. 2049, 2059, 2066, 2068 (2020).

<sup>412</sup> WITTE & NICHOLS, *supra* note 30, at 237–38. To accommodate variation among religions, courts would likely have to know what a worship service, religious ceremony, or ritual looks like for the religion in question, though only at a base level. *Id.* at 238.

<sup>413</sup> *Starkman v. Evans*, 198 F.3d 173, 176–77 (5th Cir. 1999) (quoting *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 284 (5th Cir. Unit A July 1981)).

<sup>414</sup> *Id.*

<sup>415</sup> *Id.* at 176.

<sup>416</sup> *Morrissey-Berru*, 140 S. Ct. at 2066.

the employee meet the bare minimum requirements to fulfill that mission? If the employee did only the bare minimum, was that amount sufficient to deem her a minister? In the case of *Biel*, her fulfillment of this mission seemed to be the bare minimum, and though she may have come close to ministerial status, she should not have been deemed a minister in looking at the context of her employment and the context of ministerial exception cases as a whole.<sup>417</sup>

Situations in which an employee is identified as “called” or “lay” would also serve as an important indicator of ministerial status, as it may serve to support any or all of the factors of title, how the employer held out the employee, and how the employee held herself out or understood her role.<sup>418</sup> Formal ordination, though a factor to consider, is a Judeo-Christian concept that does not have a “clear counterpart” in all religions.<sup>419</sup> Thus, courts should be mindful of religions, such as Islam, in which every member of the religion “can perform the religious rites.”<sup>420</sup> Considering characteristics unique to individual religions is not over-imposing and is necessary to account for pluralism, as well as to allow courts to differentiate between individuals who are simply relaying religious tenets as part of their employment duties from those who are ministering to the faithful as part of their employment duties.<sup>421</sup> Finally, any religious certifications or trainings, if supported by detailed and formal program descriptions, may support a finding of religious importance and ministerial status. Vague mention of a religious training program or curriculum does not support a finding of ministerial status, as it leaves open questions as to the extensiveness of a program, voluntariness of completion, and importance to the employment in question and its religious aspects.<sup>422</sup>

Clarification of the ministerial exception’s scope may be achieved by an act of Congress to better define Title VII in the context of religious employers, or by a new Supreme Court ruling. However, setting clear lines again runs the risk of excessive government entanglement with the church and infringement on employment decisions, making line-drawing difficult and perhaps something the Court is unlikely to do.<sup>423</sup> Thus, if no such legislative or judicial guidance comes

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<sup>417</sup> *Id.* at 2071–72, 2077–78 (Sotomayor, J., dissenting).

<sup>418</sup> *Hosanna-Tabor*, 565 U.S. at 191–92; *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 659–60 (7th Cir. 2018).

<sup>419</sup> *Fratello v. Roman Cath. Archdiocese of N.Y.*, 863 F.3d 190, 207 (2d Cir. 2017) (quoting *Hosanna-Tabor*, 565 U.S. at 198, 202 n.3 (Alito, J., concurring)).

<sup>420</sup> *Id.*

<sup>421</sup> *See, e.g., Hosanna-Tabor*, 565 U.S. at 202 nn.3–4 (Alito, J., concurring).

<sup>422</sup> *See Grussgott*, 882 F.3d at 659.

<sup>423</sup> *Hosanna-Tabor*, 565 U.S. at 190 (declining to adopt a rigid formula); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2067 (2020) (affirming the denial to adopt a rigid formula).

along, the above proposal seeks to provide lower courts with a reasoned mode of analysis that could at least urge a more consistent application of *Hosanna-Tabor*, and avoid the slippery slope that may accompany the *Morrissey-Berru* holding.

### CONCLUSION

Although the proposed analysis would attempt to address some issues of consistency and fairness, the concerns still exist surrounding the ministerial exception's application in general. Striking the perfect level of government involvement in matters of church-state relations is difficult to do. Zero involvement is not a feasible option, but beyond that, the ideal level is hard to define, though this proposal attempts to find a balance.

Even with a clarified test, one concern deriving from the exception's applicability to all antidiscrimination laws is whether courts will continue to be more focused on religious liberty of religious institutions than they are on other fundamental and statutory rights of the individual employee. Perhaps the exception really should be limited to cases of religious discrimination and, beyond that, discrimination laws should be deemed "valid and neutral law[s] of general applicability and therefore applicable to the Church, even if [they] impose[] a 'substantial burden' on [a religious institution's] operation."<sup>424</sup> Another concern is whether application of the exception enables abuses by religious institutions. While the level of abuse may be limited by a better-defined mode of analysis, as the number of *employees* falling under the exception would be restricted, potential for abuse would not be fully quashed as application of the exception at all could permit abuse of the exception for obvious ministerial employees.<sup>425</sup> Lastly, does the government even truly achieve its goal of avoiding Establishment Clause issues through a ministerial exception? While one of the main stated goals of this exception is to avoid excessive entanglement and establishment of religion, through having such an exception the government seemingly favors religion over no religion by deeming antidiscrimination laws inapplicable to religious institutions. The Court in *Amos* explicitly denied

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<sup>424</sup> WITTE & NICHOLS, *supra* note 30, at 237 (citing *Emp. Div., Dept. of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877–79 (1990)).

<sup>425</sup> The ministerial exception does not bar sexual harassment claims, a positive limitation to potential abuse of the exemption. 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, 250–51 (2019).

unconstitutionality under the Establishment Clause, but that understanding does not assuage all doubt.<sup>426</sup>

The proposal here attempts to address one gray area of the ministerial exception—who is a minister for purposes of the exemption and thereby barred from bringing suit against their religious employer. Through clarifying the balance between function and title and enumerating factors indicative of religious importance, this proposal draws upon the fundamental purpose of the ministerial exception and ensure courts' analyses center on the idea of religious importance and essential religious functions. Now that the Supreme Court has dramatically broadened the ministerial exception, in accordance with some lower court practices, the exception may slowly be extended to cover cases less and less indicative of ministerial status, allotting to religious organizations excessive freedom to discriminate against any employee resembling a minister in any way. Surely the framers of the Constitution did not intend for religious institutions to be completely free from any law of general applicability short of crime, and surely courts can find a way to engage in a fair analysis of the ministerial exception.

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<sup>426</sup> Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 329–30 (1987).

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