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# Reconciling the Ministerial Exception and Title VII: Clarifying the Employer's Burden for the Ministerial Exception

Amy Dygert\*

## INTRODUCTION

The ministerial exception, under the Free Exercise and Establishment Clauses of the First Amendment, provides an immunity for churches or religious organizations from employment discrimination claims. Under the exception, qualifying religious organizations are protected from employment discrimination claims brought by employees who hold or held a position within the organization that included a religious function.<sup>1</sup> As the ministerial exception lies between civil rights and First Amendment rights, it is imperative that the Supreme Court provide clear guidance for lower courts.

The ministerial exception is undeniably a powerful tool for religious organizations. However, in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n*,<sup>2</sup> the Supreme Court's first opinion on the exception,<sup>3</sup> the Court specifically avoided any indications of the exception's scope, leaving unclear what organizations qualify for the protection. In the absence of such guidance, the application of the exception falls prone to bias, and is perhaps more readily available for some religious groups than for others.<sup>4</sup>

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\* J.D. Washington University in St. Louis School of Law (2018).

1. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012).

2. 565 U.S. 171 (2012).

3. *Id.* at 188.

4. The Supreme Court has been cautious to define religion. It has approached the issue in cases of the Universal Military Training and Service Act, concerning the conscientious objector exception: in *United States v. Seeger*, the Court held that "the test of belief 'in a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." 380 U.S. 163, 165-66 (1965). Considering an exception to a state's compulsory education law, the Supreme Court in *Wisconsin v. Yoder* distinguished religion from secular values:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief...the very concept of ordered liberty precludes allowing every person to make his own standards on

This Note proposes clarifying the ministerial exception, namely the burden employers must meet in order to be protected. The Supreme Court's decision in *Hosanna-Tabor*, the first case in which the Supreme Court affirmed the existence of the exception, fell far short of this mark. I argue that there should be a three-prong test for employers in order to apply the ministerial exception to a particular employment issue. Two of these prongs are already being utilized by lower courts and are present in the *Hosanna-Tabor* ruling, though not specifically identified as part of a threshold test: (1) that the employer be a religious institution; (2) that the position in question be a minister. The third prong, which has not been required, is a notice requirement: I argue this prong is necessary in order to preserve the integrity of federal employment discrimination laws.

Part II of this Note examines the history of the ministerial exception leading up to the 2012 Supreme Court decision in *Hosanna-Tabor*, the application of the *Hosanna-Tabor* ruling in circuit courts, its correlation with Title VII, and an overview of the religious demographics of the United States today. Part III of this note critically examines the conflict between Title VII protection to individual employees and the First Amendment rights of individuals and religious institutions. Part IV of this note includes a proposal of both modified language and a clarified test for the application of the ministerial exception.

## I. HISTORY

### *A. Religion in US Law and Policy*

In 2012, the Supreme Court addressed the ministerial exception for the first time in *Hosanna-Tabor*.<sup>5</sup> In his majority opinion, Justice Roberts includes a foundation: the history of “[c]ontroversy between church and

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matters of conduct in which society as a whole has important interests.

406 U.S. 205, 215-16 (1972). The Court held that the “traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.” *Id.* at 216. See generally Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); Jesse Choper, *Defining ‘Religion’ in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982).

5. 565 U.S. 171 (2012).

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state.”<sup>6</sup> This controversy, in fact, predates the United States and its Constitution: “In 1215, the issue was addressed in the very first clause of Magna Carta. There, King John agreed that ‘the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.’”<sup>7</sup> Centuries later, the Puritans left England “[s]eeking to escape the control of the national church,” hoping “to elect their own ministers and establish their own modes of worship.”<sup>8</sup> As the United States came into being, the First Amendment was adopted “to foreclose the possibility of a national church,” ensuring that the federal government “would have no role in filling ecclesiastical offices.”<sup>9</sup> In this spirit, the First Amendment includes two clauses commonly referred to as the Religion Clauses: the Establishment Clause and the Free Exercise Clause.<sup>10</sup>

The Establishment Clause prohibits discrimination of religion by Congress.<sup>11</sup> Initially, the establishment clause prevents the passage of laws that facially discriminate against any religion.<sup>12</sup> If a law is challenged, the

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6. *Hosanna-Tabor*, 565 U.S. at 182.

7. *Id.*

8. *Id.*

9. *Id.* at 183-84.

10. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

11. The establishment clause prohibits any law “respecting an establishment of religion.” *See id.*

12. *Allegheny Cty. v. Greater Pittsburgh ACLU*, 492 U.S. 573, 590-91 (1989).

In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.

*Id.*

The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

*Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1942).

Courts apply the “*Lemon* test,” developed by the Supreme Court in *Lemon v. Kurtzman*.<sup>13</sup> In *Lemon*, the Court distilled precedent on the Establishment Clause to the following three-part test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>14</sup> Courts have used the *Lemon* test to overrule both state and federal laws that violate one or more of these three prongs.<sup>15</sup>

Working alongside the Establishment Clause’s prohibition on discrimination of religion, the Free Exercise Clause functions to protect the practice of religion. An early construction of the Free Exercise Clause can be found in *Reynolds v. United States*,<sup>16</sup> where the Supreme Court considered whether a Mormon who practiced polygamy could be required

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13. 403 U.S. 602 (1971).

In *Lemon v. Kurtzman* . . . the Court sought to refine these principles by focusing on three ‘tests’ for determining whether a government practice violates the Establishment Clause. Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion. This trilogy of tests has been applied regularly in the Court’s later Establishment Clause cases.

*Allegheny Cty.*, 492 U.S. at 592 (internal citation omitted).

14. *Lemon*, 403 U.S. at 612-13(citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 674 (1970)).

15. *Allegheny Cty.*, 492 U.S. at 592.

Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion, a concern that has long had a place in our Establishment Clause jurisprudence.

*Id.*; see generally *Engel v. Vitale*, 370 U.S. 421, 436 (1962). Thus, in *Wallace v. Jaffree*, the Court held unconstitutional Alabama’s moment-of-silence statute because it was “enacted . . . for the sole purpose of expressing the State’s endorsement of prayer activities.” 472 U.S. 38, 60 (1985). The Court similarly invalidated Louisiana’s ‘Creationism Act’ because it ‘endorses religion’ in its purpose. *Edwards v. Aguillard*, 482 U.S. 578, 593(1987). And the educational program at issue in *School District of Grand Rapids v. Ball*, was held to violate the Establishment Clause because of its ‘endorsement’ effect. 473 U.S. 373, 389-92, (1985). See also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (tax exemption limited to religious periodicals “effectively endorses religious belief”); *Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 592 (1989).

16. 98 U.S. 145 (1878).

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to abide by state law that made polygamy unlawful.<sup>17</sup> More generally, the Court considered “whether religious belief can be accepted as justification of an overt act made criminal by the law of the land.”<sup>18</sup> Turning to the Free Exercise Clause, the Court determined that “Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion.”<sup>19</sup> Looking to the intention of the writers of the Constitution, the Court further held that, under the Free Exercise Clause, “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”<sup>20</sup>

A more recent application of the free exercise clause is *Employment Div., Dept. of Human Resources of Oregon v. Smith*.<sup>21</sup> There, the Supreme Court denied the plaintiffs’ claim of a violation of free exercise. Justice Scalia, writing for the majority, stated, “[w]e have never held that an

17. *Id.*

[T]he accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church ‘that it was the duty of male members of said church, circumstances permitting, to practise polygamy . . . [the accused] asked the court to instruct the jury that if they found from the evidence that he ‘was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be ‘not guilty.’ This request was refused.

*Id.* at 161-62.

18. *Id.* at 162.

19. *Id.*

20. *Id.* at 164. Decades later, the Supreme Court reiterated this sentiment, describing the free expression clause as “embrac[ing] two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be.” *Cantwell v. Connecticut*, 310 U.S. 300, 303 (1940).

21. 494 U.S. 872 (1990).

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

*Id.* at 874. In this case, two individuals had been “fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church”; these individuals were subsequently denied unemployment compensation, having been found to be “ineligible for benefits because they had been discharged for work-related ‘misconduct.’” *Id.*

individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>22</sup> Echoing the construction of the Free Exercise Clause in *Reynolds v. United States*, the Court continued to hold that laws may prohibit certain actions regardless of any religious association such actions may carry.

*B. Title VII: Protecting Employees in the Workplace*

As part of the Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e et seq., protects employees from discrimination on the basis of "race, color, religion, sex, or national origin."<sup>23</sup> Beyond Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Genetic Information Nondiscrimination Act of 2008, among others, provide workplace protections for select groups. The ADA prohibits discrimination "on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>24</sup> Under the ADEA, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age; to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such an individual's age; or to reduce the wage rate of any employee in order to comply with [the ADEA]."<sup>25</sup>

Each of these provisions—Title VII,<sup>26</sup> the ADA,<sup>27</sup> and the ADEA<sup>28</sup>—

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22. *Id.* at 879.

23. 42 U.S.C. § 2000e-2 (2012). *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (developing the burden-shifting framework of an employment discrimination claim); F. GREGORY, THE CIVIL RIGHTS ACT AND THE BATTLE TO END WORKPLACE DISCRIMINATION: A 50 YEAR HISTORY, 2014; HUBERT H. HUMPHREY, JOSEPH L. RAUH, AND JOHN G. STEWART, THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION, 1997.

24. 42 U.S.C. § 12112(a) (2012). *See also* *The ADA: Your Employment Rights as an Individual with a Disability*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Jan. 1, 2017), <https://www.eeoc.gov/facts/ada18.html>.

25. 29 U.S.C. § 623(a) (2012). *See also* *Facts About Age Discrimination*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Jan. 1, 2017), <https://www.eeoc.gov/facts/age.html>.

26. *See* 42 U.S.C. § 2000e-3(a) (2012)

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includes an anti-retaliation provision.

### *C. The Religion Clauses and Employment*

Nearly eighty years after the ratification of the First Amendment, the Supreme Court ruled on a property case arising from an internal discrepancy in a church.<sup>29</sup> The decision marked the Court's first intervention into an internal church matter. Importantly, the Court did not embrace this opportunity to intervene, acknowledging that, if at all possible, such matters should be resolved internally by the church.<sup>30</sup>

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It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

27. See 42 U.S.C. § 12203 (a) (2012) (“No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter”); 42 U.S.C. § 12203 (b) (2012):

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

*Id.*

28. 29 U.S.C. § 623(d).

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

*Id.*

29. *Watson v. Jones*, 80 U.S. 679 (1872).

30. *Id.* at 734-35.

The novelty of the questions presented to this court for the first time, their intrinsic importance and far reaching influence, and the knowledge that the schism in which the case originated has divided the Presbyterian churches throughout Kentucky and Missouri, have seemed to us to justify the careful and laborious examination and discussion which we have made of the principles which should govern the case. For the same reasons we have held it



Over the next century, Court intervention began to develop into the current ministerial exception. For example, in a Fifth Circuit case, *McClure v. The Salvation Army*,<sup>31</sup> plaintiff McClure, an ordained minister for the Salvation Army,<sup>32</sup> brought suit against the church when her officer status was terminated, “alleging that it had engaged in discriminatory employment practices against her in violation of Title VII.”<sup>33</sup>

On appeal, plaintiff and the EEOC argued that the defendant was “not exempt from the prohibitions of Title VII and [was] therefore liable” for discrimination.<sup>34</sup> In response, the Salvation Army put forth three arguments: first, that it did not qualify as an employer under Title VII; second, that if it did qualify as an employer, it was an employer within Title VII’s § 702 exemption; and third, that if § 702 was not applicable, that in this case the application of Title VII would be a violation of the First Amendment.<sup>35</sup> The Fifth Circuit did not support the defendant’s first two arguments—finding it to be an employer within the meaning of Title VII<sup>36</sup> and to be outside the § 702 exemption.<sup>37</sup> However, the court

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under advisement for a year, not uninfluenced by the hope, that since the civil commotion . . . has passed away, that charity, which is so large an element in the faith of both parties, and which, by one of the apostles of that religion, is said to be the greatest of all the Christian virtues, would have brought about a reconciliation. But we have been disappointed. It is not for us to determine or apportion the moral responsibility which attaches to the parties for this result. We can only pronounce the judgment of the law as applicable to the case presented to us.

*Id.*

31. 460 F.2d 553 (5th Cir. 1972).

32. *Id.* at 554.

33. *Id.* at 555. According to the Fifth Circuit, the District Court “found that The Salvation Army was a religion and concluded that [plaintiff’s] activities ‘were connected with carrying on of the religious activities of The Salvation Army in accordance with § 702 of Title VII.’” *Id.*

34. *Id.* at 556.

35. *See id.*

36. “[T]he record shows that [Plaintiff] was selected, employed, controlled, trained, and paid by The Salvation Army. When the existence of such factors is shown, the individual falls within the definition of ‘employee.’” *Id.* at 557.

37. *Id.* at 558.

The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.

*Id.*

supported the Salvation's Army's third argument, finding that applying Title VII would unconstitutionally interfere with internal matters of the church.<sup>38</sup>

Ultimately, the Fifth Circuit held that applying Title VII in this matter would entail State "intru[sion] upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern."<sup>39</sup>

Following *McClure*, the term "ministerial exception" began being used in other circuit courts. For example, in *Rayburn v. Gen. Conference of Seventh-Day Adventists*,<sup>40</sup> the Fourth Circuit considered "whether a woman denied a pastoral position in the Seventh-day Adventist Church

38. *Id.* at 560-61.

We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment . . . We therefore hold that Congress did not intend, through the nonspecific working of the applicable provisions of Title VII, to regulate the employment relationship between church and minister.

*Id.* "[R]estrictions on the free exercise of religion are allowed only when it is necessary 'to prevent grant and immediate danger to interests which the state may lawfully protect.'" *Id.* at 559 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

39. *Id.* at 559. The court acknowledged that "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." *Id.* at 558-59. The court looked to Supreme Court precedent to establish that such internal matters of a church are not for courts to decide. Here, it began with *Watson v. Jones*, where "the Supreme Court began to place matters of church government and administration beyond the purview of civil authorities." *Id.* at 559 (citing *Watson v. Jones*, 80 U.S. 679 (1872)). Next, the Fifth Circuit looked to *Gonzalez v. Roman Catholic Archbishop*, where the Supreme Court held that, "[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." *Id.* (citing *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929)). Third, the court looked to the Supreme Court's holding in *Kedroff v. Saint Nicholas Cathedral*, where it held that "legislation that regulates church administration, the operation of churches [or] the appointment of clergy prohibits the free exercise of religion." *Id.* (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952)). Finally, the court looked to a 1969 Supreme Court case in which it posited that "[i]f civil courts undertake to resolve [controversies over religious doctrine and practice] in order to adjudicate a property dispute, the hazards are ever present of . . . implicating secular interests in matters of purely ecclesiastical concern." *Id.* at 560 (citing *U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969)). The Fifth Circuit concluded that the "common thread" through these cases was that religious organizations should be free to manage matters of its faith without secular interference. *Id.* (citing *Kedroff*, 344 U.S. at 116).

40. 772 F.2d 1164 (4th Cir. 1985).

may charge that church with sexual and racial discrimination under Title VII.”<sup>41</sup> The case came to the Fourth Circuit after the district court “granted summary judgment to defendants on the grounds that the suit was barred by the religion clauses of the First Amendment.”<sup>42</sup> The court followed an analysis similar to that in *McClure*, finding the case to be within Title VII but outside of its § 702 exception for religious employers, and therefore placing Title VII at odds with the First Amendment.<sup>43</sup>

As Justice Roberts notes in the majority opinion of *Hosanna-Tabor*, the circuit courts had uniformly recognized the ministerial exception prior to the Supreme Court granting certiorari.<sup>44</sup>

#### *D. Overview of Hosanna-Tabor Decision*

It was not until 2012 that the Supreme Court encountered the exception.<sup>45</sup> In *Hosanna-Tabor*, the Supreme Court endorsed the ministerial exception, and held that an employer, a Lutheran school, could

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41. *Id.* at 1164-65.

42. *Id.* at 1165.

43. “To subject church employment decisions of the nature we consider today to Title VII scrutiny would . . . give rise to ‘excessive government entanglement with religious institutions prohibited by the establishment clause of the First Amendment.’” *Id.* at 1169-70 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

44. 565 U.S. 171, 188 (2012).

Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue. Since the passage of [Title VII] and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a “ministerial exception,” grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.

*Id.* (citing *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989); see *Rweyemamu v. Cote*, 520 F.3d 198, 204–09 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–07 (3d Cir. 2006); *E.E.O.C. v. Roman Catholic Diocese*, 213 F.3d 795, 800–01 (4th Cir. 2000); *Combs v. Central Tex. Annual Conference*, 173 F.3d 343, 345–50 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–227 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991); *Werft v. Desert Southwest Annual Conference*, 377 F.3d 1099, 1100–04 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F.3d 648, 655–57 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301–04 (11th Cir. 2000); *E.E.O.C. v. Catholic Univ.*, 83 F.3d 455, 460–63 (D.C. Cir. 1996).

45. *Hosanna-Tabor*, 565 U.S. at 188.

dismiss a teacher whose actions, the school found, did not comply with the church's teachings.<sup>46</sup>

Hosanna-Tabor Evangelical Lutheran Church and School included "a small school in Redford, Michigan, offering a 'Christ-centered education' to students in kindergarten through eighth grade."<sup>47</sup> As a member of the Missouri Synod, the school classified teachers into called and lay categories, where lay teachers did not have a religious affiliation or role but called teachers were "regarded as being called to their vocation by God through a congregation."<sup>48</sup>

Hosanna-Tabor initially employed plaintiff Cheryl Perich in 1999 as a lay teacher.<sup>49</sup> Once she completed various qualification requirements, "Hosanna-Tabor asked [Perich] to become a called teacher."<sup>50</sup> Perich accepted.<sup>51</sup> As a called teacher, Perich taught, in different years, kindergarten and fourth grade.<sup>52</sup> Additionally, Perich "taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school wide chapel service," which she led "about twice a year."<sup>53</sup>

In 2004, Perich was diagnosed with narcolepsy, and she "began the 2004-2005 school year on disability leave."<sup>54</sup> When Perich tried to return to work in January of 2005, the school principal informed her that a lay teacher had been appointed "to fill Perich's position for the remainder of

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46. *Id.* at 190 ("Having concluded that there is a ministerial exception grounded in the Religion Clauses of the First Amendment, we consider whether the exception applies in this case. We hold that it does").

47. *Id.* at 177 (citing *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 582 F. Supp. 2d 881, 884 (E.D. Mich. 2008)).

48. *Id.* Called teachers were required to meet additional qualifications for their positions, including "eight courses of theological study, obtain[ing] the endorsement of their local Synod district, and pass[ing] an oral examination." *Id.* Once qualified, a called teacher is hired when he or she is called by a congregation. *Id.* Upon being called by a congregation, "a teacher receives the formal title 'Minister of Religion, Commissioned.'" *Id.* "A commissioned minister serves for an open-ended term; at Hosanna-Tabor, a call could be rescinded only for cause and by a supermajority vote of the congregation." *Id.*

49. *Id.* at 178.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

the year.”<sup>55</sup> Perich again returned to the school on February 22 with medical clearance to work; she refused to leave “until she obtained written documentation that she had reported to work.”<sup>56</sup> The school principal informed her “that she would likely be fired,” to which Perich “responded that she had spoken with an attorney and intended to assert her legal rights.”<sup>57</sup> Following her threat of legal action, the school board sent Perich a letter informing her that the congregation “would consider whether to rescind her call at its next meeting”; the congregation did so, sending a letter of termination the day after its decision.<sup>58</sup>

In its opinion, the Supreme Court declined to create a test or rule about the ministerial exception’s applicability. Finding that “Perich was a minister within the meaning of the exception,” the Court found that it was “require[d]” to dismiss Perich’s “employment discrimination suit against her religion employer.”<sup>59</sup> Importantly, the Court used the ministerial exception not as persuasive in its analysis of a retaliation claim, but as precluding consideration of Perich’s claim altogether.<sup>60</sup> Its analysis

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55. *Id.*

On January 30, Hosanna–Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next. The congregation voted to offer Perich a ‘peaceful release’ from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher. Perich refused to resign and produced a note from her doctor stating that she would be able to return to work on February 22. The school board urged Perich to reconsider, informing her that the school no longer had a position for her, but Perich stood by her decision not to resign.

*Id.* at 179 (citation omitted).

56. *Id.* at 179–80.

57. *Id.*

58. *Id.*

59. *Id.* at 194. The Court determined that ordering the school to reinstate Perich would “plainly violat[e] the Church’s freedom under the Religion Clauses to select its own ministers.” *Id.*

60. In *Hosanna-Tabor*, the Supreme Court was careful to distinguish the case at hand from *Smith*. *Id.* at 190. The Court explained that *Smith* concerned a state law banning the use of peyote, despite its role in certain religious practices; despite the limitation on religious practice the state law imposed, the Court found that the law “did not violate the Free Exercise Clause . . . because the ‘right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.’” *Hosanna-Tabor*, 565 U.S. at 190 (citing *Smith*, 494 U.S. at 879). Finding the selection of ministers to be unique from the participation of a religious practice involving peyote, the Court held that “*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.” *Id.*

focuses more on the protection of a church selecting its own ministers than on an individual's rights under the ADA or Title VII.<sup>61</sup> Concerning the scope of the ministerial exception, the Court also considered the use of the exception in lower federal court, noting that “[e]very Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and [the Supreme Court] agree[s].”<sup>62</sup> However, while the Court was willing to rule that, in this particular case, the ministerial exception applied, precluding the plaintiff's claim, it specifically stopped short of developing a rule or test as to the application of the exception.<sup>63</sup> The Court's analysis shows that application of the ministerial exception is a fact-based inquiry that examines the circumstances of the employment, but provides little direction beyond that.

Justice Alito, joined by Justice Kagan, concurred in the opinion. While Alito supported application of the ministerial exception in this case, he sought to clarify the term “minister” in the context of the ministerial exception.<sup>64</sup> Alito noted that the term was more common in Protestant denominations than in other religious practices, “it would be a mistake if the term [‘minister’] or the concept of ordination were viewed as central to the important issue of religious autonomy.”<sup>65</sup> Justice Thomas separately concurred, arguing that civil courts, when applying the ministerial exception, “defer to a religious organization's good faith understanding of

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61. *Id.* at 188-89.

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

*Id.*

62. *Id.* at 190.

63. “We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in our first case involving the ministerial exception, that the exception covers [Plaintiff], given all the circumstances of her employment.” *Id.*

64. *Id.* at 198 (Alito, J., concurring).

65. *Id.*

who qualifies as its minister.”<sup>66</sup>

### *E. Critiques and Applications of Hosanna-Tabor*

Following the Supreme Court’s ruling on *Hosanna-Tabor* in 2012, there have been several circuit court opinions relying on and interpreting the opinion.<sup>67</sup> In 2012, the Fifth Circuit considered the termination of a music director who claimed his termination violated the ADEA and ADA.<sup>68</sup> The employer, Catholic Diocese of Austin, claimed that the music director position was a minister position, therefore falling within the ministerial exception, and based its argument “on the important role music plays in the celebration of Mass.” Conversely, the plaintiff argued that, in the position of music director, he “merely played the piano at Mass and that his only responsibilities were keeping the books, running the sound system, and doing custodial work,” activities which are non-ministerial.<sup>69</sup>

Looking to *Hosanna-Tabor* for guidance, the Fifth Circuit observed “[t]he Supreme Court specifically declined to adopt a ‘rigid formula’ for determining when an employee is a minister within the meaning of the ministerial exception, concluding instead ‘that the exception covers Perich, given all the circumstances of her employment.’”<sup>70</sup> The Fifth Circuit then turned to its own three-part test, previously established, finding that *Hosanna-Tabor* had not overruled it.<sup>71</sup> Ultimately, the Fifth

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66. *Id.* at 196 (Thomas, J., concurring).

67. *See generally* *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184 (2d Cir. 2014); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015); *Puri v. Khalsa*, No. 13-36024, 2017 WL 65393 (9th Cir. 2017); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Askew v. Trs. of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc.*, 684 F.3d 413 (3d Cir. 2012).

68. *Cannata*, 700 F.3d at 170-71.

69. *Id.* at 177.

70. *Id.* at 174 (citing *Hosanna-Tabor*, 565 U.S. at 190).

71. *Id.* at 176.

The court described its previously established ministerial exception test as follows: First this court must consider whether employment decisions regarding the position at issue are made largely on religious criteria[.] . . . Second, to constitute a minister for purposes of the ‘ministerial exception,’ the court must consider whether the plaintiff was qualified and authorized to perform the ceremonies of the Church. . . . Third, and probably most important, is whether [the employee] engaged in activities traditionally considered ecclesiastical or

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Circuit ruled that the ministerial exception precluded the plaintiff's claims, finding that "the church has the right to determine who will participate in its religious ceremonies."<sup>72</sup> The court agreed with the defendant that the plaintiff "played a role in furthering the mission of the church and conveying its message to congregants," therefore allowing the ministerial exception to apply to the music director position.<sup>73</sup>

The Ninth Circuit also considered the application of the ministerial exception in a post-*Hosanna-Tabor* case, *Headley v. Church of Scientology Int'l*.<sup>74</sup> Here, plaintiffs were former ministers of the Church of Scientology International (the Church), working at Sea Organization, a component of the Church.<sup>75</sup> In 2009, plaintiffs brought suit against the Church under the Trafficking Victims Protection Act.<sup>76</sup>

On appeal, the Ninth Circuit found that it did not need to consider the ministerial exception in this case, finding instead that "the text of the Trafficking Victims Protection Act resolves this case."<sup>77</sup> The court found that the plaintiffs failed to present a valid claim under the Act, and therefore it did not need to consider whether the ministerial exception applied.<sup>78</sup> Still, the Ninth Circuit clearly endorsed the ministerial exception.<sup>79</sup>

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religious, including whether the plaintiff attends to the religious needs of the faithful. *Id.* at 175-76. (citing *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999)).

72. *Id.* at 180.

73. *Id.*

74. 687 F.3d 1173 (9th Cir. 2012).

75. *Id.* at 1174. Plaintiffs joined Sea Organization, a secluded compound, knowing "that they would work long, hard hours without material compensation." *Id.* at 1175. They worked "more than 100 hours a week" in exchange for living expenses and "a \$50 weekly stipend." *Id.* at 1176. However, the court found that "[t]hroughout their ministerial service they repeatedly showed by word and deed that they enjoyed their work, performed it willingly, and were helping to further the Sea Org[anization]'s mission." *Id.* at 1175. Gradually, plaintiffs became dissatisfied with their life and work at Sea Organization, and each left the ministry in 2005. *Id.* at 1177.

76. *Id.* at 1178. The court notes that plaintiffs "also brought federal and state minimum wage claims, but they have abandoned those claims." *Id.*

77. *Id.* at 1179. The district court had granted summary judgment in favor of the church, holding that the plaintiffs' claims were "barred by the ministerial exception." *Id.*

78. *Id.*

79. *Id.* at 1181.

The district court rested its rulings on the ministerial exception. The district court was right to recognize that courts may not scrutinize many aspects of the minister-church relationship . . . Here, moreover, the defendants maintain that the vast majority of the conduct on which the



The following year, the Tenth Circuit considered the ministerial exception and *Hosanna-Tabor* in *Hobby Lobby Stores, Inc. v. Sebelius*.<sup>80</sup> There, the court contemplated an expansion of protected rights to organizations that do not fit the definition of religious organizations, allowing for other opportunities in which an employer's religious views may limit the rights of employees.<sup>81</sup> In sum, after the Supreme Court endorsed the ministerial exception in *Hosanna-Tabor*, circuit courts have begun to consider in an increasingly wide array of circumstances that may empower and extend the ministerial exception.

In both practice and academia, *Hosanna-Tabor* was met with mixed reviews. In an article advising employers with a religious focus on how to adjust to the decision, Michael Ewing urged employers to clarify which employees they consider to be ministers and to be able to justify or explain their reasoning.<sup>82</sup> Further, Ewing encouraged employers to be clear with employees about any religious mission it held, as well as to inform employees of any and all expectations related to that mission.<sup>83</sup>

In his article, *Hosanna-Tabor and the Ministerial Exception*,<sup>84</sup> Douglas Laycock commented on the distinction between *Smith*<sup>85</sup> and *Hosanna-Tabor*, tying the distinction to precedent. Laycock argues that the distinction "is about 'outward physical acts' versus 'internal' church decisions...The essential point is that internal church governance is

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Headleys' claims rest—stringent lifestyle constraints, assignment to manual labor, strict discipline, the requirement to leave the ministry only by routing out, efforts to retain ministers, and the practice of declaring some departed members 'suppressive persons'—is religiously motivated or otherwise protected.

*Id.*

80. 723 F.3d 1114 (10th Cir. 2013).

81. *Id.* at 1136.

The main point of the Court was that the Religion Clauses add to the mix when considering freedom of association . . . But it does not follow that because religious organizations obtain protections through the Religion Clauses, all entities not included in the definition of religious organization are accorded *no* rights.

*Id.*

82. Michael Ewing, *The 'Ministerial Exception': Where Employment Law & Religious Autonomy Collide*, FROST BROWN TODD (July 2012).

83. *Id.*

84. Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y. 839, (Summer 2012).

85. See *supra* note 21 and accompanying text.

constitutionally protected and is outside the domain of *Smith*.<sup>86</sup> Relating this distinction to the Court's precedent, Laycock looks to *Reynolds v. United States*<sup>87</sup> as a precursor to *Smith*: "*Reynolds* upheld a bigamy prosecution against a religiously motivated polygamist, holding that the Free Exercise Clause required no exception for religious practice."<sup>88</sup> Held shortly after *Watson*, the Court did not directly link the two. However, Laycock argues that the two cases can be used to demonstrate the distinction Roberts posited in *Hosanna-Tabor*: that the law does not transcend the boundary of the internal church function.<sup>89</sup>

Critical of *Hosanna-Tabor*, Leslie Griffin argues in her article *The Sins of Hosanna-Tabor*, that the majority opinion demonstrates a poor interpretation of the First Amendment.<sup>90</sup> Griffin urges courts to look to the exception as having a role within the employment discrimination framework—a religious difference with an employee holding a ministerial position being a legitimate reason for a religious employer to terminate the employee, while the employee may rebut the employer's decision by a showing of pretext.<sup>91</sup>

Critical of *Hosanna-Tabor* for a different reason, Brian M. Murray argues in *The Elephant in Hosanna-Tabor*<sup>92</sup> that the Court's decision in *Hosanna-Tabor* left a key gap in its analysis, one which will inevitably lead to future litigation.<sup>93</sup> The gap Murray points to is defining the qualification of "religious institution." Without explaining or in any way limiting "which entities may invoke the ministerial exception," the Court allows the ministerial exception to hold the potential of overpowering the First Amendment religion clauses themselves.<sup>94</sup> In *Hosanna-Tabor*, the Court accepted without question that the Hosanna-Tabor Evangelical Lutheran Church and School qualified as a religious institution, therefore

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86. Laycock, *supra* note 84, at 855-56.

87. *Reynolds v. United States*, 98 U.S. 145 (1878).

88. Laycock, *supra* note 84, at 856.

89. Laycock, *supra* note 84, at 857.

90. Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981 (2013).

91. Griffin, *supra* note 90, at 1002. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 791, 804 (1973) ("On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.")

92. Brian M. Murray, *The Elephant in Hosanna-Tabor*, 10 GEO. J. L. & PUB. POL'Y 493 (2012).

93. *Id.* at 494.

94. *Id.*

having access to the ministerial exception.<sup>95</sup> In evading the difficult tasks of defining “religion” and “minister,” the Court neglected to define or even acknowledge this analytical step that would be a threshold to an employer invoking a ministerial exception.<sup>96</sup>

## II. ANALYSIS

In *Hosanna-Tabor*, the Supreme Court unanimously upheld the ministerial exception that had been developed in the lower courts. Justice Roberts, writing for the majority, aligned the holding with the existing case law: “Since the passage of [Title VII] and other employment discrimination laws, the courts of appeals have uniformly recognized the existence of a ‘ministerial exception,’ grounded in the First Amendment...We agree that there is such a ministerial exception.”<sup>97</sup> Roberts acknowledges that the ministerial exception is in conflict with Title VII and similar protections for employees, as he describes the exception as a function “that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.”<sup>98</sup>

Importantly, the Court’s endorsement of the ministerial exception was unanimous. Justice Alito, joined by Justice Kagan, concurred, seeking to clarify the term minister to ensure that it is equally available across religions.<sup>99</sup> Justice Thomas separately concurred, arguing that, when

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95. *Id.* at 496.

96. *Id.*

97. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012).

98. *Id.*

99. *Id.* at 198 (Alito, J., concurring).

I join the Court’s opinion, but I write separately to clarify my understanding of the significance of formal ordination and designation as a “minister” in determining whether an “employee” of a religious group falls within the so-called “ministerial” exception. The term “minister” is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions. Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term “minister” or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for

applying the ministerial exception, courts should “defer to a religious organization's good-faith understanding of who qualifies as its minister.”<sup>100</sup> Therefore, while there is some variation within the Court regarding the understanding and identification of a “minister,” the ministerial exception received unequivocal support.

When applying *Hosanna-Tabor*, lower courts have suggested that the holding contains certain gaps. In a 2012 case, the Fifth Circuit, while acknowledging the Supreme Court's holding in *Hosanna-Tabor*, still looked to its own previously-developed three-part test<sup>101</sup> to apply the exception, finding that the *Hosanna-Tabor* opinion contained no “rigid formula” for application.<sup>102</sup> The Fifth Circuit's holding demonstrates that *Hosanna-Tabor* was only a small step in clarifying the ministerial exception, and that it will largely be left to lower courts to utilize or develop their own guidelines for application.

While the majority opinion in *Hosanna-Tabor* carefully left room for continued development of the ministerial exception, it was plain in its understanding that the ministerial exception fully precludes Title VII and similar employee protections, such as the ADA and ADEA.<sup>103</sup> This was a point heavily contested by the EEOC in their arguments before the Supreme Court, as they argued that the ADA's anti-retaliation provision<sup>104</sup>

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religious bodies.

*Id.*

100. *Id.* at 196 (Thomas, J., concurring).

101. The Fifth Circuit described its previously established ministerial exception test as follows:

First this court must consider whether employment decisions regarding the position at issue are made largely on religious criteria . . . Second, to constitute a minister for purposes of the “ministerial exception,” the court must consider whether the plaintiff was qualified and authorized to perform the ceremonies of the Church . . . Third, and probably most important, is whether [the employee] engaged in activities traditionally considered ecclesiastical or religious, including whether the plaintiff attends to the religious needs of the faithful.

*Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 175-76 (5th Cir. 2012). (citing *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999)).

102. “The Supreme Court specifically declined to adopt a ‘rigid formula’ for determining when an employee is a minister within the meaning of the ministerial exception, concluding instead ‘that the exception covers Perich, given all the circumstances of her employment.’” *Id.* at 174 (citing *Hosanna-Tabor*, 565 U.S. at 190).

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

104. See 42 U.S.C. § 12203(a) (2012) (ADA anti-retaliation provision). See also 42 U.S.C. § 2000e-3(a) (2012) (Title VII anti-retaliation provision); 29 U.S.C. § 623(d) (2012) (ADEA anti-retaliation

should apply to religious employers.<sup>105</sup> The EEOC supported its assertion by looking to the Supreme Court's 1990 case *Employment Division v. Smith*,<sup>106</sup> where the court found that "the Free Exercise Clause of the First Amendment does not provide a defense to those who violate neutral and generally applicable laws, even when their actions are based on religious belief."<sup>107</sup> As the ADA is a "neutral and generally applicable" law, the EEOC argued that it should not be displaced on First Amendment grounds.<sup>108</sup> Despite these arguments by the EEOC, the Court held that employee protections such as the ADA and Title VII are precluded by the ministerial exception.<sup>109</sup>

Title VII and other statutes such as the ADA and ADEA speak to the vulnerability of the employee in the employer-employee relationship. Title VII makes discrimination on the basis of certain characteristics unlawful in the workplace,<sup>110</sup> the ADA makes discrimination on the basis of disability unlawful in the workplace,<sup>111</sup> and the ADEA makes discrimination on the basis of age unlawful in the workplace.<sup>112</sup> Therefore, the Supreme Court granting the ministerial exception the capacity to displace these workplace protections is significant.

Carrying such a weight, I argue that the ministerial exception's application calls for an additional step on the part of the employer.

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provision).

105. "The only question presented in this case is...whether the ADA's anti-retaliation provision is unconstitutional as applied to a religious employer that fires an employee...for asserting her rights under the ADA. The answer to that question is no." Brief for the Federal Respondent, 10-11, *Hosanna-Tabor v. E.E.O.C.*, 565 U.S. 171 (2012) (No. 10-553) 2011 WL 3319555.

106. 494 U.S. 872 (1990).

107. Brief for the Federal Respondent at 11, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553) (citing *Employment Division v. Smith*, 494 U.S. 872, 877-78 (1990)).

108. *Id.*

109. *Hosanna-Tabor*, 565 U.S. at 188.

110. 42 U.S.C. § 2000e-2. *See, e.g.* *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens").

111. *See* 42 U.S.C. § 12112(a) (2012). *See also* *Sutton v. United Air Lines*, 527 U.S. 471, 471 (1999) (the ADA "prohibits covered employers from discriminating against individuals on the basis of their disabilities").

112. *See* 29 U.S.C. § 623(a) (2012). *See also* *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (the ADEA "makes it unlawful for an employer to take adverse action against an employee 'because of such individual's age.'").

## III. PROPOSAL

As detailed above, the ministerial exception removes employee protections such as Title VII from the employer-employee relationship when the employer is a religious institution and the employee is a minister. The preclusion of Title VII and other employee protections was established in *McClure v. Salvation Army*<sup>113</sup> and was upheld in *Hosanna-Tabor*.<sup>114</sup> With such precedent, I argue that the religious organization employers should be required by courts to show that the employee they contend to be a minister was on notice prior to the dispute at hand that the position the employee holds or held was one of a minister, and therefore within the realm of the ministerial exception. This effectively raises the burden for employers, it compensates for the lack of protection such employees may well face should a dispute arise, and provides several other benefits, such as increased communication between employer and employee, that may reduce the need for court intervention.

I propose a discrete three-prong conjunctive test for applying the ministerial exception.<sup>115</sup> The first two prongs are already included in case law, though not identified by all courts as prongs of a specific test. The first is that the employer be a religious organization.<sup>116</sup> The second is that the position of the employee in question be that of a minister.<sup>117</sup> The third, which I propose, is a notice requirement: employers should be required to

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113. 460 F.2d 553 (5th Cir. 1972).

We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.

*Id.* at 560-61.

114. *Hosanna-Tabor*, 565 U.S. at 188 (the ministerial exception “precludes application of [Title VII] to claims concerning the employment relationship between a religious institution and its ministers”).

115. Effectively, this allows the ministerial exception to function as an affirmative defense to an employee’s claim of discrimination. For an alternative approach, see Leslie Griffin’s article, *The Sins of Hosanna-Tabor*, in which she argues that the employee should then have an opportunity to rebut the affirmative defense, similar to the traditional burden-shifting framework of an employment discrimination claim. See Griffin, *supra* note 90.

116. As held in *Hosanna-Tabor*, the ministerial exception is particular to employment at a “religious institution.” *Hosanna-Tabor*, 565 U.S. at 188.

117. Similarly, *Hosanna-Tabor* defines the scope of the ministerial exception as between a “religious institution and its ministers.” *Id.*

show that the employee was on notice that the employee's position was considered by the employer to be subject to the ministerial exception prior to the circumstances that gave rise to the employer's claim. Each of these prongs is addressed more fully below.

The requirement that the employer be a religious organization is implicated in *Hosanna-Tabor*, though not fully analyzed. For example, the majority opinion refers to the defendant employer as "the Church" throughout the opinion. However, Justice Roberts refrains from any direct analysis as to whether the employer qualifies as a religious institution. This prong of the test is further discussed in *The Elephant in Hosanna-Tabor*, where Murray argues that this is a key piece of analysis for the ministerial exception.<sup>118</sup>

The requirement that the position of the employee be a minister is the focus of *Hosanna-Tabor*, and the opinion provides guidance on the issue. In evaluating whether the plaintiff in *Hosanna-Tabor* was a minister, the court found the following facts persuasive: "Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members"<sup>119</sup>; "Perich's title as a minister reflected a significant degree of training followed by a formal process of commissioning"<sup>120</sup>; "Perich held herself out as a minister of the Church by accepting the formal call to religious service"<sup>121</sup>; "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission."<sup>122</sup> While these are not set forth as factors to be identified in each case in which a ministerial exception is sought, these serve as a guide for courts going forward.

Finally, I propose a requirement that an employer provide notice to the employee that the employer considers the employee's position to be that of a minister and therefore beyond the reach of employee protections against discrimination. Such notice would formally acknowledge that the employee understood his or her employment protections were limited and that he or she agreed to an employment arrangement without such protections. Providing notice would protect employees from being without

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118. See Murray, *supra* note 92.

119. *Hosanna-Tabor*, 565 U.S. at 191.

120. *Id.*

121. *Id.*

122. *Id.* at 192.

certain protections they may otherwise reasonably believe they hold. This process encourages a dialogue between an employer and employee prior to any dispute arising. Ideally, this would limit the disputes that reach the court, allowing the court to avoid acting in internal church matters—a role it specifically dreaded assuming in *Watson*.<sup>123</sup>

Beyond saving litigation costs for both sides, notice would benefit employees by serving as a potential bargaining point in hiring negotiations (they may point out, for example, that a position without employee protections calls for a slight increase in benefits), and encourages them to enter an employment arrangement with a more stringent eye towards employer practices that may be problematic. Absent a notice requirement, employees will likely enter into the employment relationship based on asymmetric information. For employers, notice would be a significant protection against claims by minister employees. Ultimately, notice would encourage both sides to approach their employment agreements more realistically.

Overall, these requirements help courts by largely transitioning the minister determination from one that is entirely substantive to one that is largely procedural, but with the flexibility for a substantive review. As the Court noted in *Watson*, it hesitates to involve itself in internal church matters.<sup>124</sup> Therefore, a procedural evaluation allows the court to preside over disputes between a religious institution and its employees without appearing to evaluate a particular religious practice or belief.

## CONCLUSION

Following *Hosanna-Tabor*, the ministerial exception is firmly rooted in the employment landscape of religious organizations. The Court has

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123. *Watson v. Jones*, 80 U.S. 679, 735 (1872).

[W]e have held [this case] under advisement for a year, not uninfluenced by the hope, that since the civil commotion . . . has passed away, that charity, which is so large an element in the faith of both parties, and which, by one of the apostles of that religion, is said to be the greatest of all the Christian virtues, would have brought about a reconciliation. But we have been disappointed.

*Id.*

124. *Id.*



unanimously held that the First Amendment precludes Title VII and other employee-oriented protections from applying to ministerial positions of a religious employer. This rule had been utilized in every circuit prior to the 2012 ruling in *Hosanna-Tabor*, and has now been blessed by the Supreme Court.

While *Hosanna-Tabor* was important in affirming that such an exception exists, the Court neglected to provide guidance on key aspects of the exception's application. This analytical gap is particularly problematic when it entails leaving certain employees without any protection or remedy against discrimination or harassment in the workplace.

To help protect workers while upholding the *Hosanna-Tabor* conclusion that the First Amendment trumps Title VII, I propose that the courts look to the employer to meet a three-prong test prior to applying a ministerial exception. Two of these prongs are already present in the Supreme Court's holding in *Hosanna-Tabor*, though are not clarified as part of a clear-cut test: (1) that the position in question be a minister; (2) that the employer be a religious institution. The third is one that has not been employed, but I argue that it is necessary in order to preserve the integrity of federal employment discrimination laws, is a notice requirement.

A clarified threshold rule such as this three-prong test will help ensure that religious institutions and their ministers approach employment conflicts on even ground. Faced with the ministerial exception, employees in these circumstances are without resort to employment discrimination claims, no matter how blatantly a religious employer's conduct may violate such laws as Title VII, the ADA, or the ADEA. The only way to approach such an imbalance of power is to set a clear, high standard that a religious employer must meet in order to invoke the ministerial exception.

Furthermore, a notice requirement such as the one I propose serves several benefits. It will encourage communication between the religious employer and minister prior to any conflict arising, thereby potentially obviating, or at least limiting, the need for court involvement in several cases. Further, it will help the minister employee more effectively navigate the workplace, understanding from the time of hire that they are significantly less than a non-ministerial employee would hold in the workplace.

Following *Hosanna-Tabor*, the ministerial exception has a clear place

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in employment law for religious employers. To ensure that it is applied fairly and justly, courts must hold religious employers to a clear, high standard before it can be invoked. Only then will the Courts uphold the country's values of both religious liberty and equality.