A Nun, a Synagogue Janitor, and a Social Work Professor Walk Up to the Bar: The Expanding Ministerial Exception

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A Nun, a Synagogue Janitor, and a Social Work Professor Walk Up to the Bar: The Expanding Ministerial Exception

PATRICK HORNBECK†

ABSTRACT

Some employees who hold significant positions within some religious organizations fall outside the protections of certain laws, especially employment discrimination laws. But which employees, which organizations, and which laws? In its 2020 decision in Our Lady of Guadalupe School v. Morrissey-Berru, the Supreme Court reaffirmed the “ministerial exception” doctrine, a constitutional immunity that is “extraordinarily potent” where applicable.1 The doctrine exempts religious employers from liability for nearly all forms of discrimination, some torts, and some breaches of contract, even when an employer does not act for religious reasons.

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This Article argues that Our Lady of Guadalupe School marks a new stage in the exception’s gradual expansion. Parts I and II demarcate the doctrine’s boundaries where they are clear, particularly for educators who teach religion. Analyzing the Court’s two ministerial exception decisions and the lower-court cases that have applied them, Part III identifies where gaps in the Court’s analysis have enabled courts to expand the exception still further. This expansion has occurred along three intersecting lines: who qualifies as a minister, what claims the exception bars, and which employers may invoke the exception. As the doctrine develops, the conditions of employment for hundreds of thousands of employees of religiously affiliated organizations hang in the balance.

Part IV offers a policy proposal. Until the Court cabins the ministerial exception within clearer boundaries, religious institutions should voluntarily notify each employee regarding whether the institution considers the employee’s position to fall within the exception. This practice, which aligns with the social ethics of major U.S. religious groups, would provide clarity throughout the employment relationship, streamline litigation, and enable employers who are willing to waive the exception to compete for discerning employees.
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INTRODUCTION

Some employees who hold significant positions within some religious organizations fall outside the protections of certain laws, including those contained in Title VII of the Civil Rights Act of 1964 and its state and local analogues. There is no doubt of that following the U.S. Supreme Court’s decisions in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* and *Our Lady of Guadalupe School v. Morrissey-Berru.* But which employees, which religious organizations, and which laws?

The Supreme Court has grounded the “ministerial exception” in both Religion Clauses of the First Amendment. The exception is constitutionally necessary, the Court held, because without it the government could impose employees on religious institutions in violation of the Establishment Clause, as well as impede institutions’ internal processes in violation of the Free Exercise Clause. Both of the Court’s cases involved elementary school teachers who taught religion for part of the day and engaged in duties ancillary to worship, such as praying with their students and preparing students to attend school liturgies.

The ministerial exception is an affirmative defense. When it applies, it is, in the words of Justice Sotomayor, “extraordinarily potent.” It enables religious employers to take adverse employment actions, *for virtually any reason,* against employees who fall within its scope. Under the exception, courts have upheld religious institutions’ alleged (and sometimes openly avowed) decisions to fire employees on account of traits such as race, gender, sexual orientation, disability, and pregnancy. The ministerial exception

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4. See *Hosanna-Tabor,* 565 U.S. at 194.
immunizes an employer even when the employer cannot point to a religious belief that it alleges has required it to act. In this way, the ministerial exception differs from and is significantly broader than the exemptions Congress and state legislatures have written into many antidiscrimination statutes, including Title VII.5

This Article argues that the Court’s decision in Our Lady of Guadalupe School marks a new stage in the exception’s gradual expansion. The argument unfolds in three phases. First, in Parts I and II, the Article demarcates the exception’s boundaries where they are clear. It traces the exception’s evolution from the early 1970s through the present day and then analyzes the Court’s two decisions in detail. Because these cases featured similarly situated plaintiffs, the law is clearest with regard to educators who teach religion.6 Next, in Part III, the Article identifies where gaps in the Court’s analysis have enabled judges to expand the exception still further. A crucial question in cases implicating the exception is what degree of deference courts owe to employers’ assessments of the religious significance and importance of their employees’ responsibilities. In Our Lady of Guadalupe School, the Court noted that employers’ views are “important” but did not take the opportunity to clarify how or to what extent they are. The Court also did not specify which causes of action the exception bars, what makes employers sufficiently religious to invoke the exception, and whether employers can waive the exception. As has been apparent in the almost two years since the Court handed down Our Lady of Guadalupe School, these unresolved issues make it less likely that lower courts will cabin the exception’s scope.7

After illustrating how the doctrine remains unsettled, in

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6. See infra Parts I, II.
7. See infra Part III.
Part IV, the Article offers a policy proposal. At least until the Court clarifies the exception’s boundaries, religious institutions should adopt the practice of giving notice to any employee who occupies a position the institution regards as falling within the exception. Either the employer should warn the employee that it believes the employee falls within the exception and that it will assert the exception in the event of a dispute, or else the employer should inform the employee that it will not assert the exception. This approach would serve several related ends: providing clarity to both parties throughout the employment relationship, streamlining litigation, and enabling religious employers who are willing to waive the exception to compete for discerning employees. The benefits of this approach are more than legal: when they waive the immunity that the exception confers, some employers may also be fulfilling their religious traditions’ ethical teachings regarding their operations in the secular world.

Before turning to the substance of the argument, a preliminary observation is necessary about the doctrine’s title, the “ministerial” exception. In the Supreme Court’s cases, Justice Alito has repeatedly stressed the difficulties this nomenclature entails. At oral argument in Our Lady of Guadalupe School, he asked the teachers’ lawyer: “Do you appreciate that the very term, minister, treats different religions differently? It is a predominantly Christian/Protestant term. And as you apply it to other religions, it becomes—its application becomes less and less clear.” Justice Alito memorialized his concern in the majority opinion for the Court, echoing his concurrence in Hosanna-Tabor.

8. See infra Part IV.


Indeed, to designate as “ministers” those employees whose employers are immune from certain liabilities comes with at least three sets of difficulties. First, as Justice Alito stressed, the term “minister” is associated primarily with the Protestant denominations that have been the dominant religious traditions of the United States. In the sixteenth century, Martin Luther and other reformers began referring to clergypersons as “ministers” in distinction from the Roman Catholic Church’s “priests.” The terminology reflected Luther’s view that ministry is less akin to a lifelong calling or status and more like an office or form of temporary service.11 Not all Protestant traditions dub their clergy as ministers—the Episcopal Church is one prominent exception—but most do. Second, the term reflects assumptions about ministry that are shared broadly within Christianity but less commonly in other traditions: some members of the faith community who minister are set apart from or over others, and they deserve special titles and prerogatives.12 As Justice Alito noted, this conception of ministry is foreign to Islam, some forms of Judaism, and Asian religions such as some Buddhist and Hindu traditions.13 While it is true that many of the cases in which courts developed the ministerial exception have involved Christians who answered to the title “minister,”14 the term’s continued use not only reinforces implicit notions of Christian supremacy but makes it difficult for courts to apply


13. Our Lady of Guadalupe Sch., 140 S. Ct. at 2064 (referring to Judaism and Islam and observing that within Christianity, the concept of ministry varies across denominations); Hosanna-Tabor, 565 U.S. at 198 (mentioning Catholicism, Judaism, Islam, Hinduism, and Buddhism).

14. See, e.g., Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); see also Our Lady of Guadalupe Sch., 140 S. Ct. at 2060 (collecting cases).
the doctrine to cases involving other traditions.  

A third problem is that when courts employ the term “minister,” they blur the distinction between theological and legal categories. Fundamentally, the ministerial exception is a legal rather than religious doctrine. It emerges from an inquiry courts have developed: which employees are so central to the functions of religious institutions that the Religion Clauses protect the institutions’ management of the employees? In some instances, where a religious tradition designates key employees with titles such as “minister,” the group of employees holding those titles is substantially the same as the group of employees regarding whom the institution enjoys legal immunity. But this is not usually true. Only one of the three employees who have featured in the Court’s ministerial exception cases had the title of “minister” (“Minister of Religion, Commissioned”). The other two were called elementary schoolteachers and catechists, the latter term signifying persons in Catholicism who train others in the faith but need not be, and usually are not, members of the clergy.

Many cases, in which lower courts have struggled to apply the ministerial exception to employees other than clergy, reflect confusion about the exception’s status as a legal, rather than religious category. But in Our Lady of Guadalupe School, the Court expressly affirmed that an employee’s designation as a minister, without more, is “not enough to justify the exception,” and that, conversely, the


17. Hosanna-Tabor, 565 U.S. at 177.

absence of a religious title is no guarantee the exception does not apply.\footnote{Our Lady of Guadalupe Sch., 140 S. Ct. at 2063.} In short, cases involving the ministerial exception need not turn on whether a religious organization regards an employee as a minister. The doctrine is a legal shorthand, an infelicitous term of art that seeks to identify employment relationships where First Amendment concerns are at stake. To avoid confusion, this Article will eschew the term “minister” wherever possible.

I. FROM MCCLURE TO HOSANNA-TABOR: THE SUPREME COURT RECOGNIZES THE MINISTERIAL EXCEPTION

In the early 1970s, lower courts began to read into employment discrimination laws what was at first a narrow exception for ministers and others serving in clergy-like positions. This new exception arose subsequent to the religious exemptions Congress and state legislatures had written into employment discrimination laws.\footnote{See, e.g., 42 U.S.C. § 2000e-1, 2000e-2(e).} The statutory exemptions, which the Supreme Court upheld against an Establishment Clause challenge,\footnote{Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987).} protect employers who wish to dismiss employees on the basis of the employees’ religious beliefs or practices, or even on the basis of the employers’ assessment of the employees’ religious beliefs or practices. For instance, one statutory exemption allows religious employers to make an employee’s religious beliefs, including the employer’s assessment of the orthodoxy of those beliefs, a bona fide occupational qualification for employment.\footnote{See 42 U.S.C. § 2000e-2(e)(1); infra note 273.} A Buddhist religious institution could therefore choose to decide to hire only Buddhists, or even only Buddhists that share its views on particular doctrines. But the statutory exemptions, unlike the ministerial exception, do not protect employers who wish to dismiss an
employee pursuant to the employer’s religious beliefs about matters unrelated to the employee’s actual or perceived religion.23

The seminal case articulating the ministerial exception isMcClure v. Salvation Army.24 McClure concerned anordained minister of the Salvation Army who claimed that the organization, which federal law regards as a church, discriminated against her on account of sex. The Fifth Circuit held that, since “[t]he relationship between an organized church and its ministers is its lifeblood,” to apply Title VII to the employee’s claim would unconstitutionally inhibit the Salvation Army’s free exercise rights.25 In the decades after McClure was decided, other circuits adopted its reasoning in a series of cases involving religious workers.26

Employment disputes implicating the ministerial exception have multiplied in the twenty-first century.

23. In her dissent inOur Lady of Guadalupe School, Justice Sotomayor characterized the statutory exemptions’ purpose as being to “protect a religious entity’s ability to make employment decisions—hiring or firing—for religious reasons.”Our Lady of Guadalupe Sch., 140 S. Ct. at 2072 (Sotomayor, J., dissenting). This characterization may be overinclusive, because the statutory exemptions do not cover employment actions that an employer takes because of its rather than its employees’ beliefs. Few courts have discussed the breadth of the statutory exceptions, although one has counseled that they “should be narrowly construed to avoid reducing Title VII’s expansive rights and protections.”Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195, 1203 (S.D. Ind. 2020).

24. 460 F.2d 553 (5th Cir. 1972).


Between 2000 and 2012, federal appellate courts held that the exception barred certain claims brought by Catholic priests and chaplains, Episcopal youth ministers, Methodist hospital pastoral caregivers, and Salvation Army rehabilitation center administrators, among others. Though the courts of appeals unanimously adopted the ministerial exception, circuits developed different tests for determining to which employees and claims it applied.

A. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC

It was not until 2012, forty years after McClure, that the Supreme Court formally recognized the ministerial exception, confirming it covers more than traditional pastoral workers. In Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, the Court held that “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”

Hosanna-Tabor arose out of a suit for retaliation under the Americans with Disabilities Act (ADA). Cheryl Perich taught at a small Lutheran church school in Redford, Michigan. The Lutheran Church–Missouri Synod (LCMS), which sponsored the congregation and school, distinguished between “lay” teachers, who were appointed annually and did not need to have religious qualifications, and “called” teachers, who undertook a special course of studies and were


30. Id. at 180; 42 U.S.C. § 12203(a).
commissioned to serve for an open-ended term. Perich started as a lay teacher but, after approximately a year, became a called teacher. Several years later, she developed symptoms of narcolepsy. She went on disability leave, but when she said she was ready to return, the congregation disagreed that she would be able to discharge her duties. It offered her a settlement—in Lutheran parlance, a “peaceful release”—under which it would continue contributing to the cost of her health insurance in exchange for her resignation. Perich refused the settlement and returned to school as soon as her doctors permitted her. When school administrators refused to allow her to work and told her she would likely be fired if she persisted, she threatened legal action.

The school indeed dismissed Perich, and she filed a charge of retaliation with the Equal Employment Opportunity Commission (EEOC). The EEOC brought suit on her behalf, and she intervened in order to add retaliation claims under Michigan’s disability discrimination law. Among the remedies the EEOC and Perich sought were her reinstatement (or, alternatively, frontpay), backpay, compensatory and punitive damages, attorney’s fees, and injunctive relief.

Both in the district court and on appeal, Hosanna-Tabor argued that Perich’s suit must be dismissed because the First Amendment protects a religious institution’s right to make employment decisions regarding employees who are ministers. The church also asserted that its reason for firing Perich was fundamentally religious: Lutheran doctrine, as construed by the LCMS, forbids church members from pursuing ecclesiastical disputes in civil courts. The district court found that Perich fell within the ministerial exception

31. Hosanna-Tabor, 565 U.S. at 177.
32. Id. at 178–79.
33. Id. at 179–80; see Mich. Comp. Laws § 37.1602(a) (1979).
and held that the court lacked subject matter jurisdiction.\textsuperscript{35} The Sixth Circuit vacated the judgment and remanded, holding that Perich fell outside the exception.\textsuperscript{36} At the Supreme Court, Perich and the EEOC argued that the ADA and other civil rights laws are neutral and generally applicable; therefore, under \textit{Employment Division, Department of Human Resources of Oregon v. Smith},\textsuperscript{37} they are constitutionally permissible even when they incidentally burden religious exercise.\textsuperscript{38}

Declining to apply \textit{Smith}, the Court unanimously held that the First Amendment necessitates a ministerial exception to civil rights laws. The Court also found that Perich fell within the exception.\textsuperscript{39} Chief Justice Roberts’ opinion grounded the exception in both Religion Clauses: “The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”\textsuperscript{40} Tracing controversies concerning the appointment of ministers back to the colonial period, Chief Justice Roberts analogized cases in which the Court refused to resolve ecclesiastical controversies.\textsuperscript{41} For a court to

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\textsuperscript{36} EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 778–82 (6th Cir. 2010), rev’d, 565 U.S. 171 (2012).


\textsuperscript{38} Hosanna-Tabor, 565 U.S. at 189–90.

\textsuperscript{39} Id. at 190–92.

\textsuperscript{40} Id. at 184.

\textsuperscript{41} Id. at 185–87 (discussing Wataon v. Jones, 80 U.S. (13 Wall.) 679 (1872); Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); and Serbian Eastern Orthodox Diocese for the U.S. & Can. v.
“requir[e] a church to accept or retain an unwanted minister” or to “punish[] a church for failing to do so,” he wrote, “interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”

But who falls within the exception? Employing a phrase that would figure prominently in Our Lady of Guadalupe School, the Court in Hosanna-Tabor declared it was “reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister.” Instead, courts should look to a variety of “considerations” or “circumstances” to determine, case-by-case, whether the exception applies. As to Perich, the Court identified four relevant factors: “the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed.” The Court rejected several elements of the Sixth Circuit’s analysis: the appellate court should have taken Perich’s ecclesiastical title into consideration, should not have stressed that lay teachers performed religious duties identical to hers, and should not have placed weight on the fact that Perich’s religious duties occupied only a portion of her workday. On another front, the Court declined to consider Perich’s claim that Hosanna-Tabor’s stated reason for firing her, that she had transgressed Lutheran doctrine, was pretextual. “That suggestion,” Chief Justice Roberts wrote, “misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason.”

There were two concurring opinions. Justice Thomas

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42. *Id.* at 188.
43. *Id.* at 190.
44. *Id.* at 192.
45. *Id.* at 192–94.
46. *Id.* at 194.
wrote briefly to stress that he would defer entirely “to a religious organization’s good-faith understanding of who qualifies as its minister.” In his view, for courts to “fashion a civil definition of ‘minister’ through a bright-line test or multifactor analysis” intrudes upon the autonomy of religious institutions to govern their internal affairs; it also prejudices religious groups whose structures and beliefs fall outside “the ‘mainstream.’” The fact that “Hosanna-Tabor sincerely considered Perich a minister” was, for Justice Thomas, “sufficient . . . to conclude that Perich’s suit is properly barred.”

The lengthier concurrence by Justice Alito, whom Justice Kagan joined, began by reiterating that because the ministerial exception emerged out of and applies most readily to Protestant denominations, “it would be a mistake” for courts to impose the theological concepts of those traditions on the practitioners of other faiths. Instead, “courts should focus on the function performed by persons who work for religious bodies,” and those who “perform these key functions” should fall within the exception even absent the other circumstances the Court found meaningful.

Justice Alito also amplified the Court’s refusal to inquire whether an employer’s rationale is pretextual: “[T]he mere adjudication of such questions would pose grave problems for religious autonomy.”

Reactions to the Court’s decision in Hosanna-Tabor were mixed. Some critics lamented that the Court failed to apply

47. Id. at 196 (Thomas, J., concurring).
48. Id. at 197.
49. Id. at 198.
50. Id. at 198 (Alito, J., concurring).
51. Id. at 198, 199.
52. Id. at 205–06.
53. Applauding the decision were, for example, Michael W. McConnell, Reflections on Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol’y 821, 836–37 (2012), and Ira C. Lupu & Robert W. Tuttle, The Mystery of Unanimity in Hosanna-Tabor
Smith; in their view, because antidiscrimination laws are typically neutral and generally applicable, courts should be able to review nearly all employment decisions involving religious institutions. Others expressed concern that the Court did not provide a clear test for determining whether an employee falls within the exception and rejected wholesale any inquiries into the reasons religious institutions give for their actions.

B. Open Questions after Hosanna-Tabor

Hosanna-Tabor left open at least three sets of questions. The first concerns the appropriate level of deference to religious employers. As we have seen, Justice Thomas argued that a religious institution’s sincere belief that an employee is a minister should be enough for the institution to invoke the exception. But his position appears to have been an outlier: no other justice joined Justice Thomas’ concurrence, and the Court analyzed at some length the sets of circumstances that led it to conclude, as a matter of law, that Perich was subject to the exception. However, Justice Evans...
Alito’s concurrence suggested, without explicitly stating, that courts should defer to an employer’s account of the religious ramifications of an employee’s functions. “What matters in the present case is that Hosanna-Tabor believes that the religious function that respondent performed made it essential that [Perich] abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment.”

Second, in *Hosanna-Tabor* the Court expressly declined to enumerate which causes of action the exception forecloses:

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.

In the ensuing years, a number of cases tested the exception’s breadth, and some lower courts expanded it. Some plaintiffs have brought hostile work environment and failure to accommodate claims under antidiscrimination laws, while others have filed suit for breach of contract, tort, and whistleblower claims. Part III, *infra*, discusses the mixed reception courts have given to these causes of action.

The Court partially addressed a third issue: whether and how an employer may waive the ministerial exception. In a footnote, the Court resolved a circuit split concerning the

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56. *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring). Justice Alito departed here from the Court’s opinion by assigning some significance to the fact that Hosanna-Tabor proffered a religious rationale for firing Perich. According to the Court, the ministerial exception applies more broadly than when a religious employer makes a personnel decision “for a religious reason.” *Id.* at 194 (majority opinion).

exception’s status as a matter of civil procedure. The exception “operates as an affirmative defense to an otherwise cognizable claim,” the Court held—not, as the district court had decided, as a “jurisdictional bar.”\(^{58}\) This distinction affects a court’s power to invoke the ministerial exception if an employer elects not to do so. If the exception limited the court’s subject matter jurisdiction, a court would be authorized—indeed, required—to raise the issue sua sponte.\(^{59}\) But because the Court held that the exception is an affirmative defense, it might be deemed waived if a defendant does not raise it.\(^{60}\) In clarifying this issue, the Court did not address whether an employer may expressly or implicitly waive the exception before an employee brings suit. For instance, the LCMS’s model employment manual for schools such as Hosanna-Tabor included a provision that even where the law does not require it, “the church should not discriminate against persons with disabilities and should, where reasonably possible without undue hardship, take the lead in making reasonable accommodations for disabled workers.”\(^{61}\) If the congregation had adopted the denomination’s model policy, would that bar it from invoking

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59. See *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019); *Fed. R. Civ. P. 12(h)(3).*

60. *Fed. R. Civ. P. 8(c)(1)* (party “must affirmatively state any avoidance or affirmative defense”). On the possibility of waiver, see *infra* Section III.E; Michael J. West, Note, *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861, 1864 (2017) (asserting that waiver is permissible under both the Establishment and Free Exercise Clauses). But see Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847, 1883–84 (2018) (arguing that even though failure to raise an affirmative defense normally constitutes waiver, “the ministerial exception should be deemed nonwaivable and that courts in fact have an obligation to raise it sua sponte” because of its constitutional roots).

the exception in disputes involving disabled employees? What if the congregation expressly assured an employee it would not invoke the exception? The record in Hosanna-Tabor did not indicate whether the local church had adopted the denomination’s model policy, and so it is not surprising that the Court left these questions for another day.62

II. Our Lady of Guadalupe School: The Court Opt Not to Narrow the Exception

Eight years after Hosanna-Tabor, the Supreme Court considered the ministerial exception a second time. In Our Lady of Guadalupe School, the Court adopted a rule that most closely resembles the approach of Justice Alito’s concurrence in Hosanna-Tabor. The Court, splitting 7–2, held that to invoke the exception, an employer need not demonstrate anything more than that an employee exercised important religious functions.63 The Court thereby expanded the doctrine further, crafting an approach so malleable and deferential that few principles clearly limit its application.

Our Lady of Guadalupe School concerned employment discrimination claims brought by two women who had been terminated from positions as elementary school teachers in the Catholic archdiocese of Los Angeles. Both signed employment agreements that emphasized their schools’ religious mission and affirmed that all teachers must “model and promote Catholic faith and morals.”64 They taught religion alongside secular subjects, prepared students to participate in church sacraments, and prayed with students daily.65 One plaintiff, Agnes Morrissey-Berru, alleged that Our Lady of Guadalupe School had reduced her hours and then terminated her employment because of her age, in

62. See infra Section III.E.
64. Id. at 2056 (internal quotations omitted).
65. Id. at 2056–59.
violation of the Age Discrimination in Employment Act (ADEA). The second plaintiff, Kristen Biel, alleged that St. James School fired her when she requested a leave of absence to pursue treatment for breast cancer; her cause of action was for discrimination on the basis of disability in violation of the ADA.

Justice Alito authored the Court’s opinion in *Our Lady of Guadalupe School*. Justice Thomas filed a concurrence, joined by Justice Gorsuch. Justice Sotomayor, joined by the late Justice Ginsburg, dissented. The majority framed the Court’s decision as a refinement of its previous holding. Justice Alito emphasized that in *Hosanna-Tabor*, the Court had declined to announce “a rigid formula” for the ministerial exception but instead “identified circumstances that we found relevant in that case.” In the two cases at bar, the question was whether teachers whose responsibilities resembled Cheryl Perich’s, but did not have comparable external markers of ministerial status (e.g., ecclesiastical titles, special training, or self-identification), still fell within the exception. The Ninth Circuit had held that, under *Hosanna-Tabor*, an employee must both exercise religious functions and possess one or more of the objective characteristics the Court had enumerated. The Supreme Court reversed. Its rationale is worth quoting in full:

66. *Id.* at 2057–58.

67. Biel died while her suit was pending, and her husband represented her estate. *Id.* at 2058 n.6.

68. *Id.* at 2055. The phrase “a rigid formula” recurs at pages 2062, 2067, and 2069. Both in *Hosanna-Tabor* and *Our Lady of Guadalupe School*, the Court labeled the characteristics of Cheryl Perich’s employment as “circumstances” or, more rarely, “factors.” For the latter usage, see *id.* at 2063; *Hosanna-Tabor*, 565 U.S. at 194. Importantly, the Court has never referred to “elements” of the exception.

69. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069.

The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.71

Animating this explanation is a robust conception of church autonomy. The Court included within the ministerial exception all of the teachers who engage in the “religious education and formation of students.”72 By excluding claims involving “the selection and supervision” of teachers from judicial review, the Court appeared to suggest the First Amendment bars not only employment discrimination claims but other employment-related claims as well.73

Following a recitation of the facts, Justice Alito summarized the historical background the Court had rehearsed in Hosanna-Tabor. As Chief Justice Roberts had done before him, Justice Alito stressed that the framers of the Constitution were at pains, given their experiences with established churches, to ensure that government would not be in a position to select or impose ministers.74 In its ecclesiastical autonomy cases, the Court had affirmed the right of religious institutions to decide matters “of faith and doctrine” without government interference.75 This, in turn, “requires the authority to select, supervise, and if necessary, remove a minister . . . . Without that power, a wayward minister’s preaching, teaching, and counseling could contradict the church’s tenets and lead the congregation away from the faith.”76

71. Our Lady of Guadalupe Sch., 140 S. Ct. at 2055.
72. Id.
73. Id.; see infra Section III.C.
75. Id. at 2055 (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).
76. Id. at 2060. Throughout the Court’s opinion, Justice Alito stressed that
In the heart of the opinion, Justice Alito reviewed the “circumstances” that had led the Court to conclude that Perich fell within the exception. He noted that the Court had discussed these clusters of facts in *Hosanna-Tabor* “because of their relationship to Perich’s ‘role in conveying the Church’s message and carrying out its mission,’” but again he stressed that the Court had not intended its opinion to serve as a checklist for future litigants. “[O]ur 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.” He nevertheless proceeded to discuss three of the four elements of the Court’s analysis from *Hosanna-Tabor*.

The first *Hosanna-Tabor* circumstance concerned the employee’s title. In *Our Lady of Guadalupe School*, the Court concluded that a ministerial title is neither necessary nor sufficient, as a matter of law, to bring an employee within the exception. “Simply giving an employee the title of ‘minister’ is not enough to justify the exception,” and yet “[r]equiring the use of the title would constitute

the exception seeks to safeguard religious institutions’ autonomy, especially in the “quintessential case where a church wants to dismiss its minister for poor performance.” *Id.* at 2068. But as Justice Sotomayor noted in dissent, the exception sweeps far more broadly: it protects the right of religious employers to fire ministerial employees for reasons that are “wholly unrelated to the employer’s religious beliefs or practices,” even out of animus. *Id.* at 2072 (Sotomayor, J., dissenting). As discussed *supra* note 23, Justice Sotomayor also noted that statutes such as Title VII and the ADA contain exemptions of their own.

77. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2062–63.

78. *Id.* at 2063.

79. *Id.*

80. As Justice Sotomayor noted in dissent, Justice Alito’s opinion for the Court passes over the third *Hosanna-Tabor* circumstance, whether the plaintiff held herself out as a minister. *Id.* at 2080 (Sotomayor, J., dissenting); see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190–92 (2012). This consideration is separate from whether an employer perceives the employee “as playing a vital part in carrying out the mission of the church,” which the Court concluded was true of the schools that employed Morrissey-Berru and Biel. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066.
impermissible discrimination.”

The former proposition licenses courts to weigh the legal significance of an employer’s designation of an employee as a minister, because a ministerial title, without more, is insufficient to invoke the exception. The latter proposition echoes a familiar theme of Justice Alito’s: because the cases in which courts developed the ministerial exception mostly concerned Protestant Christians, the doctrine does not map well onto some other religious traditions.

The second *Hosanna-Tabor* circumstance had to do with whether an employee had received specialized religious education or training. Echoing the reasoning just outlined, Justice Alito wrote that “insisting in every case on rigid academic requirements could have a distorting effect.” Some religious traditions do not mandate formal theological training, and some roles, such as those of elementary schoolteachers, do not require that an employee specialize in theology.

After concluding that neither of the first two circumstances could be dispositive, the Court turned to the final consideration from *Hosanna-Tabor*. “What matters, at bottom, is what an employee does.” Adopting the approach of his earlier concurrence, Justice Alito again articulated what he took to be the key rationale for the ministerial exception. “[I]mplicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith

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81. *Id.* at 2063, 2064.
82. *Id.* at 2064. In dissent, Justice Sotomayor replied to the Court’s assertions about titles. While it is axiomatic that religious institutions have the right to establish their internal structures, she wrote “that freedom of choice should carry consequences in litigation.” *Id.* at 2079 (Sotomayor, J., dissenting). Where a religious institution elects to use titles to distinguish some employees as ministers, the absence of such a title should carry weight. *Id.*
83. *Id.* at 2064 (majority opinion).
84. *Id.*
85. *Id.*
are responsibilities that lie at the very core of the mission of a private religious school."\textsuperscript{86} Justice Alito observed that religious education plays a critical role in numerous faith traditions.\textsuperscript{87} He proceeded to demonstrate that both Morrissey-Berru and Biel had performed religious functions and concluded that, on account of their work in forming their students in the Catholic faith, their employers were entitled to invoke the exception against their claims.\textsuperscript{88}

III. UNRESOLVED ISSUES

\textit{Our Lady of Guadalupe School} answered the primary question that \textit{Hosanna-Tabor} had left unresolved: whether performing religious functions alone can bring an employee, or at least a schoolteacher who teaches religion, within the scope of the exception. The Court said yes. But the Court left other issues unsettled. It did not provide a clear test for what religious functions are sufficiently important to justify the exception, nor did it clearly indicate to what extent courts should defer to an employer’s assessment of an employee’s functions. Nor did it clarify against what causes of action, other than discriminatory termination, employers may assert the exception as a defense. Moreover, in \textit{Our Lady of Guadalupe School}, the Court did not identify which kinds of employers are sufficiently religious to merit the immunity the exception confers. Last, the Court did not specify whether an employer may waive the exception. This Part discusses how lower courts have expanded the exception along each of these lines.

\textsuperscript{86} \textit{Id.}

\textsuperscript{87} \textit{Id.} at 2064–66.

\textsuperscript{88} \textit{Id.} at 2066.
A. Important Religious Functions and Deference to Employers

Now that the Court has held that performing certain kinds of religious functions brings an employee within the exception, litigation will turn even more often on whether an employee’s religious responsibilities are sufficiently important.\(^8^9\) In any particular case, resolving this issue may require as many as three analytically separable inquiries. First, there may be a straightforward question of fact: what job responsibilities did an employee actually perform? Second, a potentially more complex question of fact: were the job responsibilities religious? Third, a mixed question of fact and law: were the religious job responsibilities sufficiently important for the employer to be able to invoke the ministerial exception? The logic of the Court’s opinions suggests that for the exception to apply, all three answers must be yes.

While it might seem the first question is the most straightforward, in some cases where employer and employee have proffered different accounts of the scope of the employee’s responsibilities, employers have claimed that factfinding would require a degree of procedural entanglement between religious institutions and courts that is forbidden under the Establishment Clause. In a July 2021 en banc opinion holding that the ministerial exception bars hostile work environment claims, the Seventh Circuit nevertheless acknowledged that limited discovery into the “threshold” question of whether an employee has ministerial

\(^8^9\) During the eight and a half years that separated *Hosanna-Tabor* and *Our Lady of Guadalupe School*, the majority of cases involving the ministerial exception turned on this question. Courts found employees to fall within the exception approximately two-thirds of the time; the same proportion held whether the court employed the multifactor approach of *Hosanna-Tabor* or instead focused only on an employee’s religious functions. Patrick Hornbeck, *Cases Between Hosanna-Tabor and Our Lady of Guadalupe School* (Mar. 29, 2022) (unpublished spreadsheet) (on file with author).
responsibilities may be “necessary.” 90 Indeed, most courts have permitted discovery into the nature and scope of an employee’s functions, as well as into how the employer held the employee out to its congregants and the public. 91

Most cases, including Hosanna-Tabor and Our Lady of Guadalupe School, have turned on the second and third questions. In Hosanna-Tabor, Chief Justice Roberts collapsed these questions into a single inquiry, whether an employee performed “important religious functions,” but both logically and in the case law the phrase implies a conjunctive test. 92 An employee’s functions could be important without being religious, they could be religious without being important, they could be both, or they could be neither. How to proceed when employer and employee offer different assessments of the importance and religious nature of the employee’s responsibilities is a separate and crucial question discussed infra Section III.B.

In neither of its decisions did the Court provide a bright-line test for determining what kinds of job responsibilities are important and religious. In Hosanna-Tabor, Chief Justice Roberts wrote that the ministerial exception applies to “ministers,” 93 “those who will personify [a religious employer’s] beliefs,” 94 those who “minister to the faithful,” 95 those whom religious employers choose to “preach their beliefs, teach their faith, and carry out their mission,” 96 and

90. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 983 (7th Cir. 2021). See infra Section III.C for further discussion of Demkovich.
91. Disputes over the scope of discovery, including whether any discovery is permissible, are regular in ministerial exception cases. See, e.g., Collette v. Archdiocese of Chi., 200 F. Supp. 3d 730, 734–36 (N.D. Ill. 2016).
93. Id. at 180.
94. Id. at 188.
95. Id. at 189.
96. Id. at 196.
those “who will guide [the church] on its way.”\textsuperscript{97} He characterized Perich, the \textit{Hosanna-Tabor} plaintiff, as having “performed an important role in transmitting the Lutheran faith to the next generation.”\textsuperscript{98} In \textit{Our Lady of Guadalupe School}, Justice Alito relied less on the word “minister,” in both its noun and verb forms. Instead, he proffered these descriptions of employees to whom the exception applies:

- “certain key employees”;\textsuperscript{99}
- “teachers upon whom the schools rely to do this work” (i.e., “[t]he religious education and formation of students”);\textsuperscript{100}
- “individuals who play certain key roles”\textsuperscript{101} or who hold “certain important positions”;\textsuperscript{102}
- those who have “been given an important position of trust”;\textsuperscript{103}
- those who hold “an important responsibility in elucidating or teaching the tenets of the faith”;\textsuperscript{104}
- those who do the work of “educating young people in their faith, inculcating its teachings, and training them to live their faith,”\textsuperscript{105} or of “educating the young in the faith,”\textsuperscript{106} or of “[e]ducating and forming students in the . . . faith”;\textsuperscript{107}
- those who “guide their students, by word and deed, toward the goal of living their lives in accordance

\textsuperscript{97} Id.
\textsuperscript{98} Id. at 192.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 2060.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 2063.
\textsuperscript{104} Id. at 2064.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 2066.
\textsuperscript{107} Id.
with the faith”;\textsuperscript{108}   
- those who “play[] a vital part in carrying out the mission of the church”;\textsuperscript{109} and   
- those who have been “entrust[ed] ... with the responsibility of educating and forming students in the faith.”\textsuperscript{110}

In addition, Justice Alito twice quoted his \textit{Hosanna-Tabor} concurrence, where he had included within the exception “any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”\textsuperscript{111}

These characterizations of job responsibilities that bring an employee within the exception are not inconsistent, but neither do they establish clear boundaries.\textsuperscript{112} The Court’s language circles around a few categories of activity: leadership, education, and ritual. Because the plaintiffs in \textit{Hosanna-Tabor} and \textit{Our Lady of Guadalupe School} were teachers, it is unsurprising that the majority of Justice Alito’s descriptions invoke the language of education and formation. Yet Justice Alito employed general terms, too, like “playing a vital part in carrying out the mission of the church.”\textsuperscript{113}

The ambiguity of the Court’s approach comes more clearly into view in cases where an employer not only

\begin{itemize}
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.}
\item \textsuperscript{110} \textit{Id.} at 2069.
\item \textsuperscript{111} \textit{Id.} at 2063, 2064 (quoting \textit{Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC}, 565 U.S. 171, 199 (2012) (Alito, J., concurring)).
\item \textsuperscript{112} Several commentators have expressed concern that the Court’s approach risks spawning inconsistent or result-driven analysis on the part of lower courts. \textit{See, e.g.}, Allison R. Ferraris, \textit{Comment, The Expansive Scope of the Ministerial Exception after Our Lady of Guadalupe School v. Morrissey-Berru}, 62 B.C. L. REV. E. SUPP. II.-280, II.-280 (2021); Rachel Barrick, \textit{Comment, The Ministerial Exception: Seeking Clarity and Precision Amid Inconsistent Application of the \textit{Hosanna-Tabor} Framework}, 70 EMORY L.J. 465, 465 (2020).
\item \textsuperscript{113} \textit{Our Lady of Guadalupe Sch.}, 140 S. Ct. at 2066.
\end{itemize}
considers employees to play roles of religious significance but also incorporates religious content into job descriptions, contracts, and personnel assessments for positions that on the surface appear secular. As discussed further in the next Section, close cases have featured teachers and administrators whose duties did not involve teaching religion. The outcomes of these cases have depended in significant part on the degree of deference courts have afforded to religious employers’ perspectives on their employees’ responsibilities.

One approach reflects a stance that I will call “substantial deference.” In this view, courts should categorically defer to religious institutions on matters that are even marginally religious, absent extraordinary circumstances like patent bad faith. For the purposes of the ministerial exception, this would amount to accepting a religious employer’s designation of an employee’s functions as both religious and important, without further inquiry. This is the position Justice Thomas took in his concurrences in *Hosanna-Tabor* and *Our Lady of Guadalupe School.* Expounded by scholars including Douglas Laycock and Michael W. McConnell, as an element of the broader doctrine of “church autonomy,” substantial deference has recently gained currency among some judges and administrative

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officials. The National Labor Relations Board (NLRB), for instance, adopted a substantially deferential position in declining to take jurisdiction over a labor dispute involving faculty members at a Christian college in Kansas, holding that to consider the dispute would “inevitably involve inquiry into the religious tenets” of the college.117 The D.C. Circuit, too, showed substantial deference when it overturned a previous NLRB decision in which a differently constituted Board had ordered a Catholic university to bargain with adjunct instructors.118 And at oral argument in Our Lady of Guadalupe School, Justice Gorsuch observed that courts regularly exercise substantial deference under the federal and state Religious Freedom Restoration Acts; he suggested that to do otherwise in ministerial exception cases would be to invite unconstitutional entanglement.119

Yet in Our Lady of Guadalupe School, the Supreme

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118. See Duquesne Univ. of the Holy Spirit v. NLRB, 947 F.3d 824, 826 (D.C. Cir.), en banc reh’g denied, 975 F.3d 13 (D.C. Cir. 2020). Both this case and the Bethany College decision cited NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), in which the Supreme Court held that religiously affiliated schools are not subject to the National Labor Relations Act. The Court opined that because teachers play a “critical and unique role . . . in fulfilling the mission of a church-operated school,” for the Board to exercise jurisdiction necessarily entailed a “significant risk that the First Amendment will be infringed.” Id. at 501, 502. In Duquesne, Judge Pillard analogized the ministerial exception. Duquesne, 947 F.3d at 843–45 (Pillard, J., dissenting); Duquesne, 975 F.3d at 14–19 (Pillard, J., concurring in the denial of rehearing en banc). “[T]he Supreme Court has repeatedly held in the parallel context of the ‘ministerial exception’ to employment discrimination laws that the EEOC and the courts may look to employees’ actual religious roles . . . without running afoul of the Religion Clauses.” Duquesne, 975 F.3d at 14 (Pillard, J., concurring in the denial of rehearing en banc). See generally Charlotte Garden, Religious Employers and Labor Law: Bargaining in Good Faith?, 96 B.U. L. REV. 109 (2016).

Court adopted a position short of substantial deference. As we have seen, the Court concluded that where an employee has a ministerial title alone, without exercising important religious functions, the title is “not enough to justify the exception.”\(^\text{120}\) As for the reverse scenario, where employees like the plaintiffs in *Our Lady of Guadalupe School* lack ministerial titles but perform functions the employer deems to be religious and important, the Court gave an elliptical answer. Justice Alito observed:

> [B]oth their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools’ definition and explanation of their roles is *important*. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution’s explanation of the role of such employees in the life of the religion in question is *important*.\(^\text{121}\)

The Court’s repeated designation of an employer’s views as “important” represents some, but not substantial, deference.\(^\text{122}\) It is necessary to distinguish here between two senses in which the Court used the word “important.” We have already seen that part of the test for whether an employee falls within the ministerial exception is whether the employee’s religious functions are important. Here, the Court opined that religious institutions’ *characterizations* or *explanations* of their employees’ functions are also “important.”\(^\text{123}\) The Court’s use of the adjective “important” suggests that the majority intended employers’ assessment of their employees’ functions to carry some extra weight. The absence of more precise language may reflect a lack of consensus within the majority as to exactly *how* important

\(^{120}\)*Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2063.

\(^{121}\) *Id.* at 2066 (emphasis added).

\(^{122}\) *See id.* at 2066.

\(^{123}\) *Compare id.* at 2063, with *id.* at 2066. I am indebted to Abner S. Greene for this observation.
employers’ views should be.

At the other end of the spectrum from Justice Thomas’s substantial deference, and quite some distance even from the Court’s moderate deference, is the position Justice Sotomayor took in dissent. She stressed that as courts assess the facts of each individual case, the presumption should be that “most employees” will fall outside the exception. Courts should undertake a detailed, “context-specific” inquiry rather than proceeding to judgment if material facts remain disputed.124

The Court chose the middle of these paths in Our Lady of Guadalupe School, characterizing employers’ views of the nature and importance of their employees’ responsibilities as important but not dispositive. How should trial courts operationalize this approach? Perhaps the Court’s intention is that judges treat an employer’s assessment that an employee’s functions are religious and important as a rebuttable presumption. That is, when an employer asserts that an employee performed such functions, the burden would shift to the employee to demonstrate that her job responsibilities fall outside the scope of the ministerial exception. But this only postpones the more challenging question: how a court is to decide among competing assessments of the religious significance or importance of an

124. Id. at 2073, 2075 (Sotomayor, J., dissenting). Justice Sotomayor accused the majority of adopting a standard of nearly complete deference. The Court’s opinion “all but abandons judicial review,” she wrote. Id. at 2076. “[T]he Court’s apparent deference here threatens to make nearly anyone whom the schools might hire ‘ministers’ unprotected from discrimination in the hiring process.” The Court’s “decision thus invites the ‘potential for abuse’ against which circuit courts have long warned. . . . Nevermind that the Court renders almost all of the Court’s opinion in Hosanna-Tabor irrelevant. It risks allowing employers to decide for themselves whether discrimination is actionable.” Id. It is worth noting the numerous qualifications in Justice Sotomayor’s language: the Court “all but abandons” its duty, demonstrates “apparent” deference, adopts a rule that “threatens” adverse consequences with regard to “nearly anyone”, and “invites the ‘potential for abuse.’” These carefully crafted phrases suggest that the Court’s holding, even though it does not embrace Justice Thomas’s substantially deferential approach, fails to prohibit lower courts from adopting that standard. Id.
employee’s responsibilities.

Imagine an employee who worked as a shelf-stocker at a church-sponsored food pantry and was fired because of his national origin. He might well argue that his job responsibilities were not religious, especially if he did not pray with, counsel, or interact more than minimally with the pantry’s clients. But the church might respond that it regards its pantry as a means of implementing the New Testament command to feed the hungry.125 That is, in the church’s eyes, even a worker whose duties seem secular is actually advancing its religious mission. The church would likely add that for a court to decide whether feeding the hungry is a religious activity would be tantamount to adjudicating a theological question, clearly forbidden under the Court’s precedents. The church might invoke other First Amendment defenses as well, arguing that discovery and other procedural steps would constitute excessive entanglement in violation of the Establishment Clause. The stocker would likely reply that simply working for a religious institution, without more, does not transmute secular duties into religious ones.

What then for the trial court? Under Our Lady of Guadalupe School, the question is not simply whether an employee’s job responsibilities are religious. As we have seen, the Court also asked whether the employee’s religious functions are sufficiently important to justify overriding antidiscrimination statutes on First Amendment grounds. These are both legal rather than religious inquiries. In the hypothetical concerning the stocker, the court could defer to the church’s claim that his duties were religious, yet still find that he had rebutted the church’s contention that those religious duties were sufficiently important to bring him within the exception. The court would then deny the church’s motion to dismiss because, as a matter of law, it would not have established the ministerial exception defense. If the

employee were the pantry’s logistics manager, the court might make the opposite finding, and therefore the opposite ruling on the motion to dismiss, finding he had a sufficiently important role even if he interacted with clients as minimally as the stocker.

B. “What an Employee Does”

But none of this is explicit in Hosanna-Tabor and Our Lady of Guadalupe School. In real-life cases, trial courts have taken different approaches and reached different outcomes. The employees whom courts have typically found to fall within the exception can be sorted, broadly speaking, into three categories. First, there are ordained clergy members such as rabbis, Episcopal and Catholic priests, and Presbyterian ministers, as well as lay ministers with liturgical or pastoral functions such as a Roman Catholic sacristan, several Catholic directors of liturgical music, a Presbyterian youth ministry director, and an evangelical spiritual counselor. 126 Second, courts have applied the exception to teachers and administrators at religious schools in the Adventist, Catholic, Lutheran, evangelical, and Jewish traditions. 127 Some faculty members at religiously

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affiliated colleges have also been found to fall within the exception,128 but courts have permitted institutions of higher education to invoke the exception less often than primary and secondary schools.129 Third, courts have applied the exception to employees whose roles were primarily administrative, such as the manager of a Catholic cemetery.130

While courts have expanded the exception’s reach beyond traditional pastoral workers, they have tended not to apply the exception to secretarial or behind-the-scenes personnel with de minimis religious responsibilities. In Davis v. Baltimore Hebrew Congregation, for instance, the plaintiff was a synagogue facilities manager who claimed that he had been discharged because of his race and disability.131 He annually constructed the synagogue’s sukkah, a pavilion-like structure that congregants used on the holiday of Sukkot. Students from the synagogue’s school would occasionally “ask Davis questions about the Sukkah, and he explained to the children how it was built. He also explained the religious significance of the Sukkah, to the extent of his ‘limited knowledge.’”132 The synagogue argued

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132. Id. at 710 (citations omitted).
that these facts were sufficient to bring Davis within the exception, but the district court disagreed. It characterized his remarks about the sukkah as “a limited and infrequent exception to [Davis’s] primary function as Facilities Manager” and concluded that “his overall function as Facilities Manager was not ‘important’ to the Defendant’s religious mission” to the necessary extent.133 Likewise, in Barrett v. Fontbonne Academy, the district court rejected a Catholic school’s claim that its food service director, whom it fired for being married to another man, fell within the exception.134 The court found Barrett’s position to involve none of the “considerations” the Supreme Court had enumerated in Hosanna-Tabor; it observed that “to apply the ‘ministerial’ exception here would allow all religious schools to exempt all of their employees from employment discrimination laws simply by calling their employees ministers. If that were the rule, most of the discussion in Hosanna-Tabor would have been unnecessary.”135 In short, the courts in both Davis and Barrett concluded that the employees’ responsibilities, however important in terms of an institution’s operations, were insufficiently religious to justify the exception.

The fact-intensive approach courts have adopted in the closest cases has sometimes produced disparate results in cases that appear similar. Consider a pair of decisions the Supreme Court of Kentucky handed down in 2014 involving scholars dismissed from faculty positions at the same seminary. Although the decisions pre-date Our Lady of Guadalupe School, the court’s analysis focused primarily on

133. Id. at 711. On all of Davis’s federal and state law claims, the court granted summary judgment for the synagogue for reasons unrelated to the First Amendment. Id. at 718–19. The court in Morgan v. Central Baptist Church of Oak Ridge, No. 3:11-CV-124-TAV-CCS, 2013 WL 12043468, at *20 (E.D. Tenn. Dec. 5, 2013), reasoned analogously with regard to a church secretary.


135. Id.
the fourth circumstance from *Hosanna-Tabor*, which, as we have seen, became decisive in *Our Lady of Guadalupe School*. The interpretation of the ministerial exception that the court announced in the first case, *Kirby v. Lexington Theological Seminary*, produced an opposite result in the second, *Kant v. Lexington Theological Seminary*.136

Jimmy Kirby and Laurence Kant were both tenured professors at Lexington Theological Seminary, an ecumenical institution sponsored by the Christian Church (Disciples of Christ). Like many theological schools, in the early 2000s the seminary fell into difficult financial circumstances, and its board eliminated several faculty and staff positions, including Kirby’s and Kant’s. Both professors declined the seminary’s offer of a severance package that required them to waive their claims.137 Instead, they challenged their termination in court. Kirby, an African-American scholar of Christian ethics who belonged to a denomination different than the seminary’s, alleged breach of contract, breach of the implied covenant of good faith and fair dealing, and racial discrimination under Kentucky’s state civil rights law.138 Kant, a white Jewish scholar who taught courses in religious and cultural studies, brought only contract claims.139

Explicating *Hosanna-Tabor*, the Kentucky Supreme Court observed that the U.S. Supreme Court had “provided little direction” regarding the exception and, moreover, “did not constitutionalize any litmus test for a ministerial employee.”140 Instead, lower courts had “no more than the Court’s treatment of Perich as a guide to how the ministerial

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137. *Kirby*, 426 S.W.3d at 603; *Kant*, 426 S.W.3d at 590.
138. *Kirby*, 426 S.W.3d at 603.
139. *Kant*, 426 S.W.3d at 590.
140. *Kirby*, 426 S.W.3d at 601, 606.
exception should be applied.”141 Like its federal counterpart, the Kentucky high court declared that it was “loath to adopt a categorical rule regarding Seminary professors or any other class of individuals who may be considered ministers.”142 The court dubbed the factors Chief Justice Roberts had identified in Hosanna-Tabor to be “akin to a review of the totality of the circumstances.” Its analysis of how to approach the inquiry into an employee’s religious functions is worth quoting in full:

>C]onsideration of the important functions performed for the religious institution should involve a review of whether those functions were essentially liturgical, closely related to the doctrine of the religious institution, resulted in a personification of the religious institution’s beliefs, or were performed in the presence of the faith community.143

The court proceeded to review Kirby’s and Kant’s job responsibilities in detail.

In assessing Kirby’s duties, the court noted that his teaching had “focused on helping students understand what the basic socio-ethical issues are and the nature of the Christian (or Christ-like) response,” as well as that he had “emphasiz[ed] Christian methods of moral judgment.”144 He “participated in chapel services, convocations, faculty retreats, and other religious events. And Kirby preached on numerous occasions,” including at several of the Seminary’s annual convocations.145 These circumstances led the court to conclude that “Kirby is closely connected to the tenets of the faith espoused by the Seminary and actively involved in the promotion of the Seminary’s mission” and that “Kirby serves as a representative of the Seminary’s message.”146 Because

141. Id. at 606.
142. Id. at 611.
143. Kant, 426 S.W.3d at 591–92.
144. Kirby, 426 S.W.3d at 611.
145. Id. at 612.
146. Id. (footnotes omitted).
it deemed Kirby to fall within the exception, the court dismissed his racial discrimination claims. It noted that protecting religious autonomy via the exception sometimes comes at a social cost: “A religious institution may hold beliefs that are discriminatory under a particular antidiscrimination statute and the ministerial exception acts to protect the religious freedom of those institutions no matter how distasteful society may find it or how strong the societal interest may be.”147

But the court permitted Kirby’s contract claims to proceed, holding that the exception does not apply where a religious employer chooses to “ced[e] a degree of its constitutional rights” by entering into a contractual obligation such as the seminary’s grant of “tenure—a wholly secular concept—in exchange for professorial services.”148 Important to the court’s holding was its distinction between “government interference” in the selection of ministers by means of antidiscrimination laws, on the one hand, and private obligations that religious institutions take upon themselves through their contracts with employees, whether ministers or otherwise.149 “Arguably,” when courts uphold the terms and policies that religious institutions and their employees bargain for, this “exemplifies religious autonomy.”150 Because the relevant provisions of Kirby’s contract did not include religious language or involve any theological doctrine, the court concluded that other First Amendment defenses, such as ecclesiastical abstention, were unavailable to the seminary.151

In Kant’s case, the court focused on what it means for an employee to function as a “minister,” which “in the commonly understood sense” signifies a person who “has a very close

147. Id. at 614–15.
148. Id. at 616.
149. Id. at 615–16.
150. Id. at 616.
151. Id. at 618–19.
relationship with doctrine of the religious institution the minister represents.” 152 In addition, “members of the congregation or faith community view a minister as one who is, among other things, the face of the religious institution, permitted to speak for the religious institution, the embodiment of the religious institution’s tenets, and leader of the religious institution’s ritual. Kant did none of these things.” 153 Instead, his courses employed secular methods; he never espoused the beliefs of the seminary’s founding denomination nor played a role in transmitting its faith; and he did not hold an ecclesiastical title. 154 The court stressed that its conclusion did not turn mechanically on the fact that Kant was Jewish. Just as not every Christian employed at a Christian institution falls within the exception, “the simple fact that an employee professes a different religious belief system than his religious institutional employer does not eliminate the employee as a ministerial employee under the law.” 155 In every case, the central question is whether the employee is one who “will personify” the employer’s beliefs. 156 Because Kant did not, the court held the exception did not apply; it permitted all Kant’s claims to proceed. For the same reasons as in Kirby, the court found that other First Amendment doctrines did not bar Kant’s claims. 157

Kirby and Kant demonstrate that courts may distinguish between the job responsibilities of a religious institution’s employees without invading the employer’s constitutional sphere of autonomy. The cases also show that courts sometimes apply the ministerial exception differently to the

152. Kant v. Lexington Theological Seminary, 426 S.W.3d 587, 592 (Ky. 2014).
153. Id.
154. Id. at 593–95.
155. Id. at 595.
156. Id. at 596 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012)).
157. Id. at 596.
various causes of action a plaintiff may bring.158

Would Kant’s case have come out differently under Our Lady of Guadalupe School? The Kentucky Supreme Court’s test for whether an employee performs important religious functions aligns closely with characteristics mentioned in Justice Alito’s opinion, such as holding “an important responsibility in elucidating or teaching the tenets of the faith,” “inculcating its teachings,” “conduct[ing] worship services or important religious ceremonies or rituals,” and “serv[ing] as a messenger or teacher of [the employer’s] faith.”159 These traits generally relate to promoting a religious employer’s faith or personifying its beliefs, and Kant appears to have done neither. His title was secular, “Associate Professor of the History of Religion,” and his classes did not espouse the Seminary’s faith.160 He participated in the Seminary’s events, but his roles “were not liturgical, did not personify the Seminary’s beliefs, and were not performed in the presence of the faith community.”161 Therefore, Kant would likely still fall outside the ministerial exception had his case been decided after Our Lady of Guadalupe School.

Let us take a step back and consider the terrain more broadly. Under Our Lady of Guadalupe School, cases where employees performed obviously important religious functions (e.g., theology teachers or parochial school principals)162 and cases where employees performed purely

158. See infra Section III.C.
160. Kant, 426 S.W.3d at 592–93.
161. Id. at 595.
secular functions (e.g., the high school food service director, Barrett, or the facilities staff member, Davis), would likely both come out the same way. In Barrett, for instance, the school’s only argument for bringing Barrett within the exception was that “each of its employees is a ‘minister of the mission.’” The school did not describe any of Barrett’s particular duties as religious, let alone importantly so. The court concluded that the employer’s argument was insufficient under Hosanna-Tabor. The same result would obtain under Our Lady of Guadalupe School because Barrett’s job functions did not involve any of the kinds of duties the Court described as sufficiently important to invoke the exception.

The post-Hosanna-Tabor cases where the Court’s approach in Our Lady of Guadalupe School might have produced a different outcome are those that featured educators who do not teach religion. Consider, first, Bohnert v. Roman Catholic Archbishop of San Francisco. Kimberly Bohnert was a biology teacher at a Catholic high school who felt compelled to resign when the school responded inadequately after students sexually harassed her multiple times. The court assumed, without deciding, that the ministerial exception could bar a hostile work environment claim, but it held that Bohnert did not fall within the exception. Under Hosanna-Tabor, the court considered whether Bohnert was an ordained minister (she was not), whether she had received any ecclesiastical “call” (she had not), and whether she had any specific religious training or academic degrees (she did not). The school argued, however, that she served in a part-time role in its campus

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164. 136 F. Supp. 3d 1094 (N.D. Cal. 2015).
166. Id. at 1114.
ministry department, where she coordinated a retreat program and two service and formation programs. To allow time for this work, the school released Bohnert from one of the classes she would have normally been assigned to teach.\textsuperscript{167} The court examined Bohnert’s duties in the campus ministry office in detail. It concluded that she had “presented undisputed evidence” that her role “was not to provide spiritual or religious guidance. Instead, she assisted with the logistics of students [sic] trips and helped facilitate the programs. Although certain teachers led prayers or focused on spiritual outreach, Bohnert was not one of them.”\textsuperscript{168} About the other programs Bohnert coordinated, the court likewise found that “[i]t is not clear that these programs primarily served to further the religious mission of the church.”\textsuperscript{169} Bohnert, therefore, did not fall within the exception.

Under \textit{Our Lady of Guadalupe School}, the trial court must now afford some deference to the school’s designation of Bohnert’s duties as religious, as well as to its assessment of the duties’ importance. But because \textit{Our Lady of Guadalupe School} did not embrace substantial deference, the court would remain free to reach its own conclusion about the importance of the employee’s responsibilities. Nothing in the \textit{Bohnert} record indicates she held an “important position of religious trust” or had an “important responsibility in elucidating or teaching the tenets of the faith,” because her classroom assignments did not involve teaching religion; her duties in the campus ministry office appear to have been administrative; and she did not engage in prayer, preaching, or counseling. So even though the Court’s approach in \textit{Our Lady of Guadalupe School} would make \textit{Bohnert} a closer case, the trial court could still properly have found Bohnert to fall outside the exception.\textsuperscript{170}

\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} See \textit{id.} at 1115. The same is likely true of \textit{Herx v. Diocese of Fort Wayne-
Another case involving a Catholic schoolteacher and a slightly different set of facts, *Mis v. Fairfield Preparatory School*, would likely have come out differently.¹⁷¹ Jason Mis held tenure as a history teacher at a Jesuit high school in Connecticut before being fired for “moral misconduct.”¹⁷² (The school alleged that Mis had participated in misappropriating and abandoning a golf cart during a fundraiser at a local country club.) Assessing the school’s ministerial exception defense, the district court analyzed the four *Hosanna-Tabor* considerations and found that none of them brought Mis within the exception. Regarding his religious functions, the court found that Mis “attended mission trips with students, organized fundraisers, gave ‘faith talks,’ and participated in the Liturgical Music Program.”¹⁷³ Although the school argued that all its teachers contribute to its religious mission in the ways they serve students outside the classroom, the *Mis* court nevertheless found that he was not a ministerial employee.¹⁷⁴ Now, under *Our Lady of Guadalupe School*, he might fall within the exception. Against the backdrop of the school’s understanding of its religious mission, Mis’s active participation in religious services as a singer and not merely

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¹⁷² Id. at *1.

¹⁷³ Id. at *4. Mis testified that the “faith talks” involved speaking “with students about spirituality and morality from a nonreligious standpoint.” Id. He also testified that while he sang at school liturgies, he did not select the music. Id.

¹⁷⁴ Id. at *3.
as a member of the congregation, as well as his delivery of “talks” about spiritual matters, might be sufficient for a court to regard him as having “guid[ed his] students, by word and deed, toward the goal of living their lives in accordance with the faith.”

While these cases appear to be close calls, in *DeWeese-Boyd v. Gordon College*, the Supreme Judicial Court of Massachusetts unanimously ruled that a social work professor at a Christian liberal arts college did not fall within the exception. Margaret DeWeese-Boyd sued the college when it denied her promotion from associate professor to full professor, allegedly because she had opposed the college’s policies concerning LGBTQ+ individuals. The court lamented that the Supreme Court’s cases had left “the parameters of the exception . . . somewhat unclear,” particularly in the context of an educator who did not teach religion but was expected to, and did, integrate her faith into her academic work in a secular discipline. Like the court in *Mis*, the court in *DeWeese-Boyd* rejected the notion that instructors at faith-based educational institutions are automatically ministers. “If this were the case, the Court could have simply said so . . . .” Instead, undertaking the analysis of religious functions that *Our Lady of Guadalupe School* requires, the court held that DeWeese-Boyd’s “responsibility to integrate the Christian faith into her teaching, scholarship, and advising was different in kind, and not degree, from the religious instruction and guidance at issue in *Our Lady of Guadalupe School* and *Hosanna-Tabor*.” Many religious employers ask employees to “integrat[e] religious faith and belief with daily life and work,” and to hold that an employee falls into the exception

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175. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066.
177. *Id.* at 1002.
178. *Id.* at 1013.
179. *Id.* at 1017.
on this basis alone would produce an “expansion of the ministerial exception and . . . elimination of civil law protection against discrimination [that] would be enormous.”

DeWeese-Boyd confirms that ministerial exception cases after Our Lady of Guadalupe School will turn on the level of deference courts afford to religious institutions. Had the court fully credited the college’s assertion that “[i]n the Gordon College context, faculty members are both educators and ministers to our students,” professors in all disciplines could come inside the exception and outside the scope of antidiscrimination laws. But as the Massachusetts high court noted, the Supreme Court’s directions as to how courts should assess competing explanations of an employee’s role have been limited. The next Section explores other areas of the doctrine in which the Court has not provided definitive guidance.

C. Causes of Action Where the Exception May Apply

Regardless of how broadly courts should defer to employers’ assessments of the importance and religious significance of their employees’ job functions, against what causes of action does the ministerial exception provide immunity? As we have seen, the Court expressly declined to reach this question in Hosanna-Tabor, holding only that Cheryl Perich’s disability discrimination claim was subject to

180. Id.
181. Id. at 1006.
182. See id. at 1014. The Supreme Court denied certiorari in Gordon College v. DeWeese-Boyd, 142 S. Ct. 952 (2022) (mem.). Justice Alito, joined by Justices Thomas, Kavanaugh, and Barrett, concurred in the denial of certiorari but on procedural grounds only. The Justices expressed “doubts about the state court’s understanding of religious education and, accordingly, its application of the ministerial exception.” Id. at 955 (Alito, J., concurring in denial of certiorari). But because Gordon College sought Supreme Court review of the state high court’s resolution of an interlocutory appeal, the Justices concluded that the case’s procedural posture “would complicate our review.” Id.
the exception. The causes of action in *Our Lady of Guadalupe School* also arose under federal employment discrimination statutes, the ADA and ADEA; again, the Court elected not to consider whether the exception might bar other claims.

The cases in which courts fashioned and applied the ministerial exception have most often involved employment discrimination, but the Court’s reasoning implies that the exception sweeps more broadly. If, in Justice Alito’s words, the exception safeguards the autonomy of religious institutions when they “select, supervise, and if necessary, remove” teachers and other eligible personnel, then the exception may apply not only to employment discrimination claims but also to hostile work environment claims (which involve supervision and possibly removal, for instance in the form of constructive discharge), failure to accommodate claims (which involve supervision), tort claims, contract disputes (which can implicate selection and removal), and other causes of action.183

In the nine years since the Court handed down *Hosanna-Tabor*, numerous plaintiffs have asked lower courts to decide whether the exception applies outside the context of discriminatory termination.184 The results have varied. There is a circuit split regarding hostile work environment claims, but courts have generally expanded the exception to immunize employers against failure to accommodate claims, whistleblower claims, most tort claims, and some contract claims. In these settings, courts have sometimes found it necessary to inquire into the relationship between a plaintiff’s claim and a religious employer’s beliefs—paradoxically, an approach the Supreme Court rejected in *Hosanna-Tabor* and *Our Lady of Guadalupe School*.

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1. Hostile Work Environment Claims

Let us begin with the claims that arise under employment discrimination statutes. A circuit split is widening on the question of whether the exception applies to lawsuits concerning hostile work environments that do not culminate in tangible employment actions like demotion, reassignment, or termination.185 In these suits, plaintiffs seek recompense for the verbal, emotional, and psychological abuse they allege they suffered during their employment with a religious institution.

The seminal case in this line is the Ninth Circuit’s decision in *Bollard v. California Province of the Society of Jesus.*186 The case involved a former novice of a Catholic religious order who brought a hostile work environment claim about sexual harassment that he allegedly experienced in his years of religious formation. The harassment was so severe, he said, that he had to abandon his aspiration to be ordained a Jesuit priest.187 *Bollard* arose in the late 1990s, when courts were still in the process of recognizing the ministerial exception. The Ninth Circuit held that the exception did not bar Bollard’s suit. In two ways, the court distinguished hostile work environment claims from termination claims. First, because the Jesuits did not dismiss Bollard—in fact they desired that he be ordained a priest—the court found that his suit did not implicate a religious institution’s right to choose its ministers. Second, the court observed that the Jesuits did not offer any religious justification for the harassment Bollard alleged. “[I]ndeed,
they condemn it as inconsistent with their values and beliefs.”188 Therefore, the court concluded, “the danger that the application of Title VII in this case will interfere with [the Jesuits’] religious faith or doctrine is particularly low.”189 Turning from the ministerial exception to the Jesuits’ broader Establishment Clause arguments, the court held that Bollard’s claim could be adjudicated without delving into religious matters because “[n]othing ... will require a jury to evaluate religious doctrine or the ‘reasonableness’ of the religious practices followed within the Jesuit order.”190 Last, because Bollard sought money damages rather than reinstatement or other equitable relief, the court concluded his suit posed no risk of impermissible entanglement with, or ongoing oversight of, the Jesuits’ operations.191

Bollard remains the law in the Ninth Circuit,192 but the two other circuits to have considered hostile work environment claims have gone the other way. In 2010, the Tenth Circuit held in Skrzypczak v. Roman Catholic Diocese of Tulsa that the ministerial exception bars all Title VII claims, whether or not they involve tangible employment actions.193 The Seventh Circuit, sitting en banc, took the
same position in July 2021, overturning its panel’s decision in a case involving a church organist who alleged he had been tormented by his supervisor, the parish priest. Sandor Demkovich alleged that the priest repeatedly criticized him for his weight, complaining that the cost of keeping him on the insurance plan was too high. The priest also used demeaning epithets to describe Demkovich’s relationship with his same-sex partner and, as the date of Demkovich’s wedding neared, called his colleagues to obtain information about the ceremony, which the priest dubbed a “f** wedding.” The priest demanded Demkovich’s resignation four days after he got married and fired him when he refused. Splitting 7–3, the Seventh Circuit concluded that because “[t]he contours of the ministerial relationship are best left to a religious organization, not a court . . . workplace conflict among ministers takes on a constitutionally protected character.” The majority cited both Hosanna-Tabor and Our Lady of Guadalupe School for the proposition that the ministerial exception covers not just the hiring and firing, but also the day-to-day supervision and control of ministerial employees. To be immune from suit, a religious organization need not give a religious reason for its conduct; otherwise, the majority declared, courts would necessarily intrude into religious institutions’ constitutionally protected sphere of activity.

Judge Hamilton, who had authored the majority opinion for the panel, dissented from the en banc opinion. He defended the panel, which concluded that because harassment “is not constitutionally necessary to ‘control’ ministerial employees,” courts should permit some claims by

194. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 985 (7th Cir. 2021) (en banc).
196. Demkovich, 3 F.4th at 979.
197. Id.
198. See id. at 980.
ministerial employees who are not challenging tangible employment actions. Judge Hamilton argued that the majority had read too much into *Hosanna-Tabor* and *Our Lady of Guadalupe School*, neither of which concerned hostile work environments. Rather than drawing an “odd, arbitrary line in constitutional law,” Judge Hamilton urged that courts should proceed case-by-case on hostile work environment claims, as they are accustomed to doing in other nuanced areas of First Amendment doctrine. Where the potential for procedural and substantive entanglement with religious organizations is minimal, there is no constitutional bar to adjudicating employees’ claims. Therefore, courts should not second-guess Congress’s judgment about how to protect employees from invidious discrimination. Judge Hamilton vividly invoked the consequences of the majority’s decision:

> [I]t is difficult for me to conclude that the First Amendment requires immunity where supervisors and coworkers of ministerial employees, for example, leave nooses at the desk of a Black minister while repeatedly subjecting him to verbal abuse with racial epithets and symbols, or subject one teacher to pervasive and unwelcome sexual attention, or subject another to intimidating harassment based on national origin. Such harassment simply is not necessary to “control” ministerial (or any other) employees. We may all hope that such extreme allegations against religious organizations would be very rare. Yet the majority’s holding today will put even this sort of extreme conduct beyond the reach of employment discrimination statutes.

As Judge Hamilton noted, because the majority’s approach renders the ministerial exception even more potent, it incentivizes religious institutions to claim that ever greater numbers of their employees should fall within its

199. Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 731 (7th Cir. 2020), vacated and rev’d on reh’g, 3 F.4th 968 (7th Cir. 2021).
201. Id. at 988–89; see also id. at 991–94.
202. Id. at 989–91.
203. Id. at 995.
While there is now a split between the Ninth Circuit, on the one hand, and the Seventh and Tenth Circuits, on the other, the remaining circuits have yet to decide whether the exception bars hostile work environment claims. District courts in these circuits, however, have continued to divide over the issue. A district court in Pennsylvania, for example, has read *Hosanna-Tabor* and *Our Lady of Guadalupe School* to prohibit all employment discrimination claims. “The Supreme Court has not cabined the ministerial exception to tangible or intangible employment actions, and it is not for this Court to create such an exception to binding precedent.” However, a district court in New York, applying *Bollard*, permitted Greek Orthodox nuns to bring claims for retaliation and constructive discharge—but only insofar as their claims did not involve tangible employment actions or actions for which their employer proffered religious reasons.

2. Failure to Accommodate Claims

One might think that to the extent ministerial employees could bring hostile work environment claims, they should also be able to bring failure to accommodate claims, because neither cause of action implicates an employer’s choice of who personifies its teachings. But even the Ninth Circuit has

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204. *Id.*

205. In a recent case, the Sixth Circuit held that the exception bars courts from considering tangible employment actions as evidence of a hostile work environment. *Middleton v. United Church of Christ Bd.*, No. 21-4141, 2021 WL 5447040, at *3 (6th Cir. Nov. 22, 2021). No other appellate court has addressed the intersection between hostile work environment and termination claims in this way. Judge Moore, concurring in the panel’s judgment, criticized her colleagues for opining on the ministerial exception in a case that could have been resolved simply under *Fed. R. Civ. P. 12(b)(c)*. *Id.* at *5 (Moore, J., concurring in the judgment).*


held that the exception bars failure to accommodate suits. In Werft v. Desert Southwest Annual Conference of the United Methodist Church, the court distinguished Bollard and dismissed the suit of a pastor whose church terminated him after he sought accommodations for disabilities.208 “[A] minister’s working conditions and the church’s decision regarding whether or not to accommodate a minister’s disability, are a part of the minister’s employment relationship with the church” in a way sexual harassment cannot be.209 The court added that “Bollard’s case . . . was more similar to a negligence claim than a typical Title VII employment discrimination claim.”210 The Werft approach has been typical of courts that have adjudicated failure to accommodate claims. Central to the analysis has been whether an employer’s allegedly unaccommodating conduct constitutes an intrinsic part of the employment relationship, akin to the setting of working conditions.211 If the answer is yes, courts have found that the exception bars an employee’s claims.

3. Tort Claims

What about when an employer engages in conduct not even conceivably intrinsic to the employment relationship, such as physical or emotional abuse? Both the Demkovich majority and dissent observed that religious institutions are not immune from liability for their employees’ torts.212 The recent wave of litigation concerning sexual abuse and other forms of misconduct by clergy has reaffirmed this principle

208. 377 F.3d 1099 (9th Cir. 2004).
209. Id. at 1103.
210. Id.
212. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 982 (7th Cir. 2021); id. at 989 (Hamilton, J., dissenting).
resoundingly.213 But as we saw, an important factor in the Ninth Circuit’s decision in Bollard was that the employee’s religious order “most certainly [did] not claim that allowing harassment to continue unrectified is a method of choosing their clergy.”214 Where allegedly tortious conduct occurred in the context of a religious employer’s governance processes, courts have barred some tort claims. In Sumner v. Simpson University, the dean of a Christian university sued her employer for breach of contract and various torts, including defamation, invasion of privacy, and intentional infliction of emotional distress.215 Finding that Sumner was a minister for the purposes of the exception, the court permitted her contract claim to proceed but dismissed her tort claims. The court found that the torts Sumner had alleged were all “part and parcel of the reasons for and process of terminating [her] employment.”216 The court concluded: “Were we to allow the acts taken in terminating Sumner to be framed as tortious acts, we would render the ministerial exception meaningless.”217

A limited exception to the approach of Sumner appears to be emerging in the small number of cases where an employee brings a tort suit against a party other than a former employer. For instance, in McRaney v. North American Mission Board of the Southern Baptist Convention, Inc., the district court held that the ministerial exception did not bar McRaney’s claim against a national religious body


216. Sumner, 238 Cal. Rptr. 3d at 223.

that, he alleged, had tortiously interfered with his relationships with his immediate employer and third parties. The district court dismissed the case on broader ecclesiastical abstention grounds, but a Fifth Circuit panel reversed, concluding that it was not evident from the record that the case implicated ecclesiastical questions. The Fifth Circuit divided narrowly and voted against rehearing the case en banc. Judge Ho, dissenting, lambasted his colleagues for claiming to employ “neutral principles of tort law” to resolve a claim against a religious institution when “the whole point of the First Amendment, of course, is to privilege religion.”

4. Contract Claims

As we have seen above, the key question in contract cases involving ministerial employees has been whether a court can adjudicate disputes about the meaning or application of contracts without resolving contested theological issues.


221. Id. at 1071, 1073 (Ho, J., dissenting from denial of rehearing en banc).

222. See generally Charles A. Sullivan, Clergy Contracts, 22 EMP. RTS. & EMP. POL’Y J. 371 (2018); Andrew Donivan, Comment, Freedom of Breach: The Ministerial Exception Applied to Contract Claims, 63 DEPAUL L. REV. 1063 (2014); Kevin J. Murphy, Note, Administering the Ministerial Exception Post-
Leslie C. Griffin explained:

Long before *Hosanna-Tabor* was decided, some appeals courts distinguished breach of contract cases from antidiscrimination lawsuits. Three stated reasons for the difference were that churches may voluntarily burden themselves with contracts, contracts are not matters of theological doctrine, and awarding purely monetary damages on a contract claim does not entangle the courts with religion.\(^\text{223}\)

Courts have proceeded with caution in this area, insisting on what the New Jersey Supreme Court called “fact-sensitive and claim specific” analysis “of every issue raised in terms of doctrinal and administrative intrusion and entanglement.”\(^\text{224}\) The court held:

Before barring a specific cause of action, a court first must analyze each element of every claim and determine whether adjudication would require the court to choose between ‘competing religious visions,’ or cause interference with a church’s administrative prerogatives, including its core right to select, and govern the duties of, its ministers.\(^\text{225}\)

In one line of cases, courts have concluded that it is possible to interpret disputed contracts involving ministers if they involve what the Supreme Court has called “neutral principles of law.”\(^\text{226}\) For instance, in *Second Episcopal District African Methodist Episcopal Church v. Prioleau*, a pastor claimed that her former church had failed to pay the full amount it owed her under the last of a series of annual contracts.\(^\text{227}\) The church moved to dismiss, invoking the

\(^{223}\) Griffin, *supra* note 54, at 1010 (footnote omitted).

\(^{224}\) McKelvey v. Pierce, 800 A.2d 840, 844 (N.J. 2002).

\(^{225}\) *Id.* at 856.


ministerial exception, but both the trial court and the D.C. Court of Appeals disagreed. Although Prioleau was clearly a minister, the appellate court observed that she was not challenging the church’s personnel decisions. Instead, she was seeking only to enforce contractual obligations. Prioleau’s suit did not implicate the exception’s core rationale, so the court “decline[d] to extend the ‘ministerial exception’ to categorically bar any claim whatsoever by a ministerial employee.” 228 The court also held that it was likely possible to resolve Prioleau’s contract claim without adjudicating matters of doctrine or church governance because the dispute concerned only the church’s failure to fulfill its promise. In remanding, however, the appellate court noted that the trial court should enter summary judgment for the church if, as the proceedings unfolded, it became evident the dispute was religious in nature. 229

In another line of cases, courts have barred contract claims when adjudicating them would require the court to make religious judgments. Exemplary of these cases is Lee v. Sixth Mount Zion Baptist Church of Pittsburgh. 230 The church dismissed Lee from his position as minister, claiming that he had failed to provide adequate financial and spiritual leadership in violation of his employment contract. 231 Lee sued for breach of contract, and the church invoked the exception. The Third Circuit affirmed the trial court’s grant of summary judgment for the church, reasoning that to decide the case would require the court to determine, under the terms of the contract, “what constitutes adequate spiritual leadership and how that translates into donations and attendance—questions that would impermissibly entangle the court in religious governance and doctrine

229. Id. at 818.
231. Lee, 903 F.3d at 116, 117.
prohibited by the Establishment Clause.”

The difference between these two lines of cases tracks the rationale for the ministerial exception. Under the Supreme Court’s “neutral principles of law” approach, courts may decide contractual disputes involving both ministerial and non-ministerial employees, so long as there is no risk that the court would substitute its judgment for the employer’s on a question of religious significance. Prioleau’s suit continued where Lee’s was barred because in Prioleau’s case, the court did not need to determine what met the church’s standard for appropriate leadership on its pastor’s part. The same was true of the contracts Lexington Theological Seminary entered into with its former professors, Kirby and Kant. That court did not need to venture into theological territory to determine under what circumstances the parties had agreed the Seminary could terminate tenured faculty. But even where contract claims involving ministerial employees proceed, the ministerial exception constrains what remedies are available. Because the Supreme Court has held it would violate the First Amendment to impose a ministerial employee on an unwilling employer, courts that have heard contract disputes have typically limited plaintiffs to money damages, rather than equitable remedies.

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232. Id. at 121.


5. Other Claims

The causes of action this Section has discussed do not comprise an exhaustive list. Religious employers have successfully invoked the ministerial exception against other kinds of lawsuits as well, including claims arising under minimum wage laws\(^{236}\) and federal labor standards laws.\(^{237}\) One timely issue is whether religious institutions may invoke the exception when they terminate or punish employees for whistleblowing activity. Especially in light of revelations concerning sexual abuse within religious communities, it surely hinders attempts to prevent future abuse if those who report what they know can be fired without recourse.\(^{238}\)

Yet that appears to be the approach courts have taken. In *Archdiocese of Miami v. Miñagorri*, a Florida appellate court held that the exception barred a parochial school principal from challenging her termination when she reported that the parish priest, her supervisor, grabbed her by the arm and threatened her.\(^{239}\) An appellate court in Michigan reached the same conclusion in *Weishuhn v. Catholic Diocese of Lansing*, which involved a parochial school teacher who had reported child abuse pursuant to a state statute that made her a mandatory reporter.\(^{240}\) The court observed, almost wistfully, that “[w]e recognize that it seems unjust that employees of religious institutions can be

\(^{236}\) See, e.g., Alcazar v. Corp. of Cath. Archbishop of Seattle, 598 F.3d 668, 671–72, 676 (9th Cir.) (holding the exception bars a claim for overtime pay under state minimum wage law), vacated in part, adopted in part, 627 F.3d 1288 (9th Cir. 2010).


\(^{239}\) 954 So. 2d 640, 643 (Fla. Dist. Ct. App. 2007).

fired without recourse for reporting illegal activities, particularly given that members of the clergy, as well as teachers, are mandated reporters. However, to conclude otherwise would result in pervasive violations of First Amendment protections.”

Both Archdiocese of Miami and Weishuhn were decided prior to the Supreme Court’s ministerial exception cases, but in 2021, the Illinois Supreme Court reached a similar conclusion in Rehfield v. Diocese of Joliet. There, the diocese fired the principal of a Catholic grade school who had reported a parent’s threatening conduct to the police. The court held that the principal’s conduct was protected by the state’s whistleblower law, but because the principal was a ministerial employee under Our Lady of Guadalupe School, the diocese was immune from suit for violating the whistleblower law. The result in Rehfield confirms what we have seen throughout this Section: because the Court’s opinions in Hosanna-Tabor and Our Lady of Guadalupe School did not limit the ministerial exception only to termination claims, lower courts have been able to expand the exception’s reach. The deepening circuit split with regard to hostile work environment claims, in particular, suggests the Court might find it necessary to revisit the ministerial exception in the not-too-distant future.

D. Categories of Employers

Both Hosanna-Tabor and Our Lady of Guadalupe School involved parochial schoolteachers. In Our Lady of Guadalupe School especially, the Court framed its holding in terms of employees whose duties include religious instruction. Justice Alito affirmed that “[r]eligious education is vital to many faiths practiced in the United States” and surveyed the

241. Weishuhn, 787 N.W. 2d at 521 (citation omitted).
243. Id. at 128–29, 133–134, 140–43.
history of faith-based schools across several religious traditions.244 “The concept of a teacher of religion is loaded with religious significance. The term ‘rabbi’ means teacher, and Jesus was frequently called rabbi.”245 These points would not have been quite as apposite had the Court’s opinion addressed employees of institutions other than schools.

From *McClure* onwards, a prerequisite for the exception’s application has been that the employer seeking to invoke it is a religious employer.246 But in addition to churches, other houses of worship, and religiously affiliated schools, an increasing number of institutions hold themselves out as religious. There are religious publishers and bookstores; television, radio, and internet media; student associations; advocacy groups; humanitarian agencies; and even museums and theme parks. The Internal Revenue Service regards many of these organizations as “churches,” a loosely named category that reflects the agency’s longstanding reticence to require religious organizations to apply for recognition of their tax-exempt status.247 Those religious organizations the IRS does not


245. *Id.* at 2067.


247. *See* INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 1 (2015). The IRS uses the term “church” generically, applying it across the wide diversity of U.S. religious groups. Among the characteristics the IRS finds typical of churches are that they have a “distinct legal existence; recognized creed and form of worship; definite and distinct ecclesiastical government; . . . organization of ordained ministers; . . . established places of worship; regular congregations; [and] regular religious services.” *Id.* at 33. Yet many of the organizations the IRS regards as churches do not possess many of the named characteristics. Among them are Focus on the Family and Samaritan’s Purse. *See* Focus on the Family, CANDID, https://www.guidestar.org/profile/95-3188150 (last visited Apr. 28, 2022); Samaritan’s Purse, CANDID, https://www.guidestar.org/profile/58-1437002 (last visited Apr. 28, 2022).
recognize as churches are almost always eligible for the exemptions provided under Internal Revenue Code § 501(c)(3).248

Whether they are “churches” or religious 501(c)(3) organizations, can all these employers invoke the ministerial exception? The Supreme Court has not answered, and the language of the statutory exemptions offers little guidance. Statutes tend to define religious employers vaguely, sometimes even tautologically. The exemption in Title VII, for instance, provides that it does not apply “to a religious corporation, association, educational institution, or society” without indicating what makes an organization “religious.”249

But in determining whether an employer may invoke the exception, courts have generally not looked to questions of tax status nor to the language of related statutes; they have instead deferred to the employer’s self-identification, especially when the institution holds itself out to the public as being inspired by a religious mission. In Grussgott v. Milwaukee Jewish Day School, Inc., the school invoked the exception against a former Hebrew teacher who sued for disability discrimination.250 Grussgott argued that the school was not a religious employer, “because it does not adhere to Orthodox principles, employs a rabbi only in an advisory (rather than supervisory) capacity, and has a nondiscrimination policy.”251 A Seventh Circuit panel including then-Judge Amy Coney Barrett disagreed, concluding that an institution need not belong to a particular denomination, employ clergy, or exclude members of other faiths in order to be sufficiently religious to claim the

248. See I.R.C. § 501(c)(3).
249. 42 U.S.C. § 2000e-1(a). In only a small number of cases involving the statutory exception has the employer’s status been in dispute. See, e.g., LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n, 503 F.3d 217, 226–31 (3d Cir. 2007).
250. 882 F.3d 655, 658 (7th Cir. 2018).
251. Id.
A closer case, *Penn v. New York Methodist Hospital*, presented the question of whether a hospital that used to be controlled by a Christian denomination qualified as a religious employer after it became secular, but retained certain “vestiges” of “its religious heritage.” In 1975, the New York Methodist Hospital amended its certificate of incorporation to remove references to its “Church related character” and “relationship with The United Methodist Church,” as well as abrogating the requirement that the local bishop and another church leader be *ex officio* trustees. Yet the hospital kept the word “Methodist” in its name, maintained an archive of Methodist materials, displayed a plaque celebrating its identity as the world’s first Methodist hospital, required “significant representation from . . . the United Methodist Church” on its board, and made pastoral care available round-the-clock. Marlon Penn, a resident chaplain whose employment the hospital terminated, sued for discrimination on the basis of race and religion. When the hospital invoked the exception, Penn argued that it had shed its religious character. Both the district court and the Second Circuit disagreed, pointing to the existence of the pastoral care department as evidence that the hospital “has retained a critical aspect of [its] religious identity in order to provide religious services to its patients.” Both courts noted, and the district court expressly embraced, the

252. Id.
254. Id. at 418.
255. Id. at 419.
256. Id. at 418, 422.
257. Id. at 424–25. In dissent, Judge Droney agreed that “a religiously affiliated entity is a ‘religious institution’ for purposes of the ministerial exception whenever that entity’s mission is marked by clear or obvious religious characteristics.” Id. at 430 (Droney, J., dissenting). But he disagreed that the hospital had met this standard, observing that secular hospitals have chaplaincy departments and the presence of such a department at New York Methodist was insufficient evidence it had retained a religious character. Id. at 436.
approach of a judge who had reasoned in another case that the “exception should be viewed as a sliding scale, where the nature of the employer and the duties of the employee are both considered in determining whether the exception applies.”

In only one of the ministerial exception cases decided after **Hosanna-Tabor** did a court find that an employer was not sufficiently religious. In **Winbery v. Louisiana College**, four former professors sued a Christian college for defamation, violations of academic freedom and college handbook provisions, and breach of contract in connection with a settlement reached in an earlier, separate suit. The trial court, relying on a decades-old Fifth Circuit case involving another evangelical college, held that the employer was “a liberal arts college with a strong emphasis on Christianity,” not a “church.” The court therefore found the exception inapplicable, but it granted the college’s motion to dismiss on other First Amendment grounds. The state appellate court affirmed. Especially after **Our Lady of Guadalupe School**, **Winbery** appears to be an outlier. Given the overall expansion of deference to religious claims on the part of courts and agencies, it seems unlikely that most courts will question the self-identification of organizations that have a colorable argument for being considered religious.

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261. *Id.* at *6–10.

262. *Winbery*, 124 So. 3d at 1218–19.

263. *See generally* Brian M. Murray, **The Elephant in Hosanna-Tabor**, 10 GEO. J.L. & PUB. POL’Y 493 (2012); James A. Davids, **Religious Colleges’ Employment**
The rationale the Court has given for the ministerial exception—protecting employers’ constitutionally guaranteed autonomy as they deal with employees who exercise important religious responsibilities—makes it likely that courts will find that a wide variety of institutions may invoke the exception.\(^{264}\) In religiously affiliated social service programs, medical centers, and legal clinics, employees like counselors, nurses, social workers, and lawyers hold positions of trust.\(^{265}\) Spokespersons, publishers, broadcasters, lobbyists, museum staff, and others play important roles in communicating the messages of faith-based institutions. As we have seen throughout this Part, Supreme Court and lower court decisions have been expanding the ministerial exception along three intersecting

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\(^{264}\) Beyond the scope of this Article is the question of how the Court’s ministerial exception jurisprudence has shaped lower courts’ approach in cases that do not involve traditional employment relationships. For instance, in InterVarsity Christian Fellowship/USA v. Board of Governors of Wayne State University, the court analogized the Court’s ministerial exception cases in holding that a state university could not condition a religious group’s registered student organization status on its compliance with the university’s nondiscrimination policy. 534 F. Supp. 3d 785, 838 (E.D. Mich. 2021). The court’s decision turned on finding that the student group’s leaders were ministers within the meaning of Our Lady of Guadalupe School. The Sixth Circuit had previously held that InterVarsity was a religious employer. See Conlon v. InterVarsity Christian Fellowship/USA, 777 F.3d 829, 831, 834 (6th Cir. 2015).

\(^{265}\) In Woods v. Seattle’s Union Gospel Mission, the Washington Supreme Court remanded for further fact finding the question whether a lawyer who applied for a staff attorney position at an evangelical organization that serves the homeless fell within the exception. 481 P.3d 1060, 1070 (Wash. 2021), cert. denied, 142 S. Ct. 1094 (2022) (mem.). Judge Yu observed that one factor cutting against Woods’ being a minister is that “it is simply not possible to simultaneously act as both an attorney and a minister” while complying with Washington’s Rules of Professional Conduct. Id. at 1072–73 (Yu, J., concurring). The Supreme Court denied certiorari. Seattle’s Union Gospel Mission v. Woods, 142 S. Ct. 1094 (2022) (mem.). Justice Alito, joined by Justice Thomas, observed that the state high court’s construction of Washington’s statutory exemption may conflict with the Court’s ministerial exception jurisprudence, but that the case’s posture may preclude Supreme Court review. Id. at 1094, 1096 (Alito, J., concurring in denial of certiorari). The Justices signaled an openness to reviewing the case “once there is a final state judgment.” Id. at 1097.
lines: who qualifies as a minister, what claims the exception bars, and what employers may invoke the exception. It is no exaggeration to conclude that the conditions of employment of hundreds of thousands of employees of religiously affiliated organizations hang in the balance.266

E. Waiver

The final question to be explored is whether employers may waive the protections of the ministerial exception, either in advance of litigation or once an employee has brought suit.267 The Supreme Court did not explicitly address this issue in Our Lady of Guadalupe School, but Justice Sotomayor noted in dissent that the faculty handbook at Morrissey-Berru’s school “promised not to discriminate on the basis of any protected characteristic, including ‘race,’ ‘sex,’ ‘disability,’ or ‘age.’”268 Had the Court deemed this language to constitute waiver, it could not have reached the result it did. It is not surprising that the Court did not construe the handbook’s language as a waiver: there is generally “‘every reasonable presumption against waiver’ of fundamental constitutional rights,” and no court that has considered an employment discrimination claim implicating the exception has held that an employer’s adoption of a nondiscrimination policy, without more, bars the employer


267. This question could also be framed in terms of estoppel, i.e., whether because of an employer’s words or actions it could be equitably estopped from invoking the exception against one or more employees. The cases and literature tend to use the language of waiver, perhaps because the Supreme Court has treated the exception as a constitutional entitlement. See supra note 60 and accompanying text.

268. Our Lady of Guadalupe Sch., 140 S. Ct. at 2078 (Sotomayor, J., dissenting). The majority noted that the St. James School faculty handbook “resemble[d]” the one used at Our Lady of Guadalupe School. Id. at 2058 (majority opinion).
from asserting the exception. The more realistic question, which the next Part will explore, is whether a religious employer can expressly waive the exception at the outset of an employment relationship.

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By way of concluding this Part, it is worth reviewing what the Court did and did not decide in Our Lady of Guadalupe School. It held that performing important religious functions alone is sufficient to bring an employee within the scope of the exception. But the Court did not provide clear guidance for lower courts tasked with determining whether a particular employee meets this test. As we have seen, although Our Lady of Guadalupe School does not distinguish them, this inquiry has two elements: whether an employee’s job responsibilities are religious, and whether they are sufficiently important. Because the Court did not clearly identify the degree of deference courts owe religious institutions, did not address the kinds of claims the exception might bar, did not specify which employers are sufficiently religious to claim the exception, and did not indicate whether employers may waive the exception, its opinion is susceptible to an expansive variety of applications.

IV. WHY RELIGIOUS EMPLOYERS SHOULD PROVIDE NOTICE

As we have seen, the Court’s ministerial exception jurisprudence has placed increasing numbers of workers in positions of vulnerability vis-à-vis the religious institutions that employ them. This Part does not seek to challenge the Court’s interpretation of the First Amendment, nor does it discuss the thoughtful proposals to narrow the ministerial exception that have emerged in the wake of Our Lady of Guadalupe School. Instead, until the Court resolves the


270. See, e.g., Maxine Goodman, The Expanding Role and Dwindling
doctrinal ambiguities identified in the previous Part, I propose that it would advance the interests of all parties for religious employers voluntarily to take a step that the Court's cases do not require.271 With regard to employees whose positions fall into the gray area this Article has been tracing, employers should provide notice, at the start of the employment relationship and after any material change in the relationship, whether or not the employer deems an employee to be subject to the exception.272 This practice

Protection for Private Religious School Teachers During the Pandemic: Rethinking the Ministerial Exception After Morrissey-Berru, 54 U.C. DAVIS L. REV. ONLINE 61, 86–88 (2021) (proposing that the exception should apply only when an employer gives a religious reason for firing an employee, as well as proposing a more rigorous test for "substantial religious function"); Jeremy Weese, Comment, The (Un)Holy Shield: Rethinking the Ministerial Exception, 67 UCLA L. REV. 1320, 1364–83 (2020) (proposing that courts ask whether an employee was hired by the same body that makes religious decisions, as well as whether the employer reserves the employee's religious functions to a specific group of employees based on religious justifications; also recommending a "bona fide religious decision" defense and advocating that remedies in cases involving ministerial employees be limited to money damages); Barrick, supra note 112, at 516 (proposing that courts afford "significant weight" to whether an employer has articulated "an express expectation of religiosity" in such documents as contracts and offer letters). But see The Supreme Court, 2019 Term—Leading Cases—First Amendment—Freedom of Religion—Ministerial Exception—Our Lady of Guadalupe School v. Morrissey-Berru, 134 H ARV. L. R EV. 460, 465 (2020) (contending that "the key to a better approach lies in Justice Thomas's call for deference to . . . religious organizations").

271. This is not the first such proposal, although perhaps the first since the Court decided Our Lady of Guadalupe School. See, e.g., Amy Dygert, Note, Reconciling the Ministerial Exception and Title II: Clarifying the Employer's Burden for the Ministerial Exception, 58 WASH U. J.L. & POL'Y 367, 387–89 (2019). Whether the kind of notice this Part discusses could be mandated by statute is an interesting but complex question for which there is not space. The extensive litigation surrounding the Affordable Care Act included the issue whether requiring an employer to notify its insurer that the employer objected to providing coverage for contraception could impinge upon the employer's constitutionally protected belief that even giving notice constituted cooperation with evil. See Zubik v. Burwell, 136 S. Ct. 1557, 1559–60 (2016) (per curiam). The Court did not reach the question, and the change of administrations in 2017 rendered the issue moot. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (proposed Oct. 13, 2017) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

272. By focusing on employees whose status with regard to the ministerial
would maximize clarity, balance the interests of employers and employees, minimize and streamline litigation, and enable employers willing to waive the exception to compete for employees who are concerned about preserving their legal rights. As an ancillary benefit, the kind of notice this Part proposes would enable many religious institutions to implement their faith traditions’ social teachings, including those of the largest U.S. religious denomination, the Roman Catholic Church.

A. Brianne’s Case

To see why notice would be advantageous to employers and employees alike, consider a hypothetical but not unrealistic scenario. Meet Brianne, a Black, Christian woman with a master’s degree in mathematics and fifteen years’ teaching experience in public high schools. For many years she has felt a calling to teach in faith-based settings. She grew up in an evangelical church but converted to Catholicism in her twenties. Now in her late thirties, she values her evangelical roots alongside her Catholic faith and feels equally comfortable in both settings. A nondenominational Christian high school opened in Brianne’s hometown, and she applied for a position as a math teacher.

The school offered Brianne the position, and she signed the first of a series of annual contracts, each of which incorporated the staff handbook. The handbook provided that all teachers at the school have responsibilities as “ministers of the gospel,” specifically the duty to uphold and

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exception is uncertain, the proposal in this Part is not meant to apply to employees who clearly fall within the exception (e.g., ordained clergy), nor to those whose employers are invoking the ministerial exception in bad faith. As demonstrated in Parts II–III supra, courts have been unanimous in applying the exception to clergy. At the other end of the spectrum, the Justices appear to agree that the exception does not apply when its invocation is not “good-faith” or “sincere.” Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196, 197 (2012) (Thomas, J., concurring).
personally model Christian values. The handbook also included a nondiscrimination policy pledging equal treatment for employees regardless of race, gender, national origin, and other categories.

While Brianne’s early years at the school were warm and productive—she received excellent teaching evaluations, was asked to organize the logistics for the school’s annual mission trips, and accepted an invitation to sing in the gospel choir, which performed monthly at mandatory chapel services—the situation changed when a new principal arrived. He came from a more conservative wing of the church and showed hostility toward Brianne and the other teachers who took part in service activities, ridiculing them as “social justice warriors” and commenting that they had “abandoned the gospel for the values of Black Lives Matter.” The principal singled out Brianne and, as time went on, began to use racially charged language. After about a year, he called Brianne into his office and fired her, telling her explicitly that he did not want a “Black activist” on the faculty.

Brianne, like real-world plaintiffs who have experienced similar treatment, was devastated. She sought an attorney’s advice and filed a charge of discrimination with the EEOC. Brianne received a right-to-sue letter and filed a complaint against the school, bringing claims for discriminatory termination and a hostile work environment in violation of Title VII and state and local human rights laws. Because Brianne had been secretly recording her conversations with the principal, the school’s attorneys had to concede that her case was airtight on the merits. Their only hope was to invoke the ministerial exception. Because the school is a religious employer and termination claims are paradigmatically subject to the exception, two issues are dispositive in Brianne’s case: whether her position falls within the exception, and whether the exception immunizes the school against her hostile work environment claim.273

273. What if the principal, as part of his overall drive to promote religious
How would notice affect Brianne’s suit? To answer this question, we can compare the likely outcomes of three different scenarios: first, where the school hires Brianne without saying anything about her ministerial status; second, where the school warns her that it deems her position to fall within the exception; and third, where the school notifies her that it will waive its right to assert the exception.

In the absence of notice, whether Brianne is subject to the ministerial exception would be the most complex question for the court to adjudicate. Analogizing cases such as Grussgott and Curl, where courts applied the exception to schoolteachers who did not teach religion but had some religiously oriented job responsibilities, the school would point to Brianne’s involvement in the mission trips and the gospel choir. It would also contend that, as in Our Lady of Guadalupe School, language in Brianne’s contract and the
staff handbook demonstrates that the school regards all its teachers as ministers. If it took a more sweeping approach, the school might argue that Brianne consented to giving up certain employment protections simply by accepting employment at a religious institution. 275 Brianne would reply that courts in cases like Bohnert, Herx, and Mis rejected schools’ blanket designation of teachers as ministers and looked instead to the specific responsibilities of the particular plaintiffs. She would argue that her role on the mission trips was insufficiently religious to bring her within the exception, because like the plaintiff in Bohnert, she was responsible only for the trips’ logistics. She would observe that the court in Mis found that singing in a school choir was insufficient to apply the exception to a teacher of secular subjects. And since the principal fired her because of her race, she might ask the court to scrutinize the school’s claims closely, given the “special and central place” that race occupies “in our modern constitutional consciousness.” 276

How would the court apply Our Lady of Guadalupe School? As we have seen, the Supreme Court directed that courts regard religious employers’ explanations of the religious significance of their employees’ responsibilities as “important.” 277 The court would therefore need to credit the school’s assessment that Brianne’s roles with the mission trips and the gospel choir had religious significance. Under Our Lady of Guadalupe School, employees fall within the ministerial exception when they undertake activities such as teaching the faith, forming students spiritually, or carrying

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out an institution’s religious mission. Here, this is a close
call, because Brianne’s responsibilities on the mission trips
may have been purely secular and her role with the gospel
choir was not one of leadership or education.

The court might conclude it needs additional fact-finding
about the nature and frequency of Brianne’s religious
responsibilities, and so it might deny the school’s motion to
dismiss and permit limited discovery regarding Brianne’s job
functions. As we have seen, discovery disputes in ministerial
exception cases have been the norm rather than the exception;
sometimes, religious employers have pursued interlocutory appeals from trial courts’ discovery orders.278

Imagine that after several months, discovery reveals some
facts favorable to each party. Depositions from Brianne’s
students show that during the mission trips she occasionally
talked with them about Bible stories and helped them apply
these lessons to their service experiences, even though this
was not part of her formal duties. The gospel choir director
testified that Brianne had no role in choosing music for the
worship services, only that her soprano voice was a musical
asset. And the principal who hired her testified that in
Brianne’s first year, Brianne came to him and said that she
wanted to be certain it was acceptable to talk with her
students about her Catholicism, even though it differed from
the school’s evangelical faith. Following discovery, Brianne
and the school agree there are no contested issues of material
fact and their dispute is ripe for summary judgment.

A trial court faced with this not unrealistic pattern of
facts would draw little comfort from the Supreme Court’s
decisions. On the one hand, the court would recognize that in
both Hosanna-Tabor and Our Lady of Guadalupe School, the
Court identified teachers in religious schools as occupying
significant positions in the life of their faith communities.

278. See, e.g., Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F.
Supp. 3d 1195, 1207–08 (S.D. Ind. 2020) (observing that discovery in ministerial
exception cases poses the risk of unconstitutionally broad procedural
entanglement between courts and religious institutions).
The court would find that for Brianne’s students, she was more than just a mathematics teacher; in her informal interactions on the mission trips, for instance, she helped some of them develop their spiritual convictions. On this basis, the court might be inclined to conclude that she “guide[d her] students, by word and deed, toward the goal of living their lives in accordance with the faith.”

But that conclusion is not inescapable, and the court could distinguish Brianne’s case from *Hosanna-Tabor, Our Lady of Guadalupe School*, and lower court cases. Unlike Perich, Morrissey-Berru, or Biel, Brianne did not teach any religion classes.

Like Kant, Brianne publicly identified herself as a member of a different faith tradition, and she did so with the school’s knowledge and permission. Like Mis, but unlike Menard, her duties with the school choir were purely musical, and she did not have a role in choosing music for worship services.

*Our Lady of Guadalupe School* does not make clear how the trial court should rule on the parties’ motions for summary judgment. Even though the Court’s Religion Clauses jurisprudence has been incorporating steadily more robust doctrines of autonomy where religious institutions are concerned, *Our Lady of Guadalupe School* does not clearly indicate whether Brianne falls within or outside the exception. As time goes on and more courts apply *Our Lady of Guadalupe School* in cases like Brianne’s, it is possible that a practical consensus will emerge. Until then, parties

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279. See *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066.

280. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 178 (2012); *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2056, 2059.

281. See *Kant v. Lexington Theological Seminary*, 426 S.W.3d 587, 595 (Ky. 2014).


283. This time has not yet arrived. Contra Lauren Cyphers, Note, *Maximalist Decision Making: When Maximalism Is Appropriate for Appellate Courts*, 123 W. VA. L. REV. 611, 640–41 (2020) (arguing that *Our Lady of Guadalupe School* was a “maximalist decision” that, building on lower-court decisions after *Hosanna-
will not be able to reliably predict the outcomes of litigation.

Before turning to the effect of notice, recall that Brianne’s suit included two separate employment discrimination claims. Would the school be able to claim the ministerial exception as a defense to Brianne’s claim concerning a racially hostile work environment? As we have seen, lower courts are split on this question. In Brianne’s case, there is little reason that the school would prevail in arguing that the principal’s racially charged behavior toward Brianne was related to its faith or mission, and so under the Ninth Circuit’s approach the ministerial exception would not bar Brianne’s hostile work environment claim. But in the Seventh and Tenth Circuits, Brianne’s claim would be barred if the court found her to fall within the exception.

So the current state of the ministerial exception means Brianne faces three plausible outcomes: (1) the court could find that she falls within the exception and allow only her hostile work environment claim to advance; (2) the court could find that she falls within the exception but bar both her claims; or (3) the court could find that she falls outside the exception and permit both her claims. In our hypothetical the resolution of these legal questions dictates the overall result of Brianne’s suit, but in real-world cases these threshold matters would be only the prelude to a trial of the underlying claims. Even when facts are undisputed, litigation involving the ministerial exception is complex, lengthy, intrusive, and expensive. There has to be a better way.

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284. See supra Section III.C.

285. Outside the scope of this Article is whether the school could mount any other First Amendment defense.
B. The Effects of Notice

What if, when the school offered Brianne a teaching position, it also asked her to sign a contract which states that she is a “minister of the gospel” and understands that this status limits her legal rights? Imagine that the school permitted Brianne to take the contract home and gave her time, if she wished, to obtain independent counsel before signing.286

Barring circumstances that would render the contract unenforceable, such as fraud, duress, or undue influence, notice of this sort would almost certainly lead the trial court to decide that Brianne falls within the exception. First, even before Our Lady of Guadalupe School, courts typically assign significant evidentiary weight to a religious employer’s pre-litigation assertions concerning an employee’s status or functions. In Fisher v. Archdiocese of Cincinnati, for instance, the primary reason the court gave for finding that a cemetery administrator fell within the exception was that “[b]oth the cemetery’s mission statement and employee handbook required [the employee] to acknowledge ‘the religious function’ that she was performing.”287 Second, the trial court could conclude that the parties had bargained for Brianne’s acknowledgement of her ministerial status among the terms of her employment. It is well established that employees may contractually waive certain claims against employers-to-be, and the only constitutional question that might arise is whether the court could enforce the contract

286. I am grateful to James A. Brudney for observing that Congress has established an extensive process by which employees may waive their rights under the ADEA. For a waiver to be “considered knowing and voluntary,” it must meet eight narrowly drawn requirements. See 29 U.S.C. § 626(f)(1). In addition, the statute places the burden of establishing a waiver’s validity on the party asserting it. See 29 U.S.C. § 626(f)(3). Such provisions could readily be adapted to the ministerial exception.

without needing to resolve a religious question. But so long as the text clearly indicated that Brianne accepted her status as a ministerial employee and knew it would limit her rights, the court need not adjudicate any theological disputes.

Brianne’s claim for racially discriminatory termination, and possibly her hostile work environment claim as well, would therefore be barred. Although notice works in the school’s favor, it offers advantages and disadvantages to both parties. For the school, the obvious advantage is that absent circumstances limiting its ability to enforce the agreement, a properly drawn waiver would give it a virtually airtight defense. It would be able to save the time and expense involved in discovery and other pre-trial maneuvers that would otherwise have unfolded. The disadvantage for the school is that a number of qualified candidates for teaching positions would likely refuse to sign such a document. Indeed, as a justice of the Wisconsin Supreme Court observed just months after the Supreme Court handed down Hosanna-Tabor, the broader the immunity from suit a religious employer enjoys, the more likely that its “ability to recruit the best and brightest candidates for ministerial positions could be undermined.”

The advantages for Brianne are fewer. One would be clarity. In many of the cases that arose between Hosanna-Tabor and Our Lady of Guadalupe School, as well as in Hosanna-Tabor itself, plaintiffs were surprised when

288. This is why some advocates have urged religious employers to adjust their handbooks and workplace policies “to trigger broad application of the ministerial exception.” Brief for Respondents at 36, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (Nos. 19-267, 19-348).

289. DeBruin v. St. Patrick Congregation, 816 N.W.2d 878, 907 (Wis. 2012) (Bradley, J., dissenting). See also Duquesne Univ. of the Holy Spirit v. NLRB, 947 F.3d 824, 831 (D.C. Cir. 2020) (where the court opined that a rule requiring an educational institution to hold itself out as religious in order to be exempt from NLRB jurisdiction with regard to disputes involving instructional employees would “serve as a ‘market check’ because ‘public religious identification will no doubt attract some students and faculty to the institution,’ but ‘it will dissuade others.’” (quoting Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1344 (D.C. Cir. 2002))).
employers asserted the exception, because they were neither aware of the exception’s existence nor had their employers previously referred to them as ministers. Brianne the job applicant might not decide to become Brianne the employee if she were required to sign a document limiting her legal options, but if she did decide to accept the school’s offer it would be with open eyes. Admittedly, this clarity would come at a cost: over time, employees like Brianne might grow resentful of the school’s stance and look for employment elsewhere. In addition, until courts affirm that employees in Brianne’s shoes may limit their rights, employers may still incur litigation costs if adversely affected employees challenge the validity of waivers they signed.

What about the opposite scenario, where the school gives notice that it will not assert any defense or counterclaim raising the issue of Brianne’s ministerial status, whether under statutory, constitutional, or common law?

A provision of this sort, if enforceable, would operate to waive the school’s ministerial exception defense and, on the facts of our hypothetical, produce a victory for Brianne on all her claims. The question, however, is whether the defense can be waived. In Conlon v. InterVarsity Christian Fellowship/USA, the Sixth Circuit held that it cannot be.290 “The ministerial exception is a structural limitation imposed on the government by the Religion Clauses, a limitation that can never be waived.”291 But even though the court cited Hosanna-Tabor for this proposition, the Sixth Circuit’s is a minority view and the better argument appears to be the contrary. As we have seen, in Hosanna-Tabor the Supreme Court resolved a circuit split concerning the exception’s procedural status, identifying the exception as a defense

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290. 777 F.3d 829, 836 (6th Cir. 2015).
291. Id. Coming to this holding, the Court cited, among others, Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006), a case decided before Hosanna-Tabor that held “the ministerial exception . . . is not subject to waiver or estoppel.” Id. at 1042.
Had the Court reached the opposite conclusion, then the trial court would be obliged to raise the exception sua sponte. But because the ministerial exception is a defense, the choice to invoke it is an employer’s, and an employer may contract away that option. As the Kentucky Supreme Court observed in Kirby, courts have frequently held that a religious employer may “cede a degree of its constitutional rights” by entering voluntarily into contracts.

So if Brianne and the school stipulated that she is not a minister and bargained for a promise that the school would not invoke the exception, these provisions would bar the school from asserting the exception as a defense. If the school did so nonetheless, and if the court found that waiver was impossible under the Constitution, then a new claim might arise for Brianne—a breach of contract claim because the school violated its promise not to raise the exception as a defense. The court would likely find this claim cognizable, because it would not need to resolve any religious questions in order to interpret the contract. As in “neutral principles” cases like Prioleau, Brianne might be able to recover damages on her contract claim even if her termination and hostile work environment claims were foreclosed by the exception.

This scenario again presents a combination of advantages and disadvantages. Here, the advantages flow to both Brianne and the school, while the disadvantages
primarily affect the school. For employers, adopting and publicizing a policy of waiving the ministerial exception would likely result in larger, more diverse, and possibly better qualified applicants for teaching positions. Teachers from underrepresented groups, and those more familiar with the law, would be more likely to work in a setting where they retain all their rights. Brianne would have the comfort of knowing that her employer promised not to invoke the exception and that if the employer broke its word, she had a path to obtain redress. As in the previous scenario, both parties would benefit from the speedier resolution of disputes, since a joint stipulation concerning Brianne’s ministerial status would substantially reduce the need for discovery and other pre-trial maneuvers. But for the school, these advantages would come at a substantial cost: it would give up the exception’s protection.

C. Weighing the Options

The scenarios in which a religious employer notifies prospective employees whether it believes their positions to fall within the exception are preferable to the one in which the employer remains silent. Notice promotes fairness for employer and employee alike, enabling both parties to enter the employment relationship clear about their rights and aware of how disputes will be handled. In contrast to the torturous litigation that the ministerial exception has produced and stands to continue producing, for employer and employee to agree in advance about the employee’s ministerial status would streamline the resolution of some of the problems courts have encountered in administering the

295. Some practices that restrict employees’ freedoms, such as noncompete agreements, limit the overall employment market and disincentivize innovation, notwithstanding the benefits they confer on certain firms. See, e.g., Sampsia Samila & Olav Sorenson, Noncompete Covenants: Incentives to Innovate or Impediments to Growth, 57 MGMT. SCI. 425, 425 (2011). See generally U.S. DEPT OF THE TREASURY, OFF. OF ECON. POL’Y, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (2016).
But these may not be sufficient incentives. Why would Brianne’s school voluntarily set aside the exception’s “extraordinarily potent” protections when it is under no obligation to do so? Many employers will reasonably conclude that this is too high a price to pay to achieve clarity and judicial economy, particularly when the Supreme Court appears to be moving in the direction of accommodating religious exercise and providing more rather than fewer religiously-based exemptions from laws of all kinds.

The answer may be theological rather than legal. In many traditions, there are religious reasons for employers not to claim all the protections the exception may provide.

To begin with the largest U.S. religious employer, several authoritative documents of the Roman Catholic Church contain reflections that counsel dioceses, parishes, and other Catholic entities to refrain from asserting the exception. The *Compendium of the Social Doctrine of the Church*, a restatement of Catholic social teaching, distinguishes between practices that are allowable under secular law and those that are morally permissible. Some laws reflect the church’s understanding of morality, but others do not. In a 1971 decree of the worldwide Synod of Bishops, Catholic leaders insisted that for the church to be a credible witness to justice in the world, it must manage its internal affairs justly, even beyond what civil law requires. “Hence we must undertake an examination of the modes of acting and of the possessions and life style [sic] found within the Church herself,” the bishops commented. They


observed:

Within the Church rights must be preserved. No one should be deprived of his ordinary rights because he is associated with the Church in one way or another. Those who serve the Church by their labor, including priests and religious, should receive a sufficient livelihood and enjoy that social security which is customary in their region. Lay people should be given fair wages and a system for promotion.300

Catholic thinkers disagree sharply, however, as to how to apply these principles in the context of the ministerial exception. For the bishops of the United States, the exception implicates the church’s ability to “exercise[e] its fundamental theological belief in active lay participation,” and the Court’s ruling in Our Lady of Guadalupe School “means that the Church can continue to serve her neighbors with integrity.”301 At the other end of the spectrum, progressive Catholics have lamented the bishops’ stance: “[W]ho on earth is going to want to work in any religiously-affiliated institution, let alone a parish, under these conditions? As I see it, working in a religious institution now means living in fear for your job at all times and knowing that no one will protect you . . . .”302 Several commentators have staked out intermediate positions. The editor of America magazine, a Jesuit priest, applauded the Court’s decision in Our Lady of Guadalupe School but cautioned that the church should not deploy the decision “in pursuit of an indiscriminate purging of church employees simply because they hold unorthodox

300. Id. at para. 41.


views or have made life choices that do not accord with Catholic teaching.” 303 Another Jesuit has proposed that while church institutions should not hesitate to invoke the exception in secular tribunals, the church should develop its own dispute resolution mechanisms, such as intra-ecclesial practices of arbitration, as alternatives to the courts. 304

The Catholic Church is distinctive for its global reach and unified doctrinal apparatus, but other denominations and religious traditions embrace similar principles concerning the dignity of work and the ethics of employment relationships. The general synod of the United Church of Christ approved a resolution in 2009 calling upon the church to “reflect justice in all settings of the [Church’s] economic life by offering fair wages and benefits, adopting sustainable practices with its facilities, and transacting business in a socially just manner.” 305 Numerous resolutions of the governing bodies of The Episcopal Church have done the same, urging church institutions to apply Christian principles of ethics and justice to decisions concerning such practices as banking, investment, equal opportunity and other employment policies, wages, and labor relations. 306

In Judaism, “treating employees well is an integral part of Jewish law,” especially because “employees stand in


relationship to their superiors in exactly the same social and psychological status as the widow and orphan,” two groups the Hebrew Bible commands must be accorded special dignity and respect.\(^{307}\) In light of the Talmud’s insistence that business dealings be marked by integrity, the Jewish Association for Business Ethics has recommended that on religious grounds employers should “[p]rovide honest and accurate information to potential employee[es] and avoid knowingly making false or inaccurate statements.”\(^{308}\) The Union for Reform Judaism has adopted a resolution calling on synagogues to offer employees “compassionate and appropriate treatment.”\(^{309}\) Specifically, “Derech Eretz (doing what it takes to make others feel respected) is a principle that can guide many of the employment policies and practices of our synagogues.”\(^{310}\)

A similar mandate appears in Muslim law and ethics, where the Islamic principle of decision-making by consultation “implies that employers not only have to be transparent in recruitment and hiring affairs but also have to consult with employees on matters that are related to their work and welfare.”\(^{311}\) Employment relationships are “to be based on an understanding of the scope and nature of the contract, and the expectations of each.”\(^{312}\)


\(^{310}\) Id.


\(^{312}\) Id.; see also Mohamad Zaharuddin Zakaria et al., Guiding Principles for Islamic Labor Code and Business Ethics, 7 INT’L J. ACAD. RSCH. BUS. & SOC. SCIS. 336, 340–41 (2017).
Discussions about how broadly religious employers should avail themselves of the ministerial exception will continue in these and other traditions. Because the Court’s decisions have afforded religious employers significant discretion whether or not to follow otherwise applicable antidiscrimination laws, in the years ahead the treatment of many religious workers will depend not on the courts but on employers’ theological and ethical judgments. This brief sketch of relevant principles from several religious traditions reveals that there are credible, if also contested, faith reasons for employers to give their employees notice despite the secular disadvantages of doing so.

CONCLUSION

The Supreme Court’s cases have expanded some of the boundaries of the ministerial exception and left others unclear. In *Hosanna-Tabor* and *Our Lady of Guadalupe School*, the Court provided a constitutional rationale for extending the exception beyond disputes involving leaders of religious congregations. Chief Justice Roberts’s and Justice Alito’s opinions underscored that teaching religion in educational institutions whose *raison d’être* is to provide faith-based alternatives to public schools is akin to providing religious instruction within the walls of a church, synagogue, mosque, or other liturgical setting.

And so, in the case of a teacher who teaches religion classes at a school operated by a religious institution, there clearly is an exception to antidiscrimination laws such as Title VII, the ADEA, and the ADA should the school decide to fire the teacher. But change any one of these facts—the subject-matter the employee teaches, the religious identity of the employer, or the teacher’s cause of action—and the Court’s guidance is less clear. Change the nature of the employee’s work—by making her an administrator whose role does not call upon her directly to promote a school’s religious mission, or by taking her out of the educational context altogether and imagining her at a religious
publisher, museum, or hospital—and the murkiness deepens.

The Court has acknowledged that its decisions have been narrowly focused on teachers of religion who brought suit under antidiscrimination laws. “There will be time enough to address the applicability of the exception to other circumstances if and when they arise,” Chief Justice Roberts wrote in *Hosanna-Tabor*.313 “[I]t is sufficient to decide the cases before us,” intoned Justice Alito in *Our Lady of Guadalupe School*.314 Yet religious employers are being counseled to invoke, and are invoking, the ministerial exception more frequently now than ever before. And until such time as the Court sets bounds to the expanding ministerial exception, it will be to the benefit of all parties if employers give their employees advance notice whether they intend to assert the exception when disputes arise.
