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A Priest Walks into a School, but is he a Minister?: The "Ministerial Exception" as applied after Hosanna-Tabor

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Introduction

The United States Constitution includes a guarantee that the government will not become involved with one's ability to freely practice religion. The framers included within this document a Free Exercise Clause and an Establishment Clause.[1] The Free Exercise Clause protects "a church's right to decide matters of governance and internal organization," while the Establishment Clause forbids "excessive government entanglement with religion."[2] These clauses, known together as the Religion Clauses, provide churches with a high degree of autonomy from government interference. This includes its decisions regarding who shall serve as its leaders, now known as the "ministerial exception." Although this exception always existed, the United States Supreme Court did not recognize it formally until its 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*.[3] This case solidified the doctrine, making religious employers immune to claims of employment discrimination by those who qualify as a minister.

The *Hosanna-Tabor* decision solidified the existence of the exception, but still left many with questions regarding its scope, specifically who qualifies as a minister and thus is barred from bringing claims of employment discrimination. Justice Alito's concurring opinion in *Hosanna-Tabor*[4] provided some guidance on who qualifies as a minister under the exception, but the Court did not announce a formal test. Without adopting a formal test, the Court leaves who qualifies as a minister up to interpretation. The Court should adopt a bright-line test which focuses on the intentions of the church and the totality of the circumstances surrounding the employee's duties to

[1] U.S. Const. Amend. I. ("Congress shall make no law respecting an establishment of religion, or the free exercise thereof…").
[2] *Petruska v Gannon Univ.*, 462 F.3d 294, 307 (3rd Cir. 2006).
[3] *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012).
[4] *Id.* at 198 (Alito, J., concurring).

create a formal, easily applied test of who qualifies as a minister. Additionally, this exception should apply to all claims, not just those claims rooted in discrimination law.

When researching the ministerial exception, it became clear that much confusion exists between section 702 of Title VII of the Civil Rights Act of 1964 and the ministerial exception. While these two doctrines set out similar protections for employees, there are differences in application and scope.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on an employee's gender, sex, religion, race or national origin. The religious exception, in Section 702 of Title VII, protects employers from claims of religious discrimination when the claim relates to

> a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.[5]

This section thus allows religious employers to discriminatorily favor employees of their own religion. Additionally, this protects religious employers from claims of religious discrimination when those claims stem from employment within a religious institution and the job pertains to said religious institution.[6] This does not protect employers from any other claim of discrimination under Title VII, such as race, gender, national origin or color.

The Religion Clauses protect the First Amendment's guarantee of freedom of religion. Cases that apply the ministerial exception bar the court's interference with a decision made by religious institutions when those decisions pertain to the upper-level of church employees or ambassadors

[5] Civil Rights Act of 1964, Title VII, Section 702; *see also Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1986) (holding that an employer is protected from claims of religious discrimination under Section 702).
[6] *See Id.*; *See also* Civil Rights Act of 1964, Title VII, Section 702(a).

because doing so would violate the church autonomy protections given by the First Amendment.[7] This includes all types of discriminatory behavior, including the race, color, religion, or national origin that Section 702 does not cover. This exception fills in the gaps left by Section 702 and provides protection to religious institutions that discriminate against their ministers for both religious and non-religious purposes.[8]

Part II of this paper will explain the difference between the constitutionally based ministerial exception and the statutorily based exception under Section 702 of Title VII of the Civil Rights Act of 1964. Part III explains the pre-Hosanna-Tabor landscape and gives details regarding the most relevant cases prior to the 2012 decision. Part IV explains the facts, holding and two concurrences of the *Hosanna-Tabor* case, giving us clarity on the scope of the ministerial exception for the first time and becoming the landmark case in this area. Part V explains how the courts have applied the *Hosanna-Tabor* decision in discrimination cases since 2012. Finally, Part VI explains the holes left by the *Hosanna-Tabor* decision, including possible solutions to the problems left in the wake of this case.

I. Development/History of the Ministerial Exception

a. Supreme Court Precedent: Development of the Church Autonomy Doctrine

The Constitution always guaranteed Americans that the government would not become entangled with religion.[9] This included that the government would not involve itself with a religious entity's decision to hire or fire its employees. Although the ministerial exception was

[7] Laura L. Coon, Note, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 Vand. L. Rev. 481, 500 (2001).
[8] *Id.*
[9] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

not formally recognized by the court until 2012,[10] courts protected a church's right to autonomously make decisions for at least one-hundred-forty years prior.[11]

The First time the Court encountered a case that laid the foundation for the ministerial exception occurred in *Watson v. Jones*.[12] This case and its holding serves as a basis for the more formal ministerial exception, which is not introduced until *Serbian Orthodox Diocese v. Milivojevich* in 1976.[13] In *Watson*, "the Court considered a dispute between antislavery and proslavery factions over who controlled the property of the Walnut Street Presbyterian Church."[14] When the Presbyterian Church built the Walnut Street Presbyterian Church, it decided to incorporate the trustees of the church with the power to hold any real estate then owned by the church.[15] These trustees were to serve a two-year term before requiring re-election.[16] The problem in this case stemmed from a dispute over who had power to choose whether or not the church would participate in slavery.[17]

Ultimately, the Court held that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."[18] While this case did not involve a claim of employment discrimination, it serves as the first time the Court recognized that a decision made by the highest level of internal government of a church was not to be disturbed by civil government or legal system. Additionally, the Court, for the first time, provided a scope of the Church Autonomy Doctrine, which laid the

[10] *Hosanna-Tabor*, 565 U.S. 171 (2012).
[11] *See Watson v. Jones*, 80 U.S. 679 (1872).
[12] *Id.*
[13] 426 U.S. 696 (1976).
[14] *Watson*, 80 U.S. at 727
[15] *Id.* at 679.
[16] *Id.*
[17] *See Watson*, 80 U.S. at 679.
[18] *See Id.* at 727.

foundation for the ministerial exception. The Court in *Watson* stated that for the Church Autonomy Doctrine to apply, there must be (1) a "question of discipline, or of faith, or ecclesiastical rule, custom, or law" and (2) that question was "decided by the highest of [the] church judicatories."[19] Although this decision did not introduce the ministerial exception, these principles laid the foundation for the Court's later decisions that created the exception.

The Court next decided *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*.[20] After the Bolshevist Revolution of 1917 in Russia, a separatist movement developed among members of the Russian Orthodox Church in the United States.[21] This movement eventually declared its autonomy from the mother church in Russia.[22] As a way to free the church in the United States from those atheistic and subversive influences of the mother church, the New York Legislature passed a bill that required "all the churches formerly administratively subject to the mother church in Russia be governed by the ecclesiastical body of the American Separatist movement."[23]

This action began over a dispute as to who should control a building that was used as a church.[24] The plaintiffs, a corporation that held the building in trust for the mother church in Russia, challenged the defendants, appointees of the central Russian church authorities (appointed by the American Separatist movement).[25]

The Court ultimately decided in favor of the plaintiffs.[26] After first explaining that *Watson*[27] was decided before the passage of the Fourteenth Amendment, the Court noted that the Free

[19] *Id.*
[20] 344 U.S. 94 (1952).
[21] *Kedroff*, 344 U.S. at 95.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 96.
[25] *Id. at 96-97.*
[26] *Kedroff*, 344 U.S. at 121.
[27] 80 U.S. 679 (1872).

Exercise and Establishment Clauses are incorporated into and made applicable to the states in order to protect the people against acts of the state such as this bill.[28] The Court also held that those who controlled the building classified as clergy of the church and that "freedom to select the clergy, where no improper methods of choice are proven," falls under the Free Exercise Clause of the First Amendment.[29] As such, the bill requiring all churches to be governed by the American Separatist movement was deemed unconstitutional.[30]

These cases paved the way for the Court's decision in *Serbian Orthodox Diocese v. Milivojevich*,[31] which directly involved the relationship between a church and its minister. This case involved the split of the American-Canadian Serbian Orthodox Diocese after a bishop was defrocked for claims of misconduct.[32] After finding out about the claims of misconduct, the mother church made the decision to defrock the bishop.[33] The bishop then sued the mother church, requesting the Illinois State Courts to declare him the true diocesan bishop.[34] The Illinois Supreme Court obliged and ordered him reinstated.[35]

The United States Supreme Court found that deciding this dispute would violate the principles of the First Amendment.[36] The Court introduced, for the first time, the ministerial exception, reinforcing *Watson* and *Kedroff*, stating "[T]he rule of action which should govern the civil courts . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application

[28] *Kedroff*, 344 U.S. at 115-16.
[29] *Id.* at 120-21.
[30] *Id.*
[31] 426 U.S. 696 (1976).
[32] *Id.* at 698-99.
[33] *Id.* at 705.
[34] *Id.* at 706-07.
[35] *Id.* at 708.
[36] *Milivojevich*, 426 U.S. at 710.

to the case before them."[37] The Court leaned on the fact that the mother church was the one who made the ultimate decision about a high-ranking employee of the church in finding that it could not decide the dispute.[38]

While the above cases all cemented the fact that a decision a religious institution makes regarding its highest level of employees, or clergy, or ministers should be binding and free from governmental review, none of these cases defined the protection afforded to these groups. No test existed to decide if someone qualified as a clergy or minister, leading to the need for that clarification in *Hosanna-Tabor*.

b. Lower Court Precedent

The lower courts recognized a ministerial exception for at least forty years prior to *Hosanna-Tabor*.[39] Beginning with the cases of *McClure v. Salvation Army*[40] and *Rayburn v. General Conference of Seventh-Day Adventists*,[41] the lower courts first used the term ministerial exception and clarified the scope of the exception.

McClure involves a dispute between the church of the Salvation Army and one of its ordained ministers, Mrs. Billie B. McClure.[42] After undergoing a two-year training period by the Salvation Army, Mrs. McClure was commissioned as an officer [minister] in June, 1967.[43] After Mrs. McClure was terminated from her officer position, she brought suit under Title VII of the Civil Rights Act of 1964 alleging the Salvation Army engaged in discriminatory practices based

[37] *Id.*
[38] *Id.* at 711-12 ("Because the appointment [to the chaplaincy] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.").
[39] *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).
[40] 460 F.2d 553 (5th Cir. 1972).
[41] 772 F.2d 1164 (4th Cir. 1985).
[42] *McClure*, 460 F.2d at 554.
[43] *Id.* at 555.

on her gender, and that she was retaliated against for complaining of these practices to her superiors.[44]

The Fifth Circuit found that being an officer constituted being a minister, and as such, the Free Exercise Clause barred the employment discrimination claim.[45] "We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister, would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[46] The Court clarified, however, that "'if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute [Title VII] is fairly possible by which the question may be avoided.'"[47] This decision shows the Court's reluctance to decide this issue, as it will avoid deciding cases through the lens of Title VII if at all possible.

Rayburn v. General Conference of Seventh-Day Adventists presents the first time a court formally calls the exception the "ministerial exception," but does not go far enough to cement this exception into law.[48] The conflict in this case arises from a claim of racial and sex discrimination.[49] Appellant Carole Rayburn is a white member of the Seventh-Day Adventist Church.[50] After applying for a vacancy on the pastoral staff of the Sligo Seventh-day Adventist Church, she was denied. Ms. Rayburn then filed a complaint with the Equal Employment Opportunity Commission under Title VII alleging that she was not hired based on her sex, her association with black persons,

[44] *Id.* at 555-56.
[45] *Id.* at 560.
[46] *Id.*
[47] *Id.* citing *Ashwander v. Tennessee Valley Authority, 1936*, 297 U.S. 288 (concurring opinion of Mr. Justice Brandeis).
[48] 772 F.2d 1164 (4th Cir. 1985).
[49] *Id.*
[50] *Id.* at 1165.

her membership in black-oriented religious organizations and in retaliation of her filing a complaint under Title VII.[51] The federal district court dismissed the claim.

The Federal Court of Appeals for the Fourth Circuit affirmed the decision of the district court, holding that "because state scrutiny of the church's choice would infringe substantially on the church's free exercise of religion and would constitute impermissible government entanglement with church authority," the Court could not rule on the issue.[52]

While both of these cases solidified the existence of an exception, they lacked any guidance on how the courts should apply the exception. Over the next forty years, every circuit adopted the ministerial exception and there were numerous cases that attempted to apply the confusing precedent surrounding the ministerial exception.[53] The need for a distinct set of criteria led to the case of *Hosanna-Tabor* in 2012.

II. The Ministerial Exception Accepted: *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*

a. Facts

This case stems from the decision of petitioner Hosanna-Tabor Evangelical Lutheran Church and School to terminate the employment of Respondent Cheryl Perich. Petitioner is a member of the Lutheran Church – Missouri Synod.[54] The school has two categories of teachers, "called" and "lay."[55] "Called" teachers are those who have been called to their position by God and require certain academic requirements, including a course of theological study.[56] "Lay"

[51] *Id.*
[52] *Id.*
[53] *Hosanna-Tabor*, 565 U.S. at 188.
[54] *Id.* at 171.
[55] *Id.*
[56] *Id.*

teachers are not required to be trained by the Church.[57] Once a teacher is "called," they receive the title of "Minister of Religion, Commissioned."[58]

After respondent completed the required training, the school hired her as a "called" teacher.[59] In addition to teaching secular subjects, Ms. Perich "taught a religion class, led her students in daily prayer and devotional exercises, and took her students to a weekly school-wide chapel service," which she led about twice a year.[60]

In 2004-2005, Ms. Perich was diagnosed with narcolepsy.[61] She notified the school of her condition in January 2005, stating that she would be able to return to work in February.[62] The school informed her that they already contracted with a "lay" teacher to fill Ms. Perich's position and expressed doubts about her ability to return to the classroom.[63] After Ms. Perich was not hired, she threatened to assert her legal rights and sue the school for discrimination.[64] After this, she was told that she must use the internal decision-making process to complain, and was fired due to her threat to sue.[65]

After being terminated for "insubordination and disruptive behavior," Ms. Perich filed a charge with the Equal Employment Opportunity Commission, claiming that her termination violated the Americans with Disabilities Act.[66] The EEOC brought suit against the employers, which Ms. Perich intervened in, alleging that Ms. Perich was terminated after threatening to file an ADA law suit.[67] Hosanna-Tabor invoked the "ministerial exception," arguing that the First

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[57] *Id.*
[58] *Hosanna-Tabor*, 565 U.S. at 171.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Hosanna-Tabor*, 565 U.S. at 171.
[63] *Id.*
[64] *Id.* at 171-72.
[65] *Id.*
[66] *Hosanna-Tabor*, 565 U.S. at 172.
[67] *Id.*

Amendment barred the suit because Ms. Perich was a minister.[68] The District Court ruled in favor of the school, granting summary judgment in favor of Hosanna-Tabor.[69] The Sixth Circuit vacated and remanded that decision, recognizing the existence of a ministerial exception but concluding that Ms. Perich did not qualify as a "minister" under the exception.[70] Had the Court found that Ms. Perich did qualify as a minister, her suit could have proceeded on other grouns as she could have continued on disability grounds or on any other grounds where Title VII's exemption for religious discrimination does not apply.

b. Majority Opinion and Holding

Chief Justice Roberts wrote the opinion in a 9-0 decision. After delving into a history of the battle between church and state and how this history influenced the creation of the First Amendment, Chief Justice Roberts briefly summarized the case law up to this point.[71] After giving a history of the Amendment and the creation of the doctrine of church autonomy, Chief Justice Roberts recognized that the ministerial exception does exist, including in the decision, for the first time, the name "ministerial exception."[72]

Chief Justice Roberts then explains the reasoning for the exception. He writes that if the Court were to get involved in a church decision to accept or reject a minister, the Court would be interfering "with the internal governance of the Church."[73] This passage is similar to the earlier-discussed cases of *Watson*, *Kedroff* and *Serbian Orthodox* in that it acknowledges the long history of the Court respecting the autonomy of a church. The Court stated that "[b]y imposing an

[68] *Id.*
[69] *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 2008 U.S. Dist. LEXIS 106726, 8 (E.D. MI 2008).
[70] *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F. 3d 769, 782 (6th Cir. 2010).
[71] *Hosanna-Tabor*, 565 U.S. at 184-87 (summarizing the contents of Part III of this paper).
[72] *Id.* ("We agree that there is such a ministerial exception.").
[73] *Id.* at 188.

unwanted minister, the state infringed the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."[74]

The opinion then turns to the contentions of the parties. To begin, both sides contended that employment discrimination laws would be unconstitutional if they infringed upon the right of association.[75] As such, the EEOC and Ms. Perich saw no need for the existence of the ministerial exception.[76] The EEOC and Ms. Perich acknowledged that the right of association granted in the First Amendment serves to protect religious institutions from claims of discrimination in certain circumstances, such as compelling an Orthodox Jewish seminary to ordain a woman.[77] Since an established means of protecting these institutions from these types of claims of discrimination already exists, Petitioners argued that there is no need to create a brand new doctrine.

The Court dismissed this argument, stating that the right of association is given to both religious and secular groups and that the Court could not accept a view that the First Amendment's Religion Clauses do not speak to "a religious organization's freedom to select its own ministers."[78]

The Court then dismissed the argument that the decision in *Smith*[79] precluded the recognition of a ministerial exception. In that case, two members of the Native American Church were fired from their jobs for ingesting peyote, a substance that was illegal under federal law.[80] The Supreme Court held that this did not violate the Free Exercise Clause because "the 'right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his

[74] *Id.*
[75] *Hosanna-Tabor*, 565 U.S. at 189.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Employment Div., Dept. of Human Resources of Ore. V. Smith*, 494 U.S. 872 (1990).
[80] *Id.* at 877.

religion prescribes (or proscribes).'"[81] Chief Justice Roberts makes clear that a church's selection of its ministers differs from ingesting peyote, as *Hosanna-Tabor* concerned government interference with the internal decisions of a religious institution that affect the faith and mission of that institution while *Smith* involved government regulation of an outward physical act.[82]

After dismissing the respondent's arguments, Chief Justice Roberts set out to define the scope of the exception, specifically who qualified as a minister.[83] Chief Justice Roberts looked to factors such as Ms. Perich's title of minister, her specialized theological education, the fact that Ms. Perich held herself out as a minister, and the scope of her job duties ("leading others toward Christian maturity and teaching faithfully the Word of God").[84] Using these factors directly opposed the Sixth Circuit's determination that Ms. Perich was not a minister. The Court held that the Sixth Circuit erred in leaning too heavily on the fact that Ms. Perich performed the same duties as lay teachers and the Sixth Circuit placed too much emphasis on Ms. Perich's performance of secular duties.[85] Based on these factors, the Court held that Ms. Perich did qualify as a minister, and therefore, her claim of discrimination was barred.[86] Although the Court looked to these factors in this case, it did not offer any concrete or bright-line test as to if an employee qualifies as a minister. Chief Justice Roberts also turns to a totality of the circumstances test, explicitly restricting this holding to claims arising under anti-discrimination statutes, as opposed to other types of claims, like breach of contract.[87]

[81] *Hosanna-Tabor*, 565 U.S. at 190 (quoting *Smith*, 494 U.S. at 877).
[82] *Hosanna-Tabor*, 565 U.S. at 190.
[83] *Id.* at 191.
[84] *Id.* at 191-92.
[85] *Id.* at 174.
[86] *Id.* at 192-94.
[87] *Hosanna-Tabor*, 565 U.S. at 195-96.

c. Justice Thomas' Concurring Opinion

Although the Hosanna-Tabor case was a 9-0 decision, two Justices felt compelled to write a separate concurring opinion. Justice Thomas authored the concurrence to clarify what he believed the constitution meant by having a ministerial exception.[88]

Justice Thomas did not deliver a concrete test of who was a minister; however, he did propose a method of determining this. In the concurrence, he writes "in my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister."[89] Justice Thomas felt that the differing leadership structures present in the many religions the people of this nation practice presented problems when a secular court attempted to interpret who should qualify as a minister.[90] Justice Thomas feared a "bright-line" test of who qualifies as a minister because he felt that this sort of test would disadvantage those groups whose beliefs fell outside the scope of the "mainstream" religions.[91] Additionally, Justice Thomas feared that creating a concrete test would cause these religions to curtail their beliefs and leadership structures to ensure that their way of choosing ministers would conform with the test.[92] At the conclusion of his concurrence, Justice Thomas wrote that while the Court thoroughly set out the facts that made Cheryl Perich a minister, the main reason for this qualification was that "Hosanna-Tabor sincerely considered Perich a minister."[93]

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[88] *Id.* at 196 (Thomas, J., concurring).
[89] *Id.* at 196.
[90] *Id.* at 197.
[91] *Ibid.*
[92] *Hosanna-Tabor*, 565 U.S. at 197.
[93] *Id.* at 197-98.

d. Justice Alito's Concurring Opinion

The second concurrence in this case was authored by Justice Alito, with whom Justice Kagan joined.[94] Through this concurrence, Justice Alito attempts to outline the scope of the ministerial exception by proposing an informal test to determine if Perich was a minister.

After discussing the history of the exception in both the Constitution and in lower courts' case law, Justice Alito turns to the facts of the case. He rests his decision that Perich was a minister on four main questions, which many have called the "religious functions test," asking: 1) whether Perich played a substantial role in "conveying the Church's message and carrying out its mission;" 2) how often Perich taught the children religion; 3) whether she led the students in daily devotional exercises and prayers; and 4) the frequency that she led church-wide worship services.[95] While Justice Alito does not provide any specifics on how much time must be devoted to these activities, prong two, three and four all point to the intensity and frequency of the work. Additionally, the substance of each prong involves conveying, teaching, transmitting or carrying out religious messages, missions, or ceremonial practices. These four categories are the first time that the Court has introduced any sort of "bright-line" test. However, he does not describe which factors, if any, are the most important.

Justice Alito fails to describe the limits to which one's duties could be considered to satisfy a prong. For example, Justice Alito does not describe if leading worship services once a year satisfactorily satisfies the fourth prong. Interestingly, Justice Alito ends his concurrence similar to the way Justice Thomas concluded, stating that what truly matters is that the religious entity considered Perich a minister.[96]

[94] *Id.* at 198 (Alito, J., concurring).
[95] *Id.* at 205.
[96] *Id.* at 206.

III. Application of the decision in *Hosanna-Tabor*

Although only seven years have passed since the decision in *Hosanna-Tabor*, there are ample examples of the lower courts interpreting and applying the Supreme Court's decision. However, these courts seem to have differing opinions on how to apply the decision, although most courts emphasize similar parts of the Court's decision when deciding whether one qualifies as a minister.[97] While the decision of the Supreme Court seemed to focus on if the person in question was engaged in the ministry of the organization, the lower courts seem to focus more on the individual activities described in Justice Alito's concurrence.[98]

The first of these comes in the decision in *Cannata v. Catholic Dioscese of Austin*.[99] In that case, Cannata became the Music Director at St. John Neumann Catholic Church.[100] "In this position, Cannata oversaw the Music Department's budget and expenditures, managed the sound systems at the church and maintained the sound equipment, music room, and music area in the sanctuary, and rehearsed with members of the choir and cantors and accompanied them on the piano during services while running the soundboard."[101] All of the liturgical responsibilities of Cannata's predecessor were given to another employee because Cannata lacked the requisite education, training, and experience.[102]

After Cannata was fired in August 2007, he brought suit against the church alleging that his termination was in violation of the ADEA and the ADA.[103] The district court eventually granted

[97] Brian M. Murray, *A Tale of Two Inquiries: The Ministerial Exception After Hosanna-Tabor*, 68 SMU L. Rev. 1123, 1123 (2015).
[98] *Id.*
[99] 700 F.3d 169 (5th Cir. 2012) (holding that the previous three-part test used by the Court to determine if one qualifies for the ministerial exception could no longer be used due to Hosanna-Tabor).
[100] *Id.* at 170
[101] *Id.* at 171.
[102] *Id.*
[103] *Cannata*, 700 F.3d at 171.

a motion to dismiss the suit for lack of subject matter jurisdiction due to the application of the ministerial exception.[104]

Prior to the *Hosanna-Tabor* decision, the Fifth Circuit applied a three-factor test for determining when an employee qualifies as a minister.[105]

> First, this court must consider whether employment decisions regarding the position at issue are made largely on religious criteria[.] . . . Second, to constitute a minister for purposes of the "ministerial exception," the court must consider whether the plaintiff was qualified and authorized to perform the ceremonies of the Church . . . Third, and probably most important, is whether [the employee] engaged in activities traditionally considered ecclesiastical or religious, including whether the plaintiff attends to the religious needs of the faithful.[106]

After consulting with a professor of Constitutional Law, the Fifth Circuit formally invalidated this three-part test, deferring to the totality of the circumstances articulated in *Hosanna-Tabor*.[107] The Court acknowledged that a "bright-line" test would better help the lower courts in their application of the *Hosanna-Tabor* decision, however, the clear rejection of a bright-line test in that decision shows that lower courts should look to the totality of the circumstances so as to not discriminate against any one religion.[108] The Fifth Circuit ultimately affirmed the dismissal of Cannata's case, holding that because music was a central part of the religious ceremonies of the church, and those musical performances were led by Cannata, that Cannata did qualify as a minister, barring his discrimination claims.[109]

This decision becomes increasingly relevant as many religious educational institutions are moving to include language in their handbooks which specify that all teachers, regardless of the

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[104] The district court decided this case prior to the *Hosanna-Tabor* decision. However, the Fifth Circuit decided the appeal after the Supreme Court's ruling in *Hosanna-Tabor*.
[105] *Cannata*, 700 F.3d at 175.
[106] *Id.* at 175-76.
[107] *Id.* at 176.
[108] *Id.*
[109] *Id.* at 180.

subjects taught, qualify as ministers. This trend began in 2015 when bishops in California, Hawaii and Ohio required all teachers to know and adhere to Catholic teaching.[110] This move by the Church leadership is spurring controversy, as the teacher unions fear that by allowing the church to require this of teachers the church will gain too much power in collective bargaining.[111] The church, on the other hand, defends the practice by explaining that these teachers are meant to be moral role-models for the students, intended "not only by word, but by example, . . . to be models to their students of 'the ideal Person,' Jesus Christ."[112]

In addition to the attempt by the archdioceses to take control over this issue, the Supreme Court has the opportunity to re-examine the issue. Petitions for a writ of certiorari have been filed in the Supreme Court asking for a decision on whether a teacher with religious functions in a religiously grounded school can be a minister if they have no formal religious training or education.[113] Two of these cases are from the Ninth Circuit and one is from the California Court of Appeals.[114]

Fratello v. Archdiocese of New York, out of the Second Circuit, further exemplifies the views of *Hosanna-Tabor*, except in that case, the court formulates the totality of the circumstances view in a four-part test.[115] In this case, Fratello served as principal of St. Anthony's School, a Roman catholic educational institution.[116] After her contract was not renewed by the school, Fratello sued alleging gender discrimination.[117]

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[110] http://www.ncregister.com/daily-news/are-catholic-schoolteachers-ministers
[111] *Id.*
[112] *Id.*
[113] https://mirrorofjustice.blogs.com/mirrorofjustice/2019/09/amicus-brief-the-definition-of-minister-and-the-original-understanding-of-the-1st-amendment.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+blogs%2FlPaj+%28Mirror+of+Justice%29
[114] *Id.*
[115] 863 F.3d 190 (2d. Cir. 2017).
[116] *Id.* at 192.
[117] *Id.*

The Second Circuit looked to *Hosanna-Tabor* for guidance after St. Anthony's attempted to use the ministerial exception to bar the claim, leaning heavily on Justice Alito's concurrence. The Court originally examined the claim using the four factors set out in the majority opinion of *Hosanna*: "1) the formal title given [to the teacher-plaintiff] by the Church, 2) the substance reflected in that title, 3) her own use of that title, and 4) the important religious functions she performed for the church."[118] The Second Circuit pointed to Justice Alito's concurrence when it stated that "a formal title indicating that the plaintiff is playing a religious role, though often relevant, 'is neither necessary nor sufficient.'"[119] As such, the Second Circuit, again agreeing with Justice Alito, held that courts should focus primarily on the functions the employee performed.[120] The Court ultimately held that although Fratello's title was not inherently religious, the facts presented made it clear that she held herself out as a spiritual leader and performed many important religious functions that advanced the Roman-Catholic mission of the school.[121] As such, the Court affirmed the district court's application of the ministerial exception and grant of a motion to dismiss.[122]

Although much case law exists after the *Hosanna-Tabor* decision, there is no uniformity among the lower courts. Different circuits adopt different tests, stressing different duties in their determination of who qualifies as a minister. This confusion of which test to adopt is evident in *Biel v. St. James School*.[123] In this case, Biel, a fifth-grade teacher, was fired after taking time off due to a breast cancer diagnosis. The Ninth Circuit applied the factors from *Hosanna-Tabor* and held that Ms. Biel's claim was not barred by the ministerial exception.[124] The Ninth Circuit

[118] *Id.* at 204 (citing *Hosanna-Tabor*, 565 U.S. at 192).
[119] *Id.* at 205 (citing *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J. concurring)).
[120] *Id.* at 205.
[121] *Id.* at 210.
[122] *Id.*
[123] 911 F.3d 603 (9th Cir. 2018).
[124] *Id.* at 610.

reached this decision because (1) Biel's bachelor degree was not of a religious nature, (2) her position came with no religious requirements, such as teaching a religion class, (3) the school did not hold her out as a minister, and (4) her job was not analogous to that of Ms. Perich in *Hosanna-Tabor*.[125] The Court found that due to these factors, Ms. Biel was not a minister, and her claim was not barred by the ministerial exception.[126]

Another example of lower courts not knowing which test should be applied comes from the case of *Sterlinski v. Catholic Bishop of Chicago*[127], decided less than a year after *Biel*. The Catholic Bishop of Chicago originally hired Mr. Sterlinski in 1992 as Director of Music.[128] However, in 2014, Mr. Sterlinski was demoted to organist before ultimately being fired in 2015.[129] Mr. Sterlinski sued the Catholic Bishop alleging that his Polish heritage served as the ultimate factor in his termination.[130]

The case hinged on whether the ministerial exception applied to Mr. Sterlinski. If the Court were to find that Mr. Sterlinski qualified as a minister, his suit would not be able to proceed. Mr. Sterlinski argues that because he "robotically" played the music given to him, he could not qualify as a minister under the factors the Court used in *Hosanna-Tabor*.[131]

The Seventh Circuit upheld the decision of the Northern District of Illinois that an organist does qualify as a minister under the rationale of *Hosanna-Tabor*, holding that Mr. Sterlinski's claims fell outside the protections afforded to employees under Title VII.[132] The Seventh Circuit came to this holding even though the facts of this case were less analogous to *Hosanna-Tabor* than

[125] *Id.* at 607-10.
[126] *Id.* at 609-10.
[127] 934 F.3d 568 (7th Cir. 2019).
[128] *Id.* at 569
[129] *Id.*
[130] *Id.*
[131] *Sterlinski*, 934 F.3d at 569.
[132] *Id.* at 571-72.

those present in *Biel*, such as the fact that Mr. Sterlinski was not ordained and he did not serve as a spiritual teacher to the students.[133] Although both cases are very similar and the duties of both employees would seem to not qualify as ministerial, the two circuits adopted different tests and rationale for deciding two similar cases differently. The Supreme Court will have this opportunity through these two cases, as both cases are relied on heavily in the petition for certiorari in the case of *Our Lady of Guadalupe*.[134]

Since the Supreme Court decided not to adopt a rigid test, the lower courts are taking every opportunity to formulate their own test. The lack of a uniform test allows the lower courts to create factors not mentioned in the *Hosanna* decision, as well as to stress factors that the Court did not make dispositive in that case. This confusion of which test to apply becomes highlighted when analyzing the *Biel* and *Sterlinski* decisions. In *Biel*, the court adopts the factors that Justice Alito proposed in his *Hosanna-Tabor* concurrence, while the *Sterlinski* court chooses to ignore these factors in favor of a more inclusive view of who qualifies as a minister. Without uniformity among the circuits, there is no protection for religious employers, and the Court can impermissibly entangle itself with the internal governance of religious organizations. Not only will a uniform test clarify the scope of the ministerial exception, it will detract from the numerous instances of overly-burdensome litigation that often come with these cases.

IV. The Problem with Contracts

One of the many problems with the ministerial exception is the question of whether the exception should apply to claims of a breach of an employment contract, or whether the exception should be limited to claims of employment discrimination. Currently, the Supreme Court holds that the ministerial exception does not apply to claims of breach of an employment contract, and

[133] *Id.*
[134] See Petition for Writ of Certiorari, 2019 U.S. S. Ct. BRIEFS LEXIS 3593 *, at *19-*26.

as such, an employee that qualifies as a minister can still bring suit against their employer if they can show that the terms of their contract was validated.

Before the *Hosanna-Tabor* decision, Courts generally dispensed with the argument that the ministerial exception should protect employers. Prior to 2012, courts generally held that contract disputes between religious employers and their employees could not be adjudicated under the First Amendment's religion clauses.

The Courts continually found that limiting a religious employer's ability to hire or fire employees was a per se violation of the First Amendment.[135] This can be seen in the case of *Music v. United Methodist Church*.[136] There, an employee of a religious entity filed suit after being fired arguing that a contractual relationship existed between himself and the employer.[137] The Kentucky Supreme Court affirmed the court of appeal's grant of a motion to dismiss for lack of subject matter jurisdiction.[138] In doing so, the Kentucky Supreme Court held that deciding whether a contractual relationship existed would require interpretation of church-made laws, something that the First and Fourteenth Amendments prohibit a court from doing.[139]

The decision in Hosanna-Tabor created some confusion among the lower courts on this issue. It explicitly applied only to anti-discrimination statutes and not to contract disputes. However, after *Hosanna-Tabor*, some courts continued to protect churches in contract disputes. For instance, in *Debruin v. St. Patrick Congregation*, the Wisconsin Supreme Court again found that an employee's claim of breach of an employment contract would force the Court to violate the First Amendment, thus making the ministerial exception applicable to these types of cases.[140] After

[135] *Lewis v. Seventh Day Adventists Lake Religion Conference*, 978 F.2d 940 (6th Cir. 1992); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Hutchinson v. Thomas*, 789 F.2d 392 (6th Cir. 1986).
[136] 864 S.W.2d 286 (Ky. 1993).
[137] *Id.* at 287.
[138] *Id.* at 290.
[139] *Id.*
[140] 816 N.W.2d 878 (Wis. 2012).

Debruin entered into a one-year employment contract with St. Patrick Church (a Catholic Church in the Archdiocese of Michigan) his employment was terminated, seemingly in violation of the contract.[141] The Court found that analyzing these claims, which would require deciding why a religious institution hired or fired a ministerial employee, would violate the First Amendment.[142] By holding this, the Supreme Court of Wisconsin applied the protections afforded to religious institutions accused of discrimination under the ministerial exception to claims of a breach of contract. This decision further highlights the confusion that comes with the Supreme Court's decision not to include a bright-line test as to when or to whom the exception applies.

In contrast of the *Debruin* decision, the Kentucky Supreme Court decided *Kant v. Lexington Theological Seminary* in 2014.[143] After Kant was terminated by the seminary, he filed suit alleging that the termination violated his employment contract.[144] Adopting the decision in *Hosanna-Tabor*, the Kentucky Supreme Court held that the ministerial exception did not bar Kant's claims, but even if it did, Kant did not qualify as a minister.[145] This decision is contrary to the decision in *Debruin,* further outlining the problems and inconsistencies lower courts have with applying the "totality of the circumstances" test introduced by *Hosanna-Tabor*.

Failing to formally adopt the ministerial exception to contract disputes raises other issues as well. For example, if the ministerial exception does apply to contract disputes the same as it does employment discrimination claims, employees will not benefit from the signing of a contract. If this exception applies, the religious employer would be free to violate any employment contract it wished. As long as the employer could prove that the employee was a minister, which, under the

[141] *Id*. at 883.
[142] *Id.* at 890.
[143] 426 S.W.3d 587 (Ky. 2014).
[144] *Id.* at 589-90.
[145] *Id.* at 595-96.

confusing landscape currently adopted following *Hosanna-Tabor*, is not a difficult burden, the employee would not be able to bring a claim to settle a contractual dispute.

V. Analysis and Conclusions

It is obvious that the *Hosanna-Tabor* decision has created confusion among the lower courts. This confusion is displayed through inconsistent applications and differing analyses used by the lower courts when deciding these types of cases. Until the Supreme Court creates a bright-line test as to when and to whom the ministerial exception applies, this confusion will remain.

The current "totality of the circumstances" test serves as a good starting point, but a further test is needed. This test should look similar to that proposed in the concurrence by Justice Alito (joined by Justice Kagan). There, Justice Alito proposed the "religious functions test," asking: (1) whether Perich played a substantial role in "conveying the Church's message and carrying out its mission;" 2) how often Perich taught the children religion; 3) whether she led the students in daily devotional exercises and prayers; and 4) the frequency that she led church-wide worship services) should serve as the reasoning for finding Perich to be a minister.[146] By incorporating these four categories, Justice Alito created a valid bright-line test. However, he failed to make them more generally applicable or define their scope.

Following the logic that Justice Alito used, the Supreme Court should adopt a "balancing test" using the following four factors to determine when one qualifies as a minister: 1) whether the employee played a substantial role in furthering the employer's religious message; 2) how often the employee engages in tasks relating to the religious mission of the employer; 3) whether the employee held themselves out to be a minister; and 4) whether the employer considered the employee to be a minister. In order to determine whether the employer considered the employee

[146] *Hosanna-Tabor*, 565 U.S. at 205.

to be a minister, the Court could use a "parallel position" test. This would ask how a traditional clergy member was treated and analyze how similarly the employee in question was treated.[147] For example, in the Catholic faith, the Court would look to if the employee led weekly religious services or if the employee ever offered teachings based on scripture.

Unlike Justice Alito's concurrence, the Court should stress that although not determinative, the third and fourth factor are the most important. Since the ministerial exception is rooted in the Free Exercise and Establishment Clauses and aims to avoid the courts getting too involved in the decisions of the church, the two most important questions to ask would be if the church considered an employee to be in a leadership role, and whether the employee themselves thought of themselves to be in that role.

There is concern over the issues that come with weighing the church's view of their employees so heavily. For example, if the church wanted to avoid all discrimination suits, it could simply hold all employees as ministers. While this is a legitimate concern, especially when archdioceses are beginning to amend their handbooks to make all teachers ministers,[148] the importance of the other factors, specifically the employee's own thoughts, balances the test. Where the Church and the employee both believe that the employee is a minister, there can be no doubt that employee should be a minister. However, when there is disagreement about this between the employer and employee, then the "totality of the circumstances" as described in *Hosanna-Tabor* (and in prongs 1 and 2 of my proposed "balancing test") become helpful. These prongs focus on the daily duties of the employee as they relate to the church's religious purpose. Where an employee spends most of their day contributing to the spread of the message of the religious, they should be considered a minister.

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[147] *U.S. v. Seeger*, 380 U.S. 163 (1965).
[148] http://www.ncregister.com/daily-news/are-catholic-schoolteachers-ministers

In addition to adopting this test, the Supreme Court should adopt a ruling which states that this exception applies to all claims, regardless of whether the claim is based in contract or discrimination law. The purpose of the exception was to keep the Courts from having to get involved with the hiring or firing of an employee. This should not change based on which body of law the employee bases their claim in. Regardless of discrimination or contract, the religious institution should hold the power to decide who will be responsible for furthering their religious message. The Supreme Court's revised test should be applicable to all claims.

There is obvious concern that adopting a bright-line test will disadvantage non-traditional religions. However, the proposed test is sufficiently general to include all religions, regardless of conventionality. By focusing on how the religious institution and the employee themselves view the role of the employee, the Supreme Court would allow for analyzing a non-traditional religion. The test does not force the Court to look to if the employee performed the conventional tasks of a minister, such as leading religious services or teaching religious classes. Instead, the proposed test allows for a case-by-case analysis, where both sides view of the employee's duties hold weight. This test merges the tests proposed by Justice Thomas and Alito and allows for every relevant factor to be examined, without favoring the view of one party over the other.

By adopting a bright-line test that stresses how the employer and employee viewed the role of the employee, the Supreme Court will create uniformity among application by the lower courts. No longer will there be differing opinions of who qualifies as a minister based solely off a lower court's reading of a case. The opportunity to create factors not mentioned in the *Hosanna* decision or to lean heavily on a factor not meant to be dispositive will no longer exist for the lower courts. Instead, each jurisdiction in the country will uniformly adopt and apply a single test. In addition to the consistency of lower court decisions, this would allow employers to know who qualifies as

a minister. By doing this, the Supreme Court would allow the religious institutions to focus on spreading their message without guessing as to whether a hiring or firing decision will drag them into the perils of litigation.

Given that the Supreme Court has recently granted certiorari to *Our Lady of Guadalupe Sch. v. Morrissey-Berru*[149], the answer to the issues raised in this article likely will be answered sooner rather than later.

[149] 2019 U.S. S. CT. BRIEFS LEXIS 3593 (August 28, 2019).