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The Ministerial Exception & the Deconstruction of Title VII Anti-Discrimination Protections

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I. Introduction

The question of who qualifies as a minister and is therefore denied Title VII anti-discrimination protections has been permitted to spiral out of control. At first, questions of applicability of the ministerial exception turned on considering a multitude of factors in light of the role each religious employee played. A religious institution's right to choose its ministers is a great importance. A minister is an individual tasked with furthering the religious mission, spreading the faith, supervising and participating in religious ceremonies and rituals, all significant parts in the framework of what a religious institution stands for.[1] The Supreme Court has long recognized the autonomy of religious organizations concerning the selection of their own religious leaders. The ministerial exception, grounded in the First Amendment, precludes the application of employment discrimination laws to claims concerning the employment relationship between a religious institution and its ministers.[2] Expanding the definition of who and what constitutes a "minister" places religious employees in a vulnerable position. And yet, in choosing to preserve the liberty of religious institutions, to free them from government oversight and review, the judiciary has lost sight of half of the equation in the religious employment context: the employees. Shielded by an overbroad interpretation of what a minister *is*, the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC* and *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* has done nothing but tear down Title VII anti-discrimination protections while concurrently hiding religious institutions behind a veil of "Free Exercise protections."

In *Hosanna-Tabor* and *Our Lady of Guadalupe*, the Supreme Court adopted and revised a four-factor test in a broad manner, resulting in a focus on an employee's religious function, sufficient to strip religious employees of virtually any Title VII anti-discrimination protections. The focus

[1] *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 191-92 (2012).
[2] *Id.*

has strayed from the position's title, it's substance, how it's held out to the world and instead turned to a near exclusive consideration of function.[3] How an employee functions within their role for their religious employer is of paramount importance. The Supreme Court determined that teachers, both lay and called, may be construed as ministers based particularly on how and what they do. 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, is considered a minister.[4] Prior to *Hosanna-Tabor* the ministerial exception had never extended to teachers. Alternatively, religious schools would include morals clauses in employment contexts to permit the institutions to fire teachers under the Title VII religious employer exemption. If a religious school determined that a teacher acted contrary to the direction of their moral clause, they were no longer considered to be in adherence to the institutions religious mission and could be fired outright without the opportunity for redress. In *Little v. Wuerl*, the Third Circuit held that the Diocese of Pittsburgh could discriminate on the basis of religion in decisions to hire or rehire teachers and further choose to employ only those people whose beliefs and conduct were consistent with the employer's religious precepts.[5]

However, to permit unfettered discrimination against teachers and other employees with some religious function, in direct violation of Title VII, flies in the face of reason. The adoption of the *Hosanna-Tabor* and *Our Lady of Guadalupe* framework has had an enormous impact on religiously affiliated K-12 education. Now, religious schools are likely able to hire and fire teachers with impunity, given the general function of almost any teacher at a religious school is geared towards exactly what Justice Alito believed the ministerial exception should include.

[3] *Id.* at 198.
[4] *Id.* at 198-206.
[5] *Little v. Wuerl*, 929 F.2d 944, 955 (3d Cir. 1991).

The functional approach yields an overbroad interpretation of who qualifies as a minister. While the functional approach prioritizes the functions of an employee over the three other subverted factors, (title, title substance, how the employee holds that title out to the public), the correct approach is the Sixth Circuit's primary duties test, which provides religious employers with sufficient free exercise protections. Because the Supreme Court's function test yields an overboard qualification of who qualifies as a minister, the standard must change and return to the Sixth Circuit's analysis in *Hosanna-Tabor*. Failure to do so will permit a continued destruction of Title VII anti-discrimination protections.

Regardless of the above, the problems facing religious employees is multifaceted. The ministerial exception, once it applies, regardless of test, places religious employers in a position of absolute power over their employees. Further, a religious employer has the *only say* as to when, where, and why to apply the ministerial exception notwithstanding the instances wherein employees that the public would *not* construe as ministers nevertheless qualify under the ministerial exception. Such unquestioned power, in tandem with the tests that yield an overbroad reading of what constitutes a "minister" means that religious employers can intentionally discriminate because there is ***never*** an inquiry about pretext. Without an inquiry about pretextual decisions, religious employers may intentionally discriminate because pretext is no longer legally redressable under the ministerial exception. The pretext inquiry would *only* exist in Title VII litigation, which would normally proceed if the ministerial exception is ***not*** applicable. Because the ministerial exception acts as an absolute barrier to pretextual considerations, entirely, the reach of the ministerial exception *must* be limited so as to preserve the Title VII anti-discrimination protections of religious employees.

II. The Ministerial Exception and Determining Who is a Minister

A. Sixth Circuit Approach in Hosanna-Tabor

Cheryl Perich was first employed by Hosanna-Tabor Evangelical Lutheran Church as a lay teacher, but after completing her colloquy, she was accepted by the congregation and re-classified as a "called" teacher.[6] The distinction between each classification of teacher turns on acceptance to and furtherance of the congregation's religious mission of furthering the faith.[7] Perich later developed narcolepsy and was placed on administrative leave.[8] Upon being cleared by her doctor, she attempted to return to work, but was denied and subsequently terminated.[9] The EEOC filed suit on her behalf, claiming that Perich's termination was in violation of the American's with Disabilities Act.[10] Below, Hosanna-Tabor moved for summary judgment, invoking the ministerial exception.[11] The District Court granted summary judgment in the school's favor.[12] Here, the Sixth Circuit adopts the primary duties test, which determines whether an employee qualifies for the ministerial exception by considering if the primary duties are: furthering the religious mission, spreading the faith, supervising and participating in religious ceremonies and rituals.[13]

The Sixth Circuit vacated the District Court's determination that Perich was precluded from pursuing her claim because of the "ministerial exception."[14] "The Court of Appeals recognized the existence of a ministerial exception barring certain employment discrimination claims against religious institutions—an exception "rooted in the First Amendment's guarantees of religious

[6] *EEOC v. Hosanna-Tabor Evangelical Lutheran Church,* 597 F.3d 769, 772 (6th Cir. 2010).
[7] *Id*. at 773.
[8] *Id.*
[9] *Id.* at 774.
[10] *Id.* at 775.
[11] *Id.*
[12] *EEOC,* 597 F.3d at 775.
[13] *Id.* at 776-77.
[14] *Id.* at 781.

freedom."[15] However, the Sixth Circuit did not believe that Perich qualified as a "minister" by focusing on her duties as a teacher, which as a "called" teacher, were identical to a "lay" teacher.[16]

For the ministerial exception to bar an employment discrimination claim, two factors must be present: (1) the employer must be a religious institution, and (2) the employee must be a ministerial employee.[17] First, to qualify as a religious institution, "the employer need not be a traditional religious organization, such as a church, diocese, or synagogue, nor must it be an entity operated by a traditional religious organization.[18] Rather, a religiously affiliated entity is considered a religious institution if its "mission is marked by clear or obvious religious characteristics."[19] Second, to qualify as a ministerial employee, the Sixth Circuit focused on the function or "primary duties" of an employee.[20] Under this view, an employee will be considered as a "minister" if "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[21] Furthermore, in ascertaining the true breadth of the ministerial exception, the Sixth Circuit focuses applicability on the "function" of an employee's position, but not as the Supreme Court in *Hosanna-Tabor* understood function to mean.

Up to this point, teachers at parochial schools that taught primarily secular subjects had never fallen within the ministerial exception.[22] Conversely, teachers that have been classified as ministerial employees focused the majority of their work on primarily religious subjects or they

[15] *Hosanna-Tabor*, 565 U.S. at 181.
[16] *Hollins v. Methodist Healthcare, Inc.,* 474 F.3d 223, 225 (6th Cir. 2007).
[17] *Id.*
[18] *EEOC,* 579 F.3d at 778.
[19] *Id.*
[20] *Hollins*, 474 F.3d at 226.
[21] *EEOC,* 579 F.3d at 778.
[22] *Id.* at 779; *See e.g.*, *Redhead v. Conference of Seventh Day Adventists*, 440 F. Supp. 2d 211, 221-222 (E.D.N.Y 2006).

had a central role in the spiritual or pastoral mission of the church.[23] Here, the primary duties of Perich's position as a "called teacher" were identical to her previous role as a "lay teacher" which gave the court pause to reconsider the District Court's determination that the ministerial exception applied. The Sixth Circuit, by applying the "primary duties" test, set a reasonable set of limitations on the ministerial exception.

B. Supreme Court in Hosanna-Tabor

The Supreme Court rejected the Sixth Circuit's application of the "primary duties" test thereby ruling that the ministerial exception in fact, did apply to Perich. Specifically, the Supreme Court was hesitant to adopt a rigid formula for deciding when employees qualify as ministers but focused on four factors that are now understood to be the four-factor test. The four-factor test considers an employee's title, the substance of that title, how the employee holds themselves out to the public, and the employee's function in their role.[24] In that case, the Supreme Court focused on Perich's role as a "called" teacher, noting that she both held herself out as a "minister" of sorts while also paying close attention to the title she was given. As a "called" teacher, the Supreme Court pointed out that her titled changed to "Minister of Religion, Commissioned."[25]

Perich's title as a minister pointed to the additional steps necessary to obtain her diploma of vocation.[26] Previously, Perich's duties as a lay teacher were determined to be identical to her subsequent position as a called teacher, but the Supreme Court's reasoning as to why the ministerial exception should apply focuses on more than just her duties and instead on what she was required to do in order to obtain this elevated status. Particularly, the Supreme Court focused on the fact that Perich was required to participate in a significant degree of religious training in

[23] *See e.g.*, *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463-65 (D.C. Cir. 1996).
[24] *Hosanna-Tabor,* 565 U.S. at 191.
[25] *Id.*
[26] *Id.*

addition to a formal commission process.[27] Perich was required to complete college-level courses focused on church doctrine.[28] Additionally, Perich sought out an endorsement of her local Synod and went to great lengths to become a called teacher.[29]

In applying the ministerial exception's four-part test, the Supreme Court noted that the court below committed three errors, in failing to find that Perich was indeed a "minister" for purposes of the exception.[30] First, the Supreme Court found that Perich's status as a commissioned minister was relevant, noting that a title is not dispositive of the issue, but an ordination or commission is certainly relevant, in tandem with the extensive religious training required.[31] The Supreme Court established that a religious employees' title *is* relevant.[32] Second, the Supreme Court determined that too much weight had been given to the identical nature of the duties of both lay and called teachers.[33] Again, one single factor is not dispositive of the issue, although important, a religious employee's duties are not determinative of ministerial status. Third, the Supreme Court believed the Sixth Circuit placed too much emphasis on Perich's secular responsibilities.[34] While the EEOC argued that Perich's mere 45 minutes of daily religious work should have dispelled any qualms about her ministerial status, the Supreme Court disagreed, noting that "heads of congregations themselves often have a mix of duties."[35] The EEOC believed that the ministerial exception "should be limited to those employees who perform exclusively religious functions."[36]

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Hosanna-Tabor,* 565 U.S. at 193.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Hosanna-Tabor,* 565 U.S. at 193-94.

Although the EEOC and Perich argued below that Hosanna-Tabor's purported religious reason to terminate Perich was pretextual, the Supreme Court disagreed, pointing to what the true purpose of the ministerial exception is: to ensure that the authority to select and control who will minister to the faithful—"a matter strictly ecclesiastical," was left to the church.[37] Justice Roberts pointed out that this was not an inquiry about pretext.[38] The ministerial exception applied to Perich because "she played a substantial role in conveying the Church's message and carrying out its mission . . . it makes no difference that [Perich] taught secular subjects . . . the constitutional protection of religious teachers is not [] diminished when they take on secular functions in addition to religious . . . what matters is [Perich] played an important role as an instrument of her church's religious message."[39] Further, this case is a stark example of the court's general hesitance towards entanglement with religious organization decision making. Where a court would be "required to make a judgment about church doctrine" such as the classification or duties of an employee, the court will abstain.[40] The opinion's final words clarify the new test for ministerial exception applicability, "[t]his conclusion rests not on respondent's ordination status or her formal title, but rather on her functional status as the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees."[41]

The EEOC and Perich argued that the ministerial exception's broad reading will permit the Church and religious organizations alike to undermine Title VII anti-discrimination laws.[42] Subsequent cases proved that they were right. Specifically, the ministerial exception doctrine, post-Supreme Court analysis and application, has welcomed unfettered discrimination wholeheartedly

[37] *Id*. at 194-95.
[38] *Id.* at 175.
[39] *Hosanna-Tabor,* 565 U.S. at 197, 204-05 (Alito, J., concurring).
[40] *Id*. at 205 (Alito, J., concurring).
[41] *Id*. at 205-06 (Alito, J., concurring).
[42] *Hosanna-Tabor,* 565 U.S. at 195.

inconsistent with Title VII anti-discrimination purposes. Succinctly, the disproportionate weight given to the function factor, which weighs the *functions* of a religious employee, adopted by the Supreme Court, has destroyed anti-discrimination protections for a vast array of employees. Rather than following the Supreme Court's overbroad "functional status" approach of the four-factor test, the Sixth Circuit's "primary duties" analysis represents the correct means for determining who qualifies under the ministerial exception. The Sixth Circuit approach provides adequate Title VII anti-discrimination employment protections for religious employees concurrently with Free Exercise protections for religious institutions.

C. Supreme Court in Our Lady of Guadalupe

Our Lady of Guadalupe serves as a prime example of the implications of the ministerial doctrine, post-*Hosanna-Tabor*. In that case, the Supreme Court once again posed the question whether the ministerial exception applies to teachers at religious institutions. Justice Alito's concurrence in *Hosanna-Tabor* replaces Justice Robert's majority opinion as the new standard. Whereas in *Hosanna-Tabor*, the Supreme Court weighed each of the four-factors collectively with a general focus on function, the Supreme Court now focuses solely on employee function and mistakenly subverts the Sixth Circuit approach. Further, the importance of employee function has been elevated, and the other three factors—title—title substance—how that title is held out to the public—have been subverted. As a result, the ministerial exception has an arguably broader application than it did before in *Hosanna-Tabor*.

In *Our Lady of Guadalupe*, the Supreme Court emphasizes that the applicability of the ministerial exception must turn on the specific functions of a religious employee, as opposed to how said employees are titled.[43] The distinction between a lay and called teacher is no longer

[43] *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 (2020).

partially dependent on classification, but on what they actually do. Both a lay teacher and a called teacher may qualify under the ministerial exception if their functions are identical. Consequently, the Supreme Court makes a significant rewrite of the *Hosanna-Tabor* standard. Now, the ministerial exception should apply to any employee that "leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[44]

Agnes Morrissey-Berru was employed by Our Lady of Guadalupe School ("OLG"), as a lay teacher.[45] Similar to Perich, Morrissey-Berru taught a mix of studies and her responsibilities required religious and secular duties.[46] Every year, Morrissey-Berru would enter an employment agreement with OLG that included a specific provision requiring her to "develop and promote a Catholic School Faith Community . . . [and that] all her duties and responsibilities as a teacher were to be performed within this overriding commitment."[47] Further, Morrissey-Berru was advised that the school would make its faculty decisions, guided by its Catholic mission, and that she should be guided by that same religious mission.[48] Similar to Perich, Morrissey-Berru led her students in religious activity, and at every point was aware that failure in her responsibility to the religious mission, would be grounds for termination.[49] Morrissey-Berru was considered a "catechist" and was called to intertwine Catholic doctrine with her daily teaching activities evidenced by her participation and initiation of prayer in class. In 2014, OLG moved Morrissey-Berru to a part-time position and shortly thereafter, her contract was not renewed.[50]

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[44] *Id.* at 2063.
[45] *Our Lady of Guadalupe,* 140 S. Ct at 2070, 2078 (Thomas, J., concurring).
[46] *Id.* at 2079 (Thomas, J., concurring).
[47] *Id.* at 2079 (Thomas, J., concurring).
[48] *Id.* at 2053.
[49] *Our Lady of Guadalupe,* 140 S. Ct. at 2053-54.
[50] *Id.* at 2079 (Thomas, J. concurring).

Morrissey-Berru filed a claim with the Equal Employment Opportunity Commission ("EEOC") and then sued OLG for age-discrimination, claiming that she was not renewed in order to permit OLG to hire a younger teacher.[51] OLG maintained that its decision not to renew her contract was solely based on her performance.[52] Below, OLG successfully invoked the ministerial exception, but the Ninth Circuit reversed, pointing to the *Hosanna-Tabor* framework which weighs title and substance of the job in tandem when determining the functional status of an employee.[53] In distinguishing Morrissey-Berru's case from Perich, the Ninth Circuit noted that the former lacked a "minister" title and further, that she had limited religious training and did not hold herself out to the public as a religious leader.[54]

The second case of Kristen Biel is much the same as Morrissey-Berru's. Biel served as a lay teacher at St. James School, RC, as a long-term substitute and eventual full-time teacher.[55] Similar to Morrissey-Berru, Biel taught religion, participated in religious activity, and "imparted different techniques on teaching and incorporating God" in class.[56] Biel's employment contract was nearly identical to Morrissey-Berru's, as she was required to further the religious mission of St. James School and the Roman Catholic Church.[57] Biel prayed with her students, prepared them for mass, and emphasized Catholic doctrine, all in part to satisfy the school's requirement that she infuse faith into her classroom and daily teachings.[58] Biel's contract was not renewed, causing her to file with the EEOC and sue St. James School, claiming that she was terminated for requesting a medical leave, due to her bout with breast cancer.[59]

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[51] *Id.* at 2058.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Our Lady of Guadalupe*, 140 S. Ct. at 2058.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 2059.

Below, the Ninth Circuit reversed the district court's application of the ministerial exception, once again pointing to the Hosanna-Tabor framework. Accordingly, the Ninth Circuit found that the ministerial exception did not apply because "Biel lacked Perich's credentials, training, and ministerial background."[60] However, the Sixth Circuit's primary duties test would have yielded a cleaner result. The primary duties approach focuses on whether said duties consist of teaching, spreading the faith, church governance, supervision of a religious order or supervision or participation in religious ritual and worship.[61] Here, claims brought by Biel and Morrisey-Berru would likely have succeeded under the Sixth Circuit framework. Both parties were teachers that were tasked with spreading the faith, participating and supervising *portions* of religious worship. But it cannot be said that the primary duties of Biel and Morrissey-Berru were akin to Perich in *Hosanna-Tabor*. Further, because Morrissey-Berru and Biel were considered lay teachers, coupled with occasional supervision and participation in religious worship, neither should qualify for the ministerial exception.

The Supreme Court granted certiorari on both cases and started its analysis with a clear hesitance to engage in questioning the employment decisions of a religious institution. "The Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion."[62] In the Supreme Court's view, matters such as these, akin to *Hosanna-Tabor*, should not be left to the court to decide, simply for the sake of independence of religious organizations. While the Supreme Court was careful to point out that religious institutions are not immune from secular laws, their autonomy is paramount, if and where

[60] *Id.* at 2053.
[61] *EEOC,* F.3d at 778.
[62] *Our Lady of Guadalupe,* 140 S. Ct. at 2059.

possible.[63] Specifically, they have the autonomy to choose who is employed, and on what terms.[64] In the Supreme Court's view, without the power to decide matters of "faith and doctrine" such as employment of teachers at a religious school, the religious mission could be untethered by a "wayward minister" and frustrate the purpose of a parochial school.[65]

However, *Our Lady of Guadalupe* is distinguishable from *Hosanna-Tabor* for several reasons. In *Our Lady of Guadalupe*, we have two lay teachers working for a parochial school that lack the specific training Perich had. Yet, Biel and Morrissey-Berru taught religion, led prayers, and went to great lengths to infuse Christian ideals into their daily teachings. Although their status as ministers is questionable, this case highlights the importance of employee function.[66]

The Supreme Court returns to *Hosanna-Tabor*, pointing out that Justice Thomas stressed that courts should defer to religious organizations to determine who qualifies as a minister, in order to appreciate and respect the right to choose who and why.[67] Additionally, Justice Alito's opinion emphasizes that the application of the ministerial exception should focus on functions performed by the religious employee, rather than labels,[68] due to the slippery slope that would ensue if an analysis of "minister" and its functional equivalents was required. Again, the Supreme Court clarifies the *Hosanna-Tabor* decision by adopting Justice Alito's concurrence in *Hosanna-Tabor*, and thereby rewriting the ministerial exception standard. Now, "[the] ministerial exception should apply to 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*."[69]

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[63] *Id.* at 2060.
[64] *Id.*
[65] *Id.*
[66] The Court goes on to opine about the lofty morality that prevents it from questioning matters of faith and doctrine by citing the evils of 16th-century British rule. Specifically, the Court emphasizes the zealots that both controlled and condemned religious practice in the colonies. *Id.* at 2061.
[67] *Our Lady of Guadalupe,* 140 S. Ct. at 2063.
[68] *Id.*
[69] *Id.* (emphasis supplied)

Things such as title are seemingly important, but not dispositive of the issue of ministerial exception and its application.[70] Biel and Morrissey-Berru lacked the minister title that Perich held, and neither held themselves out to the world as ministers or leaders of their congregation or faith. However, their actions as teachers, participating and leading classes in prayer, interjecting their lessons with religious tenets of Catholicism, is of paramount importance to the Supreme Court. However, the Supreme Court does not take their extensive religious training, or a lack thereof, as significantly important. Rather, the Supreme Court presumes the purpose of a heightened education in the faith as illustrating the needs of a religious organization to impart its mission effectively.[71]

What matters most, is what an employee does, how they function within an institution. Things such as teaching students in their faith, conducting worship services or rituals, and acting as a messenger or teacher of that faith. Employee function is now the primary consideration of the Supreme Court's analysis, the Sixth Circuit factors previously relied upon are of minimal importance. And the Supreme Court reasons as such, emphasizing that both Morrissey-Berru and Biel qualify for the ministerial exemption under Justice Alito's concurrence in *Hosanna-Tabor*. Here, both teachers performed religious duties and were required by their employment agreements to further the religious mission of the parochial schools at which they taught. Their "function" within each parochial school mirrored exactly what Justice Alito emphasized in his *Hosanna-Tabor* concurrence. Although both Biel and Morrissey-Berru taught secular subjects, they were expected to intertwine Catholic ideals into their work, best illustrated by leading students in prayer, preparing them for mass, and functioning as teachers of the faith. In reversing the Ninth Circuit, the Supreme Court clarifies that the framework of *Hosanna-Tabor* was not meant to be construed

[70] *Id.* at 2058.
[71] *Id.* at 2064.

as a "rigid formula" or "checklist" when considering such issues.[72] Rather, the framework emphasizes a holistic weighing of relevant factors, but stresses that special attention to the function of the employee is paramount.

III. How a Broad Reading of "Minister" Undermines Anti-Discrimination Protections in Employment

A. Examples: Race, National Origin

An overbroad reading of "minister" has a deteriorating effect on Title VII anti-discrimination protections. Although there have been no post-*Hosanna-Tabor* cases that deal with race, the ministerial exception has previously been applied to issues of race discrimination. In *Rweyemamu*, plaintiff Justinian Rweyemamu appealed the District Court of Connecticut's decision that his Title VII race discrimination claim was barred by the ministerial exception.[73] Rweyemamu was a black Catholic priest and served as parochial vicar of St. Bernard's Church in Rockville, Connecticut.[74] Rweyemamu applied to be parish administrator of St. Bernard's, but a white priest was selected instead.[75] Rweyemamu argued that Bishop Cote failed to follow canon law and filed a claim with the EEOC and Connecticut Commission on Human Rights and Opportunities ("CHRO").[76]

The CHRO dismissed Rweyemamu's claim based upon the ministerial exception and his employment at the parish was thereafter terminated.[77] Rweyemamu argued that the appeals court's recent decision in *Hankins*[78] eliminated the ministerial exception[79] in employment cases governed

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[72] *Id.* at 2054.
[73] *Rweyemamu v. Cote*, 520 F.3d 198, 199 (2d Cir. 2008).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Hankins v. Lyght*, 441 F.3d 96, 99 (2d Cir. 2006).
[79] In *Hankins,* the Second Circuit held that the Religious Freedom Restoration Act and ADEA governed the merits of Hankin's age discrimination claim that his employer's mandatory retirement policy violated Title VII and remanded for further consideration. *Id.* at 109.

by Title VII.[80] In that case, the Second Circuit clarified that *Hankins'* claim was remanded, solely to decide whether applying the ADEA to the church's action violated the Religious Freedom Restoration Act. *Hankins* and the decision on remand was not based upon the ministerial exception. Rweyemamu's suit was also a case of first impression, as the Second Circuit had yet to formally adopt the ministerial exception.[81] The Second Circuit focused on Rweyemamu's duties as a Catholic priest and determined that any consideration of his claims would require impermissible entanglement with religious doctrine. Interestingly, the court points out that it would consider Title VII anti-discrimination cases for employees with a "lay" title, but not a minister.[82] Therefore, Rweyemamu's complaint was dismissed. The court's reasoning, here, mirrors Justice Thomas' deference standard articulated in *Hosanna-Tabor* and speaks to Perich's fear that an overbroad reading of the ministerial exception will have destructive results.

Unlike race, national origin has been addressed in the post-*Hosanna-Tabor* era. In *Sterlinski*, former music director Stanislaw Sterlinski, was barred from judicial review of his national origin-based employment discrimination claim.[83] In that case, Sterlinski was hired by Saint Stanislaus Bishop & Martyr Parish as the Director of Music, in 1992.[84] However, in 2014 he was demoted from his position as director, to organist, and then terminated entirely.[85] Sterlinski brought suit against the Bishop of Chicago, claiming that he was discriminated against for being Polish.[86] It is important to point out that the position of "music director" has long been considered to be a position falling within the context of "minister" and therefore, his case made it to court to

[80] *Rweyemamu*, 520 F.3d at 199.
[81] *Id.* at 207.
[82] *Id.*
[83] *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568, 569 (7th Cir. 2019).
[84] *Id.*
[85] *Id.*
[86] *Id.*

determine whether an "organist" falls within the purview of the ministerial exception.[87] The Seventh Circuit reasoned that it did.

As a music director, Sterlinski had what the court considered to be "substantial authority" over the conduct of religious services, noting in particular that music is a central part of masses.[88] However, Sterlinski argued, to no avail, that as an organist, he no longer exercised the necessary discretion over a central part of mass to thus enable him to act in a manner sufficiently in line with the Hosanna-Tabor "functions" approach.[89] Sterlinski argued that as an organist, he was merely "robotically playing the music he was given" and could not be construed to be a minister.[90] The District Court disagreed, and granted summary judgment to the Bishop of Chicago, giving rise to this Seventh Circuit appeal.

Cardinal Archbishop Cupich stressed the central focus that music has during Catholic mass, pointing out that although Sterlinski was no longer the director, and thus not choosing music, his position nevertheless qualified him for the ministerial exception.[91] Sterlinski stressed that he was not ordained, that "he just played music" and asked the court to determine "if an organist's role is sufficiently like that of a priest to be called part of the ministry."[92] Here, the court relied upon its previous decision in *Grussgot* which similarly calls judicial review to focus on whether the employee was serving a religious function.[93] The Seventh Circuit mirrors the traditional court hesitance to question religious organization's choices, or entanglement theory. However, the court

[87] *Id.* at 572.
[88] *Id.* at 569.
[89] *Sterlinski*, 934 F.3d at 569.
[90] *Id.*
[91] *Id.* at 570.
[92] *Id.*
[93] *Grussgott v. Milwaukee Jewish Day Sch.*, 882 F.2d 655, 656 (7th Cir. 2018).

points out that a general "hands off approach" will prove problematic, by enabling religious institutions to claim minister status for every conceivable employee.[94]

According to the court, the "answer lies in separating pretextual justifications form honest ones."[95] The court points out that had Sterlinski truly been a mere "robot" in his duties as an organist, the church still deserved to terminate him.[96] For a church ought to decide such matters, given the longstanding tradition and importance of music in mass.[97] The court likens such a position to a priest giving a monotone homily[98] such that even if Sterlinski's organ playing was rote, it still played a central to advancing the faith just as an unenthusiastic homily would.[99]

While the Seventh Circuit might have feared entangling itself with the decision making of the Cardinal Archbishop of Chicago, determining that an organist is the functional equivalent of a minister flies in the face of reason. Because the *Hosanna-Tabor* framework calls for a primary focus on the function of religious employees, cases are decided without considerations of the employee. Although the question of pretext was not appropriately considered according to Justice Robert's opinion in *Hosanna-Tabor*, the Seventh Circuit's seemingly logical determination that an organist functions as a central part of ministry within the parish completely misses the point: an overbroad reading of what constitutes a minister is detrimental to religious employees' anti-discrimination protections. Rather than applying the Alito concurrence in *Hosanna-Tabor*, and

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[94] *Sterlinski*, 934 F.3d at 570.
[95] *Id.*
[96] *Id.* at 571.
[97] *Id.*
[98] *Id.*
[99] Further, the court cites the Prince-Archbishop von Colleredo's decision to fire Mozart, that even after von Colleredo determined lesser skilled musicians would suffice and thus fired the music staff, he kept the organist. While it may seem strange, the purpose was to point out the importance of music and its performers during mass. The court determined that organ playing served a religious function at Saint Stanislaus Bishop & Martyr Parish and ruled that Sterlinski qualified under the Hosanna-Tabor framework. As a result, the merits of Sterlinski's Title VII claim were not considered. *Id.* at 571.

later the opinion of *Our Lady of Guadalupe*, the Sixth Circuit primary duties test should have been utilized. Once more, the decision here reflects Justice Thomas' full deference standard in his concurrence more than it follows Justice Alito's concurrence in *Hosanna-Tabor*.

B. Examples: Sex, Disability, Age

Sex based discrimination claims fair no better, post Hosanna-Tabor. In *Conlon,* plaintiff-appellant sought judicial review of her gender-based discrimination claim against her former employer.[100] However, like many before her, Conlon was barred from judicial review of her claim because of the overbroad application of the ministerial exception. In that case, Alyce Conlon was the spiritual director of InterVarsity Christian Fellowship/USA ("IVCF").[101] Prior to her termination, Conlon informed her employer that she was contemplating a divorce and was placed on administrative leave to save her marriage.[102] The record shows that IVCF, as part of its religious mission, "believes in the sanctity of marriage and desires that all married employees honor their vows."[103] Further, IVCF encourages all employees experiencing martial issues to attempt to reconcile with their spouse and specifically reserves the right to consider the impact any separation or divorce by staff, may have on the students.[104] Conlon alleges that she was fired in December of 2011, which predates her actual divorce in January of 2012 (somewhat semantically), for failing to reconcile her marriage.[105] Further, Conlon argues that several similarly situated male employees that were in fact divorced, were neither disciplined nor terminated, and thus brings suit for gender-based discrimination.[106]

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[100] *Conlon v. Intervarsity Christian Fellowship*, 777 F.3d 829, 831 (6th Cir. 2015).
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 832.
[106] *Conlon*, 777 F.3d at 832.

Although IVCF was not a church, it was a Christian organization and was thus permitted to claim the ministerial exception. The Sixth Circuit focused on the four Hosanna-Tabor factors: title, the substance reflected in that title, use of that title by the plaintiff, and the important religious functions performed for the Church.[107]

The Court found that Conlon met two of the four factors.[108] As to religious training and use of ministerial title, the Court distinguished Conlon from Perich. Conlon lacked the specific religious training of Perich and did not hold herself out as an ambassador of the faith, as Perich did. But as to title and function, the Court found similarities. As spiritual director, Conlon's title conveyed the appropriate religious meaning required under the Hosanna-Tabor framework. Additionally, Conlon's position had the same ministerial function as Perich.[109]

In this case, Conlon's primary duty was to assist in the cultivation of "intimacy with God and growth in Christ-like character" which the court unquestionably reasoned was a ministerial function.[110] Based on the presence of two of the four factors, the court looked to Justice Thomas's concurrence in *Hosanna-Tabor*, which requires that whenever a religious employer designates an employee as a minister, the court should merely defer to the employer's "good-faith understanding of who qualifies as its minister."[111] The court declined to analyze Justice Alito's concurrence because it, in this court's view, mirrored the fourth factor and therefore did not merit further consideration.[112] Instead, the court determined that where formal title and religious function are present, the ministerial exception applies.[113] Given IVCF's status as a religious organization and

[107] *Id.* at 834.
[108] *Id.* at 835.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Conlon*, 777 F.3d at 835.
[113] *Id.*

Conlon's status as a ministerial employee, her termination is not for the courts to reconsider.[114] As such, Conlon's Title VII sex-based discrimination case was barred from judicial review. Notwithstanding the unfortunate results of an overbroad reading of who qualifies as a "minister" the court, here, is essentially viewing the four-factors test of *Hosanna-Tabor* with a visceral hesitance to overstep and question how religious institutions go about classifying and defining employees as "ministers." In a way, the factors articulated in *Hosanna-Tabor* and Justice Alito's concurrence, emphasizing function, are seemingly quasi-subverted, in favor of Justice Thomas' full deference standard.

The Second Circuit came to the same conclusion in *Fratello*.[115] In that case, Fratello, terminated as principal of St. Anthony School, appealed her gender-based discrimination claim.[116] The Archdiocese of New York utilizes an administrative manual for all of its parochial schools to delineate the duties of employees in the furtherance of its religious mission.[117] Accordingly, the Archdiocese maintains that the focus of parochial education is the "formation in the faith, for the lived experience of Gospel values and for the preservation of Catholic culture, to train students to live by their faith."[118] As the principal of St. Anthony's, Fratello was described, as part per the manual, as "having accepted the vocation and challenge of leadership in Catholic education."[119] Further, Fratello's job description is significant: "the principal is the Catholic leader" and provides "Catholic leadership by cooperating with the Pastor in recruiting . . . staff committed to the goals of the *sic* school, in his religious ministry, monitoring the catechetical certification of teachers of

[114] *Id.*
[115] *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 192 (2d Cir. 2017).
[116] *Id.*
[117] *Id.*
[118] *Id.* at193.
[119] *Id.*

religion" along with eight additional duties.[120] At first glance, Fratello's job description, duties, and function are well within the *Hosanna-Tabor* framework.[121]

In this case, the Second Circuit points to an enduring hesitance of courts to question religious organizations in the furtherance of their mission, specifically with regards to employment. Citing James Madison, the Second Circuit opined that judicial review is incompatible with religious doctrine in so far as it represents "an unhallowed perversion of the means of salvation."[122] Relying on the four factors articulated in Hosanna-Tabor, the Second Circuit emphasized that the primary focus of the court should be on the "functions performed by persons who work for religious bodies" while paying close attention to the relationship between the activities the employee performs and the religious activities that the employer practices.[123]

The court reasoned that because Fratello's position as principal functioned as a ministerial employee, her claim was barred from judicial review.[124] The function of a principal at St. Anthony's such as carrying out the mission of the Catholic church, among various examples, was unquestionably in favor of a determination that she qualified as a ministerial employee. Specifically, the court reasoned that as part of her many duties, the main focus of Fratello's work was furthering the religious values at the school, fostering a Christian atmosphere, and so on.[125] In the court's view, the fundamental consideration for ministerial employees' qualification, was undoubtedly present illustrated by both Fratello's regular duties and her performance

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[120] *Id.* at 194.
[121] Fratello's title as a lay principal is not dispositive, as all four factors are considered together when making a determination of the ministerial exception's applicability. The Court noted that the substance of Fratello's title could have gone either way but weighed in favor of her employer because she was required to be a practicing Catholic, and to embody Catholic ideals. Further, Fratello described herself as devout. Lastly, although Fratello was not required to meet specific education requirements like Perich, her acceptance to be held out as a religious leader was sufficient to render the third factor moot. *Id.* at 207-10.
[122] *Fratello*, 863 F.3d at 203.
[123] *Id.* at 205.
[124] *Id.* at 192.
[125] *Id.*

evaluations.[126] Clearly, given the extensive circumstantial factors weighing in favor of a ministerial employee classification, the Second Circuit determined that the *Hosanna-Tabor* framework unquestionably meant her Title VII claim was barred from judicial review. The focus on function, here, anticipates Alito's opinion in Our Lady of Guadalupe.

The *Hosanna-Tabor* framework's broad interpretation has yielded much the same results for age-based discrimination cases. In *Cannata*, Philip Cannata brough suit against his former employer, John Neumann Catholic Church and the Diocese of Austin, alleging that he was terminated based on his age, in violation of both the ADA and ADEA.[127] This was a case of first impression for the Fifth Circuit, following the Hosanna-Tabor decision shortly before.[128] Cannata was the music director at St. John's Neumann Catholic Church.[129]

Cannata argues, similar to Sterlinski, that the thrust of his position was to simply perform music at Mass, maintain inconsequential ledgers, operate the sound system, and do custodial work as necessary.[130] According to Cannata, his position was one of entirely secular duties, to which the court immediately notes that following Hosanna-Tabor, "the performance of secular duties may not be overemphasized in the context of the ministerial exception."[131] Contrary to Cannata's position, the Diocese was of the well-established position that music plays an integral role in the celebration of Mass, noting that here, all musicians "exercise a genuine liturgical ministry [in their] collaboration with the pastor [to carry] out the Church's mission."[132] Further, the Diocese provided evidence that the music director has a major role during all services.[133]

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[126] *Id.* at 195.
[127] *Cannata v. Catholic Diocese of Austin,* 700 F.3d 169, 170 (5th Cir. 2012).
[128] *Id.*
[129] *Id.*
[130] *Id*. at 177.
[131] *Id*.
[132] *Id.*
[133] *Cannata,* 700 F.3d at 177.

Cannata disputed his status as a ministerial employee, pointing to his lack of training, education, and necessary experience to be considered a "worship leader" to no avail.[134] The record reflected that Cannata made unilateral decisions regarding music, designed to further the service provided.[135] In summation, the Court denied his claim, using similar rationale as the court in *Fratello*. This decision anticipates Alito's opinion in *Our Lady of Guadalupe.*

C. Examples: Sexual Orientation (Bostock Implications)

The ministerial exception's applicability to claims of discrimination based on sexual orientation has changed significantly. In *Bostock*, the Supreme Court was asked to consider a case of first impression and determine whether Title VII applied to the LGBTQ+ community, in the employment context.[136] The law post-*Bostock* extends Title VII protections to now include individuals that identify as homosexual or transgender.[137] Now, "an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.[138] Sex plays a necessary role . . . in the decision, exactly what Title VII forbids."[139]

In this case, Gerald Bostock, Donald Zarda, and Aimee Stephens were all fired shortly after revealing their status as gay, transgender, or pro-LGBTQ+.[140] Each plaintiff brought suit under Title VII alleging unlawful discrimination on the basis of sex.[141] However, the court decisions below, varied by plaintiff.[142] The Eleventh Circuit held, in Bostock's case, that the law does *not*

[134] *Id.* at 179.
[135] *Id.* at 178.
[136] *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1737 (2020).
[137] *Id.*
[138] *Id.* at 1734.
[139] *Id.* at 1737.
[140] *Id.* at 1737-38.
[141] *Id.* at 1738.
[142] *Bostock,* 140 S. Ct. at 1738.

prohibit employers from firing employees for being gay.[143] The Second Circuit held, Zarda's case, that discrimination based on sexual orientation falls under Title VII.[144] The Sixth Circuit held, in Stephen's case, that Title VII bars employers from firing employees because of their homosexual or transgender status.[145]

The Supreme Court's decision in *Bostock* was based entirely on what Title VII says about the common issue between these three cases: sex. Title VII prohibits employers from taking certain actions "because of" sex, which the Court interpreted as but-for causation and potentially "motivating factor" determinations.[146] Now, an employer violates Title VII when they make employment-based decisions, such as hiring or firing, based *in part* on sex.[147] Here, the court reasons that an employee's status as homosexual or transgender is irrelevant to the employment decision.[148] Rather, it is precisely because an employer discriminates against an individual for characteristics or traits that they would otherwise tolerate in another employee, that Title VII is triggered.[149] The Court, for example, points to an employer with two employees, both of whom like men, but one employee is a man, the other a woman.[150] If the employer then fired the male employee for being gay, Title VII is triggered because the employee's sex plays "an unmistakable and impermissible role in the discharge decision."[151] Although, as Justice Gorsuch points out, sexual orientation is not explicitly referenced in the text of Title VII, discrimination based on sexual orientation cannot happen without discrimination based upon sex.[152] The two are

[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 1739.
[147] *Id.* at 1741.
[148] *Bostock*, 140 S. Ct. at 1741.
[149] *Id.*
[150] *Id.*
[151] *Id.* at 1742.
[152] *Id.* at 1741-42.

intertwined in this regard and therefore, Title VII anti-discrimination protections must extend to LGBTQ+ status, or the purpose of the statute is moot.[153] Ultimately, the Second and Sixth Circuit decisions were affirmed, and the Eleventh Circuit decision was reversed and remanded.[154]

The implications of *Bostock* are vast and have had an immediate effect on ministerial exception litigation. In *Starkey,* Lynn Starkey was a guidance counselor at Roncalli, a private Roman Catholic school.[155] Starkey's employment contract was replaced with a guidance counselor ministry contract, that required her to "convey and be supportive of Roman Catholic teachings."[156] After learning that Starkey identified as lesbian and was in a civil union with another woman, her contracted was not renewed.[157] Starkey filed suit against the Archdiocese and Roncalli, asserting six claims, one relevant for this discussion: discrimination on the basis of sexual orientation under Title VII.[158] Roncalli argued that the First Amendment barred Starkey's Title VII claims regardless of whether she qualified as a minister.[159] The District Court, following *Bostock*, held that such an expansive reading of the First Amendment would render the ministerial exception superfluous.[160] Further, the court points to sexual orientation as a protected status under Title VII.[161] Therefore, Roncalli could not rely on the ministerial exception to bar Starkey's Title VII claims, as her status as a minister was a question of fact to be decided later, and Starkey was free to pursue her Title VII sexual orientation discrimination claim.[162] This is one of the very first decisions post-*Bostock*

[153] *Id.*
[154] *Bostock*, 140 S. Ct. at 1744.
[155] *Starkey v. Roman Catholic Archdiocese of Indianapolis*, No. 1:19-cv-03153, 2020 U.S. Dist. LEXIS 206517, at *2(S. D. Ind. October 21, 2020).
[156] *Id.* at *2-3.
[157] *Id.* at *6.
[158] *Id.* at *8.
[159] Id at *23.
[160] *Id.*
[161] *Starkey*, No. 1:19-cv-03153, 2020 U.S. Dist. LEXIS 206517, at *32.
[162] *Id.* at *23

and its decision has vast implications for what the future of ministerial exception litigation might look like, in the context of Title VII sexual orientation claims.

IV. What Would the Jurisprudence Look Like if the Sixth Circuit Test Were Used in these decisions?

A. Sterlinski, Conlon, & Fratello: A Sixth Circuit Perspective

The implications of Title VII's ministerial exception following Alito's opinion in *Our Lady of Guadalupe* are significant. The function test weighs the functions performed by a religious employee and should now be understood to apply to "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."[163] This approach has yielded broad interpretations of who qualifies as a minister and thereby destroyed the fabric of Title VII anti-discrimination protections. Conversely, the Sixth Circuit primary duties approach in *Hosanna-Tabor* is more than sufficient. The primary duties test considers several factors to determine whether an employee qualifies as a minister under the ministerial exception. Under this view, an employee is a minister if their primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order or participation or supervision of religious ritual and worship.[164]

What do an organist, principal, and spiritual director have in common? According to the *Hosanna-Tabor* and *Our Lady of Guadalupe* framework, they're all ministers. Here's where the distinction comes to life. In *Conlon*, *Sterlinski*, and *Fratello*, each decision turned on how the aforementioned employees functioned in their roles, focusing on *what* they did for their employer. However, each decision might be much different if the Sixth Circuit's primary duties test were the standard framework for considering what constitutes a "minister" in the employment context.

[163] *Our Lady of Guadalupe,* 140 S. Ct. at 2059.
[164] *EEOC*, at 597 F.3d at 778.

If each case had been viewed under the primary duties approach, there is a serious question as to how each plaintiff mentioned above was understood to *teach* the faith. None of the aforementioned taught the faith under traditional conceptions of what it means to teach. Further, teaching the faith was not among their primary duties. Spreading the faith, however, is a closer question. Organizing and playing music during mass, running a parochial school, and acting as a spiritual director are all aimed at some semblance of spreading the faith. But, not in the catechetical or preaching sense. It very well might be that a primary duty of these positions was to spread the faith, as articulated by the various employment contracts and guidance manuals. This would arguably be a close call under the primary duties test, and because of the nature of each employees' actions, it *could* potentially go either way, but it's more likely in favor of an employee in this context. Even if it were to weigh in favor of the employer, no one factor is dispositive of the issue as the court pointed out in *Hosanna-Tabor*. The facts must be considered in light of each other, and not on an individual basis.

Church governance, as one of the factors contemplated under the primary duties (of a religious employee) test, is very likely to weigh against a religious employer, here. It is difficult to say how these selected litigants could be construed to be acting in an official capacity such as church governance requires. Selecting music for masses? Unlikely. Working with students to comprehend and live their faith? Maybe. But if governance is to be understood as according to Black Law's dictionary as "applying policies, proper implementation, and continuous monitoring typically done through or by an organization's governing body" the question is not as close as it might seem. Further, it is unquestionable that the primary duties of any of these plaintiffs included church governance. Additionally, the supervision of a religious order or participation or supervision of

religious worship and rituals is highly unlikely to weigh in favor of an employer. This particular duty would almost always fall to a parochial vicar, not a principal, organist, or spiritual director.

At the very least, the primary duties test makes these cases closer than they were under the function test. Because the question of what constitutes a "minister" is a closer issue, in these examples there are significantly greater chances of judicial redress. These respective courts failed to discern the distinction between what a minister *is* and is *not* because of an overbroad interpretation of what a minister *can* be under the function test. In this "primary duties" alternative review of these cases, there should be no question of the impact on church rights. But that should not be construed as negative or in violation of Free Exercise protections. In this scenario, the church is no longer free to discriminate without question. Although Justice Roberts says these cases are not about inquiring about pretext, that might change. Religious institutions are still free to make employment decisions as they see fit, but whereas such questions were almost never reviewable, Title VII anti-discrimination protections would now be balanced against Free Exercise protections, yielding a more equitable analysis. The ministerial exception, once it is determined to apply by whatever test, gives a religious employer the absolute right to make the decision. There is never an inquiry about pretext. Even if a religious employer intentionally discriminated against an employee, it is not legally redressable. A pretext inquiry would only exist in Title VII litigation, which *could* proceed *only if* the ministerial exception did not apply which is why limiting the scope of the ministerial exception's applicability is of the utmost importance.

B. What about in the teacher context?

The ministerial exception might have much the same effect under the Sixth Circuit approach. The primary duties of a teacher in the parochial context would be a closer question, in terms of whether the ministerial exception applies, but the analysis would entirely be focused on a case-

by-case consideration. Distinguishing between a lay and called teacher would be unimportant as the focus would turn on whether a teacher's primary duties were to teach and spread the faith, supervision or participation in religious ceremonies and not spending a significant amount of time on religious instruction could mean that it's not a "primary duty."

V. Conclusion

Consideration for who qualifies as a minister has been unnecessarily broadened to include many employees that cannot and should not be classified as such. The Sixth Circuit correctly determined the process by which employees should be construed and qualified as ministers. The focus should turn on whether "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[165] However, the Supreme Court incorrectly determined in *Hosanna-Tabor* and later in *Our Lady of Guadalupe* that the function test, which weighs the employees function within the employment context, is the appropriate analysis to determine whether an employee qualifies as a minister. The *Our Lady of Guadalupe* function test has subverted important considerations first pointed out by the Supreme Court in *Hosanna-Tabor,* such that now, an employee's title, its substance and how the position is held out to the public is virtually insignificant. As a result, the Supreme Court has practically adopted Justice Thomas' concurrence in *Hosanna-Tabor*, which is nothing if not frighteningly dangerous for any notions of Title VII anti-discrimination protections. Justice Thomas' concurrence embodied the judicial hesitance entanglement theory, which only stands to betray any conception of Title VII protections for religious employees. Justice Thomas called for the ultimate form of deference, to simply let

[165] *EEOC*, at 597 F.3d at 778.

religious organizations choose who qualifies as a minister without question.[166] If the overly broad *Our Lady of Guadalupe* function test is allowed to survive, Justice Thomas' deference standard is all but inevitable.

[166] *Hosanna-Tabor*, 565 U.S. at 197-199