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The Ministerial Exception as Both the Floor and the Ceiling: Conforming State Religious Exemptions to the Ministerial Exception

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I. Introduction

The Supreme Court of the United States has recently opined on the intersection of the First Amendment's Free Exercise Clause and antidiscrimination legislation. The Civil Rights Act of 1964, and more specifically, Title VII, made it unlawful for an employer to discriminate on the basis of race, color, religion, sex, and national origin.[1] The Civil Rights Movement fought for a meritocratic society and that battle finally came to fruition with the passage of the Act.[2] Every piece of legislation, however, typically has exceptions. One notable exception to Title VII is the Religious Employer Exception. That exception permits the discrimination of employees and prospective hires as long as the employer is a religious association and the discrimination being exercised is religious in nature.[3] The exception is understood to permit, for example, churches to hire only Catholic Priests as opposed to Rabis.

Another significant carve out of Title VII, on the other hand, is not statutory, but rather stems from the First Amendment of the United States Constitution. This exception is colloquially known as the First Amendment's ministerial exception. Pursuant to the ministerial exception, not only is a religious employer permitted to discriminate on the basis of religion, but it is also shielded from liability for firing employees for developing narcolepsy,[4] taking time off of work for breast cancer treatment,[5] developing a brain tumor,[6] and even resisting sexual harassment.[7] The Supreme Court stated that "[t]he Establishment Clause prevents the Government from appointing ministers,

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[1] 42 U.S.C. § 2000e-2(a)(1).
[2] *See* Chuck Henson, *Title VII Works—That's Why We Don't Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. IS. 41, 50 (2012) [hereinafter *Title VII Works*].
[3] 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, 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, educational institution, or society of its activities.").
[4] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).
[5] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
[6] Grussgrott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 665 (7th Cir. 2018).
[7] Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004).

and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[8] With that reasoning, the Court was less focused on finding a middle ground between the two competing ideals of religious freedom and antidiscrimination law. As a result, the Court's interpretation of the ministerial exception sought to alleviate religious employers' burden of having to conform to secular laws.

While the Supreme Court has been formulating the First Amendment-based jurisprudence of the ministerial exception, states, in turn, also have been carving out their own religious exemptions. Typically, such religious exemptions are codified in statutes, some of which, are broader than that of the ministerial exception. New Jersey's religious tenets exception, for instance, is an affirmative defense that permits the religious organization to follow the tenets of its religion in implementing criteria for employment. Once the religious organization proves that it terminated an employee for failing to abide by one of its religious tenets, the inquiry ends and the suit is dismissed.[9] Moreover, Maryland's religious exemption permits religious employers to skirt discrimination suits as long as the plaintiff was an employee "who perform[ed] duties that directly further[ed] the core mission (or missions) of the religious entity."[10] Both of these religious exemptions have been interpreted to be broader than the ministerial exception.[11]

While the ministerial exception typically applies to both state and federal antidiscrimination suits, certain state courts do not comment on the constitutionality of the antidiscrimination suit, but rather focus only on the statutory protections for religious employers.[12] Additionally, if a plaintiff brought suit pursuant to state antidiscrimination laws, the defendant

[8] *Hosanna-Tabor*, 565 U.S. at 184.
[9] Crisitello v. St. Theresa Sch., 299 A.3d 781, 793 (N.J. 2023).
[10] Doe v. Catholic Relied Servs., 300 A.3d 116, 132 (Md. 2023).
[11] *Crisitello*, 255 N.J. at 793; *Doe*, Md. at 132.
[12] *See e.g.*, *Crisitello*, 299 A.3d 781at 793 ("Because we decide this matter on the religious tenets exception, we do not reach the constitutional questions presented.").

would have to affirmatively raise their First Amendment rights in order to reap the benefit of the ministerial exception.[13] Therefore, if the plaintiff's claim is brought under state law and that state's religious exemption is broader than the ministerial exception, then the defendant can opt not to plead the ministerial exception. In such a case, the plaintiff is essentially left at the mercy of the broader state religious exemption, which significantly reduces their chances of succeeding on a state antidiscrimination claim.

Furthermore, the First Amendment provides important protections because it shields individuals from government interference with their religious liberties.[14] The Supreme Court, however, expanded on religious employers' freedoms beyond the necessary contours of the First Amendment. Whether or not the Supreme Court correctly interpreted the delineations of the ministerial exception, however, state courts should not, in turn, expand their religious exemptions further than that of the ministerial exception. Such limits, specifically for antidiscrimination laws, are important to balance the scales between the policies promoting religious freedoms and policies promoting workplace antidiscrimination. This Comment will argue that state religious exemption statutes should be narrowly tailored to fit within the contours of the ministerial exception, to uphold the First Amendment while also providing employees with remedial action from discrimination. Essentially, state religious exemptions should be coextensive with the ministerial exception.

Section II of this comment explores the foundations of antidiscrimination law in this county. Section II then introduces the First Amendment's ministerial exception through to two seminal Supreme Court cases: *Our Lady of Guadalupe Sch. v. Morrissey-Berru* and *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*. From there, Section III of this Comment

[13] Jacquelyn Oesterblad, *If You're a Minister and You Knew It, Clap Your Hands: Contract Nondiscrimination Clauses as a Voluntary Waiver of the Ministerial Exception*, 41 YALE L. & POL'Y REV. 282, 312 (2023) ("[T]he ministerial exception can be waived simply by choosing not to plead it affirmatively.").
[14] *See Hosanna-Tabor*, 565 U.S. at 188.

explains how the fifty states fall in terms of their religious exemption statutes. This Comment will then scrutinize state statutes containing religious exemptions in New Jersey, Maryland, and Washington, and the case law interpreting and applying them. These specific states were chosen for an in-depth analysis because they have different religious exemptions that have recently been interpreted by the states' highest courts. Next, Section IV compares the different state religious exemptions with the ministerial exception and concludes that the differences in the exemptions can have drastic outcomes for the plaintiffs of discrimination suits. Therefore, while the ministerial exception was constructed to be the 'floor' in terms of religious employer protections, in reality it should be considered the 'ceiling' as well. In conclusion, if states with religious exemptions were to be interpreted to be coextensive with the ministerial exception the religious employees would be more adequately protected from antidiscrimination while still providing religious employers with freedom from unreasonable governmental oversight.

II. Federal Legislation Background

A. Title VII and Other Antidiscrimination Legislation

The idealism of a meritocratic society has been present since the founding of our nation, but many societal pitfalls, namely slavery, diverted its success.[15] The passage of the original Civil Rights Act of 1866, specifically Section 1981, however, sought to correct past injustices in an "effort to ensure that newly freed slaves received the same rights as other citizens."[16] The subsequent Jim Crow Era, on the other hand, once again prevented the success of a meritocracy. That was until the notions of equality had once again entered the forefront of society's consciousness with President John F. Kennedy's inaugural address reminding Americans that our

[15] *See Title VII Works*, *supra* 2, at 50; *see also* The Declaration of Independence para. 2 (U.S. 1776) ("[A]all men are created equal.").
[16] CHRISTINE J. BLACK, CONG. RSCH. SERV, IF12535, 42 U.S.C. § 1981'S CONTRACT CLAUSE: RACIAL EQUALITY IN CONTRACTUAL RELATIONSHIPS (2023).

country was "founded on the principle that all men are created equal," and Dr. Martin Luther King Jr.'s "I Have a Dream" speech, which also echoed that same sentiment.[17]

Prior to those impactful addresses, however, there were numerous executive actions taken in an effort to provide citizens with protections from discrimination. In 1941, President Franklin D. Roosevelt signed Executive Order 8802, which prohibited employment discrimination by private employers who held government contracts.[18] Seven years later, in 1948, President Harry S. Truman signed Executive Order 9981, requiring the desegregation of the Armed Forces in favor of equality of treatment and opportunity for persons of all races, religions, and national origins.[19] Further, with the determination to end employment discrimination, President John F. Kennedy, in 1961, signed Executive Order 10925 prohibiting federal government contractors from race discrimination.[20] Then, in 1963, Congress took action and passed the Equal Pay Act of 1963 ("EPA"), which sought to protect men and woman from sex-based wage discrimination.[21]

In response to the Executive Orders and the Civil Rights Movement, Congress passed the Civil Rights Act of 1964 ("Act"). There are very few pieces of federal legislation that compare to the importance and significance of that Act,[22] as this legislation was a tremendous step forward in the idea of life in a meritocracy. Specifically, Title VII had the explicit purpose of addressing inequality in the private employment sector.[23] Title VII outlawed employment discrimination on the basis of race, color, religion, sex, and national origin.[24] The Supreme Court later confirmed

[17] *Title VII Works*, *supra* note 2, at 51.
[18] Exec. Order No. 8802, 6 F.R. 3109 (1941).
[19] Exec. Order No. 9981, 13 F.R. 4313 (1948).
[20] Exec. Order No. 10925, 26 F.R. 1977 (1961).
[21] *EEOC History: The Law*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history/eeoc-history-law (last visited Feb. 3, 2024).
[22] Bostock v. Clayton City., 140 S. Ct. 1731, 1737 (2020).
[23] Kate Weber, *It Is Political: Using The Models of Judicial Decision Making to Explain the Ideological History of Title VII*, 89 ST. JOHN'S L. REV. 841, 845 (2015).
[24] 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

Title VII had the purpose of "achieving equality of employment 'opportunities' and removing 'barriers' to such equality."[25] The passage of Title VII was also a symbolic act. It was symbolic to the United States citizens and foreign countries[26] that the federal government was straying away from past practices and was no longer tolerant of the unfettered employment discrimination that permeated American workplaces.[27] Legally, with its passage, Congress institutionalized the notion of freedom from animus.

While Title VII was the starting point for eradicating the most overt forms of employment discrimination, it was not sufficient in encompassing all practices of discrimination.[28] Consequently, Congress enacted the Equal Pay Act of 1963 (EPA),[29] the Age Discrimination in Employment Act of 1967 (ADEA),[30] the Americans with Disability Act of 1990 (ADA),[31] the Genetic Information Nondiscrimination Act of 2008 (GINA),[32] and the Pregnant Workers Fairness Act (PWFA).[33] These Acts serve to bolster Title VII and the concept of freedom from

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compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[25] Connecticut v. Teal, 457 U.S. 440, 449 (1982).

[26] Chuck Henson, *The Purposes of Title VII*, 33 NOTRE DAME J. L., ETHICS & PUB. POL'Y 221, 222 (2019) [hereinafter *The Purposes of Title VII*].

[27] Anastasia Niedrich, *Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections*, 18 MICH. J. GENDER & L. 25, 26 (2011).

[28] Title VII Works—That's Why We Don't Like It, *supra* note 2, at 54-55.

[29] 29 U.S.C. § 206(d)(1) ("[N]o employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . .").

[30] 29 U.S.C. § 623(a)(1) ("[I]t shall be unlawful for an employer . . . (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.").

[31] 42 U.S.C. § 12112(a) ("[N]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

[32] 45 U.S.C. § 2000ff-1(a)(1) ("[I]t shall be an unlawful employment practice for an employer . . . (1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee.").

[33] 42 U.S.C. § 2000gg-1(1) ("[i]t shall be an unlawful employment practice for a covered entity to . . . (1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical

discrimination throughout the workplace in order to provide a larger section of the disadvantaged population with protections from prejudice.

In conclusion, Congress has enacted legislation, which has been interpreted and applied by courts, that has been instrumental in attempting to rectify past discrimination and halting current discrimination. Title VII, while it is not perfect, has nevertheless been remarkable in deterring employers from discriminating against their employees. Further, Title VII also provides employees with avenues to relief as a result of discriminatory adverse actions.[34] Thus, Title VII and other antidiscrimination legislation has been seen as a beacon of light for disadvantaged employees. Some employees, however, fall outside Title VII's umbrella of protection either because they are not a protected class of employee or because they fall within an exception. Specifically, the exception at issue here is the judicially created doctrine, stemming from the Constitution, known as the First Amendment's ministerial exception.

B. The Ministerial Exception

A hallmark of American law is that employers generally cannot base their employment decisions on protected characteristics. But this notion is limited by another equally important principle, which is the right of religious liberty.[35] The question then becomes whether these two principles can co-exist. Title VII has a specific exception for religious employers which allows them to discriminate on the basis of religion.[36] The plain text of Title VII, however, does not provide religious employers with immunity from suits alleging race, color, sex, national origin discrimination, etc. Nevertheless, courts, and ultimately the Supreme Court, have constructed the

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conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.").

[34] Niedrich, *supra* note 27, at 27.

[35] Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.F.L.. REV. 1, 2-3 (2011).

[36] 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, 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, educational institution, or society of its activities.").

ministerial exception. The ministerial exception is rooted in the First Amendment which provides religious employers with freedom from governmental constraints when making decisions related to their own self-governance.[37]

The origins of the ministerial exception can be traced back to a 1972 Fifth Circuit case.[38] In *McClure v. Salvation Army*, a Salvation Army's ordained minister alleged that she had been compensated less than her male counterparts and was consequently terminated when she reported the allegation to the EEOC.[39] While Title VII sex discrimination provisions were applicable to religious institutions, the court determined that it would be unconstitutional to apply such provisions to "regulate the employment relationship between church and minister."[40] Several years later, in 1985, the Fourth Circuit coined the phrase "the ministerial exception,"[41] and by 2008, all twelve geographic circuit courts had recognized the exception.[42] The Supreme Court addressed the exception for the first time in 2012.

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, the Court was tasked with determining "whether the Establishment Clause and the Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group's ministers."[43] The case arose from a controversy when a teacher, Cheryl Perich, was terminated for "insubordination and disruptive behavior" and "threatening to take legal action."[44] Perich alleged, however, that Hosanna-Tabor Evangelical Lutheran Church and School ("School")

[37] Lund, *supra* note 35, at 3; *see Hosanna-Tabor*, 565 U.S. at 184 ("[T]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.").
[38] McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).
[39] *Id.* at 555.
[40] *Id.* at 560-61.
[41] Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).
[42] *See* Oesterblad, *supra* note 13, at 286.
[43] *Hosanna-Tabor*, 565 U.S. at 176.
[44] *Id.* at 179.

violated the Americans with Disabilities Act of 1990 because she was not permitted to return as a teacher after a leave of absence due to her narcolepsy.[45]

During her employment with the School, Perich was considered a "called" teacher which meant she was regarded as having been "called to their vocation by God through a congregation."[46] In order to receive the call from the congregation, Perich had to satisfy certain academic requirements, such as completing a "colloquy" program at a Lutheran college. The program involved taking theology courses, obtaining an endorsement from the Synod district, and passing an oral examination. Once a teacher is "called," they are bestowed with the formal title: "Minister of Religion, Commissioned." [47]

First, the Supreme Court recognized that there is a ministerial exception,[48] holding that both the Free Exercise Clause and the Establishment Clause prohibited the government from interfering with a religious employer's decisions regarding its ministers' employment.[49] The Court reasoned that "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[50] Moreover, the Court explained that the First Amendment permits religious organizations to have free reign over their own internal self-governance.[51] Therefore, requiring a religious organization to retain an unwanted minister would impermissibly interfere in the church's internal governance and deprive the church of control over individuals that it regards as personifying its beliefs.[52]

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[45] *Id.* at 177-79.
[46] *Id.* at 177.
[47] *Id.*
[48] *Id.* at 188.
[49] *Hosanna-Tabor*, 565 U.S. at 181.
[50] *Id.* at 184.
[51] *Id.* at 187.
[52] *Id.* at 188.

Second, in applying the ministerial exception to Perich, the Court held that she was in fact a "minister."[53] The Court did not articulate a bright-line rule, but rather focused on the totality of the circumstances with an emphasis on four distinct factors: (1) whether the church held the employee out as a minister (formal titles); (2) whether the job title reflects religious training or responsibilities (education and other requirements); (3) whether the employee holds themself out as a minister (self-presentation as a minister); and (4) whether the job duties reflect a religious role (employee function).[54] Here, the Court noted that Perich was afforded the title of minister, specifically "Minister of Religion, Commissioned," she held herself out as a minister, she performed her duties according to the word of God, the congregation periodically reviewed her "skills of ministry," and her title was bestowed upon her after a significant degree of formal religious education.[55] Since Perich was a "minister" within the meaning of the exception, the "First Amendment require[d] dismissal of this employment discrimination suit against her religious employer."[56]

Eight years later, the Supreme Court revisited the ministerial exception in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*.[57] This case involved two elementary school teachers, one working for Our Lady of Guadalupe School and another working for St. James School.[58] Both teachers had comparable teaching positions to Perich, in *Hosanna-Tabor*, because they were "entrusted with the responsibility of instructing their students in the faith."[59] But they also had less religious training than Perich and were not bestowed with the title of "minister."[60] The

[53] *Id.* at 190.
[54] *Id.* at 191-92.
[55] *Hosanna-Tabor*, 565 U.S. at 191.
[56] *Id.* at 194.
[57] *Our Lady of Guadalupe*, 140 S. Ct. at 2049.
[58] *Id.* at 2056-2058.
[59] *Id.* at 2055.
[60] *Id.*

plaintiffs were teachers whose duties included religious education based on a curriculum workbook, leading an occasional prayer, and also accompanying the students to Mass.[61] In addition, both teachers signed agreements with their schools to uphold the Catholic faith.[62] Both teachers were eventually terminated, one alleging age discrimination pursuant to the ADEA and the other brought a claim pursuant to the ADA, alleging her termination was due to her requested leave of absence for breast cancer treatment.[63]

The Supreme Court opined that religious institutions do not necessarily enjoy a general immunity from secular laws, but nonetheless they are permitted to use their autonomy to make decisions with respect to internal management, including selecting individuals in core roles.[64] Therefore, the ministerial exception provides religious employers with the freedom from secular courts' involvement in employment disputes amongst "those holding certain important positions with[in] . . . religious institutions."[65] The Court further reasoned that while the majority in *Hosanna-Tabor* declined to adopt a rigid formula for application of the ministerial exception, key elements of Perich's role were highlighted.[66] The Court in *Our Lady of Guadalupe*, however, decided to abandon the previously articulated factors in favor of a broader test which simply focuses on the employee's function.[67]

Overall, the Court determined that "[w]hat matters, at bottom, is what an employee does."[68] The Court found that both teachers performed vital duties in educating their students on the Catholic faith, their employment agreements specified their duties in carrying out the schools'

[61] *Id.* at 2056-57.
[62] *Id.* at 2056.
[63] *Our Lady of Guadalupe*, 140 S. Ct. at 2058-59.
[64] *Id.* at 2060.
[65] *Id*.
[66] *Id.* at 2062.
[67] *Id.* at 2064.
[68] *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2064.

religious mission, and they provided guidance for their students on how to carry themselves in accordance with the faith.[69] In sum, the Court found that the keystone of an employee's function is whether they are tasked with transmitting the faith to the next generation.[70] Despite the fact that the plaintiffs had less formal religious training than Perich in *Hosanna-Tabor* and they were not bestowed with an important religious title, the Court found that "their responsibility as teachers of religion were essentially the same."[71] Therefore, the Court held that the two plaintiffs qualify as "ministers" and as a result, dismissal of their employment discrimination suits against their religious employers was warranted.[72]

The Supreme Court used *Our Lady of Guadalupe* as a means of expanding on the First Amendment's ministerial exception, as previously articulated in *Hosanna-Tabor,* to encompass a wider array of employees in order to provide religious employers with significant deference and consequently, immunity from discrimination suits.[73] The Court in *Our Lady of Guadalupe* focused on the power of the religious institutions to determine their ministers because "[i]n a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition."[74] As a result, the Court decided to adopt a "functional approach" in *Our Lady of Guadalupe* that stemmed from Justice Alito's concurrence in *Hosanna-Tabor*.[75] This

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[69] *Id.* at 2066.
[70] *Id.* at 2064; *See Hosanna-Tabor*, 565 U.S. at 192.
[71] *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2066.
[72] *Id.*
[73] *See Id.* at 2072 (Sotomayor, J., dissenting).
[74] *Id.* at 2066.
[75] *Compare Hosanna-Tabor*, 565 U.S. at 198 (Alito. J., concurring) ("Instead, courts should focus on the function performed by persons who work for religious bodies. The First Amendment protects freedom of religious groups to engage in certain key religious activities, including the conducting of worship and other religious ceremonies and rituals, as well as the critical process of communicating the faith."), with *Our Lady of Guadalupe*, 140 S. Ct. at 2064 ("What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.").

approach tailors its analysis to "[a] religious institution's explanation of the role of such employees in the life of the religion."[76]

The "functional approach" departs significantly from the four factors laid out in *Hosanna-Tabor*, both in scope and certainty. In terms of scope, Justice Sotomayor, in her dissent, argued that the majority opinion "collapses *Hosanna-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees play an important religious role."[77] As a result, Justice Sotomayor's dissent argues that the majority opinion risks rendering almost every parishioner a Catholic minister because religious organizations will "decide for themselves whether discrimination is actionable."[78] Moreover, in terms of certainty, the majority determined that the application of the factors as a checklist distorted the ministerial exception's analysis.[79] Thus, the majority held that the employee's function is "what matters."[80] That determination, however, to Justice Sotomayor, "is no easier to comprehend today than it was when the Court declined to adopt it eight years ago [in *Hosanna-Tabor*]."[81]

Additionally, Justice Sotomayor states that religious entities are required to abide by generally applicable laws.[82] For instance, the government requires religious institutions to pay social security taxes, enforce child-labor protections, impose minimum-wage laws, amongst other laws.[83] The government is also typically permitted to regulate religious organizations in a way that is non-discriminatory. [84] The ministerial exception, however, is absolute and is not subject to

[76] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066.
[77] *See Id.* at 2072 (Sotomayor, J., dissenting).
[78] *Id.* at 2076.
[79] *Id.* at 2066 (finding that the Ninth Circuit misunderstood the ministerial exception when they applied the *Hosanna-Tabor* factors as a checklist to hold that Biel and Morrissey-Berru were not ministers).
[80] *Id.* at 2064.
[81] *Id.* at 2075 (Sotomayor, J., dissenting).
[82] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072.
[83] *Id.* at 2072.
[84] Oesterblad, *supra* note 13, at 288.

a strict scrutiny test or any other test.[85] Commentators see this as a sharp departure from Free Exercise jurisprudence because in "no reading of the Free Exercise Clause is the government *categorically* forbidden from regulating religious people or religious organizations in a way that interferes with the free exercise of their religion."[86]

In conclusion, the ministerial exception works to bar religious employees' antidiscrimination suits by limiting the number of employees who are not considered ministers. The Court's analysis in *Our Lady of Guadalupe* not only expanded the scope of the ministerial exception but also created an air of uncertainty surrounding who can be considered a minister. At present, however, the First Amendment's ministerial exception is good law and it is routinely applied in order to uphold religious organizations' inherent right to practice their religion as they see fit.

III. State Legislation Background

The history of state antidiscrimination laws is strife with ideological battles in the mid-twentieth century.[87] The vitality and optimism that seemed to push the Civil Rights Movement forward in the 1960s has waxed and waned in recent decades.[88] Nevertheless, all fifty states have enacted statutes that prohibit some form of discrimination in the workplace.[89] In short, federal

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[85] *Id.* at 318.
[86] *Id.* at 288.
[87] *See e.g.,* Grainne De Burca, *Evolutions in Antidiscrimination Law In Europe and North American: The Trajectories of European and American Antidiscrimination Law*, 60 AM. J. COP. L. 1 (2012).
[88] *Id.* at 3.
[89] *See* ALA. CODE § 25-1-21; ALASKA STAT. § 18.80.220; ARIZ. REV. STAT. § 41-1463; ARK. CODE ANN. § 16-123-107(a)(1); CAL. GOV'T CODE §§ 12920-12926; COLO. REV. STAT. § 24-34-402; CONN. GEN. STAT. §46a-60; DEL. CODE ANN tit. 19. § 711; FLA. STAT. ANN. § 760.10; GA. CODE ANN. §§ 45-19-29 to -35; HAW. REV. STAT. ANN. §§ 378-2; IDAHO CODE ANN. §§ 67-5909 to -5910; 775 ILL. COMP. STAT. ANN. 5/2-102 to -105; IND. CODE. ANN. §§ 22-9-1-3, 22-9-2-2, 22-9-5-19; IOWA CODE § 216.6; KAN. STAT. ANN. § 44-1009; KY. REV. STAT. ANN. §§ 344.040-.050; LA. REV. STAT. ANN. §§ 23:312, :323, :332, :342, :352, :368; ME. REV. STAT. ANN. tit. 5, §§ 4572-4573; MD. CODE. ANN., STATE GOV'T §§ 20-602 to -607; MASS. ANN. LAWS Ch. 151B, § 4; MICH. COMP. LAW SERV. §§ 37.2102, .2202-.2206; MINN. STAT. § 363A.08; MISS. CODE. ANN. §§ 25-9-103, 25-9-149; MO. REV. STAT. §§ 213.010, .055; MONT. CODE. ANN. §§ 49-2-101, 49-2-303; NEB. REV. STAT. ANN. §§ 48-1101 to -1115; NEV. REV. STAT. ANN. §§ 613.330-.390; N.H. REV. STAT. ANN. §§ 354-A:1 to :7; N.J. STAT. ANN. §§ 10:5-4, -12; N.M. STAT. ANN. §§ 28-1-7, 28-1-9; N.Y. EXEC. LAW §§ 291, 296; N.C. GEN. STAT. §§ 143-422.1 to 3; OHIO REV. CODE ANN. § 4112.02; OKLA. STAT.

antidiscrimination law has set the standard which provides states with a model for their own antidiscrimination statutes. While many states had enacted antidiscrimination legislation prior to the enactment of Title VII, its passage was the key motivator for the other states to legislate similar statutes and expand on current laws.[90] In fact, many states, such as New Jersey, have provided protections to employees that exceed those available in Title VII, the ADA, or the ADEA.[91] New Jersey's antidiscrimination statute includes protected classes such as, creed, marital status, military status, and domestic partnership status, to name a few.[92] In addition, Wisconsin prohibits discrimination in private employment on the basis of marital status, arrest and conviction record, as well as military status.[93]

Moreover, many state antidiscrimination laws are more plaintiff friendly in various ways. For instance, Title VII generally only applies to employers who hire more than fifteen employees who have worked there for more than twenty weeks.[94] In contrast, many state employment discrimination statutes apply to more employers and consequently provide protection to a larger section of the workforce. For example, New York's antidiscrimination statute applies to every employer within the state.[95] In addition, Title VII limits successful plaintiffs' compensatory

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ANN. tit. 25 §§ 1302-1308; OR. REV. STAT. §§ 659A.006, .009, .030; 43 PA. CONS. STAT. § 955; R.I. GEN. LAWS § 28-5-1 to -7; TENN. CODE. ANN. §§ 4-21-401 to -408; TEX. LAB. CODE ANN. §§ 21.051-.055; UTAH CODE ANN. §§ 34A-5-101 to -106; VT. STAT. ANN. tit. 21, § 495; VA. CODE ANN. § 2.2-3903; WASH. REV. CODE ANN. §§ 49.60.040, 49.60.180; W. VA. CODE ANN. §§ 5-11-3, -9; WIS. STAT. §§ 111.321-.322; WYO. STAT. ANN. §§ 27-9-101 to -105.

[90] Alex B. Long, "*If The Train Should Jump The Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 476 (2006).

[91] N.J. STAT. ANN. § 10:5-12(a) ("[I]t shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination: (a) For an employer, of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer. . .").

[92] N.J. STAT. ANN. § 10:5-12(a).

[93] WIS. STAT. §§ 111.321-.322.

[94] 42 U.S.C. § 2000e(b).

[95] N.Y. EXEC. LAW § 292(5).

damages at $50,000 for small businesses and $300,000 for large corporations, but plaintiffs may still be awarded backpay and front pay, among other damages.[96] Conversely, many states allow for uncapped damages and even provide punitive damages for successful plaintiffs.[97] Thus, with potentially broader coverage and more robust remedies, state antidiscrimination laws are integral to uphold employees' freedom from workplace discrimination.

A. State Religious Exemption Statutes

While states have modeled their antidiscrimination statutes on Title VII and other federal antidiscrimination legislation, many of these states also have enacted religious exemptions that are even more expansive than the ministerial exemption. A majority of states have statutorily exempted religious employers from antidiscrimination laws within the state, but seventeen states and D.C. have not enacted exemptions, and thus religious employers in those states rely solely on the ministerial exception.[98]

The state exemptions that have been statutorily enacted can be broadly classified into two general categories: (1) a religious employer is not considered an "employer" as defined in the state's antidiscrimination statute;[99] and (2) a wholly separate provision detailing the religious exemption within the state's antidiscrimination statute.[100] A categorical ban occurs when a state's antidiscrimination statute defines the term "employer," and proceeds to explain that religious

[96] 42 U.S.C. § 1981a(b)(3); *See Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination (last visited Feb. 3, 2024).
[97] *See* Anastasia E. Lacina, *Small Gestures and Unexpected Consequences: Textualist Interpretations of State Antidiscrimination Law After Bostock v. Clayton County*, 90 FORDHAM L. REV. 2392, 2400-01 (2022).
[98] The states that have no religious exemptions for antidiscrimination laws are: Alabama, Connecticut, D.C., Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Texas, West Virginia, and Wisconsin.
[99] The states that exempt religious organizations from the definition of "employer" are Arkansas, California, Delaware, Illinois, Indiana, Massachusetts, Nevada, Oklahoma, Pennsylvania, Utah, Washington, and Wyoming.
[100] The states with a separate religious exemption statute are Alaska, Florida, Hawaii, Idaho, Iowa, Maine, Maryland, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, South Carolina, South Dakota, Vermont, and Virginia.

organizations are not considered employers for the purposes of the statute. For example, Washington's definition of employer "includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and *does not include any religious* or secretarian organization not organized for profit."[101] Conversely, New York's religious exemption is an example of the second category. Specifically, New York's religious exemption provision states "[n]othing contained in this [employment antidiscrimination] section shall be construed to bar any religious or denominational institution or organization . . . from taking such action as is calculated by such organization to *promote the religious principle*s for which it is established or maintained."[102] Thus, Washington's exemption categorically bar's religious organizations from the definition of "employer," and New York, on the other hand, bars discrimination suits against religious employers for adverse actions taken to promote their religious ideologies. While these categories, taken at face value, might not seem to be of much consequence, the state court's interpretation of the exemptions has significant effects on the outcomes of religious employee's discrimination suits.

The following Section will analyze and compare the application of New Jersey's, Maryland's, and Washington's religious exemption statutes as interpreted by the state's highest court. This Comment analyzes these three exemptions because they exemplify the spectrum of approaches that states have taken with regard to religious exemptions. Further, each of these states' highest courts have also recently provided useful interpretations of their statutes. First, New Jersey enacted a category two exemption, which is a separate provision within the state antidiscrimination statute, which states that "it shall not be an unlawful employment practice . . . for a religious association or organization . . . in following the *tenets of its religion* in establishing

[101] WASH. REV. CODE. § 49.60.040(11) (emphasis added).
[102] N.Y. EXEC. LAW § 296(11) (emphasis added).

and utilizing criteria for employment of an employee . . .".[103] Second, Maryland also enacted a category two exemption, which exempts discrimination claims against "a religious corporation . . . with respect to the employment of individuals of a particular religious, sexual orientation, or gender identity to *perform work connected with the activities of the religious entity*."[104] Third, Washington enacted a category one exemption, which excludes a religious organization from the definition of "employer" as defined by the state's antidiscrimination statute.[105] These three states' statutes showcase the varying religious exemptions currently enacted nationwide. Therefore, these separate religious exemption statutes are a worthwhile starting point to evaluate how they affect an employee's right to be free from discrimination.

B. A Closer Look at New Jersey, Maryland, and Washington Religious Exemption Statues for Employment Discrimination Claims

i. New Jersey

In many ways, New Jersey has one of the most expansive approaches to antidiscrimination legislation. New Jersey's Law Against Discrimination (LAD) provides:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination: (a) For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.[106]

[103] N.J. STAT. ANN. § 10:5-12(a) (emphasis added).
[104] MD. CODE ANN. § 20-604(2) (emphasis added).
[105] WASH. REV. CODE. § 49.60.040(11).
[106] N.J. STAT. ANN. § 10:5-12(a).

The New Jersey Supreme Court has described the LAD as a "remedial social legislation whose overarching goal is to eradicate the 'cancer of discrimination.'"[107] Thus, as a remedial statute, it is to be liberally construed, whereas any exception to the statute should be "strictly but reasonably construed, consistent with the manifest reason and purpose of the law."[108]

The New Jersey Legislature enacted the religious tenets exemption to the LAD. The exception states, "it shall not be an unlawful employment practice for . . . a religious association or organization . . . in following the tenets of its religion in establishing and utilizing criteria for employment of an employee."[109]

The Supreme Court of New Jersey recently interpreted the religious tenets exemption in *Crisitello v. St. Theresa School.*[110] Victoria Crisitello, a single woman, was an art teacher and toddler room caregiver for the St. Theresa School, which was operated by the Church of St. Theresa.[111] Upon employment she was required to sign an agreement which stated that she was to abide by the teachings of the Catholic religion, which included a clause forbidding her from engaging in premarital sex.[112] When Ms. Crisitello was approached by the school principal asking her to accept a new role as a full-time art teacher, she stated that she wanted a raise for accepting the position.[113] Ms. Crisitello explained that she was pregnant and as a result, the additional hours would be more taxing on her. While Ms. Crisitello offered this information as reasoning for her requested raise, she was subsequently terminated.[114] The principal, aware than Ms. Crisitello was

[107] Nini v. Mercer Cnty. Cmty. Coll., 202 N.J. 98, 108-09 (2010) (quoting Jackson v. Concord Co., 54 N.J. 113, 124 (1969)).
[108] Nini v. Mercer Cnty. Cmty. Coll., 202 N.J. 98, 108-09 (2010) (quoting Serv. Armament Co. v. Hyland, 70 N.J. 550, 558-59 (1976)).
[109] N.J. STAT. ANN. § 10:5-12(a).
[110] Crisitello v. St. Theresa Sch., 299 A.3d 781 (N.J. 2023).
[111] *Id*. at 785-86.
[112] *Id.*
[113] *Id.*
[114] *Id.*

unwed, informed her that the reason for her termination was that she had violated the Code of Ethics for engaging in premarital sex.[115] Ultimately, Ms. Crisitello was replaced by a married woman with children.[116]

Ms. Crisitello filed an action against St. Theresa's alleging that the school had violated the LAD, by discriminating against her on the basis of pregnancy and marital status.[117] Ms. Crisitello further argued that her firing on the grounds of violating the tenets of the Catholic faith was a mere pretext.[118] St. Theresa's responded stating that their decision to terminate Ms. Crisitello was protected by the First Amendment and LAD.[119] The New Jersey Superior Court granted summary judgment in St. Theresa's favor. The Appellate Division reversed, reasoning that the plaintiffs in *Our Lady of Guadalupe* "performed 'vital religious duties' whereas Ms. Crisitello did not."[120] As a result, St. Theresa's filed an appeal as of right to the New Jersey Supreme Court, citing the First Amendment of the United States Constitution and the LAD.[121]

The New Jersey Supreme Court ultimately decided this case on statutory grounds and elected not to reach the constitutional arguments.[122] The Court held that the religious tenets exception to LAD is an affirmative defense and once proven, "the employer need not contest the plaintiff's allegations."[123] The defense requires the religious organization to prove that it was following the tenets of its faith in establishing employment criteria.[124] The Court likened the religious tenets exception to other immunity statues and determined that a plaintiff's failure to

[115] *Id.*
[116] *Crisitello*, 255 N.J. at 787.
[117] *Id.*
[118] *Id.*
[119] *Id*. at 786.
[120] *Id.* at 789 (quoting Crisitello v. St. Theresa Sch., 465 N.J. Super. 223, 235-36 (App. Div. 2020)).
[121] *Crisitello*, 255 N.J. at 790.
[122] *Id.* at 797.
[123] *Id.* at 792-93.
[124] *Id.* at 793.

raise a genuine dispute of material fact that the religious employer did not rely on the tenets of their faith in taking the adverse employment action is an "absolute bar to liability."[125]

Following that reasoning, the Court determined that Ms. Crisitello did not raise any dispute of material fact to survive St. Theresa's motion for summary judgment.[126] The Court stated that there was "no evidence that St. Theresa's discriminated based on Crisitello's pregnancy . . . [or] with respect to marital status."[127] Further, "[t]he religious tenets exception allowed St. Theresa's to require its employees, as a condition of employment, to abide by Catholic law, including that they abstain from premarital sex."[128] Overall, the Court's strict adherence to the text of the exception resulted in a focus on the employment agreement between St. Theresa's and Ms. Crisitello, as opposed to Ms. Critistello's role as a possible "minister."[129]

A concurrence authored by Justice Pierre-Louis argued for the continued applicability of the *McDonnell Douglas* framework.[130] Under the second prong of the *McDonnel Douglas* framework, a religious employer would present evidence that a legitimate non-discriminatory reason—i.e., because of a religious tenet—was the reason for the adverse employment action.[131] Then, the plaintiff would still be given the opportunity to show that the legitimate non-discriminatory reason offered by the religious employer is merely a pre-text for a discriminatory action.[132] Justice Pierre-Louis argued against the religious tenets exception being treated as an affirmative defense where the burden-shifting framework of *McDonnell Douglas* does not apply.[133] Justice Pierre-Louis also opined that the *McDonnell Douglas* framework effectuates the

[125] *Id*. at 794-95.
[126] *Id*.
[127] *Crisitello*, 299 A.3d at 796.
[128] *Id.*
[129] *Id.*
[130] *Id*. at 797 (Pierre-Louis, J., concurring); *see also* McDonnel Douglas Corp., v. Green, 411 U.S. 792 (1973).
[131] *Crisitello*, 299 A.3d at 797 (Pierre-Louis, J., concurring).
[132] *Id.*
[133] *Id.*

legislature's intent as the LAD is a remedial statute and as such, the plaintiff should be permitted to prove by a preponderance of the evidence that the religious tenet reasoning is merely pre-textual.[134] The legislator's intended purpose was not for a blanket exception to apply wholesale to religious employers who simply articulate that a religious tenet justified their decision.[135] Despite the concurrence's views, the religious tenets exception involves a focused analysis on the religious employer's purposes for taking the adverse employment action, with little attention on the plaintiff's arguments and job duties. Therefore, the New Jersey Supreme Court showed significant deference to St. Theresa's, leaving Ms. Crisitello with no recourse for the alleged discrimination.[136]

ii. Maryland

Maryland is another state with extensive protections for employees alleging employment discrimination. The Maryland Fair Employment Practices Act (MFEPA) provides that,

> [a]n employer may not: (1) fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of: (i) the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment.[137]

Similarly to New Jersey's religious tenets exception, Maryland's exception is also a statutory provision. Maryland's religious exemption statute states that "[t]his subtitle does not apply to . . . (2) a religious corporation, [or] association . . . with respect to the employment of individuals of a particular religion, sexual orientation or gender identity to perform work connected with the activities of the religious entity."[138] While New Jersey's exemption hinges on the religious

[134] *Id.* at 802.
[135] *Id.* at 798.
[136] *Id.* at 796.
[137] MD. CODE ANN. § 20-606(a)(1)(i).
[138] MD. CODE ANN. § 20-604(2).

organization's inherent beliefs, Maryland's exemption focuses on the employee's functions.[139] In connection to the meaning of the employee's activities, the legislative history of Maryland's exemption reveals a critical change in statutory language. When the MFEPA was first enacted in 1965, the original statute exempted religious entities from discrimination suits "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [religious entity] of its *religious* activities."[140] Thus, the Supreme Court of Maryland was recently tasked with determining the meaning of "to perform work connected with the activities of the religious entity" in MFEPA's religious exemption.[141]

In *Doe v. Catholic Relief Servs.*, an employee of Catholic Relief Services-United States Conference of Catholic Bishops (CRS) brought suit alleging discrimination on the basis of sex.[142] The plaintiff was a cis-gendered male who was married to another man.[143] Mr. Doe accepted a position as a Program Data Analyst with CRS upon learning that same-sex spouses would not be precluded from health benefits.[144] Originally, CRS accepted Mr. Doe's benefits enrollment, but he was later informed that CRS did not in fact provide spousal health care to employees who were engaged in same-sex relationships.[145] CRS then terminated the health benefits based on the reasoning that it would be contrary to its Catholic values.[146]

Mr. Doe filed suit in the District Court of Maryland pursuant to Title VII, the Equal Pay Act (EPA), the Maryland Fair Employment Practices Act (MFEPA), and the Maryland Equal Pay for Equal Work Act (MEPEWA).[147] The District Court certified questions to the Supreme Court

[139] N.J. STAT. ANN. § 10:5-12(a); *compare* MD. CODE ANN. § 20-604(2).
[140] Act of May 4, 1965, ch. 717, 1965 Md. Laws 1043, 1046 (emphasis added).
[141] *Doe*, 300 A.3d at 131.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at 122.
[146] *Id*.
[147] *Doe*, 300 A.3d at 122.

of Maryland because interpreting MFEPA required their guidance.[148] Mr. Doe argued that Maryland's religious exemption should be interpreted to be coextensive to the First Amendment's ministerial exception.[149] On the other hand, CRS argued that all claims for discrimination based on religion, sexual orientation, and gender identity, brought against them are barred "because all work of every employee is 'connected with' the 'activities' of their employer."[150]

The Maryland Supreme Court disagreed with both arguments and clarified that since MFEPA is a remedial statue aimed at providing employees with protection, exemptions to such statutes must be narrowly construed.[151] The Court held that the legislators "intended to exempt religious organizations from these kinds of MFEPA claims brought by employees who perform duties that directly further the core mission (or missions) or the religious entity."[152] The legislators' deletion of the word "religious" prior to "activities" in the religious exemption when amending the statute was a material change and thus, their intent was not to make Maryland's religious exemption coextensive with the ministerial exception.[153]

Moreover, the broader term of "activities" as opposed to "religious activities" in the wording of the exemption encompasses the religious organization's secular activities as well.[154] Therefore, in reading the exemption in its narrowest form, the Court reasoned that the activities of the employee, whether religious or secular, must further the religious organization's core mission in order to qualify for the exemption.[155] In determining what constitutes a religious organization's core mission a trial court may consider: (1) the religious organization's description of their

[148] *Id.* at 123.
[149] *Id.* at 131.
[150] *Id.*
[151] *Id.* at 124.
[152] *Id.* at 132.
[153] *Doe*, 300 A.3d at 135.
[154] *Id.*
[155] *Id.* at 136.

missions to regulators; (2) the services provided; (3) the people the entity seeks to benefit; and (4) how the entity allocates their funds.[156] Therefore, the Maryland Supreme Court interpreted its religious exemption to include secular activities beyond the protection of the First Amendment's ministerial exception.[157]

Two separate dissents were filed in response to the majority's decision. First, Justice Watts argued that the religious exemption to MFEPA, in upholding precedent of Title VII cases, should be limited to the ministerial exception.[158] Justice Watts found that Mr. Doe's claim for employment discrimination should not be barred by the exemption because he works as a data analyst and his claim relating to denial of spousal benefits did not implicate his "employment" connected with performing activities of the religious entity.[159] Thus, Justice Watts argued that, in his view, the plain meaning of the exception, in its narrowest form, "does not permit a religious entity to discriminate in its treatment of employees to whom the religious entity has already offered employment and established an employer-employee relationship, unless the removal or termination of employment is at issue."[160] Therefore, whereas the majority opinion primarily focused on interpreting the phrase "work connected with the activities of the religious entity," Justice Watts' dissent focused on the use of the word "employment" within the language of the exemption.[161]

Moreover, Justice Hotten's dissent conceptualized the exemption to encompass only the nexus between the employer's religious activities and the employee's work, as opposed to the majority's interpretation of promoting the core mission of the employer.[162] Justice Hotten

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[156] *Id.*
[157] *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2064.
[158] *Doe*, 300 A.3d at 149 (Watts, J., dissenting).
[159] *Id.*
[160] *Id.* at 151.
[161] *Id*.
[162] *Id.* at 164 (Hotten, J., dissenting).

emphasized the continued importance of equality and justice and thus an exemption should not overtake the paramount sentiments of antidiscrimination laws.[163] In conclusion, the dissents to *Doe v. Catholic Relief Servs.*, would narrowly construe the state religious exemption in opposition to the majority's holding, which expands on the religious organization's antidiscrimination immunities further than that of the First Amendment's ministerial exception by including an employee's secular duties in the analysis.

iii. Washington

Washington is the third state discussed within this Comment which also affords extensive protection against employment discrimination. Washington's Law Against Discrimination (WLAD) provides,

> [t]he right to be free from discrimination because of race, creed, color, national origin, citizenship or immigration status, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to: (a) the right to obtain and hold employment without discrimination.[164]

WLAD's religious exemption falls within the first category of state religious exemptions, specifically, the antidiscrimination statute excludes religious employers from the definition of "employer." As compared to New Jersey's and Maryland's exemptions which fall under the second category, as they are separate provisions within the state's antidiscrimination statute. WLAD's religious exemption can be located within the definition of employer, which provides that an "'[e]mployer' includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or secretarian

[163] *Id.* at 168-69.
[164] WASH. REV. CODE. § 49.60.030(1)(a).

organization not organized for private profit."[165] The Supreme Court of Washington recently interpreted this religious exemption statute while also determining the constitutional validity of the exemption as a whole.[166]

In *Woods v. Seattle's Union Gospel Mission*, the plaintiff alleged that his employer, Seattle's Union Gospel Mission (SUGM), was liable for violating his right to be free from employment discrimination under WLAD and argued that SUGM was not immune from suit.[167] Woods, a professed Christian, began working at SUGM, an evangelical Christian nonprofit, as a volunteer in their legal aid clinic during law school.[168] When he became a licensed attorney he applied as a staff attorney at the legal aid clinic.[169] Upon doing so he disclosed that he was in a same-sex relationship, to which the SUGM informed Woods that he would not be hired because such a relationship was contrary to the Christian faith.[170]

The Washington Supreme Court's primary objective on appeal was to ascertain the legislator's intent in passing the religious exemption.[171] Secondarily, the Court was also tasked with determining the constitutionality of the religious exemption pursuant to the Washington Constitution.[172] The Washington Constitution provides that people may not be treated differently when they are similarly situated without a rational basis for doing so and when a fundamental right is at stake, an immunity cannot be given to someone without a reasonable basis.[173]

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[165] WASH. REV. CODE. § 49.60.040(11).
[166] Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1063 (Wash. 2021).
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.* at 1062-63.
[172] *Woods,* 481 P.3d at 1064.
[173] *Id.* at 1062-63; *See also* WASH. CONST. art. I, § 12 ("[N]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.").

The Court discussed the constitutional argument first, holding that their religious exemption statute is does not violate its State Constitution, but it may be facially invalid as applied to Woods.[174] In determining the exemption's constitutionality, the Court sought to balance the competing ideals of an employee facing discrimination and a religious employer's right to choose workers who reflect their beliefs.[175] In doing so the Court applied a two prong test: "(1) whether [the religious exemption] granted a privilege or immunity implicating a fundamental right and (2) if a privilege or immunity was granted, whether the distinction was based on reasonable grounds."[176] First, Woods' fundamental rights at stake were the right to an individual's sexual orientation and the right to marry.[177] Second, the Court held "that reasonable grounds exist for WLAD to distinguish religious and secular nonprofits."[178] The Court reasoned that the legislator's very inclusion of a religious exemption in WLAD is evidence of its reasonableness.[179] Therefore, the Court held that the religious exemption was facially constitutional.[180]

Next, the Court turned to the First Amendment's ministerial exception in order to determine whether the exemption was constitutional as applied to Woods.[181] The Court sought guidance from the ministerial exemption in order to define the contours of WLAD's religious exemption because "WLAD contains no limitation on the scope of the exemption."[182] The Court held that the religious exemption is constitutional as long as it is applied to claims concerning "ministers" as defined by *Our Lady of Guadalupe* and *Hosanna-Tabor*.[183] The Court reasoned

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[174] *Woods,* 481 P.3d at 1063.
[175] *Id.* at 1069.
[176] *Id.* at 1065.
[177] *Id.*
[178] *Id.* at 1066.
[179] *Woods*, 481 P.3d at 1067 ("RCW 49.60.040(11)'s inclusion in the enacting legislation and its continued existence demonstrate that the legislature plainly intended to include the exemption in WLAD.").
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 1069.

that such an approach balances the fundamental protections of sexual orientation and right to marry with SUGM's rights to exercise their faith and choose ministers who conform to such beliefs.[184] Overall, the Court remanded the case to the trial court to determine whether Woods' can be considered a "minister."[185]

In a concurrence, Justice Yu clarified that the *Woods* decision is "not a carte blanche license to discriminate against members of the LGBTQ+ community who are employed by religious institutions."[186] Rather the majority decision recognized the intrinsic battle between the statutory prohibitions against discrimination and the burden it places on a religious employers' right to freedom of religion.[187] The concurrence argued that this intrinsic battle is slightly alleviated by the application of a narrow ministerial exception.[188] Importantly, such a "freedom to discriminate is not a mandate to do so."[189]

Comparatively, a dissent in part, authored by Justice Stephens, argued that the religious exemption to WLAD does violate the State Constitution and as such the only recourse for religious employers faced with employment discrimination lawsuits is the First Amendment's ministerial clause.[190] The dissent opined that the exemption violated the antifavoritism clause of the State Constitution on the grounds that the framers of the clause sought to prevent certain people from garnering privileges to the detriment of others similarly situated.[191] Moreover, Justice Stephens vehemently argued that "it is Woods's *constitutional rights* that we must balance against the religious employers' *statutory privilege*, not the other way around."[192] Therefore, the dissent

[184] *Id.*
[185] *Woods*, 481 P.3d at 1070.
[186] *Id.* at 1071 (Yu, J., concurring).
[187] *Id.*
[188] *Id*.
[189] *Id*.
[190] *Id.* at 1074 (Stephens, J., dissenting).
[191] *Woods*, 481 P.3d at 1075.
[192] *Id.* at 1078.

argued that the exemption does not further the legislator's antidiscriminatory goals and as such should be deemed unconstitutional.[193]

In conclusion, despite the fact that the WLAD's religious exemption was a categorical ban of religious organizations from the definition of 'employer,' the majority opinion focused on the competing ideals of antidiscrimination and freedom of religion.[194] Thus, as a result, the Washington Supreme Court held that their religious exemption is coextensive with that of the First Amendment's ministerial exception.[195]

Overall, these three state exemptions are all textually different and cover the broad spectrum of religious exemption statutes. New Jersey's and Maryland's exemptions are considered category two exemptions, in that they are separate provisions in the state's antidiscrimination law. While New Jersey's exemption focuses on the employer's religious tenets, Maryland's focuses on the activities of the employee. Conversely, Washington's exemption is a category one exemption, which excludes a religious organization from the definition of "employer." Although Washington's seemingly categorical ban of religious organization from the definition of "employer," on its face is much broader than that of both New Jersey's and Maryland's exemptions, its interpretation is coextensive to the ministerial exception. Therefore, while a plain reading of the exemptions might illuminate one meaning of the legislature's intent, a state highest court's interpretation ultimately determines the boundaries of the exemption.

IV. Analysis

This Analysis endeavors to explain why the First Amendment's ministerial exception should be interpreted as both the 'floor' and the 'ceiling' when compared to state religious

[193] *Id.* at 1079.
[194] *Id.* at 1069.
[195] *Id.*

exemptions. First, Section IV.A will scrutinize the First Amendment's ministerial exception. The section will argue that although the ministerial exception is broader than it needs to be to secure the religious freedoms of religious employers, it is still current law and thus will not be overturned in the near future. Next, Section IV.B compares the New Jersey religious tenets exception to the ministerial exemption. That Section argues that the New Jersey Supreme Court should have implemented a two-part test using the ministerial exception for guidance to determine whether a religious organization is immune from discrimination lawsuits. Further, Section IV.C argues that Maryland's exemption is ripe for a re-interpretation in line with the ministerial exception because both strongly emphasize the employee's duties in their analysis. Thus, the Maryland Supreme Court should reexamine its exemption to give it the narrowest possible reading, which is one that coextensive with the ministerial exception. Section IV.D argues that the Washington Supreme Court was the only state court to correctly interpret its religious exemption to be equivalent to the ministerial exception. This approach conforms to the reasonable expectations of both religious employers and employees. Lastly, Section IV.E compares and contrasts the two categories of state exemptions to conclude that the protections that they provide to religious employers will primarily depend on how the state courts interpret such statutes. Overall, the primary purpose of this Analysis is to emphasize that state religious exemptions should be narrowly tailored to the contours of the ministerial exception.

A. Analysis of the Ministerial Exception

Regardless of the fact that modern American law provides employees with a multitude of protections, they continue to have less bargaining power due to the ever present at-will employment doctrine.[196] The one protection that has stood on employees' side since 1964 was

[196] *Title VII Works*, *supra* note 2, at 55.

Title VII's law against discrimination, which is a long-standing exception to the at-will doctrine.[197] Nonetheless, these antidiscrimination protections continue to be chipped away with the enactment of widescale exemptions and their even broader interpretations.[198]

The policy justifications for antidiscrimination legislation need to be considered coextensively with the policy justifications for the First Amendment.[199] The fact that the ministerial exception arose from the conflict between employment law and the constitutional principles of church autonomy is essential to understand when analyzing the boundaries of the exception.[200] The overarching purpose of the First Amendment was to create the separation between church and state.[201] Thus, the First Amendment effectively insulates religious institutions from governmental oversight to provide them with the freedom to practice their religion.[202] The First Amendment, however, is not a 'get out of jail free card,' rather religious institutions are still subject to government regulations by laws that are generally applicable and only incidentally impact religion.[203] On the other hand, in order for the ideals of a meritocracy to successfully permeate society, exceptions to antidiscrimination legislation must be narrowly construed to provide employees with adequate opportunities so they can exemplify their strengths. Biases within workplaces only hinder an employee's opportunity for growth. Thus, the public policy of a meritocracy is dampened with a broad and uncertain ministerial exception.

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[197] 42 U.S.C. §2000e-2.
[198] *See Our Lady of Guadalupe Sch*., 140 S. Ct. at 2072 (Sotomayor, J., dissenting).
[199] *See* Kelsie A. Ferris, *Constitutional Law – Supreme Court Expands Ministerial Exception to Law Teachers at Catholic Elementary Schools – Our Lady of Guadalupe School v. Morrissey-Berru,* 140 S. Ct. 2049 (2020), 54 SUFFOLK U. L. REV. 423, 434 (2021).
[200] Lund, *supra* note 35, at 8.
[201] Oesterblad, *supra* note 13, at 285.
[202] U.S. CONST. amend. I.
[203] *See* Ferris, *supra* note 199, at 423; *see also Our Lady of Guadalupe Sch.,* 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

The First Amendment's ministerial exception, as interpreted in *Our Lady of Guadalupe*, operates as a constitutional bar on causes of action alleging employment discrimination perpetuated by religious employers against their "ministers."[204] The Supreme Court expanded both the scope and uncertainty of the ministerial exception in *Our Lady of Guadalupe*, leaving lower courts without conclusive guidance as to how and to whom the ministerial exception should apply.[205] While originally *Hosanna-Tabor* provided slight guidance by way of the four factors that were to be considered when determining who is a minister,[206] the Supreme Court ultimately used *Our Lady of Guadalupe* to expand the exception.[207] Thus, essentially the determination of a "minister," or more accurately—someone who is not protected by antidiscrimination laws—is dependent on the functions of the employee as defined by the employer.[208]

Additionally, Justice Sotomayor authored a dissent in *Our Lady of Guadalupe*, arguing that the majority opinion "collapses *Hosanna-Tabor's* careful analysis into a single consideration: whether a church thinks its employees play an important religious role."[209] Perich in *Hosanna-Tabor* had a unique position within the church, which was one of leadership.[210] The same cannot be said for the plaintiffs in *Our Lady of Guadalupe*. As a result, the majority's deference to the religious employer threatens every religious employee's freedom from discriminatory animus.[211]

Furthermore, the ministerial exception extends beyond the bounds of typical free exercise rights "because it applies uniformly, without balancing individual and state interest[s]."[212] The

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[204] Ferris, *supra* 199, at 424.
[205] *Id.* at 430.
[206] *Hosanna-Tabor*, 565 U.S. at 191-92 (2012) (the four factors were: (1) formal titles; (2) education and other requirements; (3) self-presentation as a minister; and (4) employee function).
[207] Ferris, *supra* note 199, at 431.
[208] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064; *see* Oesterblad, *supra* note 13, at 299.
[209] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).
[210] *Id.* at 2072.
[210] *Id.* at 2075.
[211] *Id.* at 2076.
[212] Oesterblad, *supra* note 13, at 287.

Free Exercise Clause has never before been read to categorically forbid the government from regulating religious organizations in terms of their free exercise of religion. Typically, the government may regulate the religious organizations only in a way that is non-discriminatory. The ministerial exception, however, departs sharply from Free Exercise precedents to conclude that the prohibition on government interference with a religious organizations' ability to choose their ministers is absolute.[213] Thus, while the Free Exercise Clause is one of the hallmarks of the ministerial exception, the two do not merge succinctly as the rationale for the ministerial exception does not emerge from Free Exercise Clause precedents.[214]

Comparatively, although many critiques can be made about the ministerial exception, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."[215] Thus, the origins of the First Amendment predate antidiscrimination laws, and as a result, the jurisprudence of the First Amendment grew without consideration of the implication on modern employment law.[216] While the Supreme Court is now attempting to rectify the consequences of the inherent inconsistencies, religious institutions "would lose their distinctive character almost immediately" if they were prohibited from practicing their religious ideologies.[217] Therefore, it follows that "religious organizations should have control over their religious identity,"[218] as the autonomy of those organizations is essential to upholding the First Amendment. More specifically, a religious organization's ability to not only practice their faith as they see fit, but also choose their ministers in accordance with that practice, safeguards the polices of the First Amendment.[219] In conclusion, while there are many criticisms

[213] *Id.* at 288.
[214] *Id.* at 289.
[215] U.S. CONST. amend. I.
[216] Lund, *supra* note 35, at 10-11.
[217] *Id.* at 23-24.
[218] *Id.* at 29.
[219] *See Id.* at 35.

of the ministerial exception's broad scope and uncertainty, it is the current law in America and will thus continue to be applied uniformly throughout the country.

B. The Ministerial Exception Compared to New Jersey's Religious Tenets Exception

New Jersey's religious exemption statute seems to be a completely different breed of religious exemption as compared to both the ministerial exception and other state religious exemptions. New Jersey's religious exception places a strong emphasis on the tenets of the religious organization as opposed to an analysis of the duties of the employee.[220] In *Crisitello*, the New Jersey Supreme Court gave St. Theresa's significant deference while focusing on the agreement that the plaintiff signed to uphold the Catholic faith.[221] Such deference to a religious organization, and the fact that the exemption is an affirmative defense, will inherently lead to the continual dismissal of discrimination suits because the religious organization can simply argue they were upholding the tenets of their religion in implementing employment criteria.

The New Jersey Supreme Court, on the other hand, should have upheld the religious tenets exemption while using the ministerial exception as a guide. Specifically, the New Jersey Supreme Court should have held that a religious organization can only implement employment criteria based on their faith for ministerial positions within the organization. Thus, the Court should have constructed a two-part test: (1) whether the employee a minister under *Our Lady of Guadalupe*; and if yes, then (2) whether the religious organization followed the tenets of its religion in establishing and utilizing criteria for employment.

Thus, had the New Jersey Supreme Court implemented this two-part test in *Crisitello*, Ms. Crisitello would have likely been protected by state antidiscrimination laws. Ms. Crisitello was

[220] *Crisitello*, 255 N.J. at 219-20.
[221] *Id.* at 207-208.

an art teacher and only an art teacher. She did not teach religion or bring her students to Mass or lead the students in prayer throughout the day, like the plaintiffs in *Our Lady of Guadalupe*.[222] A finding that an art teacher is a minister would be a vast exaggeration to the already broad ministerial exception. Thus, the New Jersey Supreme Court should have denied the defendant's summary judgment motion based on a finding that Ms. Crisitello was not a minister and consequently permitting the trial court to apply the *McDonnell Douglas* framework. This alternative analysis would correctly tailor the New Jersey religious tenets exception to the ministerial exception to balance the interests of both the religious organization and the employee.

C. The Ministerial Exception Compared to Maryland's Religious Exemption Statute

The Maryland Supreme Court expressly denied tailoring their religious exemption to that of the ministerial exception.[223] The Maryland Supreme Court held that the religious exemption statute applied to employees who performed secular activities within the religious organization.[224] While the Maryland Supreme Court said that this was the narrowest possible reading of the statue,[225] that is incorrect. The narrowest possible reading of a state religious exemption statute is one that is coextensive to the ministerial exception. The ministerial exception is currently seen as a 'floor,' in that state courts cannot construe their exemptions to provide less protections to the religious employer than those provided by the ministerial exception. Moreover, considering the ministerial exception places an emphasis on the employee's duties within the religious organization and the Maryland religious exemption specifically applies to "work connected with

[222] *See Our Lady of Guadalupe*, 140 S. Ct. at 2056-57.
[223] *Doe*, 489 Md. at 671.
[224] *Id.*
[225] *Id*. at 673.

the activities of the religious entity,"[226] the Maryland religious exemption is ripe for a re-interpretation in line with the ministerial exception.

If the Maryland Supreme Court interpreted their state religious exemption to the contours of the ministerial exception, the plaintiff in *Doe* would very likely not have been considered a minister. The plaintiff in *Doe* was a Program Data Analyst and had no ties to the religious teachings of the institution.[227] Thus, compared to the plaintiffs in *Our Lady of Guadalupe*, Mr. Doe was far removed from performing vital duties relating to the religion of the organization.[228] Following the Supreme Court precedent of *Our Lady of Guadalupe*, Mr. Doe would likely have been protected by antidiscrimination laws and his employer would not have received the benefit of Maryland's religious exemption.

D. The Ministerial Exception Compared to Washington's Religious Exemption Statute

The Supreme Court of Washington was tasked with interpreting its category one religious exemption.[229] The Court was aware of the competing interests at play: a religious organizations' right to freely practice their religion and an employees' right to be free from discrimination.[230] The Washington Supreme Court was conscientious of the effect a categorical ban would place on employees at every level within a religious organization, so the Court turned to the Supreme Court's precedent for guidance.[231] The Washington Supreme Court is an example of a state court correctly reigning in an exemption with a potentially unlimited scope by engaging in an

[226] MD. CODE ANN. § 20-604(2).
[227] *Doe*, 489 Md. at 649.
[228] *Our Lady of Guadalupe*, 140 S. Ct. at 2066.
[229] *Id.* at 1063; WASH. REV. CODE. § 49.60.040(11) ("[E]mployer includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or secretarian organization not organized for profit.").
[230] *Woods*, 481 P.3d at 1069.
[231] *Id.* at 1067.

appropriate balancing of interests in order to interpret the exemption as narrowly as possible. That is, interpreting the state religious exemption to be coextensive with the ministerial exception.[232]

The Washington Supreme Court was keenly aware that their decision cannot be a "carte blanche license to discrimination against members of the LGBTQ+ community who are employed by religious institutions."[233] The Court's approach is also more functional because it is likely to conform to the reasonable expectations of both the religious organization and the employee. The First Amendment is well known for providing individuals and organizations the almost unobstructed right to practice one's religion. Thus, the employees' expectations of freedom of religion would be completely diminished if their freedom to exercise was limited by their employer's right practice religion.[234] Thus, the Washington Supreme Court took the correct approach in turning to *Our Lady of Guadalupe* for guidance in tailoring their religious exemption to the contours of the First Amendment's ministerial exception.

E. A Comparison of All of the State Religious Exemptions

Overall, these three states, all with varying state religious exemptions, provide their employees with different levels of protection. The antidiscrimination laws at play in these states are remedial statutes aimed at affording employees with safeguards and exemptions to such statutes must be narrowly construed.[235] The Washington Supreme Court was the only court to correctly interpret their exemption consistent with these policies. The exemptions in New Jersey and Maryland, however, were not narrowly construed and thus a reinterpretation of those statutes by the states' highest courts is necessary.

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[232] *Id.*
[233] *Id.* at 1071 (Yu, J., concurring).
[234] *See* Justin Burnworth, *The Ministerial Exception Paradox*, 41 QUINNIPIAC L. REV. 463, 467-68 (2023).
[235] *Crisitello*, 255 N.J. at 653.

As previously stated in section III.A, the enacted state religious exemptions generally fit into one of two broadly defined types: (1) a religious employer is not considered an "employer" as defined in the state's antidiscrimination statute; and (2) a separate provision detailing the contours of the religious exemption within the state's antidiscrimination statute.

First, the states that exclude religious organizations from the definition of "employer" create a wholesale ban for employees who allege that they were discriminated against on the basis of a protected characteristic. This categorical exemption completely insulates these religious employers from the rational and important laws against discrimination. In these situations, any employee, no matter their job title or functions will have no remedy for the discrimination perpetrated against them.

While the First Amendment serves as an important safeguard for religious freedoms, such a widespread allowance to discriminate redefines the meaning of freedom. Rather than a freedom to exercise one's religion within their own individually held beliefs, the exclusion of religious organizations from the definition of "employer" operates as a mandate to employees to practice their religion within the confines of their employer's faith.[236] With such a broad sweep of an exemption, state legislatures risk taking a modern society back to times prior to the institution of the Civil Rights Act of 1964 where employment was rife with discrimination. There is no true policy justification for a wholesale exemption. While the First Amendment is a protector of religious freedoms, there too needs to be a protector of the meritocracy that America has strived for since the Declaration of Independence.[237]

[236] Burnworth, *supra* note 234, at 467-68 (explaining the ministerial exception violates an individuals' right to free exercise of religion, which is typically protected by the First Amendment, because it oppresses individual liberties).
[237] *See Title VII Works*, *supra* note 2, at 50; *See also* The Declaration of Independence para. 2 (U.S. 1776) ("[A]ill men are created equal").

A category one exemption, however, still stands the chance that the state's highest court will interpret it similarly to that of the Washington Supreme Court. That is, conforming the category one exception to the ministerial exception, as opposed to allowing automatic dismissal of the suit.[238] That approach correctly reigns in a potentially enormous exemption by engaging in an appropriate balancing of interests. Therefore, any state with a category one exemption should follow Washington's lead.

Second, on the other side of the spectrum, the states that have enacted category two exemptions, i.e., separate religious exemption statutes, tend to vary. This category is inherently different than the first in both the way that the states' legislatures define the exception and the way the state courts interpret the exception. For instance, New Jersey's statute emphasizes the organization's religious tenets, whereas Maryland's statute focuses on the duties of the employee. Each statute is interpreted differently, thus the extent to which a religious organization is immunized against employment discrimination suits is ultimately up to the state's highest court. This in turn can cause a lot of uncertainty among employees working for religious organizations, especially those living in states where their state highest court has not yet interpreted its religious exemption.[239] Without a workable and coherent exemption, one point twelve million employees who are employed by religious organizations are at risk of discrimination without any avenues of relief.[240]

Therefore, the ministerial exception should be interpreted as both the floor and the ceiling. The state religious exemption statutes that expand passed the boundaries of the ministerial exception harm employees more significantly than they provide First Amendment protections to

[238] *Doe*, 489 Md. at 1067.
[239] *See* Oesterblad, *supra* note 13, at 285.
[240] *Religious Orgs.,* DATA USA, https://datausa.io/profile/naics/religious-organizations (last visited Feb. 6, 2024).

the religious employers. Stronger state religious exemption statutes make it more difficult for employees to succeed on state antidiscrimination claims. Many states, including New Jersey, Maryland, and Washington, have antidiscrimination statutes that are more plaintiff friendly than Title VII and other federal antidiscrimination laws. Some states have either eliminated the minimum number of employees requirement or lessened it from the federal requirement of fifteen minimum employees.[241] Thus, employees at religious associations are covered by many state antidiscrimination laws. In addition, Title VII limits successful plaintiffs' damages to $50,000 for small businesses and §300,000 for large corporations.[242] Whereas, many states allow for uncapped damages and even provide punitive damages for successful plaintiffs.[243] These procedural and substantive differences in the federal and state antidiscrimination landscape make suing under state antidiscrimination laws a much more remedial avenue for plaintiffs. Therefore, tailoring state religious exemption statutes to the ministerial exception, specifically for states with broader religious exemptions, would provide those employees with the necessary protections afforded to them by their state antidiscrimination laws.

V. Conclusion

In conclusion, this Comment argues that state religious exemption statutes should be narrowly tailored to the scope of the ministerial exemption. American law has long endeavored to forge equality in this country through legislation; however, such equality is difficult to achieve when balancing certain other hallmarks of the American legal system. The First Amendment affords religious organizations with the freedom from judicial constraints to choose their ministers

[241] *Employment Discrimination*, LETITIA JAMES: NEW YORK STATE ATTORNEY GENERAL, https://ag.ny.gov/publications/employment-discrimination#:~:text=Before%20suing%20under%20federal%20laws,%2F%20applied%20within%2045%20days) (last visited Feb. 6, 2024) (New York Antidiscrimination statute applies to employers with four or more employees).
[242] 42 U.S.C. § 1981a(b)(3).
[243] See Lacina, *supra* note 99, at 2400-01.

as a matter of constitutional right.[244] Whereas, antidiscrimination law effectuates the ideals of a meritocracy without fear of workplace prejudice. Thus, state religious exemptions must take these freedoms into account to the extent that the Supreme Court balanced these rights in constructing the ministerial exception. Therefore, the proper way to harmonize these policies is by modifying state religious exemption statutes to be coextensive with that of the First Amendment's ministerial exception.

[244] Lund, *supra* note 35, at 2-3.