DISCLOSING THE MINISTERIAL EXCEPTION

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The Supreme Court has repeatedly affirmed the existence of the so-called "ministerial exception"—religious organizations' constitutionally based immunity from employment discrimination suits brought by their ministers—but declined to provide a clear test for which employees count as "ministers." The Court's reticence is frustrating but understandable. A narrow definition might wrongfully burden or interfere with religion generally, privilege some religions over others, or increase friction in a society riven by ethical disagreements. A broad definition might privilege religious over non-religious employers or facilitate evasion of generally applicable law, contrary to compelling public policies and the vital interests of many individual employees.

Drawing on employment-law scholarship, this Article recommends a legal strategy often adopted in secular contexts to reconcile desirable employer autonomy with competing individual interests and public goals: targeted disclosure. The Article proposes that courts adopt this "information-forcing" rule: When a religious organization gives a purported "minister" adequate pre-hire notice of her ministerial status, that notice should create a legal presumption of ministerial status. The plaintiff then bears the burden of showing that she is not a minister. This approach incentivizes religious employers to inform employees of the risks they bear in accepting employment and creates an occasion for stakeholders to contest the religious organization's governance practices. Such contestation might, without unconstitutional overreach by the government, promote self-directed reform that narrows the gap between the religious employer's self-governance and the goals of public policy.

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INTRODUCTION

Consider this scenario. A Jewish man gets a job as a gym teacher at a private all-boys school in a rural southern town. The school's stated mission includes "guiding boys to the full stature of Christian manhood through an integrated development of mind, body, and spirit in accordance with Biblical principles." The teacher's job description says that he must "mentor the boys, fostering in them a spirit of sacrifice, perseverance, self-control, and rightly-ordered honor, in keeping with our mission of renewing Christian chivalry." The teacher makes no secret of his Jewish beliefs, but, following suggestions from his supervisors, seeks to build on common ground by, for example, motivating his charges with examples of heroism drawn from the Hebrew Bible. The school's principal abruptly fires the teacher when he discovers that the teacher has African American ancestry, telling the teacher that "blacks don't know the first thing about raising white southern gentlemen."

It takes no legal training to recognize that this (deliberately extreme) hypothetical termination gives the coach grounds to sue for unlawful discrimination in employment. What may be surprising, even to many attorneys, is that a court might well dismiss any such claims on the grounds that the Jewish gym teacher was employed as a Christian "minister."

The constitutional doctrine, commonly called the "ministerial exception," gives religious organizations a complete affirmative defense to employment discrimination claims brought by their "ministers." Lower federal courts began to apply various versions of

the ministerial exception as early as the 1970s,[1] but a unanimous Supreme Court finally ratified the doctrine in the 2012 *Hosanna-Tabor*[2] case. Eight years later, the Court vigorously reaffirmed (and arguably expanded) the ministerial exception in *Our Lady of Guadalupe* ("*OLG*").[3]

The justification for the ministerial exception is that the Religion Clauses of the First Amendment prohibit the government (i.e., courts) from interfering with the internal governance of religious organizations by enforcing ministers' discrimination claims.[4] The paradigm example of such unconstitutional interference would be a law forbidding the Catholic Church to discriminate on the basis of sex in its selection of priests. But the Court has made clear that the ministerial exception extends beyond such obvious First Amendment violations. Most strikingly, it is settled that the exception applies even when the religious employer lacks any religious motives for adverse action.[5] Moreover, the *OLG* court appeared to adopt a capacious "functional" test for ministerial status, under which the exception applies to all employees who work to further the religious "mission" of the religious employer, including those involved in religious leadership, ritual, and instruction.[6] The functional test apparently allows the ministerial exception to be used against

1. *See* McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (holding that application of Civil Rights Act provisions relating to equal employment opportunities of the Salvation Army's minister "would result in an encroachment by the State into an area of religious freedom" in violation of the free exercise clause of the First Amendment).

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

3. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020). Notably, Justices Sotomayor and Ginsburg were part of the unanimous *Hosanna-Tabor* Court but dissented from the judgment in Our Lady of Guadalupe.

4. Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008) ("[T]hough [the exception] is derived from policies that animate the First Amendment, the relevant policies come from the establishment clause rather than from the free-exercise clause. . . . The assumption behind the rule–for it is an interpretive rule–is that Congress does not want courts to interfere in the internal management of churches, as they sometimes do in the management of prisons or school systems.").

5. *See Hosanna-Tabor*, 565 U.S. at 194–95 ("The EEOC and Perich suggest that Hosanna–Tabor's asserted religious reason for firing Perich . . . was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone.").

6. *See OLG*, 140 S. Ct. at 2064 (implying that the ministerial exception should include "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." (quoting *Hosanna-Tabor*, 565 U.S. at 199)).

employees without clerical titles, employees without substantial religious training or a place in church hierarchy, employees with predominantly secular duties, and even employees who are not the employer's coreligionists.[7]

It is clear, then, that the ministerial exception applies to situations far removed from the paradigm case of the aspiring female priest, and colorably extends even to my hypothetical Jewish gym teacher. Nonetheless, that extension is *merely* colorable, as the true contours of the functional test remain obscure. Most obviously, perhaps, it is hard to say what distinguishes a properly "ministerial" participation in the organization's religious mission from any other service (however ostensibly secular or even mechanical) that happens to objectively benefit that mission. How do you classify the work of an administrator at a Lutheran seminary who regularly interacts with bishops and seminarians as she oversees "admissions, financial aid, student services [including providing chaplain offerings], housing, student activities, the candidacy process, [and] the ordination process" but does not herself have pastoral or ceremonial responsibilities?[8] There are uncertainties even when the job at issue has some clear, direct connection to religious mission. Is an art teacher at a Catholic school whose job involves no participation in religious worship or instruction a "minister" simply because she is expected, in view of the school's mission of religious formation, to adhere to Catholic sexual ethics, or is that too thin a thread to bear such momentous consequences?[9] Nor is it always decisive that an employee's role is pervasively "mission oriented." For instance, is it a "ministerial" responsibility for a Christian professor at a Christian school to infuse her teaching and scholarship with Christian ideas even if she is not a teacher of doctrine or even bound by some institutional orthodoxy?[10] Finally, even if an employee's job description or employment agreement sketches a ministerial role, is that (sometimes?) sufficient to establish ministerial status? That is, if an employee claims she did not perform the ministerial functions she was ostensibly hired to do, should a court conclude that she was a negligent minister or, on the contrary, that she was not a minister at all? [11]

7. Justice Sotomayor makes these points forcefully in her *OLG* dissent. *Id.* at 2071–72 (Sotomayor, J., dissenting).

8. Trotter v. United Lutheran Seminary, No. CV 20-570, 2021 WL 3271233, at *4 (E.D. Pa. July 30, 2021).

9. Crisitello v. St. Theresa Sch., 242 A.3d 292, 299 (N.J. Super. Ct. App. Div. 2020), *rev'd on other grounds*, 2023 WL 5185586 (N.J. Aug. 14, 2023).

10. DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000, 1017 (Mass. 2021).

11. *Compare* Ostrander v. St. Columba Sch., No. 3:21-CV-00175-W-LL, 2021 WL 3054877, at *6 (S.D. Cal. July 20, 2021) (declining to extend a ministerial exception to a teacher whose contract designated her as a minister with ministerial functions because the teacher did not engage "in acts pursuant to

The lack of a clear standard naturally raises the specter of unpredictable and inconsistent outcomes in litigation, while also endangering any attempt at greater definition. A relatively narrow test for ministerial status might result in unconstitutional state interference with church governance, intolerable burdens on free exercise, and unfair advantage to more familiar or more organized religions. Such a test might also unnecessarily increase friction in a society marked by intense ethical disagreements. A relatively broad test (and the current Court would, if pushed, likely adopt a very broad test indeed) would systematically privilege religious over non-religious employers and facilitate evasion of generally applicable law to the prejudice of important public policies and the vital interests of many individual employees. These risks would be all the greater if the Court were to adopt the proposal of Justices Thomas and Gorsuch that courts grant near absolute deference to religious groups' own determinations of ministerial status.[12]

The ministerial exception, then, appears to present a tragic dilemma: Although there are compelling reasons to both protect church autonomy and protect employees (including employees of religious organizations) from discrimination, it is very difficult to do both these things at once. The seeming intractability of the problem is reflected in the scholarly debate: Those who would prioritize religion and those who would prioritize workers' rights take turns contradicting each other, moving no closer to agreement.

This Article suggests a fresh perspective, one that puts thorny constitutional questions and ideological differences in the background. We can frame the ministerial exception in more mundane terms, as the kind of problem regularly faced by employment law: Managing the tension between firm autonomy and worker protection. Certainly, the Constitution—especially as interpreted by the Roberts Court—takes some regulatory tools off the

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educating or forming students in the faith of the church"), *with* Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 945 (7th Cir. 2022) (holding that a former employee at a private Catholic school was a minister "because she was entrusted with communicating the Catholic faith to the school's students and guiding the school's religious mission" and, therefore, the ministerial exception bars her employment discrimination claims). The *OLG* Court rejected the respondents' plea for greater doctrinal clarity. 140 S. Ct. 2049, 2069 ("Respondents argue that the *Hosanna-Tabor* exception is not workable unless it is given a rigid structure, but we declined to adopt a 'rigid formula' in *Hosanna-Tabor*, and the lower courts have been applying the exception for many years without such a formula. Here, as in *Hosanna-Tabor*, it is sufficient to decide the cases before us." (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012))).

12. *See OLG*, 140 S. Ct. at 2069–70 (Thomas, J., joined by Gorsuch, J., concurring) ("[T]he Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'" (citing *Hosanna-Tabor*, 565 U.S. at 196)).

table. But one powerful tool, often deployed in employment law, remains available: disclosure.

Students of employment law have long recognized that disclosure rules can mitigate the harms of robust firm autonomy by empowering employees in their negotiations with employers and increasing employers' exposure to reputational costs and rewards. And such disclosure rules have been successfully enacted, with the most important examples being pay-transparency laws, mandatory reporting of workforce demographic data, and mandatory prior notice of mass layoffs and plant closings. Drawing on employment-law scholarship, this Article formulates a disclosure-based strategy for managing the risks posed by the ministerial exception. I propose that when a religious employer shows that it gave an employment-discrimination plaintiff pre-hire notice that the employer considers her a "minister" who cannot avail herself of employment-discrimination laws, that showing should create a legal presumption that the plaintiff is in fact a minister. The burden would then shift to the plaintiff to show that she is *not* a minister.

This burden-shifting framework would incentivize religious employers to inform putative "ministers" of the risks they bear in accepting employment and, in some cases, provide the occasion for private parties, inside or outside the religion, to contest the governance practices of the religious organization. Such contestation might ultimately contribute to internal, self-directed reform that narrows the gap between the religious employer's self-governance and the goals of public policy. Critically, this proposal would not threaten religious employers' Free Exercise rights. The proposal would impose no affirmative conditions on religious employers' exercise of their rights, but simply give them a safe harbor that they can choose to enter.

This Article has four parts. Part I provides a doctrinal history of the ministerial exception, culminating in its adoption and reaffirmance by the Supreme Court in *Hosanna-Tabor* and *OLG*. I also discuss outstanding questions about the governing test of "ministerial" status.

Part II reviews recent scholarly appraisals of the ministerial exception, highlighting the intractability and limited practical relevance of current debates over the exception's legitimacy and proper scope as a matter of constitutional law.

Part III advocates a partial solution that sidesteps the fraught constitutional questions—and indeed seeks to exploit the current uncertainty about the scope of the exception. I argue that targeted disclosure may alleviate the tension between firm autonomy and ostensibly contrary individual and social interests. Accordingly, I propose the mechanism of a burden-shifting rule to incentivize religious employers to inform purported ministers of their status.

Finally, Part IV considers and responds to objections.

I. PART ONE

This Part traces the development of the ministerial exception from a remote implication of the Religion Clauses to an ill-defined, under-theorized, and ostensibly universal doctrine among lower federal courts which was ultimately adopted and partially clarified by the Supreme Court. This history shows that though the ministerial exception is a relative latecomer to constitutional jurisprudence, it is a doctrine of formidable scope and power that is in all probability here to stay. Nonetheless, while the Supreme Court's intervention has increased the number of "easy" ministerial exception cases, many litigants will continue to face considerable uncertainty about whether the exception will apply.

A. The Road to Hosanna-Tabor

Since the founding era, constitutionally-grounded respect for the administrative autonomy of religious bodies has marked the American legal tradition,[13] but the Supreme Court did not clearly recognize a First Amendment right to some form of church autonomy until the middle of the twentieth century.[14] Two cases—*Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*,[15] and *Serbian Eastern Orthodox Diocese for U. S. of Am. & Can. v. Milivojevich*[16]—put church autonomy firmly on the constitutional map.

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13. The *Hosanna-Tabor* Court provided a sweeping historical background to the First Amendment, emphasizing rejection and resentment (even among Anglicans) of the Crown's control over the appointment of ministers during the colonial period. The Religion Clauses of the First Amendment, the Court said, precluded creation of a national church not only to preserve doctrinal and ritual independence from the government, but to "ensure[] that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices." *Hosanna-Tabor*, 565 U.S. at 184. The Court opined that this interpretation of the Religion Clauses was corroborated by two events in the early Republic. First, in 1806 President Jefferson's deliberately refused even to advise on the "entirely ecclesiastical" question of who should be appointed to govern the Catholic Church in the Louisiana territories. *Id.* Second, in 1811 President Madison vetoed a Congressional bill to incorporate an Episcopal church, on the grounds that it violated the Establishment Clause by prescribing "rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the Minister of the same." *Id.* at 184–85 (quoting 22 Annals of Cong. 983 (1811)). As the Court noted, "it was some time before questions about government interference with a church's ability to select its own minsters came before the courts" precisely because the norm of governmental non-interference was so well established. *Id.* at 185.

14. And, derivatively, by the Fourteenth Amendment.

15. 344 U.S. 94 (1952).

16. 426 U.S. 696 (1976).

Both *Kedroff* and *Milivojevich* arose out of disputes within Eastern Orthodox churches that pitted American adherents against foreign, Soviet-aligned hierarchs.[17] In *Kedroff*, a Russian Orthodox archbishop appointed by the schismatic Russian Orthodox Church of North America sought to eject his rival, a Russian Orthodox archbishop appointed by the Patriarch of Moscow, from the Russian Orthodox Cathedral in New York.[18] The parties agreed that a corporation aligned with the American group held undisputed legal title to the Cathedral, but the issue was joined on the question of beneficial use.[19] The Moscow appointee claimed beneficial use of the Cathedral on the grounds that he was the legitimate archbishop under Church law as it (undisputedly) stood before the schism.[20] The New York Court of Appeals ruled against the Moscow appointee based on a New York law that purported to remove New York's Russian Orthodox churches from Moscow's administrative authority.[21] The Supreme Court reversed and remanded, holding that the New York law at issue unconstitutionally prohibited the free exercise of religion.[22] The Court reasoned that the New York law, in "pass[ing] the control of matters strictly ecclesiastical from one church authority to another[,]" impeded "the free exercise of an ecclesiastical right, the Church's choice of the hierarchy."[23] The Court not only asserted that the Free Exercise clause protected a religious body's "[f]reedom to select the clergy[,]"[24] but also appeared to embrace the more general principle that all "matters of church government" were beyond civil cognizance.[25]

In *Milovojevich*, the highest ecclesiastical authority ("Authority") of the Serbian Orthodox Church (an institution named the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church) defrocked the bishop of the Serbian Eastern Orthodox

17. Both cases also featured pungent dissents—by Justice Jackson in *Kedroff*, 344 U.S. at 126–32 (Jackson, J., dissenting) and by Justices Rehnquist and Stevens in *Milivojevich*, 426 U.S. at 725–35 (Rehnquist, J., joined by Stevens, J., dissenting).

18. 344 U.S. at 95–97.

19. *Id.* at 96 n.1.

20. *Id.* at 96, 102.

21. *Id.* at 97.

22. *Id.* at 121.

23. *Id.* at 119.

24. *Id.* at 116.

25. *Id.* Faced with a scarcity of instructive precedents, the *Kedroff* Court invoked the church-friendly spirit of American law. In a much-quoted passage, the Court characterized its prior opinion in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871) (involving a church-property dispute with no constitutional questions), as "radiat[ing] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116.

Diocese for the United States and Canada and then reorganized the diocese.[26] In ensuing litigation, the Illinois Supreme Court held that the defrocking was invalid under the Church's own rules and that the reorganization was beyond the power of the Authority.[27] The Supreme Court reversed, holding that the First and Fourteenth Amendments require civil courts to accept the determinations of the "highest ecclesiastical tribunal within a church of hierarchical polity"[28] with respect to "religious issues of doctrine or polity,"[29] even when those determinations arguably exceeded that tribunal's own "jurisdiction."[30] The *Milivojevich* Court endorsed *Kedroff*'s Free Exercise-based argument for church autonomy while also stressing the principle that the civil power should not decide religious controversies or pick sides among religious rivals—an argument sounding in the Establishment Clause.[31] The Court also suggested that deference to the highest ecclesiastical tribunals was appropriate on purely prudential grounds.[32] The Court reasoned that, because ecclesiastical tribunals are presumably more competent than secular courts to interpret applicable religious law, civil abstention might, on the whole, promote substantive justice.[33]

Together, *Kedroff* and *Milivojevich* supported the notion that the Religion Clauses (and, perhaps, simple good sense) required courts to strictly respect the power of churches to (1) govern themselves—and especially to select their own "clergy"—according to internal standards, and (2) conclusively interpret those standards themselves. The courts soon faced questions about the extent of church autonomy in contexts less exotic and exceptional than those in *Kedroff* and *Milivojevich*. After all, the twentieth century saw an explosion of state and federal laws governing the employment relationship. Most notably, legislatures passed laws setting minimum wages, mandating payment of overtime, and forbidding covered employers from discriminating according to designated criteria (primarily race, sex, and religion).[34] Courts quickly realized that to entertain church-

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26. Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 697–98 (1976).

27. *Id.* at 698.

28. *Id.* at 709.

29. *Id.*

30. *Id.* at 714.

31. The *Milivojevich* Court embraced deference to the highest ecclesiastical tribunals lest "the State . . . become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs," a danger present not only in disputes over doctrine but also in "disputes over church polity and church administration." *Id.* at 709–10.

32. *Id.* at 713.

33. *Id.* at 714 n.8.

34. Federal employment law is particularly important and has provided the model for much state legislation. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2021); Title VII of the Civile Rights Act of 1964, 42 U.S.C. §§ 2000e–

employee suits brought under these new laws (or asserting substantively similar claims sounding in tort and contract) could endanger the constitutional and prudential principles articulated in *Kedroff* and *Milovojevich*.

First of all, application of secular employment standards to religious employers may burden religious exercise in at least two ways: by intrinsically corrupting or impairing religious exercise or by impairing the relationship between a religious principal and its religious agent. Intrinsic impairment can occur if enforcement of governmental standards would render some activity religiously invalid or deficient—for example, sex discrimination standards enforced to require ordinations of female Catholic priests or wage and hours laws enforced to negate vows of poverty.[35] Impairment of religious agency occurs when legal standards restrict an employer's power to choose or direct religious agents, who may fail to advance or even thwart an employer's core religious purposes. For example, anti-discrimination norms—or even the possibility that they might be applied—could prevent replacement or effective discipline of a turbulent, scandalous, ineffective, or heretical pastor.[36]

Employment suits against religious employers also raise the specter of various forms of government "entanglement" with religion precluded by the Establishment Clause. Most obviously, for a government agency (court, legislature, or other) to determine who serves a religious function, or to influence how that function is performed evokes manifestly unconstitutional practices historically common in states with established religions—practices such as state appointment and supervision of clergy. Moreover, litigation (especially discovery) and enforcement may easily lead to government intrusion into and sustained oversight of religious organizations and/or lending governmental support to one faction or another of an intra-religious conflict. Finally, it is difficult to resolve any dispute regarding an employee with religious functions without—implicitly or explicitly—resolving some issue ostensibly beyond secular competence: the religious requirements of the job, the religious

2000e-17 (2021); Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101–2109 (2021).

35. There may also be cases where the absence of external control has inherent religious significance.

36. In one influential case, the First Circuit stressed "the difficulties inherent in separating the message from the messenger—a religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents." Natal v. Christian & Missionary All., 878 F.2d 1575, 1578 (1st Cir. 1989).

performance of the employee, or the plausibility or importance of any religious reasons the employer offers for its actions.[37]

In response to this multitude of hazards, courts developed a policy of giving a wide berth to employment-related civil actions brought by certain employees important to the religious mission of religious organizations. By the mid-1980s, this practice of abstention had been named the "ministerial exception[.]"[38] By 2008, some version of the ministerial exception had been endorsed by all twelve of the geographic federal courts of appeals.[39]

This impressive consensus, however, masked significant obscurity about the justification, nature, and scope of the ministerial exception. Was it a constitutional rule or a rule of statutory interpretation?[40] If constitutional, how could it be squared with the Supreme Court's holding in *Employment Div., Dept. of Human Resources of Ore. v. Smith*,[41] which held that religious conduct was not constitutionally exempt from neutral laws of general

37. Ironically, this last risk—that a secular court will decide religious disputes—is greater when the law expressly provides exemptions for religious motives.

38. *See, e.g.*, Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (referring to "[t]he 'ministerial exception' to Title VII").

39. The *Hosanna-Tabor* Court demonstrated the ostensible unanimity of the lower courts with this imposing string cite:

> Natal v. Christian & Missionary All., 878 F.2d 1575, 1578 (1st Cir. 1989); Rweyemamu v. Cote, 520 F.3d 198, 204–209 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 303–307 (3d Cir. 2006); E.E.O.C. v. Roman Cath. Diocese of Raleigh, 213 F.3d 795, 800–801 (4th Cir. 2000); Combs v. Cent. Tex. Ann. Conf. of the United Methodist Church, 173 F.3d 343, 345–350 (5th Cir. 1999); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225–227 (6th Cir. 2007); Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362–363 (8th Cir. 1991); Werft v. Desert Sw. Ann. Conf. of the United Methodist Church, 377 F.3d 1099, 1100–1104 (9th Cir. 2004) (per curiam); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655–657 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1301–1304 (11th Cir. 2000); E.E.O.C. v. Cath. Univ. of Am., 83 F.3d 455, 460–463 (D.C. Cir. 1996).

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 181 n.2 (2012).

40. Most courts before *Hosanna-Tabor* treated the ministerial exception as required by the Constitution, but the Seventh Circuit deemed it "a rule of interpretation, not a constitutional rule [although] . . . derived from policies that animate the First Amendment . . . . The assumption behind the rule—for it is an interpretive rule—is that Congress does not want courts to interfere in the internal management of churches . . . ." Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008) (Posner, J.).

41. 494 U.S. 872 (1990).

applicability?[42] Whatever its normative weight, was it based on free-exercise principles, non-establishment principles, or both?[43] Was it an affirmative defense or a jurisdictional bar?[44] Was the employer's assertion of religious motives for its challenged employment decision ever relevant to the ministerial exception analysis?[45] More specifically, did the ministerial exception categorically bar harassment claims even when the employer proffered no religious reasons for alleged harassment?[46] Did it also apply to claims beyond employment discrimination, such as wage and hour claims or some employment claims sounding in tort and contract?[47]

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42. *Id.* at 879.

43. *Compare* Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006) (grounding the ministerial exception in a religious organization's right under "[t]he Free Exercise Clause . . . to decide matters of faith, doctrine, and church governance"), *with Schleicher*, 518 F.3d at 475 ("[T]he relevant policies [behind the ministerial exception] come from the establishment clause rather than from the free-exercise clause."). *See also* Rweyemamu v. Cote, 520 F.3d 198, 205 (surveying contrasting justifications of the ministerial exception).

44. *Compare* Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007) (jurisdictional bar), *and* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1038–39 (7th Cir. 2006) (same), *with Petruska*, 462 F.3d, at 302 (affirmative defense), Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 654 (10th Cir. 2002) (same), Bollard v. Cal. Province of Soc'y of Jesus, 196 F.3d 940, 951 (9th Cir. 1999) (same), *and* Natal v. Christian & Missionary All., 878 F.2d 1575, 1576 (1st Cir. 1989) (same).

45. Many ministerial exception cases affirm that in "'quintessentially religious' matters . . . the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it." Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985). It is not self-evident, however, that every conceivable employment decision relating to a "minister" is per se "quintessentially religious." *See* Drevlow v. Lutheran Church, Mo. Synod, 991 F.2d 468, 471 (8th Cir. 1993) ("The First Amendment does not shield employment decisions made by religious organizations from civil court review . . . where the employment decisions do not implicate religious beliefs, procedures, or law.").

46. *Compare* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 960–63 (9th Cir. 2004) (holding that ministerial exception did not bar minister's harassment claims to the extent claims (1) did not implicate the employer's "unfettered" power to make "tangible" employment decisions—"such as hiring, firing, failing to promote, reassignment with significant responsibilities, or . . . causing a significant change in benefits" and (2) employer pled no religious justification for "tolerating or failing to stop the [alleged] sexual harassment."), *with* Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1244–45 (10th Cir. 2010) (declining to follow *Elvig* and holding that "the ministerial exception applies [to employment discrimination claims] without regard to the type of claims being brought.").

47. *See, e.g.*, Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309 (4th Cir. 2004) (holding ministerial exception barred wage and hour claims); Schleicher v. Salvation Army, 518 F.3d 472, 477–78 (7th Cir. 2008) (same); Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986) (holding

The most important and most nettlesome questions concerned the definition of ministerial status. Although most circuit courts expressly adopted the view that a worker was ministerial if her "primary duties" were important to the religious mission of the employer, this test proved of limited use.[48] After all, many activities in a generally religious setting can, in perfect good faith, be considered either "religious" or "secular." For example, playing a church organ may be considered simply a technical performance or a direct and critical participation in religious worship.[49] Even supposing duties have been satisfactorily classified, how should a court determine which class of duties is "primary"? Is it the relative time spent on religious or secular duties or a court's more or less subjective judgment about the basic nature of a particular role? Pre-*Tabor* jurisprudence also left unclear what weight to give to intuitively relevant factors, such as the extent of an employee's degree of specialized religious training, place in a formal hierarchy, and clerical titles.

B. *Hosanna-Tabor and OLG*

Several decades after the ministerial exception's first appearance in federal jurisprudence, the Supreme Court finally granted certiorari in a case that put the existence and scope of the exception squarely at issue. *Hosanna-Tabor* involved a suit brought by Cheryl Perich, a fourth-grade teacher at a school run by defendant Hosanna-Tabor Evangelical Lutheran Church (the "Church").[50] Perich was a "called" teacher, i.e., a teacher commissioned by a Lutheran congregation on the basis of a perceived divine calling after a period of substantial training and an examination.[51] In addition to teaching, Perich

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ministerial exception barred claims of fraud, defamation, intentional infliction of emotional distress, and breach of contract); *Petruska*, 462 F.3d at 310–11 (holding ministerial exception barred civil conspiracy, negligent supervision, and negligent retention claims, but did not bar fraudulent misrepresentation claim or breach of contract claim); Lewis v. Seventh Day Adventists Lake Region Conf., 978 F.2d 940, 942–43 (6th Cir. 1992) (holding ministerial exception barred claims for breach of contract, promissory estoppel, intentional infliction of emotional distress, and loss of consortium).

48. *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1790 (2008).

49. *Compare* E.E.O.C. v. Roman Cath. Diocese of Raleigh, 213 F.3d 795, 804 (4th Cir. 2000) (determining that the organist's duties were ministerial because the organist "was the primary human vessel through whom the church chose to spread its message in song"), *with* Archdiocese of Wash. v. Moersen, 925 A.2d 659, 669–70 (Md. 2007) (declining to find the organist's role ministerial because the position only required "knowledge of how to play an organ" and did not require "religious-based qualification[s]").

50. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 177 (2012).

51. *Id.* at 177–78.

participated in (and sometimes took a leading role in) prayer services and other religious activities.[52] The Church resisted Perich's efforts to return to work after disability leave arising from narcolepsy.[53] In the course of the ensuing dispute, Perich threatened to sue for disability discrimination, thus allegedly violating the Church's religious principles of resolving disputes internally.[54] The Church fired Perich, citing her threat of litigation along with Perich's alleged self-centeredness and insubordination.[55] Perich and the E.E.O.C. sued the Church in the Eastern District of Michigan, alleging unlawful retaliation under the Americans with Disabilities Act and Michigan law.[56] The District Court granted the Church's motion for summary judgment, holding that Perich was a "minister" whose claims were jurisdictionally barred by the ministerial exception.[57] The Sixth Circuit vacated and remanded, holding that Perich was not a minister and that her claims should therefore be allowed to proceed.[58] Applying the "primary duties" test, the Sixth Circuit determined that Perich's function was primarily secular, emphasizing that Perich spent almost all of her time teaching secular subjects in an ostensibly secular way.[59] The court saw little significance in Perich's religious title, specialized training, and religious activities, noting that her duties were the same as those of "lay" teachers without that title or training, and who were not even required to be Lutheran.[60] The court also dismissed the suggestion that Perich's responsibility to act as a "Christian role model[]" could

52. *Id.* at 178.
53. *Id.* at 178–79.
54. *Id.* at 179–80.
55. *Id.* at 179.
56. *Id.* at 180.
57. *Id.* at 180–81.
58. *Id.* at 181. *See also* E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 778 (6th Cir. 2010) ("As a general rule, an employee is considered 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.'" (quoting Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007))).
59. *Hosanna-Tabor*, 597 F.3d at 780 ("Perich spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects, using secular textbooks, without incorporating religion into the secular material.").
60. *Id.* at 781. The court opined that it would be improper (indeed, "illogical") to deem non-Lutheran teachers "ministers" for purposes of the ministerial exception. *Id.* ("[T]he intent of the ministerial exception is to allow religious organizations to prefer members of their own religion and adhere to their own religious interpretations. Thus, applying the exception to non-members of the religion and those whose primary function is not religious in nature would be both illogical and contrary to the intention behind the exception.").

"transform Perich's primary responsibilities in the classroom into religious activities."[61]

The Supreme Court reversed in a unanimous opinion authored by Chief Justice Roberts.[62] The opinion of the Court resolved several open questions. The Court not only ratified the existence of the ministerial exception, but also placed it on firmly constitutional ground by opining that the ministerial exception is required by both Religion Clauses.[63] The Court explained that

> [b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[64]

The Court roundly rejected the argument that its holding in *Smith* "foreclose[d] recognition of a ministerial exception rooted in the Religion Clauses."[65] The Court reasoned that *Smith* applied only to "outward physical acts" of religiously motivated individuals, not "internal church decision[s] that affect[] the faith and mission of the church itself."[66] In a footnote, the Court also clarified that the ministerial exception was not a jurisdictional bar but rather an affirmative defense.[67]

Considering Perich's case, the Court concluded that she should be considered a minister "given all the circumstances of her employment."[68] While the Court declined to adopt a "rigid formula" for determining ministerial status, it considered four circumstances as particularly relevant: (1) the Church "held Perich out" as a minister by giving her a title (i.e., "called" teacher) that distinguished her from the generality of congregants,[69] (2) that Perich's title reflected significant religious training and formal commissioning,[70] (3) that Perich held herself out as a minister in multiple respects,[71]

61. *Id.* at 780.

62. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012).

63. *Id.* at 188–90.

64. *Id.* at 188–89.

65. *Id.* at 190.

66. *Id.* (citing Emp. Div., Dep't of Hum. Res. Of Or. v. Smith, 494 U.S. 872, 877 (1990)).

67. *Id.* at 195 n.4.

68. *Id.* at 190.

69. *Id.* at 191.

70. *Id.*

71. Perich "accept[ed] the formal call to religious service," claimed a tax benefit available only to those involved in "ministry," and referred to her job at Hosanna-Tabor as "the teaching ministry." *Id.* at 191–92.

and (4) Perich's duties at the school (particularly her teaching of religion and her involvement in religious services) "reflected a role in conveying the Church's message and carrying out its mission."[72] While the Court neither repudiated nor endorsed the predominant "primary duties" approach to ministerial status, it clearly discouraged the Sixth Circuit's focus on "the relative amount of time Perich spent performing religious functions," counseling that the issue of ministerial status "is not one that can be resolved by a stopwatch."[73]

Having found that the ministerial exception applied to Perich, the Court held that the exception barred any claim (including the retaliation claims) challenging her termination.[74] Importantly, the Court made clear that the decision to terminate a minister was unreviewable even when not "made for a religious reason."[75] It was therefore legally irrelevant whether, as Perich claimed, Hosanna-Tabor's asserted religious reasons were pretextual.[76]

The *Hosanna-Tabor* Court emphasized the modesty of its holding. The Court claimed to have held only that the ministerial exception barred "an employment discrimination suit, brought on behalf of a minister, challenging her church's decision to fire her."[77] The Court declined to say whether or how the exception applied to "other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."[78]

Hosanna-Tabor confirmed and strengthened the general tendency of courts to accept church employer assertions of the ministerial exception, but some courts, notably the Ninth Circuit, sought to establish some robust limits to the doctrine.

In *Biel v. St. James Sch.*,[79] Plaintiff Kristen Biel alleged that her former employer, St. James Catholic School, violated the Americans with Disabilities Act (ADA) when it declined to renew Biel's contract as an elementary school teacher because Biel anticipated missing work for cancer treatment.[80] The District Court agreed with St. James that Biel was a "minister" under Hosanna Tabor and dismissed

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72. *Id.* at 192.
73. *Id.* at 193–94.
74. *Id.* at 194.
75. *Id.*
76. *Id.* at 194–95 ("[Plaintiffs' suggestion] that [the Church's] asserted religious reason for firing Perich . . . was pretextual . . . misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason [, but rather to] ensure[] that the authority to select and control who will minister to the faithful . . . is the church's alone.").
77. *Id.* at 196.
78. *Id.*
79. CV 15-04248 TJH (Asx), 2017 WL 5973293 (C.D. Cal. Jan. 24, 2017).
80. *Id.* at *1.

Biel's suit,[81] but a divided panel of the Ninth Circuit reversed.[82] Although the circuit court acknowledged that *Hosanna-Tabor* did not establish a rigid test for ministerial status, its analysis nonetheless focused on the "four major considerations"[83] highlighted by the *Hosanna-Tabor* Court—i.e., : (1) whether the school held the employee out as a minister, (2) whether the employee's title reflected ministerial training and function, (3) whether the employee held herself out as a minister, and (4) whether the employee's duties included important religious functions—and applied these much the manner of a multi-factor test.[84] The court concluded that because Biel had a secular title and training and neither St. James nor Biel herself presented herself to the community as a "minister," the first three considerations weighed against finding ministerial status.[85] The court admitted that the fourth consideration weighed in favor of ministerial status because Biel "taught lessons on the Catholic faith four days a week"[86] and "incorporated religious themes and symbols into her overall classroom environment and curriculum"[87] as required by Biel's contract and St. James's faculty handbook. As the court interpreted *Hosanna-Tabor*, however, this fourth circumstance could not be independently sufficient to make Biel a minister lest "most of the analysis in *Hosanna-Tabor* would be [reduced to] irrelevant dicta."[88] The court resisted the notion that the ministerial exception applied to "every employee whose job has a religious component,"[89] and instead suggested that it applied chiefly—though not, perhaps, exclusively—to employees who "serve a leadership role in the faith."[90]

Four months later, in *Morrissey-Berru v. Our Lady of Guadalupe Sch.*,[91] another panel of the Ninth Circuit summarily applied the holding in *Biel* to reject a Catholic school's assertion of the ministerial exception against a former teacher, Agnes Morrissey-Berru.[92] The

81. *Id.* at *3.
82. Biel v. St. James Sch., 911 F.3d 603, 611 (9th Cir. 2018).
83. *Id.* at 607.
84. *Id.*
85. *Id.* at 608–09.
86. *Id.* at 609.
87. *Id.*
88. *Id.*
89. *Id.* at 610–11.
90. *Id.* at 611.
91. 769 F. App'x 460 (9th Cir. 2019).
92. Morrissey-Berru worked as a fifth and sixth grade teacher at Our Lady of Guadalupe School in a role very similar to that of Kristen Biel. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2056 (2020). Morrissey-Berru claimed that Our Lady of Guadalupe School demoted her and failed to renew her contract to replace her with a younger teacher in violation of the Age Discrimination in Employment Act. *Id.* at 2053. As in *Biel*, the Ninth Circuit stated that Morrissey-Berru's "significant religious responsibilities" as a teacher

defendants in *Biel* and *OLG* petitioned the Supreme Court, which granted certiorari, consolidated the two cases, and reversed the Ninth Circuit by a 7-2 vote.[93]

The *OLG* Court held that both teachers were ministers because, despite being somewhat differently circumstanced from Perich, "abundant record evidence" showed that they "performed vital religious duties" (including providing religious instruction and participating in prayer and formal religious activities) that were "at the core of the mission of the schools where [plaintiffs] taught."[94]

Although the *OLG* majority rejected nothing stated in *Hosanna-Tabor*, it did represent an important shift in emphasis. While *Hosanna-Tabor*'s totality-of-the-circumstances analysis of ministerial status gave courts little direction as to the relative weight to be given to factors such as title, training, and distinctively religious duties, the *OLG* Court endorsed an overriding concern with an employee's religious functions. "What matters, at bottom," the Court declared, "is what an employee does[.]"[95] The Court implied that other circumstances are relevant only to the degree that they help to elucidate the employee's "role in conveying the [religious employer's] message and carrying out its mission."[96]

The Court specifically held that the ministerial exception applied whenever "a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith."[97] The Court also strongly suggested a broader standard previously articulated in a concurring opinion by Justice Alito (joined by Justice Kagan) in *Hosanna-Tabor*:[98] i.e., that the ministerial exception applies 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."[99] The Court also rejected plaintiffs' suggestion that ministerial status be limited to practicing coreligionists of the religious employer.[100] The Court stated that to try to determine the boundaries between religionists and co-religionists and between practicing and non-practicing

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were not sufficient to make her a constitutional "minister." *Morrisey-Berru*, 769 F. App'x at 461.

93. *OLG*, 140 S. Ct. at 2049.

94. *Id.* at 2066.

95. *Id.* at 2064.

96. *Id.* at 2063 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 192 (2012)).

97. *Id.* at 2069.

98. 565 U.S. at 198–206.

99. *OLG*, 140 S. Ct. at 2064. As in *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). Justice Thomas opined in a concurrence that courts should "defer to religious organizations' good faith claims that a certain employee's position is ministerial." *OLG*, 140 S. Ct. at 2069–70.

100. *OLG*, 140 S. Ct. at 2070.

members of the faith would "risk judicial entanglement with religious issues."[101]

In addition to making clear that the ministerial exception applies to a broad set of employees—arguably including virtually all teachers at religious schools charged with providing some religious instruction—*OLG* also suggested that the doctrine applied to a broad set of claims. Although the plaintiffs in *OLG* both challenged only *termination* under *employment discrimination* laws, language in *OLG* signaled that the ministerial exception (1) extends beyond selection (hiring and firing) to protect a church's discretion in "supervis[ing]" its ministers[102] and (2) at least in the case of teachers of religion, extends beyond employment discrimination laws to bar any judicial review of "disputes between the school and the teacher."[103]

Justice Thomas voted with the majority but wrote separately, joined by Justice Gorsuch, to opine that the Constitution required courts to "defer to religious organizations' good faith claims that a certain employee's position is 'ministerial.'"[104] Such deference was necessary, Justice Thomas reasoned, because "[w]hat qualifies as 'ministerial' is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis."[105] Notably, Justice Thomas joined the majority opinion in full, suggesting that he believed the principle of deference consistent with the reasoning of the majority opinion (and therefore fully eligible for adoption by a future Court).[106]

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101. *Id.* at 2068–69 ("Are Orthodox Jews and non-Orthodox Jews coreligionists? . . . . Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists? . . . . Would the test [of whether an employee is "practicing"] depend on whether the person no longer considered himself or herself to be a member of a particular faith? Or would it turn on whether the faith tradition in question still regarded the person as a member in some sense?"). The Court also argued that limiting ministerial status to "practicing" coreligionists might be unfair to employers. *Id.* at 2069 ("Beyond insisting on [employee attestations of 'good standing'], it is not clear how religious groups could monitor whether an employee is abiding by all religious obligations when away from the job.").

102. *Id.* at 2060–61 ("[A] church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities.").

103. *Id.* at 2069 ("When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.").

104. *Id.* at 2069–70. Justice Thomas wrote separately in *Hosanna-Tabor* to make the same argument. 565 U.S. at 196 (Thomas, J., concurring).

105. *OLG*, 140 S. Ct. at 2070.

106. This striking, even startling suggestion that an ostensibly legal determination—i.e., what relationships come within the ambit of a prophylactic constitutional doctrine—be in effect referred to a private party appears elsewhere in law and religion jurisprudence. Gabrielle M. Girgis, *What is a "Substantial*

In a vigorous dissent joined by Justice Ginsburg, Justice Sotomayor stressed the "extraordinar[y] poten[cy]" of the ministerial exception, which, when it applies, does not require an employer to "cite or even possess a religious reason [for alleged discrimination] at all" and "even condones animus."[107] The risk of abuse demands a restricted scope, especially given the exigencies of American pluralism, which "requires religious entities to abide by generally applicable laws."[108] On the dissent's telling, *Hosanna-Tabor*, like the lower court jurisprudence that preceded it, reflected such an appropriately narrow conception of the ministerial exception, focused chiefly on the putative minister's role in leading or personifying a religious institution.[109] The majority's function-based inquiry, by contrast, improperly and "mechanically" cast the mantle of categorical immunity over employers based on the relatively tenuous connection to religion of "teach[ing] short religion modules."[110] Moreover, the Court's apparent refusal to consider whether a purported minister was a coreligionist led to the strange result that "[e]ven if [the *OLG* plaintiffs] were not Catholic, and even if they were forbidden to participate in the church's sacramental worship, they would nonetheless be 'ministers' of the Catholic faith."[111] On the dissent's interpretation, the Court had compounded the evil of the overbroad standard by implicitly adopting the principle of deference to employer proposed by the concurrence, thus "trad[ing] legal analysis for a rubber stamp."[112] This judicial abdication, the dissent suggested, was an invitation to the abuse prior doctrine had sought to forestall, with results that were "profoundly unfair" to employees and to non-religious entities.[113]

Burden" under RFA and the First Amendment?, 97 WASH. U. L. REV. 1755, 1758 (2020) (and discussing the meaning of "substantial burden" in RFRA).

107. *OLG*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

108. *Id.* at 2072.

109. *Id.* at 2072–73.

110. *Id.* at 2071, 2076.

111. *Id.* at 2081. The dissent was unimpressed by the Court's objections to using coreligionist status as a criterion, arguing that even if such a criterion might be difficult "to apply to faiths like Judaism or variations of Protestantism[,] . . . that has nothing to do with Catholicism." *Id.* (citation omitted).

112. *Id.* at 2076.

113. *Id.* at 2076, 2082.

> [The Court's] error . . . risks upending antidiscrimination protections for many employees of religious entities. Recently, this Court has lamented a perceived 'discrimination against religion.' Yet here it swings the pendulum in the extreme opposite direction, permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs. The inherent injustice in the Court's conclusion will be impossible to ignore for long, particularly in a pluralistic society like ours.

Id. at 2082 (citation omitted).

C. *The Ministerial Exception After OLG*

OLG left open important questions about the ministerial exception, including regarding its precise juridical nature,[114] the definition of covered employers,[115] and the scope of covered claims.[116]

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114. While the ministerial exception is certainly an "affirmative defense," the Court has yet to decide two questions on which lower-court judges are divided: (1) Is the exception, like most defenses, waivable by its beneficiary? *See* Billard v. Charlotte Cath. High Sch., No. 3:17-CV-00011, 2021 WL 4037431, at *12 (W.D.N.C. Sept. 3, 2021) (opining that the "reasoning" supporting the *Hosanna-Tabor* decision suggests that the ministerial exception defense is unwaivable but citing contrary opinions). (2) Does the exception protect defendants solely from liability, or does it, like qualified immunity, also protect defendants from the burdens of litigation? In *Tucker v. Faith Bible Chapel International*, 36 F.4th 1021, 1028, 1037 (10th Cir.), *reh'g en banc denied*, 53 F.4th 620 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 2608 (2023), a divided court held that "a decision denying a religious employer summary judgment on its 'ministerial exception' defense [does not] constitute[] an immediately appealable final order under the collateral order doctrine," stating that "nothing [in *Hosanna-Tabor*] suggests [that the ministerial exception provides] protection from the burdens of litigation itself." The dissent argued that the ministerial exception was no ordinary affirmative defense, but was rather a device to "advance[] values of a high order, protecting religious bodies from burdensome litigation over religious doctrine and preserving the structural separation of church and state." *Id.* at 1050–51 (Bacharach, J., dissenting). Since delayed appellate review could undermine these values, courts were "compel[led] . . . to resolve application of the ministerial exception at an early stage of the litigation," including by interlocutory review. *Id.* at 1051.

115. The Court has appeared to take for granted that the ministerial exception protects only "religious institutions" or "religious organizations." *OLG*, 140 S. Ct. 2049, 2060–61 (2020). It remains to be seen, however, whether this in all cases exempts coverage of for-profit or otherwise ostensibly "secular" organizations. *Cf.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719 (2014) (holding that for-profit corporations may have *statutory* free-exercise rights).

116. Although some courts hold that the exception applies equally to "tangible" employment discrimination claims (like those for discriminatory termination) and "intangible" employment discrimination claims (like those for harassment), it remains the law of the Ninth Circuit that the ministerial exception does not necessarily reach all "intangible" claims. *See* Orr v. Christian Bros. High Sch., Inc., No. 21-15109, 2021 WL 5493416, at *2 (9th Cir. Nov. 23, 2021), *cert. denied*, 143 S. Ct. 91 (2022) (confirming precedent that harassment claims can in principle "survive the ministerial exception," although plaintiff's specific "allegations [of harassment] . . . are so intertwined with [categorically protected] employment decisions that the claims cannot be separated."). Moreover, judges outside the Ninth Circuit have found this view persuasive, even after *OLG*. A panel of the Seventh Circuit adopted the Ninth Circuit's distinction between tangible and intangible employment actions, but that holding was reversed on rehearing en banc. *See* Demkovich v. St. Andrew the Apostle Par., Calumet City, 973 F.3d 718, 720–21 (7th Cir. 2020), *reh'g en banc granted, vacated* (Dec. 9, 2020), *on reh'g en banc*, 3 F.4th 968 (7th Cir. 2021). Judge Hamilton, author of the panel opinion, filed a thoughtful dissent from the en banc

Most relevant here, however, are open questions about its scope as to covered employees—that is, who, precisely, is a constitutional "minister"?

The "primary duties" test of ministerial status has receded from view since *OLG*, removing what little clear structure belonged to the ministerial status inquiry.[117] Courts have been tasked with *ad hoc* weighing whatever circumstances of employment appear relevant. Nonetheless, there are important, naturally recurrent questions on which the Supreme Court could in principle provide guidance. For example, as religious institutions become more legally sophisticated, they will be sorely tempted to misclassify employees to insulate themselves from litigation. In light of that risk of abuse, how much weight should courts give to whether an employee's contract (or other employment-related documents) call her a "minister," and what facts should a court consider to determine whether this label has been applied in good faith? Or again, can a plaintiff's alleged failure to actually exercise religious responsibilities or perform religious duties ostensibly within her job description take her outside the ministerial exception?[118] What weight should be given to the existence of

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decision. Despite this uncertainty, it is fair to say that, since *OLG*, courts have tended to take an expansive view of the substantive reach of the ministerial exception, in some cases going beyond anything clearly demanded by Supreme Court precedent. For example, the ministerial exception has been applied to bar wage and hour claims, claims sounding in contract, and tort claims not involving discrimination. *See, e.g.*, Simon v. Saint Dominic Acad., No. 19-CV-21271, 2021 WL 6137512, at *1 (D.N.J. Dec. 29, 2021) (dismissing claims of breach of the employee manual, breach of the implied covenant of good faith and fair dealing, and the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.*); Samano v. Temple of Kriya, 2020 IL App (1st) 190699, ¶ 63, 166 N.E.3d 250, 266 (2020) (dismissing state minimum wage claim); Rehfield v. Diocese of Joliet, 2021 IL 125656, ¶ 1, 182 N.E.3d 123, 127 (2021) (dismissing claims for retaliatory discharge and violation of state whistleblower law). Moreover, the ministerial exception (or at any rate the underlying principle of the sanctity of the relationship between a church and its ministers) has now been used as a sword rather than a shield, with one federal court holding that the First Amendment entitles religious student groups at public universities the right to their discretion in selection of their "ministerial" officers. InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ., 534 F. Supp. 3d 785, 811–12 (E.D. Mich. 2021).

117. *See* Damonta D. Morgan & Austin Piatt, *Making Sense of the Ministerial Exception in the Era of* Bostock, 2022 U. ILL. L. REV. ONLINE 26, 36 (2022) (explaining that, since *OLG*, "federal and state courts have struggled to apply the Court's analysis even-handedly to a variety of factual scenarios.").

118. *Compare* Ostrander v. St. Columba Sch., No. 3:21-CV-00175-W-LL, 2021 WL 3054877, at *6 (S.D. Cal. July 20, 2021) ("[T]he language [in plaintiff's employment agreement attributing to her a "ministerial role"] tells us what [she] was *supposed* to do, not what she *actually* did. . . . Since [the] Complaint does not provide facts sufficient to infer [plaintiff] engaged in acts pursuant to educating or forming students in the faith of the church . . . [dismissal] under the ministerial exemption is not warranted at this time."), *with* Starkey v. Roman

contractual "morals clauses" binding employees to religiously based standards of conduct?[119]

Perhaps the most significant question in determining ministerial status has been specific to teachers at religious schools: What makes teaching "ministerial"? Both *Hosanna-Tabor* and *OLG* involved teachers whose duties included directly inculcating religious doctrine. This leaves open a question: Can a teacher who does not teach doctrine nonetheless be a "minister" based on a duty to relate ostensibly secular material to religion? And does it matter whether the teacher must carry out her duty consistent with some official orthodoxy or definable religious agenda? In *DeWeese-Boyd v. Gordon Coll.*,[120] the Supreme Judicial Court of Massachusetts held that a professor of social work at a nondenominational but intensely Christian college was not a "minister" despite her obligation to integrate Christianity into her teaching and scholarship, reasoning that this "integrative responsibility" was "different in kind, and not degree, from the religious instruction and guidance at issue in *Our Lady of Guadalupe* and *Hosanna-Tabor*."[121] The Supreme Court denied certiorari, but Justice Alito, in a statement joined by Justices Thomas, Kavanaugh, and Barrett, expressed grave "doubts about the state court's understanding of religious education and, accordingly, its application of the ministerial exception"[122] and signaled an inclination to review the holding of the Supreme Judicial Court at a later stage of the litigation.[123]

Despite the many unresolved questions about the contours of the ministerial exception, the Court appears committed to a robust view

Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 941 (7th Cir. 2022) (rejecting plaintiff's argument that she should not be considered a minister because she did not actually engage in the religiously significant activity within her job description, reasoning that, in determining ministerial status, "[w]hat an employee does involves what an employee is entrusted to do, not simply what acts an employee chooses to perform," lest "[r]eligious institutions . . . have less autonomy to remove an underperforming minister than a high-performing one.").

119. *Compare Starkey*, 41 F.4th at 941 (concluding that plaintiff was a minister, partly on grounds that her employment contract included a "morals clause" constraining her to live by Church teaching), *with* Crisitello v. St. Theresa Sch., 242 A.3d 292, 299 (N.J. Super. Ct. App. Div. 2020) (rejecting defendant's suggestion that "plaintiff's alleged agreement to refrain from 'immoral conduct' [as understood by the Catholic Church] converted her from a lay teacher to a minister"), *rev'd on other grounds*, 2023 WL 5185586 (N.J. Aug. 14, 2023).

120. DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000 (Mass. 2021).

121. *Id.* at 1017.

122. Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 954 (2022) ("[The state court's] conclusion [that integrative responsibility is different in kind from direct religious instruction] reflects a troubling and narrow view of religious education. What many faiths conceive of as 'religious education' includes much more than instruction in explicitly religious doctrine or theology.").

123. *Id.* at 955.

of church autonomy, which will likely lead the court to expand the exception in any future cases. Moreover, *Hosanna-Tabor* and *OLG* appear to require at least this: Religious employers are immune from liability on claims brought by employees who perform important religious functions, whenever those claims challenge the employer's failure to hire, discharge, supervise, or manage the plaintiff—and that immunity exists whatever the employer's motives. As discussed in Part II, this broad understanding of the ministerial exception has been subject to considerable, and often heated, scholarly debate.

II. PART TWO

Since the Supreme Court decided *Hosanna-Tabor* in January 2012, the modest body of scholarship on the ministerial exception has grown into a substantial literature,[124] marked by strong disagreements about the proper scope and indeed the basic legitimacy, of the exception.[125]

A. *The Critics*

As discussed in the previous section, the current Supreme Court doctrine arguably implies what may be called the "broad view" of the ministerial exception.[126] On the broad view, the Religion Clauses of the Constitution require that religious employers enjoy immunity from employment discrimination suits (including harassment suits) brought by employees who perform important religious functions. This immunity applies whether or not the employer adduces religious reasons for the challenged decision.[127] Scholars have attacked the broad view[128] as constitutionally unwarranted and substantively undesirable.

Critics argue that the Religion Clauses do not, either separately or together, justify the broad view. For some, the Free Exercise Clause is essentially irrelevant. Following the rationale of *Smith*, they argue that religious actors are not "above the law."[129] The Free Exercise Clause does not protect religiously motivated employment practices from neutral laws of general applicability such as

124. .To take a very rough measure: an October 12, 2023, Westlaw search returned 1,135 law review or journal articles containing the phrase "ministerial exception." Of these, 876 were published after January 1, 2012.

125. In what follows, I cite scholarship both before and after *Hosanna-Tabor* and *OLG*, as those cases have done little to change the terms of the scholarly debate.

126. *See supra* Part I.

127. *See supra* notes 4–5.

128. Whether or not imputed to the Supreme Court.

129. *E.g.*, Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2001–02 (2007).

employment discrimination laws.[130] These critics usually acknowledge constitutional protection for certain forms of religious employment discrimination—like the all-male Catholic priesthood—but would ground that protection in the right to freedom of association equally protective of secular activity.[131] Although the *Hosanna-Tabor* Court squarely denied that Smith applied to the internal governance decisions of religious organizations[132] and clearly affirmed that religion enjoys special constitutional protection,[133] some scholars remain unconvinced.[134]

Even supposing religious motives to be somehow, sometimes privileged, however, critics of the broad view argue that the Free Exercise Clause does not require *absolute* protection; religious rights therefore can be subject to balancing against competing interests or even be categorically trumped by certain other interests.[135] Or again,

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130. *E.g.*, *id.* at 1966–67 ("The free exercise clause neither guarantees religious organizations autonomy in their internal affairs nor shields them from neutral laws of general applicability like Title VII."); Molly A. Gerratt, *Closing A Loophole: Headley v. Church of Scientology International As an Argument for Placing Limits on the Ministerial Exception from Clergy Disputes*, 85 S. CAL. L. REV. 141, 186 (2011) (approving a "neutrality regime" for applying the Religion Clauses); Benton C. Martin, *Protecting Preachers from Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII*, 59 EMORY L.J. 1297, 1336 (2010) ("The deferential approach currently gives churches free rein to engage in actions that are repugnant to our national conscience: racial discrimination, gender discrimination, and even sexual harassment. The harsh results of deference and the refusal of most circuit courts to examine the government's interest in these cases provide clear evidence of the need for a better test. Moreover, the deferential approach relies upon precedent that does not deal with neutral laws, such as Title VII, and has been stripped of every constitutional foundation it might otherwise be based upon.").

131. Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 983–84 (2013) ("In ruling for Hosanna-Tabor, the Court explicitly rejected the EEOC's argument that Perich's case should be handled by the freedom of association protected by the First Amendment. The advantage of relying on association instead of religion is that 'the right to freedom of association is a right enjoyed by religious and secular groups alike.' The Court strongly rejected the EEOC's position as 'untenable' because the First Amendment 'gives special solicitude to the rights of religious organizations.' What the Court sees as 'special solicitude,' however, I see as lawlessness; the Court held that religious organizations enjoy special freedom to disobey the law.") (footnotes omitted).

132. Hosana-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012).

133. *See id.* at 189.

134. Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 432–33 (2013) (regretting that the *Hosanna-Tabor* Court unjustifiably "resurrected the constitutionally compelled exemption doctrine interred by Smith and has done so to afford the faith more protection than the faithful.").

135. Gerratt, *supra* note 130, at 202–03 (proposing balancing approach to ministerial exception); Daniel Gordon, *Gender, Race and Limiting the*

even if the Free Exercise Clause requires absolute protection for certain religiously motivated employment decisions, critics ask, why would it protect employers who adduce *no good-faith religious reasons* for their actions, or, worse yet, allegedly act contrary to their self-professed religious commitments?[136]

It is axiomatic that the Establishment Clause prevents the government (including courts) from becoming "entangled" with religion, including by determining matters of doctrine, church law, or religious qualifications for office, and by sustained intrusion into or oversight of religious organizations.[137] Critics of the broad view acknowledge that this non-entanglement principle—particularly the rule against judging religious controversies with religious criteria—may prevent adjudication of employment claims brought by ministers.[138] But they deny that the mere *possibility* of entanglement justifies a categorical bar on ministers' employment discrimination claims.[139] The risk of entanglement, these critics say, will depend on

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Constitutional Privilege of Religion As A Haven for Bias: The Bridge Back to the Twentieth Century, 31 WOMEN'S RTS. L. REP. 369, 374–75 (2010) (criticizing judicial tendency to protect religion without regard to competing values).

136. *See generally*, Marsha B. Freeman, *What's Religion Got to Do with It? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exemption*, 16 U. PA. J.L. & SOC. CHANGE 133 (2013). *See also, e.g.*, Corbin, *supra* note 129, at 2038 (stating that exemptions should be granted only to religious employers "whose religious beliefs . . . require race or sex discrimination," and principally on free-association grounds equally applicable to secular groups); Sarah Fulton, *Petruska v. Gannon University: A Crack in the Stained Glass Ceiling*, 14 WM. & MARY J. WOMEN & L. 197, 216 (2007) (endorsing the then-current rule in the Third Circuit that "to apply the ministerial exception . . . the employment decision must be motivated by religious belief, religious doctrine, or church regulation"); Jessica R. Vartanian, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for A More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049, 1073 (2009) (arguing that the ministerial exception should not preclude "holding religious employers accountable for their discriminatory employment actions absent evidence of a religious motivation"); Elizabeth R. Pozolo, *One Step Forward, One Step Back: Why the Third Circuit Got It Right the First Time in Petruska v. Gannon University*, 57 DEPAUL L. REV. 1093, 1118 (2008) (objecting to interpretations of the ministerial exception that would permit religious institutions to discriminate "for reasons unfounded in religious doctrine.").

137. *See OLG*, 140 S. Ct. 2049, 2070–71 (2020) (Thomas, J., concurring). *See also supra* Part I.

138. *See* Corbin, *supra* note 129, at 2006 (conceding that "at least in theory, the prosecution and defense of a Title VII lawsuit *could* lead to courts evaluating issues concerning religious doctrine," in contravention of the non-entanglement principle).

139. Some also suggest that courts underestimate the power of "neutral principles" of law in resolving employment claims involving ministers. Corbin, *supra* note 129, at 1987 ("The *Jones* Court held that deference to church authority is but one method of resolving a church dispute without deciding questions of doctrine. As an alternative, the court could apply neutral principles of law,

the facts and issues of each case, and it is inappropriate for courts to dismiss claims based on speculation or assumption.[140] In addition, some critics maintain that the test for ministerial status in itself risks unconstitutional entanglement, since it requires courts to determine the religious importance of particular jobs.[141]

Attacks on the constitutional foundation of the broad view serve chiefly to clear the way for policy-based denunciations of its perceived consequences. The most obvious, frequent, and forceful objection is that the broad view undermines compelling public interests in combatting discrimination in the workplace (or in society more

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provided that it 'involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.' In other words, to resolve a dispute between warring factions, the courts may examine church documents through the lens of the common law as long as they avoid doctrinal controversies.") (footnotes omitted).

140. Shawna Meyer Eikenberry, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269, 286–87 (1998) ("[M]any kinds of discrimination cases may be capable of being resolved without becoming excessively entangled in church doctrine, yet most courts refuse to even consider the possibility. For example, in McClure, the plaintiff claimed that she was paid less than her male counterparts. Such a claim can certainly be objectively evaluated without becoming excessively involved in church doctrine by simply evaluating the duties and wages of the church's employees. Also, in Young, the plaintiff had received excellent reviews, yet the church suddenly decided that she was not qualified to be a minister. A court could have objectively looked at Young's reviews that had been done by the church, and compared them with the church's claims that Young was not qualified. Doing this would not have involved the court in deciding whether a minister is qualified because it would be objectively relying upon the church's own judgments.") (footnotes omitted); Corbin, *supra* note 129, at 2009, 2028 (arguing that, contrary to what "[c]ourts and commentators assume" Title VII, at least "never requires . . . direct grappling with religious doctrine or beliefs. In a Title VII case, the court does not decide what is important to a religion. Instead, it decides whether a legitimate religious reason or an illegitimate secular reason (discrimination) motivated a decision. In other words, the court judges the credibility of a religious reason, rather than whether something is religiously true.") (footnotes omitted).

141. Sabine Tsuruda, *Disentangling Religion and Public Reason: An Alternative to the Ministerial Exception*, 106 CORNELL L. REV. 1255, 1298 (2021) ("[Some amici in *OLG*] argued that the Ninth Circuit should have inquired whether Biel performed 'significant religious responsibilities' or 'function[s],' and thus, whether her job functions were such that she led 'a religious organization, conduct[ed] worship services or important religious ceremonies or rituals, or serve[d] as a messenger or teacher of its faith.' But who are we to judge? What counts as a 'significant religious responsibility,' let alone a worship service, an 'important ceremony or ritual,' or whether someone is a mere teacher of religion or a voice for the organization's 'faith?' In Biel's case, are courts to look to the Vatican for guidance? And why treat Biel as any less competent than her school to determine the religious character of her work?") (footnotes omitted).

broadly).[142] Critics also say that the broad view incentivizes gamesmanship by religious employers, including bad-faith classification of employees as ministers and inducing ministerial employees to detrimentally rely on legally unenforceable promises of fair treatment.[143] Some argue that the test for ministerial status is overinclusive because it leads to plainly absurd consequences, like the possibility—so shocking to the *OLG* dissenters—that someone can be a "minister" of a religion to which they do not belong.[144]

What, according to the critics, should replace the broad view? Mainstream counterproposals fall into two main buckets, which we

142. There is prejudice to a wide range of public interests if the logic of the ministerial exception extends beyond garden-variety workplace discrimination claims to limit the applicability of a large range of laws. *See generally* Gerratt, *supra*, note 130 (discussing case applying ministerial exception to dismiss claims brought under Trafficking Victims Protection Act).

143. Allison R. Ferraris, *The Expansive Scope of the Ministerial Exception After* Our Lady of Guadalupe School v. Morrissey-Berru, 62 B.C. L. REV. E. SUPP. II.-280, II.-295–96 (2021) ("When the ministerial exception applies, it grants incredible deference to religious employers, and leaves employees with a stark lack of legal recourse. Such religious organizations are well aware of the potential immunity the ministerial exception affords to them and have attempted to bring more types of employees, employers, and claims within the exception's scope. Some organizations have even gone so far as to explicitly provide religious employers with guidance for avoiding civil rights lawsuits by using the ministerial exception."); Andrew Donivan, *Freedom of Breach: The Ministerial Exception Applied to Contract Claims*, 63 DEPAUL L. REV. 1063, 1086 (2014) ("The opportunity for abuse of the doctrine arises when a legally sophisticated religious institution creates an employment contract setting out a fixed term, while at the same time knowing that it does not have to fulfill its promise to employ the individual for the entire term. This abuse of bargaining power becomes bad faith if a church uses the illusion of an enforceable contract in order to convince the employee to accept lesser compensation in situations where, but for the promise of security, the employee would not have accepted the offer.").

144. *OLG*, 140 S. Ct. 2049 (2020); Griffin, *supra* note 131, at 1008 ("The injustices continue post-*Hosanna-Tabor*. A Kentucky court ruled that a tenured Jewish scholar of Jewish Studies at a Disciples of Christ seminary was a minister whose breach of contract lawsuit must be dismissed. The dissenting justice wisely complained, 'A basic tenet of Christianity is that Jesus Christ is the Son of God. Judaism does not accept that tenet. Therefore, it appears that, because of this seminal difference, Kant, as a practicing Jew, would not be qualified to be a minister of any Christian faith.' In the courts, however, Catholic women become priests and Jewish scholars turn out to be Christian ministers."); Madeleine Breaux, *Omnipotent Doctrine of Law: The Ministerial Exception After* Our Lady of Guadalupe School v. Morrissey-Berru, 82 LA. L. REV. 271, 290–91, 304–05 (2021) (opining that "it is a bit anomalous and nonsensical that someone not of the faith could serve as a true minister of that faith, embody the values of that faith, and instill those values in his or her students" and suggesting that OLG allows religious employers to "freely discriminate" against such a broad range of employees that the decision amounted to "judicial overreach.").

may call revisionist and strict constructionist.[145] For revisionists, any legitimate version of the ministerial exception should be conceived of as a limited accommodation of religious activity and/or a recognition of the state's incompetence to decide private religious questions, rather than recognition of a sphere of institutional autonomy for religious organizations.[146] Revisionists therefore reject status-based categorical immunity from employment discrimination laws.[147] Some would recognize exemptions only when employers prove non-pretextual religious reasons for the challenged employment action.[148] More moderate revisionists would require a showing of religious

145. A small minority (which we may call "abolitionist") would deny religious exemptions from at least some discrimination laws, or drastically limit such exemptions. *See, e.g.*, Ian Bartrum, *Religion and Race: the Ministerial Exception Reexamined*, 106 NW. U.L. REV. COLLOQUY 191, 191, 206 (2011-2012) (no exemption whatever from race discrimination laws); Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 WM. & MARY J. WOMEN & L. 459, 511 (2004) (employment discrimination only allowed by local religious groups in virtue of right to intimate association).

146. For clear and powerful critiques of a concept of church autonomy not reducible to individual rights or governmental incapacity, see Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 122–23 (2009) ("[T]he Constitution does not systematically protect the interests of certain classes of parties, defined by religious mission; rather, the Constitution disables civil courts from resolving certain classes of questions. This is an adjudicative disability, not a right of autonomy, and it rest on the Establishment Clause alone. Religious entities are the beneficiaries of such an adjudicative disability, but they are not the holders of primary rights to determine their own affairs in the face of contrary state interests") and Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 920 (2013) ("[I]nstitutions do not, in themselves, give rise to any distinctive set of rights, autonomy, or sovereignty, and that what might be called institutional or church autonomy is ultimately derived from individual rights of conscience.").

147. *See, e.g.*, Lupu & Tuttle, *supra* note 146, at 142–43 (arguing that the ministerial exception bars certain employment discrimination claims because the Establishment Clause prohibits courts from evaluating the work performance of clergy, not because "religious institution[s]" have "categorical immunity or autonomy"); Schragger & Schwartzman, *supra* note 146, at 981 (arguing that "[w]hether balancing [under the ministerial exception] leads to non-interference or exemptions for religious groups will be a matter of case-by-case" in the context of employment discrimination claims).

148. Vartanian, *supra* note 136, at 1063 (arguing that "the ministerial exception should apply on a case-by-case basis dependent on a showing of evidence that a First Amendment violation has occurred, instead of pursuant to the sweeping ministerial function test."). Notably, some revisionists would subject even good faith religious reasons to balancing. One commentator has suggested that religious interests may generally trump non-discrimination, but probably do not trump claims relating to "child labor, unfair wages, or sexual harassment." *See* Martin, *supra* note 130, at 1337.

reasons only for kinds of discrimination—e.g., discrimination based on disability—that rarely involve religious motives.[149]

Strict constructionists accept that the ministerial exception categorically (i.e., without regard to motive or competing interests) protects certain employment decisions involving certain church employees but would clearly restrict the class of decisions and/or the class of employees.[150] Most commonly, strict constructionists argue that the ministerial exception protects only "tangible" employment actions (such as hiring and firing) that limit a church's power to choose its ministers.[151] On this view, which some courts embrace,[152] churches are not constitutionally immune from *harassment* claims unless they show the alleged harassment has a religious motive. As an additional or alternative constraint, strict constructionists propose to discipline the ministerial-status inquiry and, likely, narrow application of the exception in practice.[153]

B. The Defenders

Supporters of the broad view have been quick to respond to criticisms, and some advocate a broader view still.

Perhaps the most important arguments made by supporters are aimed at the intuitive notion central to many revisionist arguments: that the Religion Clauses protect only employment decisions made for religious reasons. Most supporters embrace "church autonomy"—i.e., some constitutionally guaranteed zone of church sovereignty,

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149. *See, e.g.*, Renee M. Williams, *The Ministerial Exception and Disability Discrimination Claims*, 2011 U. CHI. LEGAL F. 423, 442–43, 445 (2011).

150. *See, e.g.*, Brian M. Murray, *A Tale of Two Inquires: The Ministerial Exception after Hosana-Tabor*, 68 S.M.U. L. REV. 1123, 1149 (2015) (proposing that the definition of minister under the ministerial exception should be limited to employees who "engage[] in responsibilities that directly cause or contribute to *institutional religious activity as a whole*, not *simply religious activity within an institution*").

151. Aimee Wuthrich, *Unacceptable Exceptions: Why the Ministerial Exception Does Not Encompass Hostile Work Environment Claims*, 71 U. KAN. L. REV. 321, 334–35 (2022) (criticizing a Seventh Circuit decision for its expansive reading of the ministerial exception that "inappropriately" extended a religious organization's "authority of selection and control beyond the termination context"); Sara Riddick, *The Seventh Circuit Got It Right the First Time: Addressing the Ministerial Exception and Workplace Harassment*, 71 DEPAUL L. REV. 141, 153–54 (2021) (advocating in favor of the Seventh Circuit's original determination that workplace harassment is not among the narrow rights to "select and control" employees granted to religious organizations by the ministerial exception).

152. The leading case remains *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 944, 947–48 (9th Cir. 1999).

153. Breaux, *supra* note 144, at 303–05 (proposing three-factor analysis: employee's rank in the chain of command; the religious character of the employee's duties; and whether the employee was a coreligionist of the employer).

inherently unreviewable by civil authority—as a basic element of constitutional structure.[154] Some have also relied on the narrower principle that the Free Exercise Clause requires unconditional respect for any institution's choice of its agent for religious purposes.[155]

Supporters have also argued that whether or not the Constitution strictly requires categorical immunity, such immunity is highly

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154. *See, e.g.*, Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 982–83 (2012) ("[T]he ministerial exception is not some incidental, ad hoc creation. It is a fundamental part of the structure of American religious freedom. It represents a recognition of the basic idea that the First Amendment, the Constitution, and Western constitutionalism more generally guarantee a 'free church in a free state.'"). The Hosanna-Tabor Court undermined the most radical versions of this autonomist position by denying that the ministerial exception was a jurisdictional bar. *See, e.g.*, Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 43 (2008) ("The ministerial exception is best understood as a subject matter jurisdiction defense . . . . When courts clearly and consistently treat the ministerial exception as a limitation on their subject matter jurisdiction, they make a powerful statement about the foundations of limited government–they affirm the penultimacy of the state."). Even after Hosanna-Tabor, however, many commentators continue to cast the exception in a quasi-jurisdictional light. *See, e.g.*, Mark E. Chopko & Marissa Parker, *Still A Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233, 297–98 (2012); Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and the Constitutional Structure*, 2011 CATO SUP. CT. REV. 307, 308–09 (2012) ("The 'religion clauses' work together, and not at cross-purposes, to safeguard freedom by maintaining jurisdictional boundaries, protecting the appropriate authority of the church, and limiting that of the state.").

155. *See, e.g.*, G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189, 1235 (1994) ("For government to control a religious entity's employment activities in relation to a religious function employee effectively destroys the entity's ability to project its religious message into the world in the manner of its own choosing. In relation to such an employee, the projection of a religious message is inextricably entwined with the choice of messenger. Thus, to regulate the choice of messenger is to strike at the heart of the entity's religious freedom. It is this reality that has led to the 'ministerial exception' that McClure and related cases have recognized."); Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U.L. REV. COLLOQUY 175, 177 (2011) ("[T]he ability of religious organizations to choose ministers without government interference is at the core of our tradition of institutional religious freedom and church-state separation: virtually every major advance in this tradition has involved government interference in such choices . . . . [T]he ministerial exception follows naturally from this tradition, and—contrary to the arguments of the exception's critics—the tradition bars government interference in the selection of those performing important religious functions, even when that interference is for ostensibly 'neutral' or 'secular' reasons that do not involve the government making explicit theological determinations.").

appropriate in the interests of administrative efficiency or prophylaxis.[156] Categorical immunity is efficient, defenders argue, because, contrary to initial appearances sometimes created by complaints, discrimination suits brought by "ministers" tend ultimately to depend on non-justiciable religious questions—categorical immunity will spare courts and parties a waste of resources.[157] Courts could, in principle, limit the categorical immunity to cases where employers offer religious reasons for their actions. But since employers will likely proffer even bogus religious reasons to escape liability, such a refinement would make little or no practical difference.[158] Categorical immunity is prophylactic because it avoids the risk of error and overreach. Supporters argue that courts are likely to err in evaluating proffered religious reasons for employment decisions, because perfectly sincere religious reasons can

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156. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 54–55 (2011).

157. *Id.* at 54–55 ("[E]very employment discrimination case involves the issue of how well the plaintiff was doing her job. Job performance affects everything. When an employee's job performance is good, juries will rightly suspect even legitimate-sounding reasons as possibly pretextual. And if they find pretext, they will be quick to conclude that discrimination was the real reason. When an employee's job performance is bad, juries will be hesitant to doubt an employer's legitimate-sounding reasons. And if the juries find pretext, they will be quick to come up with some other nondiscriminatory explanation. Thus, when the job involves highly religious duties, juries will inevitably be drawn in every case to the issue of whether the plaintiff did those religious job duties well."). Lund also argues for the value (which a categorical ministerial exception best serves) of preserving the *practical relevance* of institutions of church government that are important instruments of religious exercise and expressions of religious belief. *Id.* at 46–47 ("[In] Hosanna-Tabor v. EEOC[, . . . the plaintiff] was a commissioned minister in the Lutheran Church-Missouri Synod. . . . The Missouri Synod has long required that ministers bring disputes with their churches through the Synod's dispute-resolution process. This is both longstanding church tradition and deep theological belief. . . . Synod rules provide for limited discovery and compulsory process of witnesses, forbid ex parte contacts, protect the right to counsel, establish the right to present evidence, and create an appeal process. Disputes are handled by neutrally selected reconcilers. . . . Both sides can challenge reconcilers for cause, and both sides have peremptory strikes. On the substantive side, the Synod's courts would only approve of [plaintiff's] call being terminated in rare and specifically delineated circumstances, like if she were teaching false doctrine, disobeying church teaching, or living a highly immoral life. . . . Without a ministerial exception, these well-established systems of church governance become irrelevant.").

158. *Id.* at 56–57 ("[T]hink about what will happen . . . . [C]hurches have crass incentives to falsely portray their decisions in religious terms because they get a free pass by doing so. . . . If [courts] simply accept the church's reasons at face value, the case-by-case approach will have become a categorical rule in favor of the ministerial exception. [If they don't simply accept it] then the inquiry problem [i.e., the problem of secular courts judging religious matters] comes back.").

be difficult for religious outsiders to take seriously, or even understand, especially in the case of unfamiliar religious groups.[159] There is a risk of (perhaps unconscious) judicial overreach when the employer invokes unpalatable doctrines or when the judge, correctly or not, thinks herself competent to judge the religious matters at issue.[160]

Contrary to the strict constructionists, supporters advocate conceptions of the ministerial exception that maximize church freedom.[161] Some supporters argue that a wide range of job functions should be eligible for "ministerial" status because churches may need unreviewable authority over a wide range of employees to effectively carry out their religious mission.[162] Naturally, supporters interpret

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159. For example, a jury told that a Catholic school fired a teacher for marrying a divorced man contrary to Catholic teaching might be persuaded that "the Catholic Church's position is so fundamentally unbelievable that it could not really have motivated the defendant's action and therefore must be pretext." *Id.* at 56. Lund continues:

> Imagine the problems that less mainstream religions will face. Courts in regular employment cases often say that '[t]he more idiosyncratic or questionable the employer's reason, the easier it will be to expose it a as a pretext.' That statement makes sense in the ordinary run of employment discrimination cases, but there are many religions in this country that juries might find idiosyncratic or questionable.

Id.

160. The overreach here is above all a matter of exceeding formal authority, rather than substantive competence. For example, the late Ninth Circuit Judge John T. Noonan authored a vastly influential, 500-page study of Catholic teaching regarding contraception. *See* JOHN T. NOONAN, CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS, Harv. Univ. Press (2d ed. 1986). He would nonetheless have acted ultra vires if he relied on his learning to resolve a dispute between a Catholic school and a teacher fired for opposing Church teaching on contraception. *Id.*

161. Chopko & Parker, *supra* note 154, at 297–98 ("[T]o protect religious institutional rights in the context of employment litigation brought by ministers, the courts should draw . . . boundaries against secular litigation broadly, so as not to allow for marginal cases to press into space protected under the First Amendment. That resolution ultimately provides the best assurance that constitutional rights are not infringed, and it would discourage attempts to create openings in the wall of separation between church and state.").

162. Helen M. Alvaré, *Church Autonomy After Our Lady of Guadalupe School: Too Broad? Or Broad As It Needs to Be?,* 25 TEX. REV. L. & POL. 319, 333 (2021) ("Many or most institutions assume that they will be far more effective if their employees 'buy into' their mission and ethos, in order to shape the way they work and their work product, and simultaneously influence their colleagues toward and communicate to customers the institution's appealing brand. Religious institutions are no different in this regard, with the important addition that they will often believe that their mission and ways of operating are duties assigned by God. This locates the matter of many of their appointments within the realm of religious decisions about faith, doctrine, and religious mission.").

the ministerial exception as applying equally to "intangible" employment actions like those involved in harassment cases.[163]

While supporters grudgingly accept that the Court has decisively deemed the ministerial exception an affirmative defense, some have argued that it should nonetheless be a "threshold issue" to be resolved as early as possible in the litigation and minimize the burdens churches face in exercising their constitutional right to select and direct their ministers.[164]

Beyond defending the broad view, some scholars—whom we may call "maximalists"—seek to have the ministerial exception expressly strengthened and expanded. For instance, Christopher Lund disapproves inquiries into ministerial status that depend heavily on the subjective distinction between "religious" and "secular" duties.[165] Instead, Lund proposes that the test should be whether the job has "religious significance"[166]—which it might even in the absence of ostensibly "religious" functions. Other maximalists agree with Justice Thomas[167] that courts should give virtually absolute deference to a church's judgment about who counts as its minister.[168] Maximalists have also proposed applying the exception well beyond employment discrimination cases, for example to at least some tort and contract cases,[169] even to all employment decisions by religious

163. *See, e.g.*, Ryan W. Jaziri, *Fixing A Crack in the Wall Of Separation: Why the Religion Clauses Preclude Adjudication of Sexual Harassment Claims Brought by Ministers*, 45 NEW ENG. L. REV. 719 (2011).

164. Chopko & Parker, *supra* note 154, at 291.

165. *See, e.g.*, Lund, *supra* note 156.

166. *Id.* at 69–70 ("If [the parties in an employment relationship] originally conceived of the job as having religious significance, that is what matters.").

167. *See OLG*, 140 S. Ct. 2049 (2020).

168. Allison H. Pope, *"Of Substantial Religious Importance": A Case for A Deferential Approach to the Ministerial Exception*, 95 NOTRE DAME L. REV. 2145, 2167 (2020) ("A religious group has a First Amendment right to declare whether its employee plays an important religious role in accordance with its own religious beliefs and doctrine, as this is essentially a religious question, so a court must defer to the religious group's determination."); Chopko & Parker, *supra* note 154, at 285 ("[T]he question of who is qualified to hold a position of ministry, including the content, conditions, discipline, termination, and even communication about that ministry, is a religious question. It is not the kind of question under any set of circumstances that courts should allow jurors, who may not share or understand these principles, to decide.").

169. Chopko & Parker, *supra* note 154, at 295 ("[T]hat a (former) minister advances a contract or tort claim does not necessarily avoid the preclusive effect of the rule of law if the claim is rooted in the content of ministry . . . . [H]owever a claim is framed or labeled, if it is reasonably related to what happened in a selection, personnel, disciplinary or other internal religious process, including how the religious body communicated its decision to congregants as a matter of common importance and interest, then the constitutional barrier applies and the case should be dismissed.").

employers or at least all decisions involving employees with some religious function.[170]

Supporters are not, as a rule, simply indifferent to the worry that the ministerial exception can hamper legitimate (even compelling) government objectives and facilitate serious injustices.[171] In response, some supporters reassure critics that churches often act reasonably and in good faith[172] and often have their own—sometimes quite robust—dispute resolution procedures.[173] Moreover, they note that immunity from suit is not immunity from other real pressures to good behavior—notably, internal and external opinion—and,

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170. Joshua D. Dunlap, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2033–34 (2007) ("[T]he ministerial exception must encompass all employment decisions made by churches."); John H. Mansfield, *A Tale of Two Organists: Suits Against Churches for Employment Discrimination and Sexual Abuse by Ministers*, 7 GEO. J.L. & PUB. POL'Y 237, 241 (2009) (arguing that the ministerial exception "should be seen as a religious exception, not a ministerial exception," and that courts should "abandon the category of 'minister' and simply look to whether the function pertains to religion.") One note suggests that the ministerial exception should be expanded in another way—it should be not merely an affirmative defense but an offensive cause of action available to student ministries at state schools seeking "to choose their ministerial leaders without intervention or objection from the governing university." *Of Priests, Pupils, and Procedure: The Ministerial Exception As A Cause of Action for on-Campus Student Ministries*, 133 HARV. L. REV. 599, 601 (2019).

171. Garnet & Robinson, *supra* note 154, at 331 ("[A]lthough the ministerial exception is constitutionally required and valuable, it does not rest on an assumption that religious institutions and employers never behave badly. Of course, they sometimes do."); Horwitz, *supra* note 154, at 171 ("Churches surely will fire ministers for good reasons, bad reasons, and sometimes for no reason at all.").

172. Horwitz, *supra* note 154, at 984 ("A church that opposed gender or racial discrimination, for example, might still want to provide ministers who complain of discrimination with an internal dispute resolution process and a set of remedies equivalent to those provided by the law. It might conclude that nothing less would satisfy its own religious belief that discrimination is wrong, and that the church owes it to victims of discrimination (and to God) to make them whole.").

173. Todd Cole, *The Ministerial Exception: Resolving the Conflict Between Title VII and the First Amendment*, 4 CHARLESTON L. REV. 703, 741–42 (2010) ("[E]mployees . . . who are characterized as ministers are not left to the mercy of their superiors with no redress or judicial body to hear their grievances. Most religious organizations have some form of ecclesiastical court, tribunal, or administrative body within their internal organization. These ecclesiastical hierarchies provide employees of religious organizations, whose positions are important to the spiritual and pastoral mission of the church, with the ability to appeal and have their adverse employment decisions reviewed. This alternative to civil courts provides religious organizations and their ministers with reviewing bodies better qualified to properly adjudicate these pervasively religious employment disputes.").

relatedly, that there may be powerful, and wholly legitimate, extra-legal methods for concerned persons to respond to risks and abuses that the critics identify.[174]

C. *Can We Thread the Needle?*

Both critics and supporters of the ministerial exception advance powerful arguments that have so far not been decisively rebutted by the other side. As the critics say, the broad view of the ministerial exception will surely, in some significant number of cases, allow employers to evade perfectly legitimate obligations in furtherance of compelling public policies. Even more worrisome than the unjust impairment of public policy is unfair prejudice to employees who have no reason to suspect that they have surrendered the ordinary protections of law by accepting employment. Moreover, while such prejudice can happen even when a religious employer acts in good faith, the ministerial exception at least ostensibly protects employers who *actively induce* employees to rely on non-existent rights.

For their part, supporters are persuasive that there is no clear way to substantively reform or constrain the ministerial exception—either as to covered claims or covered employees—that does not risk significantly burdening religious employers' free exercise, if only by increasing the risk of litigation over employment decisions even most critics agree should be protected. Supporters also have realistic considerations on their side: Whatever the abstract merits of arguments against church autonomy as a constitutional principle, it is very likely that a majority of the current Court embraces this principle and would hold that it requires (at a minimum) the broad view of the ministerial exception.[175]

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174. Horwitz, *supra* note 154, at 992 ("We must talk candidly about potential abuses of the ministerial exception. But we must do so in a way that accounts for *all* the ways of addressing those abuses, including internal and public discussion within and about churches, not just state coercion."); Richard W. Garnett, *Church, State, and the Practice of Love*, 52 VILL. L. REV. 281, 302 (2007) ("The fact that the law does prevent and should prevent the state from imposing its norms on the institutions of the Church does not relieve these institutions from criticism nor from the duty of self-examination with respect to how well they are responding to the call that God has extended."); Note, *The Ministerial Exception to Title VII: The Case for A Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1795 (2008) ("[A] church's accountability to its adherents and to the public at large would act as a check on abuse [of a broad ministerial exception]. Religious employers face pressure to conform to moral standards, which could limit abusive evasion of antidiscrimination laws.").

175. Notably, at oral argument in *Hosanna-Tabor*, liberal Justice Kagan, no less than conservative Justice Scalia, expressed outright astonishment at the EEOC's argument that religion enjoyed no special constitutional protection ("So, this is to go back to Justice Scalia's question, because I too find that amazing, that you think that the Free – neither the Free Exercise Clause nor the Establishment Clause has anything to say about a church's relationship with its

But even bracketing the notion of church autonomy, Establishment Clause principles surely complicate any significant restriction of the ministerial exception. As supporters have suggested, inherently religious, potentially dispositive issues are likely to lurk—or, the cynic will note, can be manufactured—in almost all employment disputes involving employees with significant religious functions. To limit the ministerial exception to tangible employment actions or employment actions clearly based on religion, or to some conventionally "clerical" class of employees will in many (perhaps almost all) cases simply delay dismissal. Moreover, as Justice Thomas insists, any restriction based on religious reasons or clerical status may lead to unconstitutional playing of religious favorites by disadvantaging less familiar forms of religious belief and polity.[176]

In addition to the supporters' legal arguments, there are significant public policy reasons against substantively weakening the ministerial exception. For one thing, increased litigation risk would increase the cost to churches of providing socially beneficial goods. One obvious example of socially valuable goods is the instruction provided by religious schools like those sued in *Hosanna Tabor* and *OLG*, which often do not limit their services to co-religionists. To manage risk of litigation by their teachers and administrators, religious schools may, for instance, charge higher fees or provide a more narrowly or emphatically sectarian education (to make their core staff more clearly "ministerial") to the detriment of society as a whole.

Moreover, a weak ministerial exception may undermine social peace. State-defined nondiscrimination norms can generate considerable controversy and passion. To eliminate or attenuate social "buffer zones" like churches in which these norms do not necessarily apply is to heighten the stakes in interpreting and applying nondiscrimination law and is thus likely to increase rancor and division.

Finally, raising the stakes can actually *impede* the cause of social reform. Obviously, it may be harder to pass and maintain protective laws when those laws are perceived as more threatening to the norms and values of particular groups. More subtly, cultural change in the

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own employees.") Transcript of Oral Argument at 38, 565 U.S. 171 (2012) (No. 10-553). Even the aggressive reaffirmation and bolstering of the ministerial exception in OLG was joined in full by Justices Kagan and Breyer. More generally, the Roberts Court has shown a clear predilection for religious liberty. *See, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) (determining that a town's prayer of opening legislative sessions with prayer did not violate the Establishment Clause); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (enjoining enforcement of COVID restrictions on applicants' religious services).

176. *See OLG*, 140 S. Ct. 2049, 2070 (2020).

direction of non-discrimination may be more thorough and durable when social institutions like churches can adopt non-discrimination norms in their own way, at their own pace, without the dynamics of resentment and backlash.

In sum, the ministerial exception grants churches a dangerously broad and dangerously vague discretionary power in the employment sphere that probably will not (and perhaps cannot) be reduced. But while *substantive* legal reform may be infeasible, there may be *procedural* rules capable of reducing the tension between church autonomy and employment discrimination law. The next Part, drawing on recent employment law scholarship, proposes just such a procedural technique.

III. PART THREE

A. *Disclosure as an Employment-Law Strategy*

The American law of work reflects strong awareness of the tension between firm autonomy and other values. To manage this tension, employment law frequently adopts (and employment-law scholars frequently recommend) rules mandating or encouraging targeted disclosure of important facts about employment.

The terms and conditions of work implicate a large array of important private and public interests.[177] At stake for the individual employee may be sufficiency and reliability of income to meet her needs and desires and those of her dependents; economic independence (which in turn facilitates personal autonomy); socio-political power and prestige;[178] access to social networks; self-

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177. *See, e.g.*, Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523 (1997) (exploring individual and social meanings of work and proposing recognition of right to work enforceable by Congress under Section 5 of the Fourteenth Amendment as an aspect of constitutional liberty and equality). More recently, Oren Cass has urged lawmakers to make access to good work central to both social and economic policy and advised (among many other policy recommendations) payment of a wage subsidy. *See* OREN CASS, THE ONCE AND FUTURE WORKER: A VISION FOR THE RENEWAL OF WORK IN AMERICA 2 (2018) ("Alongside stable political institutions that protect basic freedoms, family and community provide the social structures necessary to a thriving society and a growing economy. These institutions in turn rely on a foundation of productive work through which people find purpose and satisfaction in providing for themselves and helping others."). Similarly, Pope John Paul II describes work as a hallmark of humanity, by which human beings image God and achieve personal, familial, and political fulfillment. *See* John Paul II, *Laborem Excercens* [Encyclical Letter] (1981), https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html.

178. Legal scholars have been particularly interested in how the terms and conditions of work can either entrench or disrupt social hierarchies. *See, e.g.*, Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1885, 1905, 1928, 1960

development through knowledge, skill and responsibility; and a sense of personal purpose—even identity. Public interests obviously include limiting welfare burdens caused by inadequate pay or by dangerous and unhealthy conditions of work and remedying injustices. Scholars have argued that states—or at any rate pluralist democracies like ours—also benefit when workplaces nurture civic habits and skills, especially participation in deliberation and cooperation across lines of sex, race, and religion.[179]

All these interests potentially conflict with the employer's freedom to govern its business, especially its freedom to select, compensate, direct, discipline, and discharge personnel. Yet there are powerful reasons to preserve the autonomy of firms in personnel matters. Autonomy obviously implicates the private economic, liberty, and free association interests of employers, but the third-party interests implicated are at least as significant. Typically, owners and managers are uniquely motivated to achieve the proper ends of a given enterprise and uniquely equipped to determine the best means to those ends—including appropriate personnel practices. To the extent the firm's ends are socially valuable, then, the public will tend to benefit from employer autonomy. Furthermore, to the degree that more efficient and productive firms offer better paid, safer, and more engaging work, employer autonomy benefits employees as a class.

Employment law strives to accommodate all relevant interests. On the one hand, substantive mandates limiting firm autonomy abound. A plethora of laws and regulations constrains employers' freedom to determine the criteria on which employees may be hired, fired, disciplined, or promoted. They also constrain the wages they may be paid, hours they can be directed to work, the terms of any employer-provided health benefit or pension plans, and even the tools, methods and means of work.[180] Yet these mandates are best

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(2000) (emphasizing feminist and generally egalitarian values served by broad access to meaningful paid work); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 225 (2013) (proposing "social equality" as a master-concept by which to explain and develop employment law).

179. *See generally* CYNTHIA ESTLUND, WORKING TOGETHER, HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003).

180. The main examples from federal law are the Fair Labor Standards Act, 29 U.S.C. §§ 203, 206, 212 (prohibiting child labor and mandating minimum wage and overtime pay for covered workers); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (prohibiting covered employers from discriminating against employees on the basis of race, color, religion, sex, or national origin); Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, 12112 (prohibiting employers from discriminating against qualified individuals with disabilities and requiring employers to provide disabled employees with reasonable accommodations); The National Labor Relations Act, 29 U.S.C. § 151 (prohibiting employer interference with employees' concerted action for mutual aid and protection and providing for employee representation and collective bargaining);

understood as selective derogations from the default norm of "regulation" by contract. These contracts may result from extensive bilateral or collective bargaining, in which employees have a meaningful opportunity to accurately determine and advance their own interests (which at least sometimes overlap with the interests of the larger public). Far more often, however, employers unilaterally dictate substantially all terms of employment, often expressly including the right to discharge employees at will—that is, for any reason, good or bad.[181] Moreover, even employers who do not expressly reserve this right benefit from the "at-will rule," i.e., the nearly universal principle of American law that "[e]ither party to a contract of employment may terminate an employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy, or an agreement between the parties, a binding employer promise, or a binding employer policy statement."[182]

Employment-law scholars, partly influenced by the prevalence of mandatory disclosure in commercial law,[183] have increasingly

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the Employee Retirement Income Security Act, 29 U.S.C. § 1001 (establishing standards for employee benefit plans); The Occupational Health and Safety Act, 29 U.S.C. § 651 (providing for the establishment and enforcement of health and safety standards in private sector workplaces and prohibiting employer retaliation against employees for exercising rights under the act). There are, of course, countless state and local mandates touching on the employment relationship.

181. It is axiomatic for most management-side employment lawyers that employers should expressly disclaim any promises of job security. For example, Jeffrey Beemer, writing on the website of the Society for Human Resource Management, advises that "[a]ll employee handbooks must include a disclaimer that nothing in the handbook . . . alters the employee's at-will employment relationship." *See* Jeffrey Beemer, *Top 10 Mistakes to Avoid with Employee Handbooks*, SOC'Y FOR HUM. RES. MGMT. (Nov. 13, 2015), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/employee-handbook-mistakes.aspx.

182. RESTATEMENT OF EMPLOYMENT LAW § 2.01 (AM. L. INST. 2015). The Restatement observes that "[t]he high courts in 49 states and the District of Columbia recognize as the default rule the principle that employment is presumptively an at-will relationship. (The sole exception is Montana, which by statute requires "good cause" for an employer's termination of a non-probationary employee.)".

183. *See, e.g.*, David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 6 (2019) ("The regulation of business through mandatory public disclosures is ubiquitous. For instance, the primary tool of the Securities and Exchange Commission (SEC) is disclosure, not substantive regulation of a company's governance. Armed with information on the company, investors are expected to protect themselves against fraud and mismanagement, which is expected, in turn, to lead to improved corporate behavior. Similarly, food and beverage companies must place nutrition labels on the products they sell. The government

explored the actual and potential uses of disclosure rules to promote interests threatened by firm autonomy (which, as just explained, most often means employer sovereignty) without excessive meddling in a firm's internal affairs. Disclosure, they have recognized, can serve regulation by both contract and government mandate, as well as enable distinct strategies based on stakeholder influence. In a seminal 2010 article, Cynthia Estlund neatly categorized these functions as "disclosure in aid of contract," "disclosure in aid of compliance," and "disclosure in aid of reputational rewards and sanctions."[184]

First, information can increase the efficiency and fairness of employment contracts. As a general matter, Estlund notes, mandating disclosure can "improve the efficiency of markets by making it easier to do comparison shopping."[185] Critically, in labor markets, "the seller of labor [i.e. the (prospective) employee] is also the buyer of a job," because, being "inseparable from the labor they are selling[,] . . . [they] care a great deal about the qualities of the buyer as well as about the price of their labor."[186] Some facts about a job may be highly relevant to a worker's preferences (and to the price they charge for their labor) but may be costly to determine before employment or before an occurrence that makes those facts salient. Indeed, employers might strategically withhold or obscure such facts.[187] Mandatory disclosure can allow workers to better satisfy their preferences by choosing more intelligently among jobs or by bargaining for more compensation.[188]

Second, disclosure can enhance the enforcement of employment law. The obligation to disclose "may help expose violations of substantive legal mandates and thereby promote compliance with those mandates."[189] As Estlund notes, disclosure mandates may increase detection of violations even when employers fail to disclose or make false disclosures.[190] This is because an outright failure to disclose will tend to attract attention to the employment practices in question, while materially false disclosures will frequently be

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requires this disclosure to allow consumers to improve their well-being and encourage corporations to produce healthier foods. Other areas of business regulation by disclosure include vehicles' risk of rollovers, exposure to chemicals in the workplace, and the release of toxic chemicals into the environment.").

184. Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 369 (2011).

185. *Id.* at 370.

186. *Id.*

187. *Id.* at 372, 391.

188. *Id.* at 371–72.

189. *Id.* at 373. Relatedly, disclosure may prompt industries to self-reform to reduce the risk of *new* government mandates.

190. *Id.* at 375.

challenged by employees, customers, or other knowledgeable parties.[191]

Finally, disclosure exposes firms to the scrutiny of stakeholders (such as customers, investors, and the general public) who will frequently hold the firm to "best practices" or other employment standards that "go beyond [legal] compliance."[192] This creates both a reputational stick and a reputational carrot that may influence the firm's behavior. The reputational stick is the threat that stakeholders will withdraw or reduce support for the firm based on its unsatisfactory practices. The reputational carrot is the opportunity to enhance the firm's image and so increase stakeholder support.[193]

Employment laws and regulations already mandate disclosure to serve one or more of the foregoing functions—especially to promote the efficiency of contract. Here are some important examples:

- The NLRA requires that during collective bargaining between unions and employers, both parties disclose (at the other party's request) information relevant to "issues properly the subject of collective bargaining;"[194] namely "wages, hours, and other terms and conditions of employment."[195]
- As a remedy for violations of the NLRA, the National Labor Relations Board sometimes orders employers to post notice of the violation prominently in the workplace.[196]
- The federal WARN Act (which has many state analogs) requires covered employers to notify employees of plant closings and mass-layoffs.[197]
- ERISA requires the employer to disclose the terms of employee benefit plans.[198]

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191. *See id.* at 375–76.

192. *Id.* at 376.

193. I propose a fourth distinct function to supplement Estlund's threefold typology: disclosure in aid of policymaking. Disclosure mandates can promote more intelligent regulatory choices by informing governmental deliberations about whether and how to regulate, enforce, or otherwise respond to the realities of the workplace. For example, employers' mandatory disclosure of pay data by race or sex can inform government policy by providing evidence about the existence and magnitude of pay discrimination in particular firms, industries, or locations, and regarding the effectiveness of any existing antidiscrimination measures.

194. Truitt Mfg. Co., 110 N.L.R.B. 856, 868 (Nov. 15, 1954).

195. 29 U.S.C. § 158.

196. *See, e.g.*, Lagos Gen. Contractors, Inc. & Laborers Loc. 1, 371 N.L.R.B. No. 88 (Apr. 1, 2022).

197. 29 U.S.C. §§ 2101–2102. As the acronym suggests, the purpose of the WARN Act is to give employees (and their communities) a reasonable opportunity to mitigate harms arising from mass layoffs and plant closures.

198. 29 U.S.C. §§ 1021–1031.

- OSHA's Hazard Communication Standard requires employers with hazardous chemicals in their workplaces to have labels and safety data sheets for exposed workers.[199]
- Under regulation pursuant to Title VII, covered employers must file form EEO-1 reporting demographic data for their workforce.[200]
- A growing number of states and localities require employees to disclose the range of salaries for a particular job, either proactively or upon request.[201]
- A majority of states mandate that employers give employees pay stubs containing required information, such as statements of pay period, gross and net wages, deductions, taxes, and overtime hours.[202]

Furthermore, scholarly proposals to legally mandate or encourage disclosure abound. [203]

Since compensation is of central concern to most employees, scholars have naturally called on lawmakers to expand or strengthen pay-transparency regimes, particularly with a view to tackling pay discrimination and wage theft.[204] But scholars have also prescribed

199. 29 C.F.R. § 1910.1200 (2023).

200. 29 C.F.R. § 1602.7 (2023).

201. *See* Christine Hendrickson, *Pay Transparency, Pay Equity, Salary History—What's New for 2022*, BLOOMBERG L. (Jan. 24, 2022, 4:00 AM), https://news.bloomberglaw.com/daily-labor-report/pay-transparency-pay-equity-salary-history-whats-new-for-2022 (discussing current or proposed pay transparency mandates in California, Maryland, Washington, Connecticut, Nevada, Rhode Island, Colorado, Cincinnati, Toledo (OH), and New York City).

202. *See Pay Stub Law 2021*, FMP GLOB., https://fmpglobal.com/resources/useful-info/us-paystub-law-by-state/ (last visited Oct. 19, 2023).

203. Estlund's seminal article proposes a sweeping transparency regime requiring disclosure of "[h]ours of work and overtime demands," "[j]ob-related hazards and injuries," "[j]ob security and internal labor markets," "[p]olicies affecting work-life and work-family balance," "[c]ovenants not to compete and other posttermination restraints," "[m]andatory arbitration agreements," "[a]greements to submit to drug testing [or other intrusions on privacy]," and "[w]orkplace demographics [i.e., according to protected categories such as race and sex] in various job categories or levels of the firm." Estlund, *supra* note 184, at 365–66. Recognizing that her proposal might create a counterproductive "information overload," Estlund stresses that her proposal depends on the willingness and ability of "[p]rivate intermediaries . . . to do the slicing and dicing of information and to rate and compare employers." *Id.* at 367.

204. *See, e.g.*, Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 785 (2014); Rafael Gely & Leonard Bierman, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 169–70 (2004); Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 53 (2005); Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST.

a disclosure remedy for a much wider range of employment-related distempers, including employment discrimination, lack of workplace diversity, and deficient coworker solidarity.[205] Indeed, Aditi Bagchi has even suggested that the right of access to information may, as a general rule, be more valuable to employees than the much-vaunted right to participate in firm decision-making through negotiation or representation in internal government.[206]

To be sure, scholars are quick to stress that disclosure "is no panacea."[207] Information is useless unless workers (or intermediaries

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L.J. 951, 1008 (2011); Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws-A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 427–29 (2013); Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1047–48 (2012); Jeremy Blasi, Note, *Using Compliance Transparency to Combat Wage Theft*, 20 GEO. J. ON POVERTY L. & POL'Y 95, 127 (2012); Elizabeth Tippett et. al., *When Timekeeping Software Undermines Compliance*, 19 YALE J. L. & TECH. 1, 54 (2017) (proposing mandatory transparency in timekeeping as part of a strategy to avoid abuse of timekeeping software).

205. Elizabeth Tippett, *Robbing A Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 481–82 (2012) (proposing disclosure approach to curbing discriminatory effects of subjective employment practices); Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1685, 1723 (2019) (proposing that "diversity information [including demographic data and firm strategies for increasing workplace diversity] should be treated as a public resource" possibly subject to mandatory disclosure); Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605, 667 (2017) (proposing mandatory filing of "solidarity statements" providing information relevant to the decree of solidarity among coworkers, such as "whether an employer has antifraternization policy, a description of the firm's internal mechanisms for complaining of . . . impediments to coworker solidarity . . . and a survey of workers' subjective assessment of the quality of solidarity."); Bradley A. Areheart, *Organizational Justice and Antidiscrimination*, 104 MINN. L. REV. 1921, 1966–67 (2020) (proposing that the law encourage employer transparency—e.g. as to job openings and criteria—to promote general fairness and thus reduce discrimination based on protected characteristics); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 499 (2020) (proposing a broad corporate disclosure regime geared to wide range of stakeholders).

206. Aditi Bagchi, *Who Should Talk? What Counts as Employee Voice and Who Stands to Gain*, 94 MARQ. L. REV. 839, 853 (2011).

207. Estlund, *supra* note 184, at 351. Scholars have amply discussed the limitations of disclosure strategies in a range of regulatory domains. *See generally* FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY (Cambridge Univ. Press, 2007). *See also* Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1090–91 (2007); Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 656 (2012) (arguing that that restaurant grades, the "perceived paragon of targeted transparency" as a powerful regulatory tool, are often "uninformative and costly"); Jennifer J. Lee & Annie

like unions, journalists, and community organizations) can meaningfully interpret it and unless workers have the practical clout (economic, social, or political) to act on it. In addition, many theoretically appealing disclosure proposals may face currently insuperable practical barriers. Some schemes may be too politically unappealing to be realistic, and some arguably run afoul of constitutional prohibitions on compelled speech.[208] All that said, disclosure is increasingly recognized as an appropriate and effective tool for easing tension between the institutional autonomy of the firm and other values.[209]

B. Managing the Ministerial Exception With Disclosure

1. Principles

The problem posed by the ministerial exception (i.e., the problem of when to entertain claims brought by employees of religious employers arising from their terms and conditions of employment) can be seen as but one instance of the tension between institutional autonomy and other values. It is true that the ministerial exception implicates an aspect of *church* autonomy that, unlike organizational autonomy in general, is constitutionally sacrosanct, as it were.[210] But this, at most, takes certain tools for handling the tension off the table. Judges and legislators should assume that they cannot directly constrain or penalize a church in its selection, retention, and direction of colorably ministerial employees. But nothing in the letter or logic of the Supreme Court's ministerial exception cases seems to preclude legal rules that require or encourage disclosure of information.[211]

Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 801 (2019) (exploring limitations of disclosure strategies for counteracting wage theft).

208. *See generally* Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016). Perhaps the best-known and most influential criticisms of disclosure strategies (primarily in the consumer-products context) is the frontal attack launched by Omri Ben-Shahar and Carl Schneider: MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (Princeton Univ. Press, 2014).

209. Charlotte Alexander has developed "a comprehensive theory of information's role in the enforcement of labor and employment laws, and in the broader project of improving workplace conditions." Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 CONN. L. REV. 177, 182 (2015).

210. The *Hosanna-Tabor* Court asserted that the church's right to choose its ministers categorically trumped the goals served by employment discrimination law. Hosana-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012) ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.").

211. *See generally id.*; *OLG*, 140 S. Ct. 2049 (2020).

So, what important informational deficiencies are often present in ministerial-exception cases, and is it possible and beneficial to fix them? Current and prospective employees of religious employers, as well as interested third parties, are often unaware that: (1) religious employers may, with legal impunity, discriminate against their "ministers" on any basis whatever; (2) religious employers enjoy this impunity even when they act wholly without religious motives and, indeed, even when they act undisputedly contrary to their own religious principles; and (3) their own (prospective) religious employers deem them "ministers."

Better diffusion of the foregoing facts would serve all the functions identified by Estlund: contract, compliance, and enabling reputational costs and rewards.[212]

Contract. These consequences of ministerial status are obviously highly relevant to a worker's decision to seek, accept or continue employment with a religious employer and on what terms. The worker will, at a minimum, have a fair opportunity to avoid detrimental reliance on the employment discrimination laws. She may also be able to negotiate terms of employment that avoid or offset the considerable risks of ministerial status.

Compliance. After an employment dispute arises, religious employers may make bad-faith claims of ministerial status that are nonetheless plausible enough to deter plaintiffs from litigation or even succeed in court. Such wrongful evasion of employment discrimination laws is less likely if an employee has a pre-dispute opportunity to understand the consequences of ministerial status, question her classification as a minister, and collect and preserve evidence that she is not a minister.

Reputational costs and rewards. When a religious employer asserts claims of ministerial status (and the impunity it implies), that fact may come to the attention of interested third parties, especially coreligionists, with power to influence the employer's conduct—i.e., stakeholders. These stakeholders are free to do what the government may not: judge the employer's assertions of ministerial status by whatever criteria, *including specifically religious criteria*, they deem appropriate and react accordingly—perhaps by advocating organizational self-reform that reduces the tension between employment discrimination law and church autonomy.[213]

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212. Estlund, *supra* note 184, at 369.

213. This aspect of the proposal resembles a recent suggestion by Andrew Koppelman that religious businesses should only be exempt from antidiscrimination laws protecting sexual minorities if they announce their discriminatory stance and accept the (possibly substantial) costs of that announcement. *See* ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT 139 (Oxford Univ. Press, 2020). It nonetheless bears emphasis that the government cannot predict or control the nature or the consequences of stakeholder reactions. It may well be, for example, that

For disclosure to be effective, it must permit employees to quickly grasp its practical significance—i.e., disclosure must be *intelligible* and yet not so simplified as to be erroneous, misleading, or useless.[214] In addition, disclosure must be made so as to attract the employee's thoughtful attention amid what may be a torrent of information regarding employment[215]—i.e., disclosure must be *salient*.

Intelligibility. To accept employment as a "minister" is, practically speaking, much like a waiver of substantive rights.[216] Unsurprisingly, then, existing law governing waiver of substantive employment rights—namely, the Older Workers Benefits Protection Act (OWBPA) and derivative regulations—suggests appropriate standards for ensuring intelligibility of disclosure.[217] Under OWBPA, a worker cannot waive her right to bring a discrimination claim under the Age Discrimination in Employment Act unless that waiver is "knowing and voluntary."[218] A waiver is not knowing and voluntary unless, among many other criteria, it is expressed "in a manner calculated to be understood by [the employee]."[219] The regulations elaborate on these criteria, providing that valid waivers "must be drafted in plain language geared to the level of understanding of the individual party to the agreement."[220] This requires employers drafting waivers to "take into account such factors as the level of comprehension and education" of affected employees.[221] Employers are advised that "[c]onsideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex

stakeholders endorse assertions of ministerial status that outsiders find highly implausible. They may even successfully push for those assertions to be expanded. Although the government could reasonably hope some churches would reform their practices in a way more congruent with public policy, my proposal would keep the government well clear of a per-se unconstitutional "attempt . . . to dictate or . . . influence" a church in "matters of faith and doctrine." *OLG*, 140 S. Ct. 2049, 2060 (2020).

214. The (often insuperable) challenge of crafting disclosures that are sufficiently precise without being too voluminous, complex, or technical for the typical reader to process is what Ben-Shahar and Schneider call the "overload problem." Ben-Shahar, *supra* note 208.

215. This is an instance of what Ben-Shahar and Schneider call the "accumulation problem." *Id.* The authors memorably illustrate this problem (and, to a lesser extent, the "overload problem") with "The Parable of Chris Consumer." This amusing hypo sketches an impossibly tedious day in the life of a man who "never met a disclosure he didn't read," from the warning on his toaster to the privacy policy changes of his credit-card provider.

216. In both cases, the individual elects a state of legal affairs partly defined by a lack of rights on which they might otherwise rely.

217. S. Rep. No. 101-263, at 1567 (1990).

218. 29 U.S.C. § 626.

219. *Id.*

220. 29 C.F.R. § 1625.22.

221. *Id.*

sentences."[222] Moreover, the waiver "must not have the effect of misleading, misinforming, or failing to inform participants."[223]

Salience. Most employees, it seems fair to assume, care whether their employer has perfect legal freedom to discriminate against them. But how is the employee, perhaps stumbling semi-comatose through the wilderness of "onboarding" documents and procedures so common in the modern workplace, to be made to notice any information beyond the rudiments of pay, hours, and benefits? I suggest three conditions that should, together, tend to attract the employee's attention. The disclosure must be (1) made in a free-standing document, (2) that is prominently styled as a *warning*, and (3) the employee must be made to specifically acknowledge receipt.

2. *Sample Application*

The following sample document illustrates how churches might provide adequate notice in line with the criteria above:

Warning of Ministerial Status

> Many state and federal laws prohibit discrimination against employees (for example, discrimination because of an employee's race, sex, age, or disability). Under the United States Constitution, ministers of religion cannot enforce *any* of these discrimination laws against employers that have hired them to be ministers.
>
> Your duties as [TITLE] require you to [DESCRIPTION OF PUTATIVELY MINISTERIAL FUNCTIONS]. For this reason [EMPLOYER NAME] considers you to be a *minister of religion*.
>
> This means that if you bring a court case against [EMPLOYER NAME] in which you claim that [EMPLOYER NAME] illegally discriminated against you, [EMPLOYER NAME] may ask the court to dismiss the discrimination claim(s) because you are a minister of religion. If the court concludes that you are in fact a minister of religion, the court will dismiss your discrimination claim(s).
>
> I [EMPLOYEE NAME] HAVE RECEIVED, READ, AND UNDERSTOOD THIS "WARNING OF MINISTERIAL STATUS"
>
> [EMPLOYEE SIGNATURE], [DATE]

To see how such disclosure of ministerial classification might play out in practice, we can look to the growing literature analyzing

222. *Id.*
223. *Id.*

the effects of pay transparency on pay equity and pay equality.[224] Pay transparency provides a helpful comparison because, like the present proposal, it aims at furthering compelling nondiscrimination policies while avoiding undesirable interference with managerial control (i.e., labor price fixing that risks distorting the market). There is substantial evidence that pay transparency forces employers to justify pay disparities to employees and thus leads to both greater equity and greater equality in pay.[225] Of course, wage transparency is not a perfect solution—pay gaps persist despite transparency, likely at least in part because unjustified discrimination persists. Moreover, transparency may come with significant costs. For example, employers may respond to egalitarian demands by compressing the pay scale, which will undoubtedly reduce the pay of some workers, particularly those at the top of the range.[226] There is also evidence that when employers weaken the link between pay and performance measures, the relevant audience does not—for whatever reason—see that action as justifying pay differences.[227] To the extent such performance measures are objectively valid, pay transparency deprives high-performing employees of a commensurate reward and denies employers a legitimate means for recruiting and motivating employees. Nonetheless, pay transparency appears to create a net benefit, preserving managerial control while reducing invidious discrimination.

Church employers who disclose ministerial classification would, like employers under pay transparency, face pressure from employees, candidates, and interested third parties to justify what is, in substance, a unilateral decision to deny employees protection of the antidiscrimination laws. To the extent employers respond to this pressure, they will claim ministerial status for their employees only when they can persuade their audience that this assertion is reasonable and appropriate (not just legal). For instance, consider a Christian university whose chief administrators believe that the role of head football coach has some non-trivial religious aspect and the coach's performance has some meaningful influence on the nature and success of the university's religious mission. The school will nonetheless assert that the role is "ministerial" only if the benefits of doing so—for example, greater power to safeguard the religious purity and intensity of the school culture—outweigh the likely costs. These

224. "Pay equity" here means the fair determination of pay within a firm or industry, independent of protected characteristics such as sex and race. Tomasz Obloj & Todd Zenger, *The Influence of Pay Transparency on (Gender) Inequity, Inequality and the Performance Basis of Pay*, 6 NAT. HUM. BEHAV. 646, 646 (2022). "Pay equality," generally means the same pay across suspect categories, controlling only for basic distinctions such as job title and seniority. *Id.*

225. *Id.*

226. *Id.* at 650, 653.

227. *Id.* at 650.

costs include dramatically shrinking the candidate pool and weathering blowback from stakeholders, such as pragmatic donors who just want victories on the field and idealistic faculty who deem it contrary to Christian morals to reserve the right to discriminate. The university could ultimately choose to classify the coach as a minister, but disclosure would make it far more likely that this choice was amply justified.

C. *Inducing Disclosure*

Assuming that notice substantially in the form I have proposed would be beneficial on the whole, how may religious employers would be induced to provide it? The most obvious and direct means is a substantive requirement that religious employers provide adequate notice as a condition of asserting the ministerial exception, at least in some subset of cases.[228] This approach has at least two considerable disadvantages. In the first place, a notice requirement may unfairly impact religious organizations that lack legal sophistication and may therefore be ignorant of the notice requirement. Second (a point likely of great concern the current Court), such a notice requirement could problematically impose extra-constitutional conditions on the enjoyment of a constitutional immunity. [229]

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228. Amy Dygert has proposed a similar requirement. Amy Dygert, *Reconciling the Ministerial Exception and Title VII: Clarifying the Employer's Burden for the Ministerial Exception*, 58 WASH. U. J.L. & POL'Y 367, 388 (2019) (arguing that courts should require employers claiming the ministerial exception to "show that the employee was on notice that the employee's position was considered by the employer to be subject to the ministerial exception prior to the circumstances that gave rise to the employer's claim."). In a similar vein, Joseph Capobianco has proposed that the ministerial exception should be recognized only when employers and employees contract for ministerial status at the start of the employment relationship. Joseph Capobianco, *Splitting the Difference: A Bright-Line Proposal for the Ministerial Exception*, 20 GEO. J.L. & PUB. POL'Y 451, 477 (2022). As discussed in the text below, I propose that religious employers be encouraged, rather than compelled, to provide notice of ministerial status.

229. As mentioned above, see *supra* note 13, the *Hosanna-Tabor* Court seems clear that a religious employer's right to choose its ministers cannot be outbalanced by any government interest, however compelling. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012) ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."). This suggests, but does not clearly entail, that the right also cannot be subject to any burden, however slight, not reasonably necessary to prove that the right exists. It might be argued, however, that even if the government is powerless to constrain an employer's control of its ministers, it retains considerable latitude in deciding who it will recognize a "minster" in the first place. It may be consistent with the constitution to restrict ministerial status—at least in some cases—to employees who have been so designated. Moreover, while a notice mandate would in a fairly straightforward sense burden religious exercise, it

When it is perilous to use the stick, it is worth considering the carrot—i.e., in this case, offering religious employers positive incentives to provide adequate notice. The distribution of burdens of proof and the criteria for recognizing legal presumptions substantially affect the difficulty of establishing ministerial status in litigation and thus the probability that purported ministers will bring suit in the first place. Although the ministerial exception is very broad and highly protective, it is nonetheless an *affirmative defense* to discrimination claims. As such, employers presumably have the burden both to assert the exception and to prove that it applies.[230] The burden to prove ministerial status can involve significant cost and risk. The employer must gather and persuasively interpret evidence to courts applying a vague, malleable standard. Employers are more likely to give notice of ministerial status that conform to the standards I have set forth if provision of notice would earn them some substantial litigation benefit—and thus reduce the risk that they would be sued at all.

So I propose that courts adopt this rule: When religious employers prove that they provided their purported ministers with adequate (i.e., intelligible and salient) notice that they have been classified as ministers, this will trigger a rebuttable legal presumption that the employees are ministers in fact. This formal burden shift should occur as long as notice was given before the employee began her duties or substantially changed position—e.g., by incurring substantial relocation expenses—in in reliance on an offer

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would rarely if ever implicate the conscience and autonomy interests that are at the heart of Free Exercise. After all, how many churches could sincerely claim that the decision to give or withhold notice implicates any specifically *religious* principles or norms? In the run of cases, churches could say no more than that the mandate (1) imposed trifling administrative costs and (2) impeded recruitment through diffusion of the truth.

230. To be sure, the burdens of (1) pleading, (2) production, and (3) persuasion are distinct and need not all rest with the same party. It is therefore technically possible that an employer could bear the burden of pleading the ministerial exception but not bear the burden of persuasion, or even production. *See, e.g.*, 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 337 (8th ed. 2020) ("[L]ooking for the burden of pleading is not a foolproof guide to the allocation of the burdens of proof. The latter burdens to not invariably follow the pleadings. In a federal court, for example, a defendant may be required to plead contributory negligence as an affirmative defense and yet, where jurisdiction is based upon diversity of citizenship, the applicable substantive law may place the burdens of producing evidence and persuasion with regard to that issue on the plaintiff."). Nonetheless, the evidentiary burdens generally do align with the pleading burden, *see id.*, and it is fitting for all three to rest with employers asserting immunity from generally applicable law. Even scholars who insist that *Hosanna-Tabor* did not declare the ministerial exception "a garden-variety affirmative defense" have not disputed this point. Chopko, *supra* note 154, at 292. *See also* discussion *supra* Section II.

of employment. Later notice should not *automatically* shift the burden. This is to recognize the "lock-in" effect: The employee receiving later notice may have made investments (including giving up alternative opportunities) that substantially reduce her freedom to leave or renegotiate. Of course, later notice would remain relevant to—and in some cases prove decisive of—the ministerial-status inquiry.[231] Moreover, *earlier* notice—for example, in job advertisements—should not only formally shift the burden to the employee but increase the strength of the presumption of ministerial status. Thus, the earlier the notice, the greater the litigation benefit to the religious employer.

Note an important advantage of this rebuttable presumption: Although intended to influence behavior (that is, it is a species of "information-forcing" rule), the presumption also tracks a legitimate inference and is therefore justified simply from an evidentiary point of view. That is, a religious employer who gives adequate notice of ministerial status runs the risk that its purported "minister" will contest the employer's classification or quit her job (and that qualified prospective employees will be scared away). The employer's willingness to run that risk suggests that the assertion of ministerial status is well founded.[232] Of course, the converse is also true: A religious organization's conscious decision not to give adequate notice of ministerial status is some evidence of a weak claim[233] on the merits. If we assume (generously, but not fancifully) that most religious employers seek to be reasonable and just, their preference for fairness would, together with self-interest, make the giving of adequate notice a common, recognized "best practice," at least for a subset of jobs whose ministerial character is not obvious. In that case, courts would tend to draw permissive inferences (not amounting to a requirement or even a legal presumption) against employers who failed to give adequate notice. Thus, use of the carrot could create conditions for moderate use of the stick.[234]

231. The weight of such later notice would depend principally on how long it preceded the events giving rise to the dispute.

232. Acceptance of that risk is also probative of the employer's good faith, which Justices Thomas and Gorsuch consider the heart of the ministerial-status inquiry. *See OLG*, 140 S. Ct. 2049, 2070–71 (2020) (Thomas, J., concurring).

233. And evidence of bad faith. *See supra* note 143.

234. This talk of carrots and sticks may disturb those for whom religious institutions are emphatically more like autonomous sovereigns to be respected than regulated entities to be directed by incentives. But nothing in the proposal is inconsistent with a robust notion of church autonomy, or even with the supposition that churches are sovereigns in precisely the same sense as France or Canada. After all, a court of the United States, deciding whether to recognize exclusive French jurisdiction over a particular matter, may, without negating French sovereignty, give considerable weight to whether France has previously *asserted* exclusive jurisdiction over such matters. Indeed, international jurisdictional rules that encourage sovereigns to stake out their respective

IV. PART FOUR

A. *Objections*

Objections to the foregoing proposal are likely to come from at least three distinct perspectives: support for the ministerial exception, opposition to the ministerial exception, and what we may call institutionalism—concern for proper institutional functioning, including allocation of responsibilities among institutions. Supporters of the ministerial exception may argue that my proposal is unlawful, otherwise improper, counterproductive, or unnecessary. Critics may say that the proposal would leave vulnerable employees worse off, that it is inadequate to protect vulnerable employees, or, at a minimum, is inferior to other means of eliciting disclosure than equally viable alternatives. Institutionalists may worry that my proposal requires judges to exceed their competence or that it would retard or distort the development of substantive law. I will turn first to the likely arguments of the ministerial exception's supporters.

Perhaps the proposal unconstitutionally interferes with rights to free exercise, free speech, or both. To attach a legal "reward" (i.e., a favorable presumption) to certain statements or to certain intra-ecclesial (and so inherently "religious") managerial acts is simultaneously to punish contrary statements and acts.[235]

In response, I emphasize, first, that the ministerial exception is an affirmative defense and so the burden of proof "naturally" lies with the defendant.[236] This allocation of the burden creates a baseline for distinguishing the imposition of a penalty from the withholding of a benefit. Simply put, a religious employer who retains the burden of proof under my proposal does not suffer a penalty because it is no worse off than it would be without my proposal. It does not, by operation of law, bear any additional cost or lose any benefit otherwise due.[237]

Some supporters of the ministerial exception may worry that the proposal would end up operating not as a safe harbor for religious employers but as a mandate to give notice, or at least as an adverse presumption against employers who fail to give notice. It could be

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juridical territory would seem ultimately to serve comity rather than domination by some over others.

235. Similarly, it can be argued that a tax subsidy to favored activity entails a penalty on the failure to engage in that activity.

236. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 195 n.4 (2012).

237. Neither can it be said that when courts give some litigants the benefit of a presumption, they unconstitutionally play religious or ideological favorites—i.e., the proposal is not an establishment of religion or a form of viewpoint discrimination. This is because the benefit is not given on the basis of an abstract preference for, or an intention to promote, any particular belief, religious practice, or form of church polity.

argued that such an adverse presumption would at least flirt with unconstitutionality since, as is well established, "[t]he power to create presumptions is not a means of escape from constitutional restrictions."[238]

Such concerns are misplaced. Even assuming that an express notice mandate would violate constitutional restrictions,[239] this proposal has no tendency to lead to anything like such a mandate, absent extraordinary and persevering judicial bad faith. As discussed above, the safe-harbor approach I have proposed might indeed make the giving of notice more common. That change in turn would make it reasonable for finders of fact to draw adverse inferences against religious employers who do not give notice. But, as stated above, this change would not necessarily amount to a legal presumption in the proper sense—i.e., failure to give notice would not be recognized as automatically negating ministerial status unless rebutted by some kind or quantum of contrary evidence.[240] More likely the absence of notice would remain basically what it is now—evidence against ministerial status—only with some increase in salience and weight.

Moreover, even a more formal presumption would necessarily be a very weak one: realistically, and often easily, rebuttable. In the mine run of cases, employers should have little difficulty showing that their failure to give notice does not undermine their defense. There will of course remain many easy cases (e.g., Catholic priests) where the evidence for ministerial status far outweighs any inference that could be drawn from the failure to give notice. There will also be many cases where employers can credibly argue that giving notice simply never occurred to them. Perhaps most importantly, employers

238. Bailey v. Ala., 219 U.S. 219, 239 (1911). In *Bailey*, an Alabama statute allowed workers to be convicted of criminal fraud if they failed to perform under a personal services contract and failed to refund money or property received. Conviction was possible because the law provided that that failure to perform or refund was prima facie evidence of the intent to defraud—i.e., that it gave rise to a presumption of intent to defraud. The Supreme Court held that this presumption impermissibly circumvented federal laws against peonage (passed pursuant to the Thirteenth Amendment).

239. This concession is only for the sake of argument. Neither Court precedent nor constitutional logic seem to settle the Free Exercise question. Estlund, *supra* note 184. As to Free Speech, it is worth noting that even if a hypothetical mandate would in some sense compel speech, it would not "force" a church to "speak in ways that align with [the state's] views but defy [its] conscience about a matter of major significance." 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2321 (2023). On the contrary, the speech would express what the speaker presumably believes enough to assert and rely upon in litigation. The speech supposedly being compelled is (1) arguably commercial, and so enjoys reduced constitutional protection and (2) as to its content, far from being contrary to the speaker's conscience, expresses what the speaker presumably believes enough to assert and rely upon in litigation.

240. Ferraris, *supra* note 143.

will often be able to show that they declined to give notice simply for fear of scaring off job candidates. One may justly condemn the intention to hide substantial risks of employment from prospective employees, but it can quite easily coexist with a subjectively sincere and objectively reasonable claim of ministerial status.[241] After all, employers have strong incentives to withhold such information from employees no matter how powerful the argument for ministerial status.

There is no denying that the proposal could lead to a change in the mix of evidence before courts in a way raises the costs to some employers of proving ministerial status. But an increase in litigation costs cannot, by itself, constitute a substantive abridgement of a right. The cost of proving any given fact naturally varies with the evidentiary context, a context over which litigants have limited control.[242]

Another possible objection is that the proposal disadvantages employers who object to using the word "minister," which may have connotations opposed to their own religious understanding (for example, it may appear too Christian, too Protestant, or too hierarchical to fit an employer's religious ideas). There are two responses to this. First, while the use of the word "minister" may indeed rankle some, it will rarely be more than an annoyance, since it cannot reasonably be taken to show that the employer accepts any particular religious views. It is simply a legal term for a legal concept, and employers may take as much care as they like to make that clear to employees or other audiences.[243] Second, and more to the point, the use of the offensive term is not actually necessary to get the benefit of the presumption. Circumlocutions may suffice as long as they convey the legal facts.

Turning from a strict regard to the rights and interests of religious employers, supporters of the ministerial exception may

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241. The analysis is different to the extent that the employer fears that employees will *contest* their ministerial designation on the merits. While that concern is logically compatible with employer sincerity, it does raise an inference against it.

242. It is true that one important reason for the ministerial exception is to limit the litigation burdens on churches that might chill free exercise. Nonetheless, there is no reason that this objective should require courts to ignore evidence suggesting that the church is not entitled to invoke the exception. In any event, the central function of the ministerial exception is not to reduce litigation burdens on employers but to insulate them from liability.

243. Any religious actors that cannot bring themselves to distinguish legal from religious use of terms may have significant difficulties in availing itself of the accommodations of American law, which pervasively uses the words "church" and "minister" outside a Christian context. To take one extreme example, a rabbi must either suffer to be taxed on the rental value of a home furnished to him as compensation or consent to be classified as a "minister of the gospel." 26 C.F.R. § 1.107-1 (2022).

argue that encouraging disclosure may reduce the welfare of some employees. Disclosure, they may say, could cause employees to overestimate the risk of mistreatment by religious employer and therefore refuse jobs they should take, leave jobs in which they should remain, or act more adversarially during employment than they should, to the detriment of both parties.

Undoubtedly, some employees will exaggerate the risk of mistreatment, but employers can be counted on to reduce such exaggeration. They have the motive and the ability to draw employees' attention to whatever reassuring facts may exist—e.g., a positive personnel track record, robust internal dispute-resolution procedures, or exposure to serious reputational sanctions.

Finally, supporters of the ministerial exception may say that, even if legitimate and not strictly harmful, the proposal is not necessary to inform putatively ministerial employees. Many employers already see fit to disclose ministerial classification and more are likely to do so as they learn of the possible advantages of doing so. In addition, if religious employers continue successfully to invoke the ministerial exception in disputes with employees, it is likely that the existence, power, and breadth of the ministerial exception will become widely known.

Neither line of argument is persuasive. It is true that many religious employers may see some benefit to themselves in (at least perfunctorily) informing employees that they are "ministers" and perhaps also in articulating the reasons for this classification. But these employers are much less likely to hamper their recruitment and retention efforts by *disclosing the legal disadvantages of ministerial status* and almost certainly not in a manner calculated to attract attention. In short, given present incentives, few churches will give employees truly adequate notice.

Nor can we rely on natural diffusion of knowledge about the ministerial exception for at least two related reasons. First, most employment disputes involving the ministerial exception (like most employment disputes generally) do not become known beyond a small circle, and even fewer culminate in an official adjudication of rights. Most potential plaintiffs are likely to settle or simply move on. Second, potentially affected employees (even within a single religious community or network like the Catholic Church) work in a large range of activities, institutions, and locales with little communication among them. For example, let us assume that, thanks to *OLG*, many elementary school homeroom teachers in the vicinity of Los Angeles know that Catholic parochial schools can probably fire anyone who spends any time teaching religion for being old or getting cancer or resisting a supervisor's sexual advances. Yet even now, nearly three years after *OLG*, it is doubtful that most coaches, guidance counselors, or professors at Loyola Marymount (a Catholic university in Los Angeles) are aware of these facts, and still less suspect that they may have any relevance to their own employment.

Critics of the ministerial exception may say the proposal ultimately hurts employees. If the net effect of the proposal is to make it easier for employers to successfully invoke the ministerial exception (such that they win more cases, or settle on more favorable terms, or forestall more claims altogether), then the employment discrimination laws in practice extend to fewer jobs, making the job market worse for employees.

There are two points to make in response. First, workers' options will be materially affected only if they work in one of the few sectors where employers with religious missions provide a substantial fraction of the job opportunities. Second, many employers will want to maintain a large pool of qualified candidates for certain roles by providing credible assurances that the ministerial exception will not apply or (as noted above) will not materially affect job security.[244] This they may do by, for example, crafting job descriptions to avoid ministerial status or maintaining and advertising internal dispute mechanisms that most potential employees consider equitable.

Even if the proposal does not actively harm vulnerable employees, it may be argued that it provides them no meaningful protection. For one thing, while there is considerable uncertainty about finer points of the ministerial exception, the cases so far suggest that doubts are quite likely to be resolved in the employer's favor. That being so, it will remain the safest bet for many employers (especially the most cynical) not to provide adequate notice and so retain the benefit in recruiting and retaining "ministers."

This objection raises a fair point: The proposal here certainly does not nullify employers' incentives to exploit employee ignorance about the ministerial exception. But it does, I contend, significantly alter the employer's calculus in cases where the employee's ministerial classification is legally debatable. These are also the cases where employees are least likely to be aware that the ministerial exception may apply and are therefore most need protection.

Critics may reply that even if employers give notice, it will make no practical difference. This could be because notice in the form proposed is not sufficiently intelligible or salient. Or it could be because even employees who read and understand the notice will not change their behavior. On the latter point, the comparison may be drawn with apparently disadvantageous terms of employment, such as nondisclosure agreements and mandatory arbitration clauses, to which employees routinely consent. Perhaps employees at the point of hire are so optimistic[245] or eager to please, that they will discount

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244. This is assuming that the exception may not be waived in advance of a dispute.

245. *See* Tali Sharot, *The Optimism Bias*, 21 CURRENT BIOLOGY R941, R941 (2011) ("This phenomenon [overestimating the likelihood of a positive event and underestimating the likelihood of a negative event] is known as the optimism

the risk that the ministerial exception will be invoked against them until it is too late, by which time the legal presumption may deter them from even bringing the suit at all.

While I concede that there may conceivably be more effective (i.e., more salient and/or intelligible) means of giving notice than that sketched in the proposal, I affirm that such notice would attract the reflective attention of a substantial proportion of employees who received it. After all, the existence or nonexistence of protection against discrimination has a high level of natural interest for workers and so has a fairly low threshold to achieve salience. Unlike the risks of non-disclosure agreements and (especially) of arbitration, the risks of lacking discrimination protection are easy even for legally unsophisticated workers to appreciate and natural for virtually all workers to care a great deal about—comparable to wages, benefits, and hours. If workers do not generally think about protection against discrimination in deciding whether to take or keep a job, that is precisely because such protection *may usually be taken for granted*. Once informed that he might not in fact have the protection he would usually take for granted, the employee is in a materially better position to protect his own interests, whatever choices he goes on to make. Consider, for example, my hypothetical gym teacher. Given notice of ministerial status, he might of course quit, demand higher wages, or contest his classification. But even if he does none of these things, he will, at a minimum, be less likely to detrimentally rely on a greater degree of job security than he in fact possesses.

Finally, it may be asked why we must rely on so weak an incentive as a legal presumption. Why not simply require that notice be given? Even assuming, arguendo, that courts cannot require notice as a condition of recognizing the ministerial exception, why can't there be, say, a free-standing statutory notice requirement with a statutory penalty attached?

This alternative proposal is worth exploring but has at least two disadvantages. First, since it is definitely coercive in nature, it is more vulnerable than my proposal to the charge of unconstitutionally "compelled speech" or interference with religious exercise. Second, it requires legislative action, while my proposal could be immediately implemented by judges.

"Institutionalists" may object to the proposal on the grounds that it illegitimately allows policy goals to shape constitutional doctrine. That is, in developing ministerial exception jurisprudence, courts should be concerned solely and simply with identifying the constitutionally required limits of legislative authority. They should not seek, in the manner of legislators or regulators, to manipulate actors in view of certain policy goals.

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bias, and it is one of the most consistent, prevalent, and robust biases documented in psychology and behavioral economics.").

Here, there is simply a disagreement of jurisprudential principle. This Article assumes, without argument, that wherever there is legal indeterminacy, a plurality of reasonable alternatives consistent with binding authority, it is legitimate for courts to consider all politically relevant values in determining a legal rule. This is particularly true of rules of evidence and procedure, matters over which judges have traditionally exercised vast, trans-substantive discretion.[246] As argued above, the proposal can be defended simply as an evidentiary rule. In addition, the chief "policy" at issue here is, at one level of generality, simply the intent to minimize conflict between constitutional rights and legislative power—to avoid unnecessary derogations from either. This consideration is arguably a necessary component of any constitutional jurisprudence meant to serve rational and effective government.

Another pair of concerns goes to the effect of the proposal on substantive law. To the extent that the proposal succeeds in keeping disputes out of court, it might slow the development of robust standards for determining ministerial status. In addition, it may be that the cases courts *do* see will involve weak or bad-faith claims, or at least unsympathetic employers. That may distort the development of the law by leading courts to take an improperly narrow view of ministerial status.

Both of these objections have merit but need significant qualification. As a preliminary note, it bears emphasis that more

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246. In an influential article, Richard Fallon notes that "[e]ven when general agreement exists that the Constitution reflects a particular value or protective purpose[,] . . . [t]he norms reflecting purposes such as these [may be] too vague to serve as rules of law; their effective implementation requires the crafting of doctrine by courts." Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 56–57 (1997). Fallon also defends the legitimacy (indeed, exigency) of compromising to arrive at "reasonable stable agreement about doctrinal formulations" despite disagreement about "what methodology should be used to interpret the Constitution, about which substantive principles the Constitution embodies, and about how . . . constitutional norms should be protected by doctrine." *Id.* at 58. Notably for the argument here, Fallon observes that deliberation among alternative doctrines is properly multi-faceted and, broadly speaking, "political." *See id.* at 66 ("[T]he Court must not only take into account the practical adequacy of one or another test to protect underlying values, but must also weigh the costs, in practical and constitutional terms, of adding or subtracting increments of judicial protection. More specifically, the Court must assess the competence of courts to conduct particular kinds of inquiries; the costs that particular tests are likely to engender—including judicial errors of both over- and under-protection and the burdens of litigation under narrower and broader, or more and less determinate, doctrinal formulations; and the political fairness of having courts resolve different kinds of questions on more or less deferential bases in the face of reasonable disagreements among the citizenry, between judges and more politically accountable actors, and, in some cases, among the Justices themselves.").

cases would not necessarily mean more legal clarity. For the reasons discussed in this Article, it is challenging to provide a satisfying test for ministerial status. Absent a major intervention from the Supreme Court, substantive doctrine might simply get more complex and unpredictable over time. However that may be, it is certainly true that the proposal, if successful, would mean less grist for the judicial mill. But it would do this not just by keeping disputes out of court, but also (perhaps primarily) by promoting the *ex ante* agreements between employer and employee that reduce the overall number of disputes. This seems like a desirable result and indeed the principal one aimed at by a clarification of substantive law. Note as well that the proposal would not just reduce litigation but give employers who would probably in any case be held entitled to the ministerial exception guidance on how to prove that entitlement more easily in court. That is, it would preserve or increase litigation accuracy while reducing litigation costs.

In response to the selection-effects[247] worry—i.e., that the likely predominance of bad-actor employers will lead courts inappropriately to narrow the test for ministerial status—there are two straightforward responses. First, many good-faith employers will, for one reason or another, fail to give notice—it is not realistic that courts would see only bad actors. Second, selection effects are only possible to the extent courts have freedom to shape doctrine. Current Supreme Court doctrine gives lower courts very little room to restrict the ministerial exception.[248] As the critics of the doctrine point out, the strong tendency of existing doctrine is to err in the other direction. Any contrary pressure caused by selection effects would be modest and probably salutary.

CONCLUSION

The ministerial exception is a recurrent flashpoint in the perennial conflict between starkly opposing views of the status of religion and religious institutions in American constitutional order. We can expect no final reconciliation of the antagonists, but this Article has proposed a means of détente: targeted disclosure. When religious employers tell prospective employees what the ministerial exception is and that it may apply to them, the harms of the doctrine are substantially reduced with no corresponding restriction of religious rights. The law can encourage this disclosure by rewarding employers who provide it with a favorable legal presumption.

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247. In empirical science, selection bias "refers to a sample being drawn in a way that makes it unrepresentative of the population to which inferences are to be made." § 4:16. *Selection bias*, 1 MOD. SCI. EVIDENCE § 4:16 (2022–2023 Edition).

248. *See OLG*, 140 S. Ct. 2049 (2020).

This disclosure-based approach may also be helpful in a range of other cases where the protection of rights—especially through exemptions or immunities—may cause material third-party harms.[249] While there is some scholarship endorsing the use of disclosure in some such cases,[250] a wide field remains open for further exploration.

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249. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) (providing a thoughtful discussion of third-party harms).

250. Koppelman, *supra* note 213.