Revoking Religious Employers’ License to Discriminate: How to Limit the Ministerial Exception to What the First Amendment Requires After Hosanna-Tabor

Introduction

In Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, the United States Supreme Court granted religious organizations a license to discriminate by recognizing the ministerial exception to otherwise generally applicable employment laws.¹ The Court held that the First Amendment gives religious organizations the absolute right to choose their ministers and bars employment discrimination claims brought by those ministers.² The court declined to adopt a “rigid formula” for deciding which employees are ministers, however, but set out several considerations relevant to this inquiry: the employee’s formal title, the “substance reflected in that title,” the extent to which the employee held herself out as a minister, and the religious functions the employee performed in the course of her employment.³

Since Hosanna-Tabor was decided in 2012, the ministerial exception has for the most part been interpreted broadly to bar employment discrimination claims brought by many employees of religious institutions.⁴ The ministerial exception has also been applied to allow religious organizations to escape the minimum wage and overtime provisions of the Fair Labor Standards Act and state wage-and-hour laws.⁵ But such an expansive interpretation of the exception goes far beyond what is justified by the First Amendment and amounts to sanctioning

¹ Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 188 (2012).
² Id. at 194.
³ Id. at 192.
⁴ See Grussgott v. Milwaukee Jewish Day School, Inc., 882 F.3d 655, 657 (7th Cir. 2018) (ministerial exception bars disability discrimination claim brought by teacher at Jewish school); Conlon v. Intervarsity, 777 F.3d 829, 837 (6th Cir. 2015) (ministerial exception bars sex discrimination claim brought against religious college student organization); Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 180 (5th Cir. 2012) (ministerial exception bars age discrimination claim brought by church organist).
⁵ See, e.g., Schleicher v. Salvation Army, 518 F.3d 472 (7th Cir. 2008).
unlawful discrimination by religious employers. The Ninth Circuit and the California Court of Appeals have recently split from the majority approach and construed the exception much more narrowly.\(^6\) In order to minimize the harm the exception inflicts on lower-level employees of religious organizations who suffer real discrimination and are then left with no remedy, courts should follow the lead of these courts and take care to apply the exception only when the religious rights of employers are actually at risk.

Part I of this paper traces the evolution of the ministerial exception as recognized by the courts of appeals prior to *Hosanna-Tabor*. Part II discusses the exception as recognized and defined by the Supreme Court in *Hosanna-Tabor*. Part III looks at how courts have applied the ministerial exception after *Hosanna-Tabor*, including cases interpreting the exception broadly and those interpreting it more narrowly. Finally, Part IV argues that the ministerial exception should not apply to hostile work environment and wage-and-hour cases because the religious freedom of the employer is not at issue in those cases, and that in discrimination cases, religious employers hoping to benefit from the ministerial exception should have to show that their employment decision had a religious motivation.

I. **Before *Hosanna-Tabor*, the Ministerial Exception Is Recognized in the Lower Courts.**

Prior to *Hosanna-Tabor*, every circuit had recognized the ministerial exception.\(^7\) But not all circuits took such an extreme view of the exception as the Supreme Court ultimately did, and many courts found that the exception did not apply to various lower-level employees of religious organizations. Although *Hosanna-Tabor* involved the Americans with Disabilities Act (“ADA”),

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\(^7\) *Hosanna-Tabor* Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 188 n.2 (collecting cases) (2012).
the Supreme Court there described the exception as applying to employment discrimination laws more generally, including Title VII of the Civil Rights Act of 1964. This is consistent with lower courts’ recognition of the exception as an exception to a variety of antidiscrimination laws as well as laws mandating minimum wage and overtime pay.

The ministerial exception was first recognized by the Court of Appeals for the Fifth Circuit in *McClure v. Salvation Army* in 1972. Billie B. McClure was an ordained minister of the Salvation Army, a religious and charitable organization, who brought a suit under Title VII for sex discrimination and retaliation. The Fifth Circuit held that the Free Exercise clause of the

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8 *Id.* at 188 (collecting cases).

9 Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, religion, or national origin. 42 U.S.C. § 2000e-2. Employers may not make hiring or firing decisions based on these characteristics or discriminate in compensation or the terms and conditions of employment. *Id.* Retaliation against employees who oppose discriminatory actions is also prohibited. 42 U.S.C. § 2000e-3(a). Title VII has a statutory exception applicable to religious employers: “this subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion.” 42 U.S.C. § 2000e-1. This narrow exemption allows religious employers to prefer to hire members of their religion, but does not allow religious employers to discriminate on the basis of race, color, sex, or national origin. Congress subsequently added age, pregnancy, and disability to the list of characteristics protected by antidiscrimination laws. In 1967, Congress passed the Age Discrimination in Employment Act (“ADEA”), which outlaws discrimination against people older than forty on the basis of age. 29 U.S.C. §§ 621-634. In 1978, Congress enacted the Pregnancy Discrimination Act, which clarifies that discrimination on the basis of pregnancy is discrimination on the basis of sex. 42 U.S.C. § 2002e(k). Finally, in 1990, Congress passed the law at issue in *Hosanna-Tabor*, the Americans with Disability Act. 42 U.S.C. §§ 12110-12113. The ADA prohibits discrimination on the basis of disability in hiring, firing, compensation, and the terms and conditions of employment. 42 U.S.C. § 12112. Retaliation against employees who oppose discriminatory practices is also unlawful. 42 U.S.C. § 12203(a). The ADA also has a narrow statutory exception available to religious employers, who may give preference to members of their faith. 42 U.S.C. § 12113.

10 Federal wage-and-hour legislation predated antidiscrimination legislation: Congress enacted the Fair Labor Standards Act (“FLSA”) in 1938 with the purpose of “protect[ing] all covered workers from substandard wages and oppressive working hours.” *Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). The FLSA requires that employees be paid a minimum wage and, for any hour over forty worked in each week, an overtime rate of 1.5 times their regular hourly rate. 29 U.S.C. § 206-207. These minimum wage and overtime provisions only apply to “employees,” and several categories of workers are exempted. 29 U.S.C. §§ 203, 213. The FLSA is to be broadly construed and interpreted “liberally to apply to the furthest reaches consistent with congressional direction.” *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959). Thus, “[e]xemptions from or exceptions to the Act’s requirements are to be narrowly construed.” *Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263, 1267 (4th Cir. 1996).


12 McClure worked as a Commanding Officer of two Salvation Army Corps, where her duties including overseeing programing and finances, conducting Sunday School, bible studies, and worship services, and swearing in new members. *McClure v. Salvation Army*, 323 F. Supp. 1100, 1103 (N.D. Ga. 1971). She later worked as a casework supervisor and a secretary in the public relations department. *Id.* at 1103-04

13 *McClure*, 460 F.2d at 553-56.
First Amendment prevents the application of Title VII to the relationship between a church and its ministers.\textsuperscript{14} It called that relationship the church’s “lifeblood.”\textsuperscript{15} The government may not intrude into church affairs and regulate it because doing so deprives the church of the freedom to control its own religious affairs.\textsuperscript{16} According to the \textit{McClure} court, because a church or religious organization must exercise complete freedom to choose its own ministers, those ministers are not protected by antidiscrimination laws.\textsuperscript{17}

Following \textit{McClure}, the ministerial exception was recognized in every circuit and was often, but not always, applied to lower-level employees of churches and religious organizations. For example, in \textit{Tomic v. Catholic Diocese of Peoria}, the Seventh Circuit held that a church organist and music director’s age-discrimination claim was barred by the ministerial exception.\textsuperscript{18} In determining whether the organist was a minister such that the exception would apply, Judge Posner looked to “significant religious dimension[s]” of the plaintiff’s duties, finding that both playing the organ during mass and selecting the music to be played at mass were traditionally religious tasks.\textsuperscript{19} According to Judge Posner, the ministerial exception barred the claim even when the complaint was not based on a theological dispute and the church did not defend its employment action based on a religious belief or doctrine.\textsuperscript{20} It was enough that Judge Posner could \textit{imagine} that that the religious employer would be “likely to defend its employment action on grounds related to church needs rooted in church doctrine.”\textsuperscript{21} Additionally, the fact that the

\begin{itemize}
  \item \textsuperscript{14} \textit{Id.} at 560.
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.} at 559-60.
  \item \textsuperscript{17} \textit{Id.} at 561.
  \item Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1041 (7th Cir. 2006).
  \item \textsuperscript{19} \textit{Id.} at 1041.
  \item Tomic, 442 F.3d at 1040.
  \item \textsuperscript{21} \textit{Id.} (emphasis added). The court went on to imagine a disagreement arising over the music selection for Easter services, calling this a “theological dispute” that it would be impermissible for a court to resolve. \textit{Id.}
\end{itemize}
church represented itself as an “equal opportunity” employer with respect to age in its employee handbook was of no moment; the ministerial exception cannot be waived.\textsuperscript{22}

In \textit{Rayburn v. General Conference of Seventh-Day Adventists}, the Fourth Circuit focused, like the \textit{Tomic} court did, on the religious functions of the job when determining whether a woman denied a pastoral position in a church could bring sex and race discrimination claims under Title VII.\textsuperscript{23} The main question was not whether the position required formal ordination but “whether a position [was] important to the spiritual and pastoral mission of the church.”\textsuperscript{24} Finding that the position of associate of pastoral care fit squarely within this test, in the court’s view, “state intervention in the appointment process would excessively inhibit religious liberty.”\textsuperscript{25} The Fourth Circuit held that, after finding that the position was ministerial, the court could not even inquire into whether her rejection was grounded in church doctrine; the church had an “unfettered right” to determine this “quintessentially religious” matter.\textsuperscript{26}

Only “ministers” are subject to the ministerial exception; secular employees of religious organizations are not. In \textit{Equal Employment Opportunity Commission v. Mississippi College}, the Fifth Circuit held that faculty at a religious college were not ministers for the purpose of the exception, because they “neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine.”\textsuperscript{27} Applying Title VII to this employment relationship would impose only a “minimal burden” on the college, far outweighed by the “government’s compelling interest in eradicating discrimination.”\textsuperscript{28} One year later, in \textit{Equal Employment Opportunity Commission v. Southwest Baptist Seminary}, the Fifth Circuit found that faculty at a

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\item \textit{Id.} at 1041-42.
\item \textit{Rayburn v. General Conference of Seventh-Day Adventists}, 772 F.2d 1164, 1168-69 (4th Cir. 1985).
\item \textit{Id.} at 1169.
\item \textit{Id.} at 1168.
\item \textit{Id.} at 1169.
\item \textit{EEOC v. Mississippi College}, 626 F.2d 477, 485 (5th Cir. 1980).
\item \textit{Id.} at 499.
\end{thebibliography}
Baptist Seminary were ministers, but support staff were not, even though the support staff largely consisted of students at the seminary and their spouses.\textsuperscript{29} In distinguishing these groups, the court focused on the tasks each group performed, concluding that faculty members were ministers because they taught solely religious subjects, were ordained as ministers, and were expected to “model the ministerial role for the students.”\textsuperscript{30} However, the support workers were “not engaged in activities traditionally considered ecclesiastic or religious.”\textsuperscript{31}

In the Ninth Circuit, the court in \textit{Equal Employment Opportunity Commission v. Pacific Press Publishing Association} rejected the employer’s argument that the ministerial exception barred a sex discrimination case brought by an editorial secretary at a religious publishing house.\textsuperscript{32} Comparing the plaintiff’s duties to those of the support staff in \textit{Southwest Baptist Seminary}, the court found that she “did not fulfill the function of minister,” because “her duties did not go to the heart of the church’s function in the manner of a minister or a seminary teacher.”\textsuperscript{33} Moreover, the federal government’s high interest in preventing discrimination outweighed the “minimal” impact on the publishing house’s free exercise of its beliefs.\textsuperscript{34}

The Ninth Circuit went even further in \textit{Bollard v. California Province of the Society of Jesus} and held that the ministerial exception did not apply to a sexual harassment claim brought by a novice preparing for ordination as a Catholic priest.\textsuperscript{35} Plaintiff John Bollard claimed that, while he was training to be ordained as a Catholic priest, his superiors harassed him by engaging him in unwelcome sexual conversations, making unwelcome sexual advances, and sending

\textsuperscript{29} EEOC v. Southwest Baptist Seminary, 651 F.2d 277, 284 (5th Cir. 1981).
\textsuperscript{30} \textit{Id.} at 283.
\textsuperscript{31} \textit{Id.} at 284.
\textsuperscript{32} EEOC v. Pac. Press Pub. Ass’n, 676 F.2d 1272, 1275 (9th Cir. 1982).
\textsuperscript{33} \textit{Id.} at 1278.
\textsuperscript{34} \textit{Id.} at 1279.
\textsuperscript{35} Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 944 (9th Cir. 1999).
Looking to the policy behind the ministerial exception—to protect a church’s ability to choose its own ministers—the court held that it did not apply in this case, because Bollard did not challenge any adverse employment action by the Jesuits and in fact maintained that the Jesuits had encouraged him to pursue the priesthood.\textsuperscript{37} Significantly, the Jesuits expressly disavowed the harassment and did not offer a religious justification for it.\textsuperscript{38} Noting that the “scope of the ministerial exception to Title VII is limited to what is necessary to comply with the First Amendment,” the court reasoned that in this case, since the Jesuits condemned the harassment, the court was not being asked to pass judgment on a matter of religious doctrine and thus interfere with the Jesuits’ free exercise.\textsuperscript{39} Moreover, allowing the suit to proceed would not involve excessive entanglement in church doctrine and so was permissible under the Establishment Clause; “the limited nature of the inquiry, combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters.”\textsuperscript{40}

The Second Circuit also put a narrowing gloss on the ministerial exception. In a case finding that a race discrimination claim brought by a Catholic priest was barred by the ministerial exception, the court noted that when deciding whether to apply the exception, courts should consider “the nature of the dispute.”\textsuperscript{41} In dicta, the court wrote that a finding that an employee is a minister is not “always a complete barrier to suit,” and even an employee high in church hierarchy who alleges “particular wrongs by the church that are wholly non-religious in character is surely not forbidden his day in court.”\textsuperscript{42}

\textsuperscript{36} \textit{Id}.  
\textsuperscript{37} \textit{Id.} at 947.  
\textsuperscript{38} \textit{Id}.  
\textsuperscript{39} \textit{Id}.  
\textsuperscript{40} \textit{Id.} at 950.  
\textsuperscript{41} Rweyemamu v. Cote, 520 F.3d 198, 208 (2d Cir. 2008).  
\textsuperscript{42} \textit{Id}.
Similar to in *Bollard*, district courts applied this analysis to allow sexual harassment cases, in which religious employers did not offer any religious justification for the harassment and therefore the wrongs were completely non-religious, to proceed.\textsuperscript{43} It may be easier for courts to find that the ministerial exception does not apply in hostile work environment claims as these do not involve adverse employment actions and it is hard to construe them as being about a church’s ability to choose its own ministers.\textsuperscript{44}

In addition to allowing religious employers to escape liability for otherwise actionable discrimination, courts have also applied the ministerial exception to claims brought under the FLSA, though the policy reasons for doing so are harder to understand. The first court of appeals case finding a ministerial exception to the FLSA was *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*\textsuperscript{45} The Fourth Circuit explained that the ministerial exception to the FLSA is derived from Congressional debate about the purposes of the FLSA and from guidance from the Department of Labor’s Wage and Hour Administrator saying that “people such as nuns, priests, monks, lay brothers, ministers, and other members of religious orders who serve pursuant to their religious obligations in schools, hospitals, and other institutions” are not employees for the purposes of the FLSA.\textsuperscript{46} The court held that even though the FLSA ministerial exception is not constitutionally required but rather based on agency guidance, it should nevertheless be coextensive with the ministerial exception under Title VII and other antidiscrimination laws as a “common sense approach [to] create[] continuity between the FLSA and Title VII.”\textsuperscript{47} In so doing, the court avoided confronting the constitutional question of whether the First Amendment

\textsuperscript{44} See infra Section IV.A.
\textsuperscript{46} Id. at 305 (quoting Field Operations Handbook, Wage and Hour Division, U.S. Dep’t of Labor, § 10b03 (1967)).
\textsuperscript{47} Id. at 306.
compelled a ministerial exception in the FLSA context.\textsuperscript{48} The court therefore applied the “primary duties” test that it then used in Title VII ministerial exception cases to the present case, and determined that the plaintiff, who worked in the kitchen of a Jewish nursing home and ensured that the food there was kosher, was a minister for the purposes of the test because his duties required him to perform religious ritual and, because Jewish dietary laws are divine commandments, he occupied a position that was central to the mission of Judaism.\textsuperscript{49} Therefore, he was not entitled to be paid overtime for this work.\textsuperscript{50}

The dissenting judge urged the plaintiff to seek \textit{en banc} review, and when such review was denied, issued a blistering dissent.\textsuperscript{51} Judge Luttig stressed that the text of the FLSA is “completely bereft of any language that even conceivably could be construed to create the ‘ministerial exception’” and that finding such an exception ran completely counter to the purposes of the act, as commanded by the Supreme Court, that it be construed in favor of broad coverage.\textsuperscript{52} Moreover, the legislative history that the majority pointed to was a single exchange on the House floor that was wholly insufficient to show legislative intent, and the position taken by the Department of Labor in the Field Operations Handbook was enforcement guidance that was not entitled to deference.\textsuperscript{53} Judge Luttig blasted the majority for recognizing the ministerial exception to the FLSA on such flimsy grounds and then going on to extend this exception to match the scope of the constitutionally required exception under Title VII.\textsuperscript{54} Because the legal foundations for both exceptions are completely distinct, they must be interpreted differently.\textsuperscript{55}

\textsuperscript{48} \textit{Id.} at 306.
\textsuperscript{49} \textit{Id.} at 309.
\textsuperscript{50} \textit{Id.} at 311.
\textsuperscript{52} \textit{Id.} at 799 (Luttig., J., dissenting).
\textsuperscript{53} \textit{Id.} at 800-02 (Luttig, J., dissenting).
\textsuperscript{54} \textit{Id.} at 802 (Luttig, J., dissenting).
\textsuperscript{55} \textit{Id.} at 805 (Luttig, J., dissenting).
And in Judge Luttig’s view, applying the FLSA to the plaintiff’s work for the nursing home would both be aligned with the intent of FLSA and would also raise no First Amendment concerns because it would not require the court to “question the Hebrew Home’s religious beliefs, inquire into the religious nature of the activities that [plaintiff] performs, or to become involved in any way in the governance or functioning of the institution.”

The ministerial exception to the FLSA was subsequently recognized in other circuits. In *Schleicher v. Salvation Army*, the Seventh Circuit held that Salvation Army employees who ran an adult rehabilitation center and supervised thrift shops, but were paid only $150 a week, could not bring a claim that they had been denied minimum wage and overtime. Unlike in *Shaliehsabou*, the court grounded the FLSA ministerial exception in the First Amendment and reasoned that the Establishment Clause rationale for the ministerial exception—avoiding judicial entanglement in religious matters—supported applying the ministerial exception in this case. The Salvation Army did not appear to assert a religious reason for flouting the minimum wage and overtime laws. Instead, the court imagined a series of hypotheticals involving applying the FLSA to church gift-shop employees and to monks who made and sold wine, and concluded that just as it would be inappropriate to force those organizations to follow the FLSA, so too, here, judges could not force the Salvation Army to pay these workers the minimum wage.

In *Alcazar v. Corporation of the Catholic Archbishop of Seattle*, the Ninth Circuit found that a Catholic seminary student who had also been hired to do maintenance work at the seminary was a minister and his minimum-wage claim under Washington state law could not proceed. Because

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56 Id. at 805 (Luttig, J., dissenting).
57 Schleicher v. Salvation Army, 518 F.3d 472, 478 (7th Cir. 2008).
58 Id. at 475.
59 Id. at 476-78.
60 627 F.3d 1288, 1290 (9th Cir. 2010).
his claim concerned work undertaken at the seminary while he was training there for the priesthood, the court could not “ask the church for a religious justification for its decisions concerning its seminarians (ordained ministers in training) . . . .”\textsuperscript{61} Beyond this gesture toward the Free Exercise clause, the court did not offer any justification for applying the ministerial exception in wage-and-hour cases.

II. \textbf{The Supreme Court Recognizes the Ministerial Exception to Antidiscrimination Laws in \textit{Hosanna-Tabor}}.

Forty years after the ministerial exception was first recognized in the courts of appeals, the Supreme Court unanimously agreed that the ministerial exception prohibited applying antidiscrimination laws to claims brought against religious employers by their ministers.\textsuperscript{62} In \textit{Hosanna-Tabor}, Chief Justice Roberts, writing for the majority, held that Cheryl Perich, an elementary school teacher, was a minister and so could not bring a claim for retaliation under the ADA against her Hosanna-Tabor, a religious school.\textsuperscript{63} Even though Perich had direct evidence of retaliation in the form of a letter stating that she was being terminated for “threatening to take legal action” after she was asked to resign upon returning from disability leave, the court absolved Hosanna-Tabor of liability for this clear violation of the ADA.\textsuperscript{64}

Rather than acknowledging that Perich had suffered actionable discrimination, the Court focused exclusively on Hosanna-Tabor’s defense, rooted in the First Amendment religion clauses: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”\textsuperscript{65} After a long discussion tracing the history of the conflict between church and state over religious positions back to the Magna Carta, the Court concluded that the

\textsuperscript{61} \textit{Id.} at 1292.
\textsuperscript{62} \textit{Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,} 565 U.S. 171, 188 (2012).
\textsuperscript{63} \textit{Id.} at 190.
\textsuperscript{64} \textit{Id.} at 179.
\textsuperscript{65} \textit{U.S. Const. Amend. I.}
ministerial exception was compelled by both religion clauses.\textsuperscript{66} The Free Exercise clause prevented application of antidiscrimination laws to ministers because “requiring a church to accept or retain an unwanted minister . . . interfer[es] with the internal governance of the church [and] depriv[es] the church of control over the selection of those who will personify its beliefs.”\textsuperscript{67} The Free Exercise clause gives a religious group the “right to shape its own faith and mission through appointments.”\textsuperscript{68} Moreover, allowing the state to regulate who will “minister to the faithful” would involve the government in religious decisions and thus violate the Establishment Clause.\textsuperscript{69} According to the Court, even when a plaintiff sought only damages, not reinstatement, this too violated the religion clauses because an award of damages would depend on a determination that the religious organization was wrong to have terminated the minister, and would operate to penalize the religious organization for exercising its right to choose its own ministers.\textsuperscript{70}

After recognizing the existence of the ministerial exception, the Court determined that Perich was a minister within the exception.\textsuperscript{71} However, the Court declined to adopt a “rigid formula” for determining which employees are ministers, instead setting out several considerations relevant to this inquiry: the employee’s formal title, the “substance reflected in that title,” the extent to which the employee held herself out as a minister, and the religious functions the employee performed in the course of her employment.\textsuperscript{72}

\textsuperscript{66} Id. at 182-88.
\textsuperscript{67} Id. at 188.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 189.
\textsuperscript{70} Id. at 194.
\textsuperscript{71} Id. at 190.
\textsuperscript{72} Id. at 190-92.
Cheryl Perich taught first grade and later fourth grade at Hosanna-Tabor Evangelical Lutheran Church and School.\(^7\) Perich was first employed by Hosanna-Tabor as a lay teacher, and within a year had become a called teacher, with the formal title of “Minister of Religion, Commissioned.”\(^7\) To become a called teacher, she had completed a course of theological study at a Lutheran college.\(^5\) The school employed both called and lay teachers (who were not required to be Lutheran), and the duties of both were largely the same; the advantage of being a called teacher was that a called teacher could only be fired for cause.\(^6\) Lay teachers, in contrast, served one-year renewable terms.\(^7\)

Perich taught secular subjects including “math, language arts, social studies, science, gym, art, and music.”\(^7\) In addition, she taught a religion class, lead her students in prayer, and attended school-wide chapel service, which she herself lead twice a year.\(^7\) The district court determined that she spent forty-five minutes per day on religious duties, while six hours and fifteen minutes of each day were devoted to secular activities.\(^8\)

The Supreme Court concluded that on these facts, Perich was a minister.\(^8\) The first fact it considered was that the school had “held Perich out as a minister” by giving her the title of “Minister of Religion, Commissioned.”\(^8\) That title reflected that she had undertaken religious training, including completing eight courses at a Lutheran college, obtaining the endorsement of her local Synod district, and passing an oral examination by faculty members at the college.\(^8\)

\(^7\) Id. at 177-78.  
\(^8\) Id. at 178.  
\(^8\) Id. at 177.  
\(^6\) Id. at 177.  
\(^7\) Id.  
\(^7\) Id. at 178.  
\(^7\) Id. at 178.  
\(^8\) EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School, 597 F.3d 769, 1179-80 (6th Cir. 2010).  
\(^8\) Hosanna-Tabor, 565 U.S. at 190.  
\(^8\) Id. at 191.  
\(^8\) Id. at 191.
Additionally, she had been commissioned as a minister after being elected by the congregation.\textsuperscript{84} Perich also held herself out as a minister by accepting the position of called teacher and by claiming a housing allowance on her taxes available only to ministers.\textsuperscript{85}

Even though Perich only performed religious-related tasks for forty-five minutes each day, the Court held that whether her job duties were religious was not an issue “that [could] be resolved by a stopwatch.”\textsuperscript{86} Perich’s religious duties, including teaching religion and leading students in prayer, “reflected a role in conveying the Church’s message and carrying out its mission” and Perich “performed an important role in transmitting the Lutheran faith to the next generation.”\textsuperscript{87}

As noted above, the Court paid no attention to the actionable discrimination Perich had suffered. It also only barely nodded toward the purpose behind the ADA or other antidiscrimination laws with the milquetoast observation that “[t]he interests of society in the enforcement of employment discrimination statutes is undoubtedly important.”\textsuperscript{88} The Court was much more concerned with protecting the church’s right to discriminate than with protecting the employee’s right to be free from discrimination. Accordingly, the Court made the sweeping statement that “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.”\textsuperscript{89} It did not matter whether the religious reason Hosanna-Tabor used to justify its firing of Perich was

\begin{footnotesize}
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\item \textsuperscript{84} Id. at 191.
\item \textsuperscript{85} Id. at 191-92.
\item \textsuperscript{86} Id. at 193.
\item \textsuperscript{87} Id. at 192.
\item \textsuperscript{88} Id. at 196.
\item \textsuperscript{89} Id. at 194.
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pretextual.90 This broad language gives religious organizations a free pass to completely ignore employment laws with impunity.

Incredibly, the justices unanimously endorsed this license to discriminate in *Hosanna-Tabor*. Justice Thomas filed a concurrence stating that courts should defer to a religious organization’s “sincere determination” that an employee is a minister rather than undertaking an independent inquiry.91 Justice Alito, joined by Justice Kagan, concurred as well and emphasized that the most important consideration when determining whether an employee is a minister is the “religious function” that the employee performed.92 The employee’s formal title or ordination are less important, especially since not all faiths use the term “minister” or have an equivalent title.93 Justice Alito further expounded on the majority’s claim that courts cannot inquire into whether a given religious reason for firing is “pretextual,” because that would require the court to “make a judgment about church doctrine” by determining whether that religious reason really was central to the church’s teachings and mission.94 On Justice Alito’s view, because courts cannot evaluate “what the accused church really believes,” courts therefore cannot evaluate whether a religious reason for hiring is pretextual.95

### III. Courts Struggle with How to Apply the Ministerial Exception After *Hosanna-Tabor*.

*Hosanna-Tabor*’s strong endorsement of the ministerial exception, combined with its minimal guidance on how to apply it, has led most courts to read the exception very broadly.

Courts have declared a number of relatively lower-level employees of religious organizations to

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90 *Id.* at 194. *Hosanna-Tabor* claimed that by threatening to sue, Perich “violated the Synod’s commitment to internal dispute resolution.” *Id.*

91 *Id.* at 197 (Thomas, J., concurring).

92 *Id.* at 206 (Alito, J., concurring).

93 *Id.* at 198 (Alito, J., concurring).

94 *Id.* at 205. This line of reasoning is reminiscent of Judge Posner’s imagined disagreement over music for Easter mass in *Tomic*. See supra p. 4.

95 *Id.* at 206 (Alito, J., concurring).
be ministers, including teachers at Jewish schools, a church organist, and an employee at a religious organization for college students.\textsuperscript{96} And after \textit{Hosanna-Tabor}, religious employers need not even bother themselves to come up with a pretextual, religious-based reason for violating antidiscrimination laws. However, the Ninth Circuit and the California Court of Appeals have recently split from the majority approach and interpreted the ministerial exception more narrowly.\textsuperscript{97}

\textbf{A. Most Courts Interpret the Ministerial Exception Broadly.}

Although circuits take a variety of approaches to determining who is a minister after \textit{Hosanna-Tabor}, most circuits find lower-level employees of religious organizations to easily fit within the exception. In \textit{Cannata v. Catholic Diocese of Austin}, the Fifth Circuit adopted a totality-of-the-circumstances analysis when evaluating whether a church music director was a minister.\textsuperscript{98} The plaintiff alleged that he had been terminated in violation of the ADEA and the ADA.\textsuperscript{99} In determining whether the music director was a minister, the Fifth Circuit took an “all things considered” approach.\textsuperscript{100} The music director argued that his only duties were playing the piano at Mass, keeping the books for the music department, running the sound system, and doing custodial work.\textsuperscript{101} The court found that even if all the plaintiff did was play the piano during mass, by doing so he “furthered the mission of the church and helped convey its message to the congregants.”\textsuperscript{102} This was so even though the plaintiff had no training or experience in being a worship leader, did not interact with congregants, did not lead the music at mass or lead the

\textsuperscript{96} Grusscott v. Milwaukee Jewish Day School, Inc., 882 F.3d 655 (7th Cir. 2018); Conlon v. Intervarsity, 777 F.3d 829 (6th Cir. 2015); Cannata v. Catholic Diocese of Austin, 700 F.3d 169 (5th Cir. 2012).

\textsuperscript{97} Biel v. St. James School, 992 F.3d 603 (9th Cir. 2018); Su v. Stephen S. Wise Temple, 244 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019).

\textsuperscript{98} Cannata, 700 F.3d at 170-71.

\textsuperscript{99} \textit{Id}. at 170.

\textsuperscript{100} \textit{Id}. at 176.

\textsuperscript{101} \textit{Id}. at 177.

\textsuperscript{102} \textit{Id}.
congregation in song, was not ordained, and did not write the music or lyrics of any of the songs he played. The court found that because music is “an integral part of the celebration of mass,” none of this mattered. Focusing on the “important function” the plaintiff played at religious services, the court found that he was a minister and could not proceed with his suit. The court provided no facts relevant to whether the plaintiff’s disability and age discrimination claims were viable, nor any reasons the church gave for firing him. Rather, the court said it would be “inappropriate” to discuss the merits and that it was “precluded from scrutinizing the church’s motives for terminating” the plaintiff.

In Conlon v. Intervarsity Christian Fellowship, the Sixth Circuit took a slightly different approach and marched through each of the Hosanna-Tabor factors in turn when determining whether the plaintiff, a “spiritual formation specialist” for an organization that engaged in evangelical ministry on college campuses was a minister. After a very brief analysis, the court concluded that the plaintiff was a minister when only two of the four factors that were present in Hosanna-Tabor were present in her case. While the plaintiff did not hold herself out as a minister, and her title did not reflect that she had completed any religious education or training, her job title of “spiritual formation specialist” was religious on its face and she fulfilled “important religious functions.” When discussing these important religious functions, the court noted only that her job included assisting others to “cultivate intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines” and labeled this a

103 Id. at 177-78.  
104 Id. at 178.  
105 Id. at 180.  
106 Id.  
107 Id. at 171 n.1.  
108 Conlon v. Intervarsity, 777 F.3d 829, 837 (6th Cir. 2015).  
109 Id. at 835.  
110 Id.
Ministerial function. Merely because her title included the word “spiritual” and she performed whatever functions this vague description entailed, the Sixth Circuit held that she was a minister. Moreover, Intervarsity did not waive the ministerial exception by representing itself as an Equal Opportunity Employer on its website, specifically with regard to sex discrimination, and the ministerial exception blocked the plaintiff’s state-law claims as well. The plaintiff, who likely had no idea that she was a “minister,” was thus left without any remedy for her claim that she had been fired because she was in the process of getting divorced, while men in the organization who had divorced their spouses were not disciplined or terminated.

Like in Conlon, in Grussgott v. Milwaukee Jewish Day School the Seventh Circuit found that an employee was a minister when “at most two of the four Hosanna-Tabor factors are present.” The plaintiff in this case was a Hebrew teacher at a Jewish elementary school who claimed she had been fired because of cognitive issues due to a brain tumor. The court characterized the Hosanna-Tabor analysis as “fact intensive” and resisted the notion that all four Hosanna-Tabor factors must be present for the exception to apply, but nevertheless used the four factors as a framework. The court found that the plaintiff’s title of “grade school teacher” or even “Hebrew teacher” did not show that her role was religious. She also did not hold herself out as a religious leader. However, she had undergone training in a religious curriculum and was expected to incorporate religious teaching in her lessons, and she also had extensive

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111 Id.
112 Id.
113 Id. at 831, 836-37.
114 Id. at 832.
116 Id. at 656-57.
117 Id. at 659.
118 Id. at 659.
119 Id.
experience in teaching religion, which was one of the reasons she was hired.\textsuperscript{120} And, most important, she performed important religious functions, including teaching students about Torah readings, Jewish holidays, and prayer, as well as praying along with them.\textsuperscript{121} The plaintiff argued that these lessons were approached from a historic and cultural perspective rather than a religious one, and moreover, she chose these topics and was not required by the school to teach them.\textsuperscript{122} The court found that it was not for her to decide “what activities the school may genuinely consider to be religious,” and that the school “clearly intended for her role to be connected to the school’s Jewish mission.”\textsuperscript{123} However, the court declined to adopt a test that only considered whether an employee performed religious functions, instead characterizing the approach dictated by \textit{Hosanna-Tabor} as a “totality of the circumstances” test.\textsuperscript{124}

Even the Second Circuit, in light of \textit{Hosanna-Tabor}, recanted its previous view that the exception did not apply in cases when the employment dispute between the religious organization and the employee was not religious in nature and so would not entangle the court in a religious dispute.\textsuperscript{125} In \textit{Fratello v. Archdiocese of New York}, the Second Circuit recognized that “the Supreme Court made clear that those properly characterized as ‘ministers’ are flatly barred from bringing employment discrimination claims against the religious groups that employ or formerly employed them” and that “the First Amendment does not tolerate a judicial remedy for any minister claiming employment discrimination against his or her religious group, regardless of the group’s asserted reason (if any) for the adverse employment action.”\textsuperscript{126}

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120 Id.
121 Id. at 660.
122 Id.
123 Id.
124 Id. at 661.
125 See Rweyemamu v. Cote, 520 F.3d 198, 208 (2d Cir. 2008).
considerations put forth in *Hosanna-Tabor*, focusing especially on the employee’s religious job functions.\(^\text{127}\) The court concluded that while the title of principal did not indicate that she was a minister, the job required someone who could provide Catholic leadership, and the principal in fact considered herself a spiritual leader.\(^\text{128}\) Moreover, the principal performed important religious functions that “‘convey[ed]’ the School’s Roman Catholic ‘message and carr[ied] out its mission.’”\(^\text{129}\) These included leading daily prayers over the loudspeaker and at assemblies and other ceremonies, supervising and approving various arrangements for annual special Masses, and supervising teachers’ religious instruction in the classroom.\(^\text{130}\) Moreover, how well she performed these religious duties was formally evaluated and her supervisors praised her performance at “setting a good example as a religious leader” and “giving priority to a comprehensive religious education program.”\(^\text{131}\) Just as it did not matter that Cheryl Perich spent most of her day teaching secular subjects, it also did not matter that the principal performed many secular administrative duties.\(^\text{132}\) The principal was a minister and so her gender-discrimination and retaliation claim against the church was barred.\(^\text{133}\)

However, the Second Circuit did seem to recognize the unfairness of this result when it noted that “[t]he irony is striking. We rely in part on [the principal’s] supervisors and faculty officials’ prior praise of her performance of her religious responsibilities as proof that she could be fired for the wrong reason or without any reason at all.”\(^\text{134}\) Unlike the Supreme Court in *Hosanna-Tabor*, the Second Circuit squarely recognized the competing rights and values in this

\(^{127}\) *Id.* at 204-05.  
\(^{128}\) *Id.* at 208.  
\(^{129}\) *Id.* at 209 (quoting *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 192 (2012)).  
\(^{130}\) *Id.* at 209.  
\(^{131}\) *Id.* at 209.  
\(^{132}\) *Id.* at 209 n.34.  
\(^{133}\) *Id.* at 210.  
\(^{134}\) *Id.* at 209.
case: “an employer’s right to freedom of religion and an employee’s right not to be unlawfully discriminated against.” It appears that the court would prefer to have done otherwise, but felt obligated under *Hosanna-Tabor* to find against the employee because “the Supreme Court has told us that . . . ‘the First Amendment has struck the balance for us.’”

**B. The Ninth Circuit and the California Court of Appeals Interpret the Exception Narrowly.**

In contrast to the broad, employer-friendly interpretation of the exception used by most courts after *Hosanna-Tabor*, the Ninth Circuit and the California Court of Appeals have recently issued decisions that view the exception as much more narrow. In *Biel v. St. James School*, the Ninth Circuit determined that an elementary school teacher at a Catholic school was not a minister, on facts largely similar to those of *Grussgott*. In doing so, the court emphasized that the ministerial exception should be limited to what is necessary to comport with the First Amendment; the ministerial exception should only apply to those who “serve a leadership role in the faith.”

The plaintiff, Kristin Biel, was fired after telling her employer that she had been diagnosed with breast cancer and needed to take leave to receive treatment. The Ninth Circuit conducted its analysis by comparing Biel to Perich and concluded that on most of the facts that the *Hosanna-Tabor* court found relevant, the two simply were not similar. The court emphasized that the Supreme Court had held that Perich was a minister only after finding that all four *Hosanna-Tabor* factors tipped in that direction. In contrast, only one of those factors was

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135 *Id.*
136 *Id.* at 210 (quoting *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 196 (2012)).
137 *Biel v. St. James School*, 992 F.3d 603, 605 (9th Cir. 2018).
138 *Id.* at 611.
139 *Id.* at 605.
140 *Id.* at 609.
141 *Id.* at 608.
present in Biel’s case.\textsuperscript{142} Biel’s title, “Grade 5 Teacher,” did not reflect any religious content, nor did Biel hold herself out as a minister; she described herself only as a teacher.\textsuperscript{143} Unlike Perich, Biel did not undergo any religious training or education and her teaching degree did not involve a religious component.\textsuperscript{144} Biel taught religion in the classroom like Perich did; she taught religion to her students four times a week, organized her students to lead prayers in the classroom, and accompanied her students to monthly Mass.\textsuperscript{145} However, her religious lessons were taken from a book required by the school, she did not lead prayers in the classroom herself, and her only duties at the Mass were to keep her students quiet and calm.\textsuperscript{146} The Ninth Circuit found that these tasks, while religious in nature, were not ministerial because they did not involve “the kind of close guidance and involvement that Perich had in her students’ spiritual lives.”\textsuperscript{147}

As “[a]t most, only one of the four \textit{Hosanna-Tabor} considerations weighed in St. James’s favor,” the Ninth Circuit found that Biel was not a minister.\textsuperscript{148} The court acknowledged that the Seventh Circuit’s recent decision in \textit{Grussgott} could be seen to be at odds with this decision, but emphasized that Grussgott was much more similar to Perich than Biel was, because Grussgott had undergone training in Jewish curriculum, held herself out as having extensive religious teaching experience, and lead her students in prayers and rituals.\textsuperscript{149} The court questioned whether \textit{Grussgott} was correctly decided,\textsuperscript{150} but nevertheless distinguished this case from other circuits’

\textsuperscript{142} \textit{Id.} at 609.
\textsuperscript{143} \textit{Id.} at 608-09.
\textsuperscript{144} \textit{Id.} at 608.
\textsuperscript{145} \textit{Id.} at 610.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.} at 609 (“Even assuming \textit{Grussgott} was correctly decided, which we are not sure it was . . .”).
cases by saying that “No federal court of appeals has applied the ministerial exception in a case that bears so little resemblance to Hosanna-Tabor.”¹⁵¹

The Biel court, unlike many courts considering the ministerial exception, recognized that employees have the right to be free from discrimination.¹⁵² Accordingly, the ministerial exception should be limited and should not “provide carte blanche to disregard antidiscrimination laws.”¹⁵³ Following Biel, in Morissey-Berru v. Our Lady of Guadalupe School, the Ninth Circuit reversed the district court and held that another Catholic school teacher was not a minister on similar facts; although she had “significant religious responsibilities,” she had a secular title, did not hold herself out as a minister, and had no religious training or credentials.¹⁵⁴ Accordingly, she could proceed with her age-discrimination claim.¹⁵⁵

Using a similar method of analysis as used in Biel, in Su v. Stephen S. Wise Temple, the California Court of Appeals found that teachers at a Jewish preschool were not “ministers.”¹⁵⁶ Thus, they could proceed with their claim that they were not paid overtime or provided with rest or meal breaks as required under California wage-and-hour laws.¹⁵⁷ Without deciding whether the exception should even apply to claims under wage-and-hour laws,¹⁵⁸ the court, following Biel, compared the preschool teachers to Perich and found that only one of the Hosanna-Tabor factors was met: the preschool teachers fulfilled religious functions by teaching religious prayers and rituals, celebrating Jewish holidays, and participating in weekly Shabbat services.¹⁵⁹ Although the teachers played “an important role in the life of the Temple,” because the other

¹⁵¹ Id. at 610.
¹⁵² Id. at 611.
¹⁵³ Id.
¹⁵⁵ Id. at 460.
¹⁵⁷ Id. at 549.
¹⁵⁸ Id. at 554 n. 2.
¹⁵⁹ Id. at 553.
three factors were not present, the teachers were not ministers for the purposes of the exception.160

Judge Lee Smalley Edmon, in her concurrence, squarely addressed the important threshold issue neglected by the majority; in her view, the ministerial exception should not apply to this dispute at all.161 Emphasizing, as the Biel court did, that the exception should be limited to what is needed to comport with the First Amendment, she advocated for a return to the rule from Bollard that the ministerial exception does not apply when “a religious institution ‘is neither exercising its constitutionally protected prerogative to choose its ministers nor embracing the behavior at issue as a constitutionally protected religious practice.'”162 As this case was not about the synagogue’s choice of teachers, but rather about whether to pay them overtime and provide them with breaks, and as the synagogue did not put forth a religious justification for not following the wage-and-hour laws, there was no constitutional bar to the suit as the Free Exercise and Establishment Clauses would not be implicated.163 In order for a religious employer to show that it should be exempt from wage-and-hour laws, it must first demonstrate that applying those laws to its ministers would violate its First Amendment rights; no such showing was made here.164

The religious employers in Biel, Morrissey-Berru, and Su have all sought certiorari.165

IV. The Ministerial Exception Should be Strictly Limited to What the First Amendment Requires.

160 Id. at 553.
161 Id. at 555 (Edmon, J., concurring).
162 Id. at 558-59 (Edmon, J., concurring).
163 Id. at 559 (Edmon, J., concurring).
164 Id. See also Bigelow v. Sassafras Grove Baptist Church, 786 S.E.2d 358, 366 (N.C. Ct. App. 2016) (applying “neutral principles” of wage-and-hour laws to part-time pastor’s claims would not entangle the court in an “ecclesiastical dispute or interpretation”).
The ministerial exception must be construed narrowly to protect the rights of lower-level employees of religious organizations to be free from discrimination. Following the Supreme Court’s unsatisfactory articulation of the exception’s scope in Hosanna-Tabor, courts have broadly swept workers who likely had no idea that they were “ministers” into the exception and unfairly deprived them of a remedy for the very real discrimination they have suffered. In Hosanna-Tabor, the Supreme Court located the exception in both the Free Exercise Clause and the Establishment Clause. But neither clause justifies a broad application of the exception. Courts must take care to confine it to what is required to protect the First Amendment rights of religious employers.

In the leading Free Exercise case, Employment Division v. Smith, the Court held that the Free Exercise clause did not exempt religiously motivated conduct from “neutral, generally applicable laws,” retreating from the balancing test that the Court had previously applied to Free Exercise claims. Thus the plaintiffs could constitutionally be denied unemployment insurance after being fired for their religious use of peyote. Justice Scalia, writing for the majority, observed that society suffers when religious organizations are allowed to escape laws that promote the social good, citing to cases in which the Court declined to recognize religious exceptions in “social welfare legislation such as minimum wage laws” and “laws providing for equality of opportunity for the races.” Employment discrimination laws and wage-and-hour

166 See 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 employers should be required to provide notice to employees upon hiring that they would be classified as “ministers” and thus lack antidiscrimination protections).
167 Hosanna-Tabor, 565 U.S. at 188-89.
169 Id.
170 Smith, 494 U.S. at 889 (citing Tony and Susan Alamo Foundation v. Sec’y of Labor, 471 U.S. 290 (1985); Bob Jones Univ. v. United States, 461 U.S. 574 (1983)).
laws thus fall squarely within the category of laws contemplated by *Smith*—neutral, generally applicable laws to which the constitution does not require religious exceptions, because doing so would make every citizen “a law unto himself.”

The *Hosanna-Tabor* court made a brief, unsatisfying attempt to distinguish *Smith* as involving “government regulation of only outward physical acts.” In contrast, the ministerial exception involves “government interference with an internal church decision that affects the faith and mission of the church itself.” But as constitutional scholar Leslie C. Griffin observes, employment decisions made by religious organizations resound outside of “internal church decisions” when victims of disability discrimination, sexual harassment, and unequal pay experience real harms, unmotivated by religious doctrine.

First Amendment scholars Ira Lupu and Robert Tuttle recognize that *Hosanna-Tabor*’s characterization of *Smith* is wholly unpersuasive, but nevertheless argue that the ministerial exception should not be controlled by *Smith* because employment disputes between religious organizations and ministers involve “strictly and purely ecclesiastical questions,” while *Smith* applies only when secular concerns conflict with religious concerns. In Lupu and Tuttle’s view, the ecclesiastical questions at issue are the “fitness of particular persons for ministry”—religious organizations must be able to choose who is fit to lead their congregations. But in ministerial exception cases like *Hosanna-Tabor* in which the religious employer asserts a religious reason for the employment decision, the plaintiff’s secular interest in being treated fairly comes in conflict with this religious justification, so *Smith* should apply. Even accepting

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171 *Smith*, 494 U.S. at 885 (citing Reynolds v. United States, 98 U.S. 145, 167 (1878)).
172 *Hosanna-Tabor*, 565 U.S. at 190.
173 *Id*.
176 *Id*. at 1314.
Lupu and Tuttle’s characterization of what the ministerial exception is meant to protect, not all ministerial exception cases are about whether a particular person is fit for ministry.

Regardless, the Court said in *Hosanna-Tabor* that the ministerial exception does survive *Smith*. But *Smith*’s caution about the danger of allowing religious organizations to evade socially valuable legislation and become laws unto themselves should guide courts toward limiting the exception. The remainder of this Part will present a method for limiting the exception while comporting with First Amendment constraints. Section A will argue that the ministerial exception should not be applied at all in hostile work environment and wage-and-hour cases, because the Free Exercise interests of religious employers are not implicated. Section B will argue that in discrimination cases, religious employers should be required to show that their Free Exercise rights are at issue by giving a religious reason for the discriminatory decision, and that courts can evaluate whether this reason is pretextual without running afoul of the Establishment Clause.

A. **The First Amendment Does Not Compel Granting Employers Exceptions from Liability for Wage-and-Hour Violations or Hostile Work Environments.**

Courts evaluating suits brought by employees against religious employers should first ask the basic question posed by Judge Edmon in *Su*: Does this suit implicate the religious organization’s First Amendment rights? Two categories of cases will rarely, if ever, involve First Amendment interests: wage-and-hour claims and hostile work environment claims.

As recognized by Judge Edmon in *Su* and Judge Luttig in *Shaliehsabou*, wage-and-hour claims are not about whether a religious organization can choose its own leaders or practice its

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177 *Hosanna-Tabor*, 565 U.S. at 190.
beliefs. As Judge Luttig argued in dissent in Shaliehsabou, there is no reason for courts to recognize a ministerial exception to the FLSA that is coextensive with the ministerial exception to employment discrimination laws. It is frankly outrageous for a religious organization to underpay its workers and then turn around and defend itself by arguing that this is justified because those very same underpaid workers are “ministers” who play essential roles as religious leaders, as the Jewish preschool in Su did. When courts allow such employers to escape wage-and-hour laws, they are sanctioning the exploitation of workers through payment of substandard wages, exactly what the FLSA was enacted to prevent.

The Supreme Court has given guidance on the threshold question courts must ask when employers claim that the ministerial exemption allows them to disregard wage-and-hour laws in Tony and Susan Alamo Foundation v. Secretary of Labor, one of the cases expressly approved of by Justice Scalia in Smith. In this case, a religious charity argued that applying the FLSA to workers involved in its commercial activities violated its right to free exercise. The Court held that a religious organization was not exempt from the FLSA absent a showing that “the program actually burdens the [organization’s] freedom to exercise religious rights.” While this was not a ministerial exception case, employers seeking to use the ministerial exception to escape the

181 Su, 244 Cal. Rptr. 3d at 559 (Edmon, J., concurring).
182 Shaliehsabou, 369 F.3d at 803-04 (Luttig, J., dissenting).
183 See Su, 244 Cal. Rptr. 3d at 549.
187 Tony and Susan Alamo Foundation, 471 U.S. at 303 (emphasis added).
188 Id. at 292.
FLSA should have the same burden of showing that applying the law to their employees would actually burden their First Amendment rights.\(^{189}\) Because the FLSA is interpreted in favor of liberal coverage of employees, this should be a high bar for employers to meet.\(^{190}\) In cases like *Su*, *Shaliehsabou*, *Schleicher*, and *Alcazar*, it is hard to imagine how an employers’ free exercise rights would be burdened by paying these low-level employees a little bit more or giving them more breaks in their workdays.

The Department of Labor recently weighed in on this issue in an Opinion Letter from the Acting Administrator of the Wage and Hour Division, which concerns whether members of a religious community who work in factories or workshops owned by the community are employees for the purposes of the FLSA.\(^{191}\) The community described takes living communally and sharing all personal property as central tenets of its faith.\(^{192}\) Community members also consider work to be a form of worship.\(^{193}\) Some community members work in the community’s “onsite ventures” manufacturing medical equipment and furniture.\(^{194}\) According to the Acting Administrator, these workers would not be employees covered by FLSA because, first of all, they do not expect compensation for their work.\(^{195}\) Second, these workers “fall squarely within the ministerial exception recognized in *Hosanna-Tabor,*” although the letter does not explain how they do so, only noting that “imposing the FLSA on these members and their community would force them to recognize private property, wages, and hierarchical economic relationships among members—vitiating their central religious tenets.”\(^{196}\)

\(^{189}\) See *Su*, 244 Cal. Rptr. 3d at 548.


This Opinion Letter, reminiscent of the *Schleicher* court’s musings on how inappropriate it would be to apply the FLSA to wine-making monks,197 seems innocuous but is in fact deeply troubling. Within what appears on the surface to be a common-sense decision, the Department of Labor flatly states that there is a ministerial exception to the FLSA that is coextensive with the exception recognized in *Hosanna-Tabor*.198 As discussed above, the First Amendment does not require this result. Members of religious communes and wine-making monks are not likely to bring FLSA lawsuits against their religious orders; plaintiffs are more likely to be preschool teachers, as in *Su*, or nursing-home kitchen workers, as in *Shaliehsabou*. In a letter nominally about people who have chosen to live together and share their goods and their work, knowing that in so doing their basic needs will be met through group endeavor, the Department of Labor encourages exploitation of workers whose employers clearly do not care whether they are paid enough to care for their basic needs.

Just as the First Amendment does not require a ministerial exception in most FLSA cases, it also does not require a ministerial exception in hostile work environment cases. Although they are employment discrimination cases under Title VII, in these cases employers do not (or do not always) take tangible employment actions against their employees. Rather, employees are harassed by their supervisors or coworkers because of their sex or another protected characteristic, and the harassment itself is the discrimination.199 Hostile work environment cases are therefore not about the religious employer’s freedom to choose who will personify its beliefs or minister to the faithful; rather, like FLSA cases, they are about the terms and conditions of the work after the employee has been hired. As recognized by the *Bollard* court, there is no Free

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197 See *Schleicher* v. Salvation Army, 518 F.3d 472, 476 (7th Cir. 2008).
Exercise problem with allowing a hostile work environment case to proceed; moreover, there is also no Establishment Clause problem when a plaintiff is only seeking damages because the litigation only requires a limited inquiry that will not result in excessive entanglement between church and state.\textsuperscript{200} In cases like \textit{Bollard}, in which the suit does not involve the employer’s choice to keep or retain an employee, and the employer offers no religious reason for the discrimination or indeed expressly disavows it, there is no danger that allowing the suit to proceed will burden the employer’s First Amendment rights.\textsuperscript{201}

The harder cases will be those in which, rather than disavowing actionable harassment, the religious organization endorses it or otherwise defends the suit on the basis that the complained-of remarks are consistent with its religious doctrine. The employer will argue that litigation over these claims would violate the Free Exercise Clause, because the court would be required to pass judgment on matters of church doctrine, and the Establishment Clause, by excessively entangling the government in religion through lengthy and intrusive litigation. But the availability of this defense does not turn on whether the employee is characterized as a minister; the employer can argue that the First Amendment bars the claim because they have a religious justification for the challenged conduct even when the ministerial exception does not apply.\textsuperscript{202} In the recent Northern District of Illinois case \textit{Demkovich v. St. Andrew the Apostle Parish}, the court held that although the ministerial exception did not bar the plaintiff’s hostile work environment claims because he did not challenge a tangible employment action, litigation over his claims of sex and sexual orientation harassment would nevertheless impermissibly

\textsuperscript{200} Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 947, 950 (9th Cir. 1999).
\textsuperscript{201} \textit{Id.} at 947; see also \textit{Demkovich v. St. Andrew the Apostle Par.}, 343 F. Supp. 3d 772, 782 (N.D. Ill. 2018) (“If a minister's hostile-environment claim does not challenge a tangible employment action and does not pose excessive entanglement with the religious employer, then the ministerial exception should not apply.”)
\textsuperscript{202} \textit{Demkovich}, 343 F. Supp. 3d at 782.
tangle the government in religion.\textsuperscript{203} Thus, a religious employer has a First Amendment defense to a hostile work environment claim when it can show the court that its First Amendment interests are implicated, even though the ministerial exception itself does not apply to hostile work environment claims.\textsuperscript{204}

\textbf{B. The First Amendment Does Not Compel Granting Employers Exceptions to Antidiscrimination Laws Without a Religious Justification for the Discriminatory Action.}

In discrimination cases that involve a tangible employment action and therefore do potentially implicate the employer’s Free Exercise rights, under \textit{Hosanna-Tabor} courts must determine whether the ministerial exception should apply. The Supreme Court’s refusal to set what it called a “rigid formula” and define more concretely the contours of the exception has led to the majority approach of interpreting the exception broadly.\textsuperscript{205} However, the same failure to fully delineate the exception allows room for courts to interpret the exception much more narrowly, as the Ninth Circuit and California Court of Appeals have recently done.\textsuperscript{206}

In fact, requiring more—or all—of the \textit{Hosanna-Tabor} factors to be met in order for a plaintiff to be considered a minister is truer to that case and to the underlying policy reasons for recognizing the exception in the first place.\textsuperscript{207} \textit{Hosanna-Tabor} took a holistic look at Perich’s employment and found four reasons for her to be considered a minister; concentrating, as the Grussgott and Conlon courts did, on only one or two of the factors “render[s] most of the analysis irrelevant.”\textsuperscript{208} And because the ministerial exception is grounded in the First Amendment, it should be interpreted rigorously to only be applied when an employer is actually

\textsuperscript{203} \textit{Id.} at 786.
\textsuperscript{204} \textit{Id.} at 785.
\textsuperscript{205} See \textit{Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC}, 565 U.S. 171, 190 (2012).
\textsuperscript{206} Biel v. St. James School, 992 F.3d 603, 605 (9th Cir. 2018); Su v. Stephen S. Wise Temple, 244 Cal. Rptr. 3d 546, 548 (Cal. Ct. App. 2019).
\textsuperscript{207} See Biel, 911 F.3d at 610.
\textsuperscript{208} \textit{Id.}
selecting “those who will personify its beliefs.” 209 When courts apply it more widely to encompass lower-level employees who have some religious tasks, courts are sanctioning unlawful discrimination. 210

Even if the employee is found to be a minister, courts should require the employer to show that the challenged employment action had a religious justification. The Supreme Court went much farther than the First Amendment necessitates when making the proclamation in Hosanna-Tabor that “[t]he 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.” 211 When a religious employer discriminates against its employees for nonreligious reasons, its right to freely exercise its religion is simply not impacted and the First Amendment does not compel absolving the employer of liability.

Once an employer asserts a religious justification, the court should determine whether that reason actually motivated the decision; in other words, whether it was pretextual. Contrary to Justice Alito’s concern, this inquiry does not require a court to “sit[] in ultimate judgment of what the accused church really believes.” 212 Rather, the court simply determines whether the religious reason asserted was the real reason for the employment decision. 213 As Caroline Mala Corbin points out, the Supreme Court held in Jones v. Wolf that courts can avoid entanglement issues in disputes involving churches by applying “neutral principles of law.” 214 Courts act free

209 Hosanna-Tabor, 565 U.S. at 188.
210 Griffin, supra note 174, at 984.
211 Id. at 194.
212 Hosanna-Tabor, 565 U.S. at 715 (Alito, J., concurring).
from entanglement when they apply secular, well-established doctrines and avoid passing judgment on matters of religious belief.\textsuperscript{215} Courts can thus apply “neutral principles of law” and use the same tools to evaluate whether the preferred reason for the employment action is pretextual that they use in other employment cases.\textsuperscript{216} This analysis, which involves assessments of credibility and circumstantial evidence, is well within a court’s competence.\textsuperscript{217} In fact, the Supreme Court has held that a religious employer’s First Amendment rights are not violated when a state equal opportunity commission “ascertain[s] whether the ascribed religious-based reason was in fact the reason” for an employee’s termination.\textsuperscript{218}

The ministerial-exception analysis itself poses more entanglement concerns than a pretext analysis would.\textsuperscript{219} Courts do not defer to the religious organization’s decision about who is a minister, as doing so would allow these employers to characterize all their employees as ministers;\textsuperscript{220} courts instead undertake an independent analysis modeled after \textit{Hosanna-Tabor}.\textsuperscript{221} But this requires courts to “choose between competing religious visions” by deciding whether to credit the plaintiff’s or the employer’s vision of what religious leadership means in that particular workplace.\textsuperscript{222} As the ministerial exception itself has been approved by the Supreme Court, the pretext inquiry, which does not involve resolution of any religious questions, surely does not constitute excessive entanglement.

\begin{itemize}
\item \textsuperscript{215} \textit{Jones}, 443 U.S. at 603.
\item \textsuperscript{216} Corbin, supra note 213, at 2022.
\item \textsuperscript{217} Corbin, supra note 213, at 2022.
\item \textsuperscript{218} \textit{Ohio Civil Rights Com’n v. Dayton Christian Schools, Inc.}, 477 U.S. 619, 628 (1986).
\item \textsuperscript{219} Corbin, supra note 213, at 2026; see \textit{Elvig v. Calvin Presbyterian Church}, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring) (“The very invocation of the ministerial exemption requires us to engage in entanglement with a vengeance.”)
\item \textsuperscript{220} Corbin, supra note 213, at 2026-27.
\item \textsuperscript{221} See \textit{Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC}, 565 U.S. 171, 192 (2012).
\item \textsuperscript{222} Corbin, supra note 213, at 2028.
\end{itemize}
Without this inquiry into pretext, “[r]eligious freedom means allowing religious institutions to violate the law even when nothing religious is at stake.”223 When nothing religious is at stake, there is no justification for giving constitutional protection to a religious employer’s discriminatory employment decisions. Even when an employee is found to be a minister, courts must both require religious employers to assert a religious justification for the discriminatory conduct and assess whether that justification was the real motivation for the employer’s actions.

Conclusion

Hosanna-Tabor’s lack of guidance as to the scope of the ministerial exception has allowed the majority of courts to see the ministerial exception as extremely broad, encompassing elementary school teachers, church musicians, and religious campus group employees and denying them the benefits of otherwise generally applicable laws regulating employment. But although Hosanna-Tabor itself suggests that the ministerial exception protects a religious employer’s choice of leadership no matter what, because the ministerial exception is a creature of the First Amendment, it should be limited to what the First Amendment actually requires. Courts should refrain from applying the ministerial exception in two contexts in which employers’ Free Exercise interests are not implicated: hostile work environment and wage-and-hour cases. In discrimination cases, courts should interpret the ministerial exception narrowly and require religious employers to show a religious justification for the discrimination that is not pretextual. This will bring the ministerial exception in line with what is constitutionally required while more fully effectuating the purposes of employment legislation and protecting the rights of workers.

223 Griffin, supra note 174, at 999.