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# The Sins of Hosanna-Tabor

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# The Sins of *Hosanna-Tabor*

LESLIE C. GRIFFIN\*

*The Supreme Court has lost sight of individual religious freedom. In Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, the Court for the first time recognized the ministerial exception, a court-created doctrine that holds that the First Amendment requires the dismissal of many employment discrimination cases against religious employers. The Court ruled unanimously that Cheryl Perich, an elementary school teacher who was fired after she tried to return to school from disability leave, could not pursue an antidiscrimination lawsuit against her employer.*

*This Article criticizes Hosanna-Tabor as a profound misinterpretation of the First Amendment. The Court mistakenly protected religious institutions' religious freedom at the expense of their religious employees. Religious employees have been subjected to disabilities discrimination, sexual harassment, unequal pay, hostile work environments, age discrimination, pregnancy discrimination, gender discrimination, race discrimination, assault, retaliation, national origin discrimination, tortious interference with contract, blacklisting, intentional and negligent infliction of emotional distress, and breach of contract. Instead of having a day in court to win or lose their cases, they have been barred from litigation by the ministerial exception, a rule that always grants victory to the employer.*

*This Article explains the flaws in Hosanna-Tabor's reasoning and questions its presupposition that religious institutions are constitutionally entitled to disobey the law. It defends a neutral interpretation of the First Amendment over the Court's favoritism toward religion and explains how the antidiscrimination laws can and should be applied to religious organizations.*

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## INTRODUCTION

The Supreme Court has lost sight of individual religious freedom. Consider the case of Cheryl Perich, an elementary school teacher at Hosanna-Tabor Evangelical Lutheran Church and School, a K–8 school in Redford, Michigan. The school’s personnel manuals stated that she, like any other schoolteacher, was protected by employment discrimination laws.<sup>1</sup> As the 2004–2005 school year approached, Perich suddenly and unexpectedly became ill. When she tried to return to class from disability leave, the school suggested that she voluntarily resign. Perich refused and was fired after she threatened to talk to the Equal Employment Opportunity Commission (EEOC) about a disabilities discrimination lawsuit. She then sued Hosanna-Tabor under the antiretaliation provisions of the Americans with Disabilities Act (ADA).<sup>2</sup>

The Supreme Court unanimously denied Perich her day in court. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>3</sup> the Court ruled that the First Amendment requires a “ministerial exception” to the employment laws. The ministerial exception is a court-created doctrine holding that the First Amendment requires the dismissal of many employment discrimination cases against religious employers, even when the antidiscrimination statutes authorize litigation.<sup>4</sup>

The Fifth Circuit created the ministerial exception in 1972 when it dismissed Mrs. Billie McClure’s equal pay lawsuit against the Salvation Army.<sup>5</sup> After that, federal and state courts repeatedly expanded the exception to reject lawsuits by elementary and secondary school teachers, school principals, university professors, music teachers, choir directors, organists, administrators, administrative secretaries, communications managers, and public relations personnel alleging violations of the ADA, the Age Discrimination in Employment Act (ADEA), Title VII, the Pregnancy Discrimination Act, the Equal Pay Act, the Fair Labor Standards Act, the Family & Medical Leave Act, workers’ compensation laws, and numerous state tort and contract laws.<sup>6</sup> In *Hosanna-Tabor*, the Supreme Court for the first time

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1. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 782 (6th Cir. 2010).

2. *Id.* at 775.

3. 132 S. Ct. 694, 706 (2012).

4. *Id.*

5. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

6. *See, e.g., Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010) (director of the Department of Religious Formation could not bring an Equal Pay Act claim); *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010) (seminarian could not bring state minimum wage claim); *McCants v. Alabama-W. Florida Conf. of United Methodist Church*, 372 F. App’x 39 (11th Cir. 2010) (African American pastor could not bring § 1981 race and retaliation claim); *Friedlander v. Port Jewish Ctr.*, 347 F. App’x 654 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1714 (2010) (rabbi’s breach of contract claim dismissed); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (priest could not bring Title VII racial discrimination claim); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (college chaplain could not bring Title VII sex discrimination claim); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (music director could not bring

recognized the ministerial exception as a requirement of the religion clauses of the First Amendment.

This Article criticizes that ruling as a profound misinterpretation of the First Amendment. The Court mistakenly protected religious institutions' religious freedom at the expense of their religious employees. Over the forty years since *McClure v. Salvation Army*,<sup>7</sup> religious employees have been subjected to disability discrimination, sexual harassment, unequal pay, hostile work environments, age discrimination, pregnancy discrimination, gender discrimination, race discrimination, assault, retaliation, national origin discrimination, tortious interference with contract, blacklisting, intentional and negligent infliction of emotional distress, breach of contract, and more.<sup>8</sup> Instead of having a day in court to win or lose their cases, they have been barred from litigation by the ministerial exception, a rule that always grants victory to the employer.

Professor Philip Kurland argued that “[l]imited powers of government were not instituted to expand the realm of power of religious organizations, but rather in favor of freedom of action and thought by the people.”<sup>9</sup> In the Supreme Court, however, the people’s concerns were abandoned and the power of religious institutions aggrandized. Chief Justice Roberts blithely wrote that the ministerial exception “has not given rise to the dire consequences predicted by the EEOC and Perich” in the forty years since it came into being.<sup>10</sup> Yet the consequences of the exception have been dire for every individual employee whose rights were trampled by a religious employer and who then lost his day in court—and job. The Court has lost sight of individual religious freedom.

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.”<sup>11</sup> The Court strongly rejected the EEOC’s position as “untenable” because the First Amendment “gives special solicitude to the rights of religious organizations.”<sup>12</sup> What the Court sees as “special solicitude,” however, I see as

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ADEA claim); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (Hispanic communications manager could not bring Title VII national origin claim); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (choirmaster’s ADA claim dismissed); *Combs v. Cent. Texas Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (former clergy member could not bring pregnancy discrimination claim); *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306 (N.D. Ga. 2007) (director of Worship Arts (music director) barred from bringing § 1981 claim); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005) (director of music precluded from bringing FMLA suit); *Malichi v. Archdiocese of Miami*, 945 So. 2d 526 (Fla. Dist. Ct. App. 2006) (priest could not bring state workers’ compensation claim).

7. *McClure*, 460 F.2d at 553.

8. For an example of cases, see *supra* note 6.

9. Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 4 (1961).

10. *Hosanna-Tabor*, 132 S. Ct. at 710.

11. *Id.* at 706.

12. *Id.*

lawlessness; the Court held that religious organizations enjoy special freedom to disobey the law.

When *Hosanna-Tabor* and the earlier ministerial exception cases are reviewed in detail, it becomes apparent that the numerous justifications for the exception are all a restatement of one foundational and fundamentally mistaken argument: that religious groups are entitled to disobey the law.

It is unfortunate that the Court gave its imprimatur to a lawless interpretation of the religion clauses. In this Article, I identify the numerous flaws in the Court's reasoning in *Hosanna-Tabor* and argue that the Court was mistaken to recognize a special preferential rule for religious organizations.

In Part I, for background I provide the details of Cheryl Perich's retaliation lawsuit against Hosanna-Tabor and explain the reasoning of the Court's ruling against her. Part II challenges the Court's argument that the history of the First Amendment requires that ministers not enjoy the protection of the employment laws. The Court's historical argument about English governments' appointment of ministers mistakenly ignores the actual context of contemporary ministers and overlooks a different constitutional history—namely of individual, not institutional, religious freedom. Part III rebuts the Court's argument that the leading Free Exercise Clause precedent, *Employment Division v. Smith*,<sup>13</sup> which held specifically that Native Americans must obey the drug laws and generally that religious citizens must follow “neutral laws of general applicability,” did not require a ruling for Perich. It is unacceptable that religious individuals must obey the law but religious institutions need not. Part IV addresses the argument of numerous ministerial employees, including Perich, that religion was a pretext rather than the real reason for their firing, and criticizes the Court's astonishing response that firing for nonreligious as well as religious reasons is protected by the First Amendment.<sup>14</sup> Part V examines the vexing question of who qualifies as a minister pre- and post-*Hosanna-Tabor*. Although the Court's definition of minister appears to leave open some situations in which religious employees may sue their employers, lower court precedents suggest that most employees will continue to lose their day in court. The Conclusion ends with a defense of a neutral interpretation of the First Amendment over the Court's favoritism toward religion.

I begin with the facts and reasoning of *Hosanna-Tabor*.

#### I. CHERYL PERICH V. HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL

In 1999, Cheryl Perich became a kindergarten teacher at Hosanna-Tabor Evangelical Lutheran Church and School, a K–8 school in Redford, Michigan. Four years later Perich switched to teaching fourth grade students at Hosanna-Tabor. Her classes included Math, Language Arts, Social Studies, Science, Gym, Art, Music, Computer, and, occasionally, Religion. During her time there she switched from lay

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13. 494 U.S. 872 (1990).

14. See *Hosanna-Tabor*, 132 S. Ct. at 709 (stating that the purpose of the ministerial exception is “not to safeguard a church's decision to fire a minister only when it is made for a religious reason”).

teacher status to called teacher status. As the 2004–2005 school year approached, Perich was preparing to teach third and fourth grade. Suddenly and unexpectedly, in June 2004 she was hospitalized after becoming ill at a school golf event. Because her health had not improved by the time the 2004 school year started, Hosanna-Tabor granted her a disability leave of absence. After Perich took the disability leave, the principal assured her that “‘she would still have a job with [us]’ when she regained her health.”<sup>15</sup>

Fortunately, Perich’s doctor was able to diagnose her illness as narcolepsy and to prescribe appropriate medication to ameliorate her symptoms. By February 2005, the doctor assured Perich that she was “fully functional” and able to perform her job.<sup>16</sup> Perich immediately presented her doctor’s certification to school officials. She was eager to return to her classroom and to follow the proper requirements to keep her job. Hosanna-Tabor’s employment handbook provided that “failure to return to work on the first day following the expiration of an approved medical leave may be considered a voluntary termination.”<sup>17</sup> Moreover, Perich was no longer eligible for disability insurance once she had the release letter from her doctor. Accordingly, Perich informed the school of her doctor’s findings and prepared to return to work.

School officials, however, questioned her doctor’s diagnosis without providing any medical support for their skepticism about her return to work. They urged Perich to resign voluntarily from her position. Perich questioned their decision and mentioned that she would talk to an attorney about a disabilities discrimination lawsuit. The court found that the Lutheran Church Missouri Synod personnel manual and the Governing Manual for Lutheran Schools in effect at Hosanna-Tabor “clearly contemplate that teachers are protected by employment discrimination and contract laws.”<sup>18</sup> Nevertheless, school officials fired Perich for threatening to sue.<sup>19</sup>

Jobless despite her employment contract and her employer’s promise to keep a position open for her after her disability leave, Perich, joined by the EEOC, filed a disabilities discrimination and retaliation lawsuit against Hosanna-Tabor under the ADA. Following Sixth Circuit precedent, the district court and the Sixth Circuit applied a “primary duties” test to determine whether Perich’s ADA and retaliation lawsuit against Hosanna-Tabor would be dismissed under the ministerial exception.<sup>20</sup> If Perich’s primary duties were religious, the case would be dismissed. If Perich’s primary duties were secular, she would have her day in court. The district court concluded that the ministerial exception applied and dismissed the lawsuit. The Sixth Circuit reversed, finding that Perich’s primary duties were secular.

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15. EEOC v. Hosanna-Tabor Lutheran Church & Sch., 597 F.3d 769, 772–73 (6th Cir. 2010).

16. *Id.* at 773.

17. *Id.* at 774.

18. *Id.* at 782.

19. *Id.* at 774–75.

20. *See id.* at 771, 778; EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 887 (E.D. Mich. 2008).

In the district court, Hosanna-Tabor did not introduce any evidence about Perich's primary, secular, or religious duties and did not challenge Perich's description of her duties as an elementary school teacher.<sup>21</sup> According to the Sixth Circuit's opinion, on appeal Hosanna-Tabor "attempted to reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution."<sup>22</sup> In the Supreme Court, Hosanna-Tabor argued that the "ministerial exception is a categorical rule; if a claim falls within it, the claim must be dismissed."<sup>23</sup>

If Perich were allowed to litigate her case, she would argue that the church violated the antiretaliation provision of the ADA, which states: "No person shall discriminate against any individual because such individual has *opposed* any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this chapter."<sup>24</sup> The ADA language is similar to the antiretaliation language of other civil rights legislation, including Title VII,<sup>25</sup> in allowing lawsuits for both opposition and participation, that is, for employees who oppose unlawful employer conduct or participate in an investigation, complaint, or other legal proceeding against the employer. Perich's lawsuit was the latter type because she alleged she was fired in response to filing a complaint with the EEOC and threatening to sue Hosanna-Tabor.<sup>26</sup>

In order to establish a prima facie antiretaliation case, Perich must demonstrate that (1) she engaged in statutorily protected conduct, (2) she suffered a materially adverse employment action, and (3) there was a "causal connection between the statutorily protected conduct and the adverse action."<sup>27</sup> Victory in a participation case like Perich's would be near absolute<sup>28</sup> because (1) filing with the EEOC is protected conduct and (2) being fired easily qualifies as a materially adverse

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21. See Brief of Cheryl Perich as Appellant at 22, *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769 (6th Cir. 2010) (Nos. 09-1134, 09-1135) 2009 WL 8384308.

22. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 781 (2012).

23. Brief for the Petitioner at 24, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

24. 42 U.S.C. § 12203(a) (2006) (emphasis added).

25. See 42 U.S.C. § 2000e-3(a) (2006) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

26. 42 U.S.C. § 12203(a); Brief of Cheryl Perich as Appellant at 18–19, *Hosanna-Tabor*, 597 F.3d 769 (Nos. 09-1134, 09-1135).

27. 1 CHARLES A. SULLIVAN & LAUREN M. WALTER, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 362 (4th ed. 2009).

28. *Id.* at 366.

employment action.<sup>29</sup> Under the third element, moreover, Perich has direct evidence of Hosanna-Tabor's retaliatory intent: Hosanna-Tabor sent Perich a letter stating it was firing her because she had threatened to sue.<sup>30</sup>

At trial, Hosanna-Tabor would be free to counter Perich's presentation with its own evidence that it would have fired her even if she had not threatened a lawsuit. The letter to Perich would make that argument difficult. Those bad facts and Perich's direct evidence of retaliation may explain why late in the case the school "attempted to reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution."<sup>31</sup> In other words, school officials may have transformed a legal question into a religious dispute by challenging Perich's spirituality long after they had retaliated against her, by arguing that a spiritual person does not sue her employer.

It is noteworthy that Hosanna-Tabor did not offer a nonretaliatory defense to its firing of Cheryl Perich, but instead argued that it was justified in retaliating against Perich because she was spiritually unfit.<sup>32</sup> In other words, it argued that the First Amendment grants it religious freedom to retaliate against employees who assert their right to sue.

The Supreme Court reversed the Sixth Circuit's ruling that Perich's primary duties were secular and ruled that she was a minister for purposes of the ministerial exception.<sup>33</sup> Warning that the question of who qualifies as a minister "is not one that can be resolved by a stopwatch,"<sup>34</sup> the Court concluded that the Sixth Circuit had ignored Perich's title, and had placed too much emphasis on Perich's secular duties and the similarities of those duties to the lay teachers' jobs. The Court emphasized Hosanna-Tabor's recognition of two types of teachers ("called" and "lay") and observed that Perich became a "called" teacher after she engaged in a course of theological study in a Lutheran colloquy, thereby becoming a commissioned minister.<sup>35</sup>

Refusing to adopt a "rigid formula" for a minister, the Court suggested that individuals who convey a church's message and carry out its mission are ministers for First Amendment purposes.<sup>36</sup> In Perich's case, "the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the

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29. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (Title VII prohibits employer actions that would likely "deter victims of discrimination from complaining to the EEOC").

30. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 774 (6th Cir. 2006).

31. *Id.* at 781.

32. Petition for Writ of Certiorari at 6, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-533) (arguing Perich was fired "because her insubordination and threats of litigation violated Church teaching").

33. *Hosanna-Tabor*, 132 S. Ct. at 708, 710.

34. *Id.* at 709.

35. *Id.* at 699-700.

36. *Id.* at 707-08.



important religious functions she performed for the Church”<sup>37</sup> qualified her for the exemption. Therefore her antiretaliation lawsuit was dismissed.

In its legal reasoning, the Court insisted that the Free Exercise and Establishment Clauses require a ministerial exception. The Court based that conclusion on the history of the First Amendment and a few of the Court’s older church property cases. The substantive arguments are reviewed in the following Parts. In fact, the Court’s argument was not very complex. It seemed to apply a simple syllogism: (1) churches enjoy absolute freedom to pick their ministers; (2) Perich was a minister; and therefore (3) the employment laws could not be enforced. Part II rejects the over-simplified history that undergirds the Court’s opinion.

## II. A MISTAKEN READING OF HISTORY AND MINISTERS

The Court’s historical argument about the First Amendment begins with the Magna Carta in 1215 and paints a sorry story of church ministers being forcibly appointed by the English Crown. Puritans and Quakers apparently fled Europe in order to “elect their own ministers.”<sup>38</sup> According to the Court, the Religion Clauses allowed “no role [for the government] in filling ecclesiastical offices.” Secretary of State James Madison warned “against a political interference with religious affairs.”<sup>39</sup> Throughout the opinion, government appointment of ministers is identified as the key evil motivating the religion clauses of the First Amendment. Thus the Court’s account of First Amendment history appears to be a “curious mash-up of religious and political history” that stops in 1791.<sup>40</sup>

Other available accounts of that history were neglected. For example, after the sixteenth century, Britain abolished the ecclesiastical courts’ jurisdiction over the clergy’s criminal conduct and increasingly subjected clergy to the rule of law.<sup>41</sup> The United States never had a system of ecclesiastical courts, but instead ab initio subjected clergy to court proceedings.<sup>42</sup> Thus an alternative lesson of English and American history is that religious institutions and clergy should be subject to the secular courts.

On another account of the Constitution, the Framers, who knew and understood the history of religious power in Europe from the Inquisition to the Wars of Religion, developed a Constitution acknowledging “that every individual and every institution holding power was likely to abuse that power and therefore must be checked.”<sup>43</sup> Like all other powerful institutions, religions had to be subject to the rule of law. The religion clauses did just that. The same James Madison quoted on behalf of the ministerial exception in *Hosanna-Tabor* feared the power of both state

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37. *Id.* at 708.

38. *Id.* at 702.

39. *Id.* at 703.

40. Winnifred Fallers Sullivan, *The Church*, THE IMMANENT FRAME (Jan. 31, 2012, 4:25 PM), <http://blogs.ssrc.org/tif/2012/01/31/the-church/>.

41. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1128–29.

42. *Id.* at 1132.

43. *Id.* at 1133.

and church and warned against “the potential abuse of ecclesiastical corporate power.”<sup>44</sup> Even Protestant clergy of the revolutionary era supported the First Amendment because they understood that “[p]ower, civil *and ecclesiastical*, has to be deflated, diffused, and properly related in order to keep it from becoming absolute, arbitrary, and abused.”<sup>45</sup> Thus an alternative lesson in American history is that the power of religious institutions needs to be limited as much as any other institution’s power.

Another interpretation of the First Amendment holds that the Bill of Rights protects individual freedom against the power of institutions. As the late constitutional scholar Philip Kurland concluded, “[l]imited powers of government were not instituted to expand the realm of power of religious organizations, but rather in favor of freedom of action and thought by the people.”<sup>46</sup> Interpreting the Free Exercise Clause to protect religious institutions’ rights against their members ignores the experience of the earliest Americans, who broke away from traditional religious organizations and pursued individual liberty.<sup>47</sup> “The American Revolution broke many of the intimate ties that had traditionally linked religion and government . . . and turned religion into a voluntary affair, a matter of individual free choice.”<sup>48</sup> Americans of that era “believed that the individual, not the state *or the church*, should decide matters of faith.”<sup>49</sup> Thus, yet another alternative lesson of English and American history is that courts should not select a legal rule that automatically favors powerful institutions over individuals as the ministerial exception does.

According to the National Employment Lawyers Association, who filed a brief in the Supreme Court on behalf of Cheryl Perich, an early American tradition of allowing lawsuits by former and current ministers against their employers coexisted alongside the history of opposition to government appointment of ministers.<sup>50</sup> Some ministers successfully sued to recover their positions.<sup>51</sup> Courts regularly enforced employment contracts involving clergy.<sup>52</sup>

Courts gave several reasons for enforcing contract claims by ministers. They explained, first, that ministers had the *same right as anyone else* to judicial enforcement of their legal rights. . . . A

44. FORREST CHURCH, *SO HELP ME GOD: THE FOUNDING FATHERS AND THE FIRST GREAT BATTLE OVER CHURCH AND STATE* 355 (2007).

45. James H. Smylie, *Protestant Clergy, the First Amendment and Beginnings of a Constitutional Debate, 1781–91*, in *THE RELIGION OF THE REPUBLIC* 116, 153 (Elwyn A. Smith ed., 1971) (emphasis added).

46. Kurland, *supra* note 9, at 4.

47. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 609–13 (2009).

48. *Id.* at 576.

49. FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 180 (2003) (emphasis added).

50. Brief Amicus Curiae of the National Employment Lawyers Association in Support of Respondents at 3–4, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

51. *Id.* at 4–7.

52. *Runkel v. Winemiller*, 4 H. & McH. 429 (Md. 1799).

substantial portion of these [cases in which religious organizations sought redress from secular courts] involved a disputed dismissal, the religious organization seeking a court order to enjoin a previously appointed minister from continuing to hold services or engage in other functions. These lawsuits necessarily turned at least in part on the legality of the defendant's termination, and a decision in favor of the minister-defendant overturned the purported dismissal and confirmed his right to remain in the pulpit.<sup>53</sup>

Thus an alternative lesson of American history is that ministers have not traditionally fallen outside the protection of civil law in the manner that *Hosanna-Tabor* suggests.

The Court's reasoning in *Hosanna-Tabor* demonstrates the dangers of historical analogy and originalism in resolving contemporary problems. As argued above, alternative histories that protect clergy rights were equally available for the Court's selection. Moreover, the idea that government appointment of ministers in Europe should resolve the case of a disabled elementary schoolteacher in Michigan lacks common, moral, and legal sense. Many of the ministerial exception cases have involved women clergy in Christian denominations for whom women's ordination was not even imaginable at the time of the nation's founding. The founding Constitution lacked the Fourteenth Amendment's commitment to racial, gender, and political equality. Today's American employees, religious and nonreligious alike, came of age enjoying the protection of the civil rights legislation of the 1960s, which prohibits discrimination on the basis of race, national origin, gender, and religion, thus banning sexual harassment, hostile work environment, and pregnancy discrimination from the workplace. The disability rights movement began in the 1970s and culminated in bipartisan passage of the ADA in 1990. In passing these antidiscrimination statutes, moreover, Congress repeatedly refused to exempt religious organizations from lawsuits for discrimination on the basis of race, national origin, gender, pregnancy, and disabilities.

Thus, despite the fact that multiple plausible historical interpretations of the First Amendment's religion clauses exist, the Court chose a truncated history of the Magna Carta that automatically dismisses antidiscrimination lawsuits. This is unacceptable. Using English history to overcome civil rights legislation approved by Congress defies the rule of law.

Instead, the lesson of the modern history of sexual harassment, antiretaliation, disability, and minimum wage cases is that male and female seminarians and clergy may require legal protection from their church supervisors and colleagues. A Mexican seminarian who moved to Washington state and stereotypically performed maintenance work as part of his duties was denied the protection of sexual harassment, antiretaliation, and state minimum wage laws simply because he was a seminarian.<sup>54</sup> Older pastors have been fired because of their age;<sup>55</sup> black and

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53. Brief Amicus Curiae of the National Employment Lawyers Association in Support of Respondents, *supra* note 50, at 7, 9–10 (emphasis added) (citations omitted).

54. See *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292–93 (9th Cir. 2010).

55. See, e.g., *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d

Hispanic ministers because of their race and national origin.<sup>56</sup> Women clergy have been denied the protection of equal pay and pregnancy discrimination laws.<sup>57</sup> The only reason given is that the ministerial relationship enjoys a different legal status.<sup>58</sup>

Reverend Pamela Combs, for example, was first ordained a Baptist minister and later became a Methodist minister working for the United Methodist Church. Soon after telling church officials she was pregnant, Combs asked why her salary was lower than comparable male ministers' salaries and asked for a different housing allowance.<sup>59</sup> After Combs gave birth, she "suffered serious post-partum complications, which required hospitalization, surgery, heavy medication, and extensive rest."<sup>60</sup> Only then did her male pastor question her "competence, performance, and honesty."<sup>61</sup> Despite the fact that the Methodist bishop had reappointed Combs to a ministerial role, her pastoral supervisor determined she was a lay employee and asked her to repay her maternity benefits.<sup>62</sup> Reverend Combs's pregnancy discrimination case was then dismissed under the ministerial exception, even though the United Methodist Church had returned her to lay status in order to end her insurance coverage.

Mary Rosati was a novice with the Roman Catholic Contemplative Order of the Sisters of the Visitation of Toledo, Ohio. After fifteen months with the order, during which she had advanced from postulant stage to novice, Rosati developed kidney problems and breast cancer and underwent neurosurgery for a herniated disc.<sup>63</sup> After Rosati's doctor explained to the Mother Superior that Rosati would need a lumpectomy or mastectomy as well as further breast cancer treatment, Mother Superior said, "We will have to let her go. I don't think we can take care of her."<sup>64</sup> The doctor was concerned about the Mother Superior's remarks because he understood that Rosati would lose her health insurance if she left the order.<sup>65</sup> Later, another sister told Rosati, "Maybe God is trying to tell you something. Perhaps you

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1354 (D.C. Cir. 1990).

56. *See, e.g.*, *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003); *Young v. N. Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994).

57. *See, e.g.*, *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010); *Combs v. Central Texas Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

58. *See supra* notes 53–57 and accompanying text.

59. *See Combs*, 173 F.3d at 343.

60. *Id.* at 344.

61. *Id.*

62. *Id.* In a pregnancy discrimination case, a plaintiff must initially show: (1) that she was pregnant; (2) that she was qualified for her job; (3) that she was subjected to an adverse employment decision; and (4) that there is a nexus between her pregnancy and the adverse employment decision. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir.1990).

63. *See Rosati v. Toledo, Ohio Catholic Diocese*, 233 F. Supp. 2d 917 (N.D. Ohio 2002).

64. *Id.* at 918.

65. *See id.*

don't have a vocation."<sup>66</sup> Rosati's case was also dismissed under the ministerial exception.<sup>67</sup>

The assumption in the Court's historical argument about government appointment of ministers is that ministers should not enjoy the protection of the civil rights laws. Taking ministers outside the protection of the courts supposedly protects religious freedom. The ministerial exception instead stands for the proposition that religious institutions are not required to obey the law, even at the expense of the civil rights of their religious employees. This holding appears irreconcilable with the Court's earlier rulings about the Free Exercise Clause, which I discuss in the next Part. Part III explains that the Court misinterpreted its own leading Free Exercise precedent in order to issue a ruling for *Hosanna-Tabor*.

### III. RECONCILING *EMPLOYMENT DIVISION V. SMITH*

The leading free exercise case is the Court's 1990 decision in *Employment Division v. Smith*.<sup>68</sup> In *Smith*, the Court held that two Native American drug counselors who used peyote in a religious ritual could be denied unemployment compensation benefits because the criminal laws prohibit drug use. The famous language from *Smith* is that all citizens are subject to "neutral laws of general applicability"<sup>69</sup> because to permit exceptions from the criminal law "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."<sup>70</sup> Thus under *Smith* every religious citizen must follow the law if it is a neutral law of general applicability.

Opponents of the ministerial exception, including this author, have argued that if religious individuals must obey neutral laws of general applicability, so too must religious institutions. Just as Alfred Smith had to obey neutral drug laws of general applicability, they have insisted, so too should Hosanna-Tabor Evangelical Lutheran Church and School and other religious employers obey the antidiscrimination laws.<sup>71</sup> Nonetheless, all the federal courts of appeals ruled that the ministerial exception is consistent with *Smith*.<sup>72</sup> The Supreme Court confirmed the courts' position in a short paragraph that distinguished *Smith* from the ministerial exception:

It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general

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66. *Id.*

67. *Id.* at 922–23.

68. 494 U.S. 872 (1990).

69. *Id.* at 901.

70. *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).

71. See Brief of Amici Curiae Law & Religion Professors in Support of Respondents at 17–20, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

72. See *Bryce v. Episcopal Church Diocese of Colo.*, 289 F.3d 648, 656 (10th Cir. 2002); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 n.2 (2012) (identifying circuit holdings on *Smith* and the exception).

applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.<sup>73</sup>

This is a strange argument in the context of the ministerial exception. In terms of religious freedom, the ingestion of peyote is a profound religious ritual with a long American history predating the Constitution.<sup>74</sup> In sharp contrast, the ministerial exception involves cases where employees allege disabilities discrimination, retaliation, pregnancy discrimination, sexual harassment, hostile work environment, unequal pay, race discrimination, gender discrimination, and other civil rights violations.<sup>75</sup> Women clergy, for example, sue for pregnancy discrimination, sexual harassment, hostile work environment, and unequal pay.<sup>76</sup> Other ministers sue for disabilities discrimination.<sup>77</sup> Many of these "ministers" have been schoolteachers or nonordained personnel who did not realize they were "ministers" until their lawsuits were dismissed.<sup>78</sup>

The Court asserts that it rightly distinguishes between the "outward physical acts" of *Smith* and the "internal church decision that affects the faith and mission of the church itself" in *Hosanna-Tabor*.<sup>79</sup> That distinction cannot hold water. What could "affect[] the faith and mission of the church itself" more than punishing individuals like Smith for participation in a religious ritual? And what "internal church decision that affects the faith and mission of the church itself" is involved in the firing of a disabled employee in a church that does not preach disabilities discrimination?<sup>80</sup>

The distinction between "outward physical acts" and the "internal church decision that affects the faith and mission of the church itself" collapses when the

73. *Hosanna-Tabor*, 132 S. Ct. at 707 (citing *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990) (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma") (parenthetical in original)).

74. CAROLYN N. LONG, RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF *OREGON V. SMITH* 6–8 (2000).

75. For a list of pertinent cases, see *supra* note 6.

76. See *Skrzypczak*, 611 F.3d 1238; *Petruska*, 462 F.3d 294; *Combs*, 173 F.3d 343; *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

77. See, e.g., *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004).

78. See *Pardue v. Ctr. City of Consortium Sch.*, 875 A.2d 669 (D.C. Cir. 2005); *Alicea-Hernandez*, 320 F.3d 698; *Clapper v. Chesapeake Conference of Seventh Day Adventists*, No. 97-2648, 1998 WL 904528 (4th Cir. Dec. 29, 1998); *Archdiocese of Miami, Inc. v. Miñagorri*, 954 So. 2d 640 (Fla. Dist. Ct. App. 2007); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

79. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

80. *Id.*

Court clarifies that *Smith* bars religious acts by individuals while *Hosanna-Tabor* governs cases that do not even involve a religious dispute between the parties. It seems odd that an individual's religious ritual would not enjoy First Amendment protection while a nonreligious dispute among church members would. Nonetheless, in one of the most astonishing parts of the opinion, the Court held:

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—a matter “strictly ecclesiastical”—is the *church's alone*.<sup>81</sup>

Thus, the Court did not protect religious freedom by refusing to take sides in a religious dispute, as it had done in its past church property cases.<sup>82</sup> Instead, it ruled that religious employers enjoy absolute First Amendment protection to dismiss their “ministers” even when no religious issue is involved. In other words, religious freedom trumps the antidiscrimination laws even when no religious dispute is at stake. According to the Supreme Court, religious freedom entitles institutions to disobey the law.

To understand the confused rationale behind the Court's ruling on the nonreligious or religious nature of the employment dispute, it is important to understand the ministerial exception case law that developed in the courts before *Hosanna-Tabor*. Although the Court referred to that body of case law,<sup>83</sup> it did not spend sufficient time in assessing the nuances of the prior litigation. The following Part of this Article provides more evidence that the Court's dismissal of nonreligious disputes on First Amendment grounds is based on its unseemly belief that religious organizations are free to disobey the law. Part IV explains that the ministerial exception is unnecessary because antidiscrimination law is capable of handling the problems that usually justify the ministerial exception.

#### IV. FIRING EMPLOYEES FOR NONRELIGIOUS AND PRETEXTUAL REASONS

In order to analyze the Court's ruling in Perich's case, it is important to understand the general structure of an employment discrimination lawsuit. Recall from Part I that in order to establish a prima facie antiretaliation case, Perich had to demonstrate that (1) she engaged in statutorily protected conduct, (2) she suffered a materially adverse employment action, and (3) there was a causal connection between the statutorily protected conduct and the adverse action.<sup>84</sup>

The elements of the prima facie case do not intrude upon the First Amendment. Allowing lawsuits against religious organizations does not guarantee success for employees. A minister who complains that a coworker is “making her miserable” without clarifying that she is complaining about sexual harassment has not engaged

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81. *Id.* at 709 (emphasis added) (citation omitted).

82. *See, e.g.*, *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969).

83. *Hosanna-Tabor*, 132 S. Ct. at 710.

84. SULLIVAN & WALTER, *supra* note 27.

in statutorily protected activity.<sup>85</sup> A pastoral student who merely asserts, “I worry about retaliation for filing the EEOC complaint” has not stated a clear claim of retaliation.<sup>86</sup> Reverend Gellington (who was asked to move 800 miles at reduced pay),<sup>87</sup> Chaplain Schmoll (who lost fifty percent of her work hours),<sup>88</sup> Chaplain Petruska (whose office was reorganized before she resigned under pressure),<sup>89</sup> and Reverend Himaka (whose office lost its funding)<sup>90</sup> would have to prove that the employment action taken against them was materially adverse.<sup>91</sup> All plaintiffs have to prove a causal link between the statutorily protected conduct and the adverse employment action.<sup>92</sup> Unlike Perich, many plaintiffs do not have direct evidence of a letter stating that threatening a lawsuit cost them their jobs and will have to rely upon circumstantial evidence to make their claim.

Once the plaintiff establishes her prima facie case, the burden of production shifts to the defendant.<sup>93</sup> Although the exact nature of that burden is described differently under various antidiscrimination statutes, the burden shift allows the defendant to rebut the plaintiff’s prima facie case. In a retaliation case, for example, the defendant could “put into evidence a nonretaliatory reason for its action” or evidence that it would have made the same decision anyway.<sup>94</sup> The nonretaliatory reason may be religious or nonreligious. Once the defendant identifies this nonretaliatory reason for action, the burden shifts back to the plaintiff to establish that the defendant’s reason is a pretext for action. Under the classic *McDonnell*

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85. *Rojas v. Roman Catholic Diocese of Rochester*, 793 F. Supp. 2d 381, 397, 408 (W.D.N.Y. 2010); *see also Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130, 134 (3d Cir. 2006) (endorsing an ad is not protected activity).

86. *McNeil v. Mo. Annual Conference of The United Methodist Church*, No. 2-10-CV-04154-NKL, 2010 WL 3732191, at \*6 (W.D. Mo. Sept. 20, 2010), *aff’d*, 412 F. App’x 912 (8th Cir. 2011).

87. *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301 (11th Cir. 2000).

88. *Schmoll v. Chapman Univ.*, 83 Cal. Rptr. 2d 426 (Cal. Ct. App. 1999).

89. *Petruska v. Gannon Univ.*, 462 F.3d 294, 301 (3d Cir. 2006).

90. *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 703 (N.D. Cal. 1995).

91. *See Ticali v. Roman Catholic Diocese of Brooklyn*, No. 99-7474, 1999 WL 1212555 (2d Cir. Dec. 13, 1999) (request to change to pre-kindergarten class was not materially adverse).

92. SULLIVAN & WALTER, *supra* note 27.

93. HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* § 2.40, at 146 (2d ed. 2004) (“Once the employee satisfies her prima facie burden, the resulting presumption of retaliation must be rebutted by the employer by producing evidence of a legitimate nondiscriminatory reason for the adverse employment action.”); PAUL M. SECUNDA & JEFFREY M. HIRSCH, *MASTERING EMPLOYMENT DISCRIMINATION LAW* 123 (2010) (“If the plaintiff makes out a prima facie case, the burden of production (not persuasion) shifts to the defendant to articulate a legitimate, non-retaliatory reason for its employment actions.”); *see also Jones v. Walgreen Co.*, 679 F.3d 9, 20 (1st Cir. 2012) (“If she does make out a prima facie case, ‘the burden shifts to the employer ‘to articulate a legitimate, nondiscriminatory [or nonretaliatory] reason for its employment decision.’” (alteration in original) (quoting *Wright v. Compusa, Inc.*, 352 F.3d 472, 478 (1st Cir. 2003))).

94. SULLIVAN & WALTER, *supra* note 27, at 383.



*Douglas* rule that governed many ministerial exception cases, once the defendant offers its nondiscriminatory rationale for action, the plaintiff must “be afforded a fair opportunity to show that [defendant’s] stated reason for [plaintiff’s] rejection was in fact pretext.”<sup>95</sup>

Part A explains what happens in an employment lawsuit when employers offer either religious or nonreligious reasons to justify their employment action. Part B challenges the Court’s conclusion in *Hosanna-Tabor* that the pretextual analysis is always prohibited under the First Amendment.

#### *A. Religious and Nonreligious Reasons for Employment Actions*

Perhaps surprisingly, there are not many ministerial exception cases that take the form of *Perich*’s, where the defendant asserts that it has a religious reason to violate the law; namely that retaliation (as prohibited by law) is proper because Christian employees are not allowed to sue. Church defendants rarely state that they have a religious belief in racial or national-origin discrimination, gender discrimination, disabilities discrimination, or sexual harassment when those types of lawsuits are brought against them. The majority of gender discrimination cases, for example, are filed by either women clergy or women in nonclerical positions.<sup>96</sup> *Rockwell v. Roman Catholic Archdiocese of Boston* is the rare case in which a woman sued the Roman Catholic Church seeking ordination to their all-male priesthood.<sup>97</sup> The women’s ordination case is usually viewed as offering the strongest argument on behalf of the ministerial exception as no one will argue that the state should be able to force the church to ordain women. Unfortunately, the Catholic women’s ordination case drew considerable attention at the *Hosanna-Tabor* oral argument, and in the opinion when the Court stated that it, the EEOC, and *Perich* all agreed “that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary.”<sup>98</sup>

The ordination example suggests that an employer’s religious reason (we do not ordain women) should always defeat an employee’s lawsuit. That has not been the case. Several Baptist churches held a religious, scripture-based belief that men are the heads of households and therefore entitled to higher pay than women.<sup>99</sup> A Seventh-day Adventist church argued that it was entitled to demote and then fire an employee who filed an equal pay complaint because church doctrine prohibited

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95. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

96. See Brief of Amici Curiae Law & Religion Professors in Support of Respondents at 11 n.15, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

97. *Rockwell v. Roman Catholic Archdiocese of Boston, Mass.*, No. 02-239-M, 2002 WL 31432673, at \*1 (D.N.H. Oct. 30, 2002).

98. *Hosanna-Tabor Evangelical Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

99. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990); see also *Russell v. Belmont Coll.*, 554 F. Supp. 667 (M.D. Tenn. 1982).

lawsuits by its members.<sup>100</sup> The Shiloh True Light Church of Christ challenged the minimum age requirements of the child labor laws, arguing that their religion required them to give their children vocational training.<sup>101</sup> A Quaker charitable organization thought that its religious tradition of hospitality to the stranger should allow it to ignore the alien worker requirements of the immigration laws.<sup>102</sup>

In all those cases courts rejected the religious defense and held the employers to the application of the employment laws.<sup>103</sup> They based their decisions upon some variant of a balancing test. The cases decided in the pre-*Employment Division v. Smith* era applied strict scrutiny and balanced the burden upon religion against the government's compelling interest. In the pre-*Smith* era, the burden on religion was viewed as insubstantial in the equal pay cases, and the government's interest was seen as compelling in the child labor and immigration contexts.<sup>104</sup>

The application of the ministerial exception in those cases involved the courts in deciding when and which religions either must obey or may disobey the laws. The result was unequal among religions. Presumably, the Baptists were as committed to their head-of-household rule as Catholics are to their all-male priesthood. Moreover, the government's interest in both cases—women's equality—was the same.

The language of *Hosanna-Tabor* suggests that the Court has permanently struck the balance in favor of institutional religious freedom instead of the antidiscrimination laws. As the Court explained in *Hosanna-Tabor*:

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. 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.<sup>105</sup>

Surely this preference for religion over antidiscrimination cannot and will not be absolute. As Methodist Minister Ralph Minker warned years ago, “taken to its logical conclusion [the ministerial exception] view would create a first amendment prohibition against even the most egregious human rights violations. . . . [F]or example, . . . under our formulation courts would be prevented from enforcing homicide statutes against churches that selected their pastors by making them play russian roulette.”<sup>106</sup>

100. EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982).

101. Brock v. Wendell's Woodwork, Inc., 867 F.2d 196 (4th Cir. 1989).

102. Am. Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405 (9th Cir. 1991).

103. See, e.g., *Thornburgh*, 961 F.2d 1405; *Dole*, 899 F.2d 1389; *Brock*, 867 F.2d 196; *Fremont Christian Sch.*, 781 F.2d 1362; *Pac. Press Publ'g Ass'n*, 676 F.2d 1272; *Tree of Life Christian Schs.*, 751 F. Supp. 700; *Russell*, 554 F. Supp. 667.

104. For a list of cases, see *supra* note 103.

105. *Hosanna-Tabor Evangelical Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012). (emphasis added).

106. *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990).

I am confident the courts will prohibit religious employers from hiring and firing their ministers through Russian roulette. But by what reasoning? The courts will have to make a determination that some religious beliefs are worse than others, thereby undermining the neutrality among religions that the First Amendment should protect.

As noted above, the more astonishing part of *Hosanna-Tabor* is its blithe assertion that religious employers win even when there is no religious dispute at stake: “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*.”<sup>107</sup> Instead of ruling that religious employers are justified in disobeying the law whenever they have a doctrinal reason to do so, the Court opened the possibility that purely secular lawsuits against religious employers will also be dismissed.

In making this assertion, the Court appears to undermine court decisions that have permitted ministerial lawsuits for sexual harassment and hostile work environment. Both John Bollard and Christopher McKelvey alleged that as Roman Catholic seminarians they were sexually harassed by superiors who propositioned them, invited them to gay bars, showed them pornography, or engaged in other harassing conduct.<sup>108</sup> Both men left the seminary because of the harassment. The Ninth Circuit and the Supreme Court of New Jersey refused to apply the ministerial exception to those cases based in large part on the impossibility of interference in the churches’ choice of ministers because the seminarians did not want to return to the priesthood.<sup>109</sup>

It was also relevant to, but not determinative of, the outcome of those two cases that neither church defendant espoused a religious belief in sexual harassment. That is true of all the sexual harassment cases; no church defends sexual harassment as a doctrinal matter. On that basis, several courts allowed sexual harassment lawsuits to proceed on the grounds that “[hostile work environment] ha[d] [any]thing to do with the . . . doctrine of the [Roman] Catholic Church,”<sup>110</sup> sexual harassment is “unrelated to pastoral qualifications,”<sup>111</sup> or the “reasons for termination are not religious-based.”<sup>112</sup> In the Second Circuit, but not elsewhere,<sup>113</sup> a “plaintiff alleging

107. *Hosanna-Tabor*, 132 S. Ct. at 709 (emphasis added).

108. *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999); *McKelvey v. Pierce*, 800 A.2d 840, 845–46 (N.J. 2002).

109. *Bollard*, 196 F.3d at 947; *McKelvey*, 800 A.2d at 858–59.

110. *Rojas v. Roman Catholic Diocese of Rochester*, 557 F. Supp. 2d 387, 399 (W.D.N.Y. 2008).

111. *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171, 1185–86 (Md. 2011) (finding no doctrinal reason for policy and church had policy against it); *Black v. Snyder*, 471 N.W.2d 715, 721 (Minn. Ct. App. 1991) (“Black’s sexual harassment claim is unrelated to pastoral qualifications or issues of church doctrine.”).

112. *See Nigrelli v. Catholic Bishop of Chi.*, No. 84-C-5564, 1991 WL 36712, \*4 (N.D. Ill. Mar. 15, 1991); *see also Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 953–54 (9th Cir. 2004) (allowing some but not complete lawsuit for sexual harassment); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996 (D. Kan. 2004) (declining to apply ministerial exception to sexual harassment claim where plaintiff resigned as a result of harassment).

113. *See Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008). *But see, e.g., Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) (“The ‘ministerial exception’ applies without regard to the type of claims being brought.”); *Skrzypczak v.*

particular wrongs by the church that are *wholly non-religious in character* is surely not forbidden his day in court.”<sup>114</sup> District courts applied that rule to allow hostile work environment cases.<sup>115</sup>

The Supreme Court now suggests those purely secular law disputes are covered by the ministerial exception, giving religious employers the right to free themselves from secular disputes even when secular employers may not.

In other words, religious freedom means allowing religious institutions to violate the law even when nothing religious is at stake. Such a conclusion is at odds with any rational interpretation of the First Amendment.

### *B. Religious Pretext*

The Sixth Circuit expressed doubt as to whether Hosanna-Tabor fired Perich for religious or nonreligious reasons. The school “attempted to reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution.”<sup>116</sup> In employment law terms, Perich argued that the religious reason for her firing was pretextual and should not be believed by the trial court.

Justice Alito’s questions at oral argument and concurrence expressed strong doubts about letting juries review evidence that a church firing was pretextual. The pretextual analysis, he argued, always intrudes upon religious doctrine:

The credibility of Hosanna-Tabor’s asserted reason for terminating respondent’s employment could not be assessed without taking into account both the importance that the Lutheran Church attaches to the doctrine of internal dispute resolution and the degree to which that tenet compromised respondent’s religious function. If it could be shown that this belief is an obscure and minor part of Lutheran doctrine, it would be much more plausible for respondent to argue that this doctrine was not the real reason for her firing. If, on the other hand, the doctrine is a central and universally known tenet of Lutheranism, then the church’s asserted reason for her discharge would seem much more likely to be nonpretextual. But whatever the truth of the matter might be, the mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church’s overall mission.<sup>117</sup>

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Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1245 (10th Cir. 2010) (accord).

114. *Rweyemamu*, 520 F.3d at 208 (emphasis added).

115. *E.g., Rojas*, 557 F. Supp. 2d at 397–98.

116. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 781 (6th Cir. 2010).

117. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 715 (2012) (Alito, J., concurring).

According to the court decisions that agree with Justice Alito and favor the ministerial exception, constitutional trouble begins somewhere around the time that the defendant identifies its nonretaliatory reason or the plaintiff tries to prove pretext. The courts have repeatedly expressed First Amendment concerns about the entanglement with or intrusion upon religious doctrine that occurs if they dare attempt to decipher the churches' motives in their employment decisions. They fear that allowing employment discrimination lawsuits to proceed will involve them in religious questions over which the First Amendment denies them authority.

Those arguments reflect a misinterpretation of both employment and First Amendment law. As Judge Richard Posner has explained:

[T]he question in a discrimination case is not whether the employer's stated nondiscriminatory ground for the action of which the plaintiff is complaining is correct but whether it is *the true ground* of the employer's action rather than being a pretext for a decision based on some other, undisclosed ground. If it is the true ground and not a pretext, the case is over.<sup>118</sup>

In other words, "the question is not whether the asserted reason is true but whether the defendant *believed it to be true* when it took the challenged action."<sup>119</sup>

A similar distinction between what is true and what the defendant believed to be true is also a crucial component of First Amendment analysis. Under a long line of Supreme Court cases beginning with *United States v. Ballard*,<sup>120</sup> courts and juries are free to decide whether an individual's religious beliefs are sincerely held but not whether they are true.<sup>121</sup> Soldiers are routinely subjected to court analysis of whether their religious beliefs are sincerely held before they receive conscientious objector status.<sup>122</sup> Unemployment compensation benefits may be withheld or granted based on whether an applicant's religion is sincerely held.<sup>123</sup> Prisoners' religious beliefs are regularly subjected to sincerity review when they request accommodation for their religious practices.<sup>124</sup> Plaintiffs must hold a sincere religious belief in order to win a religious discrimination lawsuit under Title VII.<sup>125</sup>

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118. *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 417 (7th Cir. 2006) (emphasis added) (citation omitted).

119. SULLIVAN & WALTER, *supra* note 27, at 126 (emphasis added).

120. 322 U.S. 78 (1944).

121. *See supra* note 120 and accompanying text; *infra* notes 122–27 and accompanying text.

122. *See, e.g.*, *United States v. Seeger*, 380 U.S. 163, 185 (1965).

123. *See Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *Hansard v. Johns-Manville Prods. Corp.*, No. 1902, 1973 WL 129, at \*2 (E.D. Tex. Feb. 16, 1973) (dismissing plaintiff's employment discrimination claim not to work Sundays on sincerity grounds because he had previously worked regularly on Sundays).

124. *See, e.g.*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987).

125. *See, e.g.*, *Webb v. City of Phila.*, 562 F.3d 256, 259 (3d Cir. 2009) ("To establish a prima facie case of religious discrimination, the employee must show: (1) she holds a sincere religious belief that conflicts with a job requirement; (2) she informed her employer of the conflict; and (3) she was disciplined for failing to comply with the conflicting requirement."

Legislators are usually subjected to a court determination of whether they acted with a secular purpose; the Establishment Clause invalidates their legislation if they acted with a religious purpose or a sham secular purpose.<sup>126</sup> Finally, in the employment discrimination context, the Supreme Court has stated that the EEOC does not violate the First Amendment rights of a religious employer when it tries to “ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.”<sup>127</sup>

Thus courts are wrong to hold, for example, that Holley Van Osdol’s lawsuit alleging demotion for reporting sexual abuse “inevitably leads the court into analysis of UCRS’ choice of a minister, even for purposes of a pretextual inquiry. The decision to hire or discharge a minister is itself inextricable from religious doctrine.”<sup>128</sup> Judge Posner himself has defended a strong ministerial exception on similar grounds, arguing that in a pretext setting the “court would be asked to resolve a theological dispute.”<sup>129</sup> That point ignores not only the courts’ regular examination of religious motivation but also their authorized use of “neutral principles of law” to resolve church property disputes. According to *Jones v. Wolf*, a court may review church deeds, charters, constitutional provisions, and other documents as long as it interprets them in purely secular terms.<sup>130</sup>

The same rule should apply in the employment setting. Under *McDonnell Douglas*, a plaintiff “must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a . . . discriminatory decision.”<sup>131</sup> As in nonreligious cases, a “variety of evidence may help determine” pretext, including prefiring statements showing bias, violation of standard operating procedures, comparative treatment of other employees, data suggesting a general pattern of discrimination, and “non-discriminatory justification stated only after the allegation of discrimination is made.”<sup>132</sup>

Like Cheryl Perich, Todd David Barton complained that the religious reason for his firing was offered late in the litigation and was “rhetorical posturing” covering up the real reason for his dismissal—namely that the bishop retaliated against him for reporting that Pastor Mikel Hayes called Barton “hot” and “purred and pawed”

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(citation removed)).

126. See *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 859 (2005) (“Ever since *Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has ‘a secular legislative purpose’ has been a common, albeit seldom dispositive, element of our cases. Though we have found government action motivated by an illegitimate purpose only four times since *Lemon*, and ‘the secular purpose requirement alone may rarely be determinative . . . , it nevertheless serves an important function.’” (footnotes omitted) (citations omitted)).

127. *Ohio Civil Rights Comm’n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 628 (1986).

128. *Van Osdol v. Vogt*, 908 P.2d 1122, 1128–29 (Colo. 1996).

129. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006).

130. *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

131. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973).

132. *Redhead v. Conference of Seventh-Day Adventists*, 566 F. Supp. 2d 125, 134 (E.D.N.Y. 2008) (quoting *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 349 (E.D.N.Y. 1998)).

at him.<sup>133</sup> Courts are capable of distinguishing between religious rhetoric and sincerely held religious belief. The argument about pretext and religious entanglement cannot justify the ministerial exception.

The same pretext analysis should apply to civil rights statutes that prohibit discrimination based on race, gender, and age.

Shorthand for the central issue in many racial discrimination ministerial exception cases is whether it was race or religion that motivated the adverse employment action. As suggested above, a court should be able to decide that question by examining religious motivation and by using neutral principles of law. For example, Dennis Ross was hired as Pastor of Worship Services at the Metropolitan Church of God in Cumming, Georgia in December 2003, where he conducted music and created videos and CDs. Soon after Ross started his job, however, Pastor Charles Ramsey complained about Ross's music, telling him "this is a white church, Shirley Caesar music won't work here," and "since you've come, the church is experiencing white flight."<sup>134</sup> Ramsey also told Ross "Latinos are lazy," and "more blacks will probably join the church now that you are here, I guess we'll get more "rims."<sup>135</sup> Ramsey then fired Ross in February 2004.

Even if Ramsey's remarks did not provide direct evidence of discrimination, a jury could determine whether they reflected racial discrimination or harmless "stray remarks" without ever debating the liturgical theology of the Metropolitan Church of God.<sup>136</sup>

Father Peter Bogan alleged that the Mississippi Conference of the United Methodist Church put him on administrative leave for not spending at least five nights a week at the parsonage, while Caucasian pastors who were similarly absent faced no discipline.<sup>137</sup> His case could be decided like nonreligious racial discrimination cases in which the court considers whether race was a motivating factor in the adverse employment action, whether employees of different races were treated differently, and whether the church was credible in saying it really disciplined Bogan because he was not a good priest.

The Seventh Circuit dismissed Reverend Darreyl Young's race and gender discrimination case because she was a minister at the Northern Illinois Conference of the United Methodist Church.<sup>138</sup> Her complaint was carefully drafted. She did not ask the court to consider the church's reasons for dismissing her or to review

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133. *Barton v. MikelHayes*, No. 09-CV-00063, 2010 WL 980708, at \*1 (N.D.N.Y. Mar. 15, 2010).

134. *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306, 1308 (N.D. Ga. 2007).

135. *Id.*

136. In the absence of evidence of intentional discrimination, a plaintiff may establish a prima facie racial discrimination claim under both § 1981 and Title VII by alleging facts establishing "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action with respect to compensation; and (4) that similarly-situated employees outside the protected class received more favorable treatment." *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 295 (4th Cir. 2004).

137. *Bogan v. Miss. Conference of the United Methodist Church*, 433 F. Supp. 2d 762, 763 (S.D. Miss. 2006).

138. *Young v. N. Ill. Conference of United Methodist Church*, 818 F. Supp. 1206 (N.D. Ill. 1993), *aff'd*, 21 F.3d 184 (7th Cir. 1994).

her qualifications to become a church elder. Instead, she argued that the church had not followed the usual procedures it applied to all other candidates, and in particular, that the review panel that considered her application had a different composition from all previous committees.<sup>139</sup> Moreover, the pastors told Young that they failed to promote her because they disliked her sermons even though they had never heard her preach. A neutral principles of law approach would have allowed the court to review meeting procedures and minutes without interfering in any question of dogma and to decide whether it was religion or discrimination that motivated the employment decision.<sup>140</sup>

The late Judge Edward Becker understood this point when he wrote the initial Third Circuit opinion in *Petruska v. Gannon University*<sup>141</sup> that was later withdrawn due to his untimely death. Lynette Petruska was hired as a chaplain by Gannon University, a Roman Catholic university. Accepting that only men may become Catholic priests, Petruska asked for and received assurances that her chaplain's job was open to women and that she would not be replaced simply because a male priest candidate later became available. Later, her job responsibilities were restructured after she reported the university president's sexual harassment to the local bishop and the university provost. A man was then promoted to her former position.<sup>142</sup> Judge Becker rejected the application of the ministerial exception to Petruska's case because the university offered no religious reason for firing her—the position remained open to women. “[W]here an employment decision is devoid of religious or doctrinal content, and is based solely on sexism,” he wrote, “we fail to see how the decision relates to the free exercise of religion.”<sup>143</sup> If sexism is the motivating factor, the laws prohibiting sex discrimination are violated.

The same rule should apply in the age discrimination cases. Some courts have been optimistic about the possibilities of deciding age cases without violating the First Amendment, especially because age discrimination is not a religious tenet defended by any church defendants.<sup>144</sup> Nonetheless, cases with direct evidence of

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139. *Id.* at 1207–08.

140. *Id.*

141. 448 F.3d 615 (3d Cir. 2006), *vacated on reh'g*, 461 F.3d 294 (3d Cir. 2006), and *withdrawn*. For the old unpublished opinion with full text, see *Petruska v. Gannon Univ.*, No. 05-1222 (3d Cir. May 24, 2006), *available at* <http://www.ca3.uscourts.gov/opinlarch/051222p.pdf>.

142. *Petruska*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at \*\*5–8 (3d Cir. May 24, 2006).

143. *Id.* at \*\*47.

144. *See, e.g.*, *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (allowing age discrimination case to proceed); *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993) (same); *Ritter v. Mount St. Mary's Coll.*, 814 F.2d 986 (4th Cir. 1987) (same); *Miller v. Intervarsity Christian Fellowship/USA*, No. 09-CV-680-SLC, 2010 WL 2803123 (W.D. Wis. July 14, 2010) (same); *Hendricks v. Marist Catholic High Sch.*, No. CIV. 09-6336-AA, 2010 WL 1499251 (D. Or. Apr. 12, 2010) (same); *Butler v. Archdiocese of Galveston Houston*, No. CIV.A. H-08-897, 2009 WL 3837003 (S.D. Tex. Nov. 12, 2009) (same); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849 (S.D. Ind. 1998) (same); *Grotke v. Canisius High Sch.*, No. 90-CV-1057S, 1992 WL 535400 (W.D.N.Y. Apr. 13, 1992) (same); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57



age discrimination have been dismissed under the ministerial exception. For example, his bishop told Rev. Ralph Minker that ““he should not expect a new better level appointment and that Methodist pastors in their fifties cannot expect growth opportunities in new appointments.””<sup>145</sup> In another age discrimination case, “Father Serrick personally told [Organist George Assemany] that he was too old for the job and that Gesu was becoming a black parish and it was time it had a black organist.”<sup>146</sup> After making those remarks, Serrick then hired Carl Clendenning, a twenty-eight-year-old black male, for Assemany’s position.<sup>147</sup> Methodist Rev. John Paul Hankins was subjected to the United Methodists’ mandatory retirement policy requiring him to retire at age seventy.<sup>148</sup> The Age Discrimination in Employment Act (ADEA) allows some mandatory retirement policies, but whether the church qualified for that defense was not litigated in *Hankins*; the case was dismissed under the ministerial exception.<sup>149</sup>

As in any employment lawsuit, a church could win an ADEA case, especially because the defendant is not liable “where the differentiation is based on reasonable factors other than age.”<sup>150</sup> Thus the Maryknoll Society had good reason to win its case against Father Henry Willen Sanchez, a sixty-eight-year-old Roman Catholic priest who worked for Maryknoll from 1963 to 1967, but was rejected when he sought reemployment in 1996. Maryknoll had a policy not to reemploy individuals who had a lengthy separation from their service.<sup>151</sup> That argument was never considered by the court, however, which dismissed the lawsuit under the ministerial exception. The *McDonnell Douglas* framework is now in question in ADEA cases, which instead require plaintiffs to prove that age was the “but-for” cause of the challenged adverse employment action.<sup>152</sup> Like burden shifting, but-for causation does not automatically involve a theological question.

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(E.D. Pa. 1991) (same); *Soriano v. Xavier Univ. Corp.*, 687 F. Supp. 1188 (S.D. Ohio 1988) (same).

145. *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1355 (D.C. Cir. 1990) (citation omitted).

146. *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233, 235 (Mich. Ct. App. 1988).

147. *Id.*

148. *Hankins v. N.Y. Annual Conference of United Methodist Church*, 351 F. App’x 489, 409–91 (2d Cir. 2009).

149. *See Id.* at 489; *see also* 29 U.S.C. § 631(c) (2006); 29 C.F.R. § 1625.12 (2005) (explaining that the ADEA allows employers to mandate the retirement of their employees because of their age, provided those employees meet three criteria: (1) the employee is sixty-five or older, (2) the employee is entitled to collect a retirement benefit of at least \$44,000 annually, and (3) the employee was employed in a “bona fide executive” or “high policymaking” position for the two years immediately prior to retirement).

150. 29 U.S.C. § 623(f)(1) (2006).

151. *Sanchez v. Catholic Foreign Soc’y of Am.*, 82 F. Supp. 2d 1338, 1339 (M.D. Fla. 1999).

152. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009) (“The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”); *Clark v. Matthews Int’l Corp.*, 628 F.3d 462, 469 (8th Cir. 2010) (“[The plaintiff] is required to prove that his age was the ‘but-for’ cause of [the employer’s] challenged decisions regardless of whether he uses direct or circumstantial evidence to prove his age-discrimination claims.”).

The reasoning in favor of the ministerial exception even when a religious justification is not offered for the employer's conduct is explained in a Seventh Circuit age discrimination opinion written by Judge Posner.<sup>153</sup> Richard Tomic worked as a music director and organist at St. Mary's Cathedral in Peoria and for the Roman Catholic Peoria Diocese. Tomic, who was fifty and was not an ordained Catholic priest, alleged that the diocese fired him because of his age and replaced him with a younger man.<sup>154</sup> As in most of the ministerial exception cases, the facts are tantalizingly brief.<sup>155</sup> Tomic's complaint suggests that problems arose when Tomic disagreed with a priest about the scheduling of choir practices during Easter week: Tomic "had expressed his concerns to Rev. Gray that the scheduling he (Gray) was requesting would have a detrimental effect on the music scheduled for Easter week."<sup>156</sup> After the firing, moreover, the church contested Tomic's application for unemployment compensation; "the Diocese first took the position that plaintiff left his job voluntarily and later took the position that he was terminated for misconduct."<sup>157</sup>

Surely that case should get to court, because the church did not have a religious tenet of age discrimination, the nature of the dispute was not theological, and the diocese's changing story suggests pretext and undermines credibility, correct? No, explained Judge Posner:

[T]his is not correct, because the church would be likely to defend its employment action on grounds related to church needs rooted in church doctrine. The reference in the complaint in this case to the dispute between Tomic and the bishop's assistant suggests that if the suit were permitted to go forward, the diocese would argue that he was dismissed for a religious reason—his opinion concerning the suitability of particular music for Easter services—and the argument could propel the court into a controversy, quintessentially religious, over what is suitable music for Easter services. Tomic would argue that the church's criticism of his musical choices was a pretext for firing him, that the real reason was his age. The church would rebut with evidence of what the liturgically proper music is for an Easter Mass and Tomic might in

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153. *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006).

154. *Id.* at 1037.

155. *Id.* Age discrimination cases without facts are also prevalent. *See, e.g.,* Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010); Clapper v. Chesapeake Conference of Seventh-Day Adventists, No. 97-2648, 1998 WL 904528 (4th Cir. Dec. 29, 1998); Hopkins v. DeVeaux, 781 F. Supp. 2d 1283 (N.D. Ga. 2011); Musante v. Notre Dame of Easton Church, No. Civ. A. 301CV2352MRK, 2004 WL 721774 (D. Conn. Mar. 30, 2004); Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994); Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination, No. Civ. A. 09-1950, 2009 WL 1668550 (Mass. Super. Ct. June 2, 2009); Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

156. Brief and Required Short Appendix of Plaintiff-Appellant, Richard Tomic at 4, Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006), 2005 WL 5806789.

157. *Id.* at 4–5.

turn dispute the church's claim. The court would be asked to resolve a theological dispute.<sup>158</sup>

The contrast between the opinion and the facts of the case undermines the Seventh Circuit's rationale. The court first imagined its own theological dispute over music while the parties were arguing about scheduling, possibly turning a secular dispute into a doctrinal one. Second—like all the courts that have adopted the ministerial exception—the court engaged in actual theological analysis before ruling it could not resolve a questionably theological issue. After all, the court made a doctrinal ruling that Tomic was a minister, even though he was not a priest. Music, it ruled, is central to liturgy and therefore a musician must be a minister.

Now the Supreme Court appears to have adopted even stronger reasoning than the Seventh Circuit's: that the courts cannot get away from religion even in a secular dispute. Again, the Court has provided no rationale for siding with religious employers over religious employees in such circumstances. The only reason it seems to provide is that ministers are different. The next Part reviews the question of who now qualifies as a minister for ministerial exception purposes.

## V. WHO IS A MINISTER?

Obviously (and not) the ministerial exception applies to ministers. *Hosanna-Tabor* clarified that the ministerial exception is a defense on the merits rather than a jurisdictional bar.<sup>159</sup> The exception is an affirmative defense because the issue is “whether the allegations the plaintiff makes entitle him to relief,” not whether the court has “power to hear [the] case.”<sup>160</sup> Therefore district courts have the power to decide whether employment claims can proceed or are barred by the affirmative defense of the ministerial exception. Presumably, the primary question to be determined by the trial courts is whether the employee is a minister or not. The following sections argue that the test for a minister remains problematic and excessively deferential to religious institutions. Part V.A explains that the question of ministerial status is always a theological question unsuited for determination by the courts. Part V.B examines the ambiguity of the Court's suggestion that some breach of contract lawsuits may proceed despite the ministerial exception. Part V.C explores whether the courts may continue to hear tort disputes involving ministers.

### *A. Ministry Is Always a Theological Question*

As argued in Part II, *Hosanna-Tabor* avoids the question why ministers should be denied the protection of the employment laws. Moreover, there is no neutral and secular legal manner to resolve the question of who qualifies as a minister. On the grounds that they may not become entangled in a religious employer's decision making, the courts regularly became entwined in a more theological question by

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158. *Tomic*, 442 F.3d at 1040 (citations omitted).

159. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 n.4 (2012).

160. *Id.* (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (internal quotation marks omitted)).

deciding who should count as a minister. As Ninth Circuit Judge Alex Kozinski wrote, “[t]he very invocation of the ministerial exemption requires us to engage in entanglement [with religion] with a vengeance.”<sup>161</sup>

The ministerial exception has never been limited to clergy or ordained ministers. The courts have turned theological cartwheels to transform elementary and secondary school teachers, university and seminary professors, school principals, communications managers, administrative personnel, music directors, organists, and musicians into ministers.<sup>162</sup> The effect has been especially strong on teachers—elementary and high school teachers, school principals, college and university instructors and professors—who the courts have turned into ministers, denying them the protection of the disability, age, gender, pregnancy, race, sexual harassment, and breach of contract laws.<sup>163</sup> Several courts relied upon the ministerial exception to dismiss lawsuits of university professors without review of their academic qualifications or employment records.<sup>164</sup>

One irony and injustice in the ministerial rule is that female employees of denominations that do not ordain women suddenly became ministers at the moment they filed a lawsuit. Although some Roman Catholic, Muslim, and Orthodox

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161. *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in the denial of rehearing en banc).

162. *See, e.g., Tomic*, 442 F.3d 1036 (holding music director could not bring ADEA claim); *Pardue v. Ctr. City of Consortium Sch.*, 875 A.2d 669 (D.C. Cir. 2005) (dismissing school principal’s race and retaliation claim); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (holding that Hispanic communications manager could not bring Title VII national origin claim); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (dismissing choirmaster’s ADA claim); *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, No. 97-2648, 1998 WL 904528 (4th Cir. Dec. 29, 1998) (dismissing elementary school teacher’s ADEA claim).

163. *See, e.g., Clapper*, 1998 WL 904528 (dismissing elementary school teacher’s ADEA claim); *Pardue*, 875 A.2d 699 (school principal’s race and retaliation claim dismissed); *Redhead v. Conference of Seventh-Day Adventists*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008) (dismissing elementary school teacher’s pregnancy discrimination lawsuit); *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858 (E.D. Wis. 2004) (dismissing elementary and middle school teacher’s race and religion discrimination claim); *Temple Emanuel of Newton v. Mass Comm’n Against Discrimination*, No. CIV.A. 09-1950, 2009 WL 1668550 (Mass. Super. Ct. June 2, 2009) (dismissing Hebrew Day School teacher’s age discrimination suit); *Sabatino v. Saint Aloysius Parish*, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996) (dismissing high school principal’s breach of contract claim); *Coulee Catholic Sch. v. Labor & Indus. Review Comm’n*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868 (dismissing first grade teacher’s age discrimination case).

164. *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (dismissing canon law professor’s Title VII sex discrimination case); *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594 (N.D. Tex. 2008) (dismissing seminary professor’s breach of contract case); *Hope Int’l Univ. v. Superior Court*, 119 Cal. App. 4th 719 (2004) (dismissing case where psychologists who were Marriage and Family Therapy professors had marital discrimination); *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334 (Ind. Ct. App. 1999) (dismissing seminary professor’s breach of contract case); *Alicea v. New Brunswick Theological Seminary*, 608 A.2d 218 (N.J. 1992) (dismissing theology professor’s breach of contract claim); *Jocz v. Labor & Indus. Review Comm’n*, 538 N.W.2d 588 (Wis. Ct. App. 1995) (dismissing seminary director of field education’s sex discrimination lawsuit).

Jewish women may not become priests, imams, or rabbis and perform their jobs with the full understanding that they cannot be ministers, the courts and churches confer ministerial status upon them just long enough to keep their lawsuits out of court.<sup>165</sup> This situation is the clearest proof that the ministerial exception unfairly overprotects the rights of institutions at the expense of individuals.

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.<sup>166</sup> 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.”<sup>167</sup> In the courts, however, Catholic women become priests and Jewish scholars turn out to be Christian ministers.

Although all the circuit courts agreed before *Hosanna-Tabor* was decided that the Religion Clauses require a ministerial exception, they disagreed about who qualifies as a minister. The Sixth Circuit relied upon a “primary duties” test to determine that Perich was not a minister. As the name suggests, that test often counted the minutes in the employee’s day to determine if her activity was primarily secular or religious. If Perich or another teacher taught reading, writing, and arithmetic all day with only a little time for religion, she could be labeled a teacher instead of a minister and have her day in court. Chief Justice Roberts rejected such an approach when he wrote that ministerial status “is not one that can be resolved by a stopwatch.”<sup>168</sup>

In *Hosanna-Tabor*’s argument before the Court, Professor Douglas Laycock argued for an important religious functions test, where the question is whether the employee performed any important religious functions.<sup>169</sup> Because of the concerns about religious entanglement, Laycock urged judicial deference toward the

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165. For examples of cases involving Catholic women deemed ministers for purposes of the ministerial exception, see *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1240 (10th Cir. 2010) (involving Catholic Director of Religious Formation); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (involving non-ordained chaplain assured women were eligible for her position); *Pardue*, 875 A.2d 669 (involving school principal); *Alicea-Hernandez*, 320 F.3d 698 (involving Catholic communications director); *Musante v. Notre Dame of Easton Church*, No. CIV.A. 301CV2352MRK, 2004 WL 721774 (D. Conn. Mar. 30, 2004) (involving Director of Religious Education); *Archdiocese of Miami, Inc. v. Miñagorri*, 954 So. 2d 640 (Fla. Dist. Ct. App. 2007) (involving school principal); *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003) (involving Director of Religious Education); *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483 (Mich. Ct. App. 2008) (involving elementary school teacher); *Sabatino*, 672 A.2d 217 (involving high school principal); *Coulee Catholic Sch.*, 768 N.W.2d 868 (involving first grade teacher).

166. See *Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR, 2012 WL 3046472 (Ky. Ct. App. July 27, 2012).

167. *Id.* at \*15 (Keller, J., dissenting).

168. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012).

169. Brief for the Petitioner at 22, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

churches' definition of who counts as a minister. Justice Thomas agreed; his concurrence concluded that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister."<sup>170</sup> Justice Thomas's approach gives religious organizations broad freedom to violate the law; all they have to do is invoke ministerial status in order to win their lawsuits.

The other eight Justices provided minimal guidance for future cases. The Court rejected the EEOC's idea that a minister performs "exclusively religious functions,"<sup>171</sup> perhaps influenced by the Chief Justice's clever quip that although the Pope performs numerous secular duties in Vatican City, he is undoubtedly a minister.<sup>172</sup> In resolving the ministerial question, the Court instead emphasized the facts that Hosanna-Tabor considered Perich to be a minister, and that Perich accepted the formal call to religious service and claimed a minister's housing allowance on her tax return. Ministerial status was thus based on "the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church."<sup>173</sup> Any employee "conveying the Church's message and carrying out its mission" is presumed to be a minister.<sup>174</sup>

Justice Alito, joined by Justice Kagan, wrote that the word minister,

should apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. . . . These include those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.<sup>175</sup>

All the Justices were concerned that "minister" be interpreted broadly enough to include non-Christian clergy of whatever title as well as denominations that lack official clergy.

Following those definitions, it is possible that some past ministerial exception cases were wrongly dismissed and that some limited future victories await plaintiffs in similar circumstances. On the other hand, the Court's new test may cover some employees, especially teachers, who were previously allowed to sue.

Presumably, a non-Catholic teacher in a Catholic school is still not a minister.<sup>176</sup> What about a lay math teacher at a parochial high school who also led students in prayer and took students to mass? In the Second Circuit he was not a minister;

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170. *Hosanna-Tabor*, 132 S. Ct. at 710 (Thomas, J., concurring).

171. *Id.* at 708–09.

172. Transcript of Oral Argument at 47, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

173. *Hosanna-Tabor*, 132 S. Ct. at 708.

174. *Id.*

175. *Id.* at 712 (Alito, J., concurring).

176. See, e.g., *Braun v. St. Pius X Parish*, No. 09–CV–779–GKF–TLW, 2011 WL 5086362 (N.D. Okla. Oct. 25, 2011). *But see* *Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR, 2012 WL 3046472 (Ky. Ct. App. July 27, 2012) (Jewish Studies professor is a Christian minister for purposes of the ministerial exception).

would the Supreme Court ordain him?<sup>177</sup> Could a teacher who taught “exclusively secular subjects” now become a minister if his employers believe that all teachers “carry[] out its mission”?<sup>178</sup> Will the Court describe religious studies as an academic discipline, or does anyone teaching “religion” become a minister?<sup>179</sup> In the past, church schools that believed that all employees were ministers were required to pay equal wages to women even when it violated biblical teaching.<sup>180</sup> Does the Court’s careful acknowledgment of churches in which everyone is a minister mean that those precedents are no longer good law?

Especially interesting are cases such as that of Alicia Hernandez, a press secretary for a Catholic diocese. A “press secretary is responsible for conveying the message of an organization to the public as a whole[,] . . . is often the primary communications link to the general populace[,] . . . [and] is critical in message dissemination.”<sup>181</sup> Are all press secretaries now ministers because they “convey[] the Church’s message”?<sup>182</sup>

With *Hosanna-Tabor* limited to its facts, the trial courts will still struggle with an eminently theological question of church ministry. If the ministerial definition is unclear, they will undoubtedly do what they have done in the past: avoid any possible entanglement with religion. The best way to avoid entanglement is to dismiss a case. The ministerial rule always favors employers.

#### *B. The Breach of Contract Exception*

The Supreme Court left an opening for some lawsuits by religious employees when it stated “[w]e express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”<sup>183</sup>

Long before *Hosanna-Tabor* was decided, some appeals courts distinguished breach of contract cases from antidiscrimination lawsuits. Three stated reasons for the difference were that churches may voluntarily burden themselves with contracts,<sup>184</sup> contracts are not matters of theological doctrine, and awarding purely monetary damages on a contract claim does not entangle the courts with religion.

177. See *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993).

178. *Hosanna-Tabor*, 132 S. Ct. at 708; see also *Butler v. Archdiocese of Galveston Houston*, No. H-08-897, 2009 WL 3837003 (S.D. Tex. Nov. 12, 2009).

179. See, e.g., *Hendricks v. Marist Catholic High Sch.*, CIV. 09-6336-AA, 2010 WL 1499251 (D. Or. Apr. 12, 2010); *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200 (D. Conn. 2000); *Kant*, at \*15 (Keller, J., dissenting) (expressing concern that majority had lost sight of distinction between teaching religion and teaching *about* religion in dismissing lawsuit of Jewish Studies professor at a Christian seminary).

180. See, e.g., *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272, 1280 (9th Cir. 1982).

181. *Alicia-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003).

182. *Hosanna-Tabor*, 132 S. Ct. at 708.

183. *Id.* at 710.

184. *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990) (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 714 (1871)).

*Minker v. Baltimore Annual Conference of United Methodist Church*,<sup>185</sup> the D.C. Circuit's leading ministerial exception case, illustrates this point. The court rejected Methodist Minister Ralph Minker's age-discrimination lawsuit under the ministerial exception. It also dismissed his breach of contract claim that the church had violated the Methodist Book of Discipline, which states "appointments are to be made without regard to race, ethnic origin, sex, color, or age, except for the provisions of mandatory retirement."<sup>186</sup> The court dismissed *that* contract claim because it "could not interpret or enforce such a provision without running afoul of the first amendment" by construing the theological book.<sup>187</sup>

Nonetheless, the court remanded Minker's breach of contract claim based on the church's oral promise that Minker "would be moved to a congregation more suited to his training and skills, and more appropriate in level of income, at the earliest appropriate time."<sup>188</sup> In those secular circumstances, the court thought that "the issue of breach of contract can be adduced by a fairly direct inquiry into whether appellant's superintendent promised him a more suitable congregation, whether appellant gave consideration in exchange for that promise, and whether such congregations became available but were not offered to Pastor Minker."<sup>189</sup>

The court also recognized that breach of contract litigation would result in "[m]oney damages alone."<sup>190</sup> The limitation to money damages is important. Successful employment-discrimination plaintiffs are entitled to remedies that make them whole, including back pay, compensatory damages, punitive damages, front pay, and reinstatement to the job.<sup>191</sup> Proponents of a strong ministerial exception believe that the First Amendment prohibits any award of damages against religious employers and accordingly urge the dismissal of all religious employment lawsuits.<sup>192</sup> Among all the potential remedies, however, the idea of reinstatement of an employee to a ministerial position has been particularly troubling to the courts and church defendants. Indeed, Hosanna-Tabor identified reinstatement as "[p]erhaps the most fundamental problem with discrimination suits by ministers[.]" likening reinstatement to the government's appointment of ministers in an established church.<sup>193</sup>

Cheryl Perich's lawyers took that argument seriously and emphasized that she was not seeking reinstatement but still deserved other damages such as back pay and front pay.<sup>194</sup> Despite Perich's loss, the Court may be sympathetic to a breach of contract claim without the possibility of reinstatement that is limited to monetary

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185. *Id.*

186. *Id.* (internal quotations omitted).

187. *Id.*

188. *Id.* at 1355 (internal quotations omitted).

189. *Id.* at 1360.

190. *Id.*

191. Robert E. Talbot, *A Practical Guide to Representing Parties in EEOC Mediations*, 37 U.S.F. L. REV. 627, 643-44 (2003).

192. Brief for the Petitioner at 24, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-533).

193. *Id.* at 26.

194. Brief for Respondent Cheryl Perich at 59, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-533).



loss. Monetary damages appear far from the governmental-appointment-of-ministers concern that persuaded the Justices to rule against Perich.

Such reasoning explains and justifies the results of *Bollard* and *McKelvey*, the two seminarian cases where reinstatement was not a remedy but monetary damages were.<sup>195</sup> In other religious breach of contract cases, ministers have been allowed to sue for payment of salary for services already rendered,<sup>196</sup> for the difference between short-term disability benefits and salary,<sup>197</sup> for a congregation's failure to pay into a rabbi's retirement fund,<sup>198</sup> and for terminating the employee's contract without a proper notice and meeting.<sup>199</sup> Post *Hosanna-Tabor*, two courts have already ruled that actual ministers—pastors with the Presbyterian Church and the African Methodist Episcopal Church, respectively—may pursue breach of contract claims for *wages due on past work already completed* without even citing *Hosanna-Tabor*.<sup>200</sup>

Yet *Minker* also created a loophole that has been applied to other breach of contract cases; it cautioned that even *Minker*'s contract case must be dismissed if the court became entangled in any theological controversy or ecclesiastical policy. Unfortunately, a quick trip to entanglement takes place when the employer asserts that the contract was not enforced because the employee was not qualified for the job or performed the job poorly. For example, Episcopal priest Janet Kraft tried to enforce an employment contract that entitled her to certain benefits if her termination occurred without cause. She contested the church's allegation that she was fired for making improper expenditures on the church's credit card.<sup>201</sup> High-school principal Patricia Dayner alleged that her firing by Father Bzdyra was "motivated by or in retaliation for [her] refusal to 'stick up for him' regarding his unwanted sexual remarks to eighth grade girls."<sup>202</sup> Both contract lawsuits were dismissed because the courts feared theological issues in the discussions of how Reverend Kraft had spent the money or why Father Bzdyra had dismissed Principal Dayner.

Even some cases that appear more purely economic, for example, a church's refusal to pay workers' compensation for a priest-employee who was injured lifting

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195. See *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 950–51 (9th Cir. 1999); *McKelvey v. Pierce*, 173 N.J. 26 (2002).

196. *Goodman v. Temple Shir Ami, Inc.*, 712 So. 2d 775, 777 (Fla. Dist. Ct. App. 1998).

197. *Errgong-Weider v. United Congregational Church of Norwalk*, No. FSTCV116009458S, 2011 WL 5842378 (Conn. Super. Ct. Oct. 25, 2011).

198. *Elbaz v. Congregation Beth Judea, Inc.*, 812 F. Supp. 802 (N.D. Ill. 1992).

199. *Errgong-Weider*, 2011 WL 5842378.

200. See *Second Episcopal Dist. African Methodist Church v. Prioleau*, 49 A.3d 812 (D.C. Cir. 2012); *Crymes v. Grace Hope Presbyterian Church, Inc.*, No. 2011-CA-000746-MR, 2012 WL 3236290 (Ky. Ct. App. Aug. 10, 2012).

201. *Kraft v. Rector, Churchwardens & Vestry of Grace Church*, No. 01-CV-7871 (KMW), 2004 WL 540327 (S.D.N.Y. Mar. 17, 2004); see also *Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654, 655 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1714 (2010); *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1021 (N.D. Iowa 2007).

202. *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1198 (Conn. 2011) (quoting the trial court); see also *Marshall v. Munro*, 845 P.2d 424 (Alaska 1993); *McDonnell v. Episcopal Diocese of Georgia*, 381 S.E.2d 126 (Ga. Ct. App. 1989).

a television;<sup>203</sup> an employee who was fired allegedly because his organization lost funding;<sup>204</sup> a church's provision of inadequate medical care to a missionary-employee overseas;<sup>205</sup> or a church's failure to provide food, clothes, housing, and medical care to another overseas missionary,<sup>206</sup> have all been dismissed under fear of entanglement. An exception for breach of contract will not solve the core problems of the ministerial exception rule.

### C. The Tortious Conduct Exception

The Supreme Court also left an opening for some lawsuits by religious employees alleging tortious conduct by their religious employers.<sup>207</sup> Torts have enjoyed a mixed reception in prior ministerial exception cases. In the Second Circuit, for example, the ministerial exception “plainly [did] not create for religious institutions a charmed existence free from liability for their torts and upon their valid contracts.”<sup>208</sup> “[A] plaintiff alleging particular wrongs by the church that are wholly non-religious in character is surely not forbidden his day in court. The minister struck on the head by a falling gargoyle as he is about to enter the church may have an actionable claim.”<sup>209</sup>

Torts may have attracted the Court's attention because of general concerns about the extensive sexual abuse of children by clergy<sup>210</sup> and a Michigan case that had a certiorari petition before the Court while *Hosanna-Tabor* was argued. Michigan elementary school teacher Madeline Weishuhn was fired by a Catholic school principal for reporting possible sexual abuse of a student's friend to state authorities.<sup>211</sup> Even though Weishuhn was a required reporter of abuse under state law, Michigan state courts dismissed her whistleblowers lawsuit under the ministerial exception.<sup>212</sup> At oral argument, Justice Sotomayor asked Hosanna-

203. *Malichi v. Archdiocese of Miami*, 945 So. 2d 526, 528 (Fla. Dist. Ct. App. 2006).

204. *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 330 (4th Cir. 1997).

205. *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877 (Tex. Ct. App. 2000).

206. *Dowd v. Soc'y of St. Columbans*, 861 F.2d 761, 762 (1st Cir. 1988).

207. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 708 (2012).

208. *Guerrier v. S. New England Conference Ass'n of Seventh Day Adventists, Inc.*, No. CV085007824, 2009 WL 4282894, at \*3 (Conn. Super. Ct. Nov. 12, 2009) (citing *Friedlander v. Port Jewish Ctr.*, 588 F. Supp. 2d 428, 431 (E.D.N.Y. 2008)).

209. *Guerrier*, 2009 WL 4282894 at \*3 (emphasis added) (citing *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008)).

210. See Brief of Amicus Curiae BishopAccountability.org et al., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

211. *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483 (Mich. Ct. App. 2008).

212. *Id.*; Petition for Writ of Certiorari at 16 n.2, *Weishuhn v. Catholic Diocese of Lansing*, 2010 WL 5043331 (2012) (No. 10-760), cert. denied, 132 S. Ct. 1088 (2012); see also Richard Renner, *Supreme Court Considers Whistleblower Protection for “Ministerial Employees,”* WHISTLEBLOWERS PROTECTION BLOG (Mar. 28, 2011), <http://www.whistleblowersblog.org/2011/03/articles/corporate-1/supreme-court-considers-whistleblower-protection-for-ministerial-employees/>.

Tabor's lawyer, "How about a teacher who reports sexual abuse to the government and is fired because of that reporting?"<sup>213</sup>

In response, Professor Laycock distinguished between the government's interest in protecting ministers from discrimination and the government's interest in protecting children from abuse:

If the government's interest is in protecting ministers from discrimination, we are squarely within the heart of the ministerial exception. If the government's interest is something quite different from that, like protecting the children, then you can assess whether that government interest is sufficiently compelling to justify interfering with the relationship between the church and its ministers. But the government's interest is at its nadir when the claim is: We want to protect these ministers as such. We want to tell the churches what criteria they should apply for—for selecting and removing ministers.<sup>214</sup>

In other words, the government has some interest in protecting children from abuse but no interest in protecting ministers from discrimination. Weishuhn should lose her case.

Laycock's answer suggests that some third-party tort lawsuits do not violate the First Amendment. If a victim of sexual abuse sues a bishop for his negligent supervision of an abuser-priest, then presumably the government's interest prevails and the fear of governmental intrusion upon ministerial decisions does not apply.<sup>215</sup>

More usual are lawsuits like Weishuhn's, where employee-whistleblowers allege that they faced retaliatory firing for their protected legal conduct. Catholic school principal Yolanda Miñagorri was fired after she complained to the Archdiocese of Miami that her supervisor, Father Jesus Saldana, assaulted and battered her.<sup>216</sup> Organist William Moersen was fired after he reported his own sex abuse to church officials.<sup>217</sup> Father John Conley was punished and defamed after reporting another priest's sexual misconduct.<sup>218</sup> Chapman University Chaplain Shaunie Schmoll had her work hours cut in half after she reported the sexual harassment of students by two faculty members.<sup>219</sup> Margie Weiter was fired from her bookkeeper/receptionist job with the Archdiocese of Louisville after she

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213. Transcript of Oral Argument at 5, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

214. *Id.* at 6–7.

215. See *Malicki v. Doe*, 814 So. 2d 347, 351 (Fla. 2002) ("We conclude that the First Amendment does not provide a shield behind which a church may avoid liability for harm caused to an adult and a child parishioner arising from the alleged sexual assault or battery by one of its clergy, and accordingly approve the Third District's decision. We thus join the majority of both state and federal jurisdictions that have found no First Amendment bar under similar circumstances."); *id.* at 351 n.2 (collecting cases with that holding).

216. *Archdiocese of Miami, Inc. v. Miñagorri*, 954 So. 2d 640 (Fla. Dist. Ct. App. 2007).

217. *Archdiocese of Washington v. Moersen*, 925 A.2d 659 (Md. Ct. App. 2007).

218. *Conley v. Roman Catholic Archbishop of S.F.*, 102 Cal. Rptr. 2d 679, 682 (Cal. Ct. App. 2000).

219. *Schmoll v. Chapman Univ.*, 83 Cal. Rptr. 2d 426 (Cal. Ct. App. 1999).

reported instances of clergy sexual abuse.<sup>220</sup> Rabbi Steven Ballaban alleged that he was fired after he reported improper physical contact between a teacher and a student.<sup>221</sup> Gannon University Chaplain Lynette Petruska's job responsibilities were restructured after she reported the university president's sexual harassment to the local bishop and the university provost.<sup>222</sup> Vineyard Community Church workers Sandi Horine and Greg Williams were fired after they consulted with an attorney about the possibility that their church was violating employment laws against sex discrimination.<sup>223</sup> Reverend Julius Baker was fired after he reported his suspicions that African Methodist Episcopal Church bishops had converted church funds for their own personal use and failed to pay federal income tax.<sup>224</sup> Christian Methodist Episcopal Church Reverend Lee Otis Gellington helped his coworker Veronica Little, who suffered sexual advances from her supervisor, to draft a complaint to the bishop. Soon after he was asked to transfer to a church over 800 miles away, where he would receive reduced pay.<sup>225</sup>

*Gellington* is striking because of its similarities to a later Supreme Court case permitting Roderick Jackson, a male girls' high school basketball coach who complained that his team did not receive equal funding, to assert a Title VII retaliation claim even though he was not the victim of sex discrimination.<sup>226</sup> Moreover, recent Supreme Court decisions have insisted, "Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct."<sup>227</sup> Yet *Gellington*, like most of the other cases mentioned in this section, was dismissed under the ministerial exception.<sup>228</sup>

Some courts have held religious employers accountable for libel and intentional interference with expectancy of employment.<sup>229</sup> Others have dismissed defamation and tortious blacklisting claims.<sup>230</sup> Perhaps courts will now construe the torts

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220. *Weiter v. Kurtz*, No. 2011-CA-001058-MR, 2012 WL 6213759 (Ky. Ct. App. Dec. 2012) (wrongful termination lawsuit not allowed to proceed).

221. *Ballaban v. Bloomington Jewish Cmty., Inc.*, No. 53A01-1207-CT-315, 2013 Ind. App. LEXIS 15 (Ind. Ct. App. Jan. 17, 2013).

222. *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006).

223. *Horine v. Vineyard Cmty. Church*, 1st Dist. No. C-060097, 2006-Ohio-6620 (Dec. 15, 2006).

224. *Baker v. African Methodist Episcopal Church*, No. 3-01-CV-2485-M, 2002 WL 1840931 (N.D. Tex. Aug. 8, 2002).

225. *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301 (11th Cir. 2000); *see also* *Young v. N. Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994) (regarding retaliation in race and sex discrimination context).

226. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 179 (2005).

227. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011); *see also* *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.").

228. *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000).

229. *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468 (8th Cir. 1993).

230. *E.g.*, *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003) (dismissing blacklisting lawsuit under the ministerial exception); *Callahan v. First Congregational Church*, 808 N.E.2d 301 (Mass. 2004) (holding tortious interference and

exception expansively due to the dicta in *Hosanna-Tabor*. But there is no requirement to do so.<sup>231</sup> As in the definition of minister and breach of contract areas, the fear of entanglement may shut these cases down.

A better option would be to have the same tort, contract, and employment law for everyone. The Conclusion explains some avenues to that goal.

#### CONCLUSION

Although *Hosanna-Tabor* promises to be a decision limited to its facts, its reasoning presents a disturbing portrait of the First Amendment. Individual ministers fall outside the protection of the antidiscrimination laws.<sup>232</sup> Individual religious believers are subject to the rule of *Smith*, while institutions are not.<sup>233</sup> Institutional religious freedom allows the firing of ministerial employees for any reasons, even nonreligious ones.<sup>234</sup> The test of who qualifies as a minister is vague enough that courts will continue to engage in theological discussion to resolve that controversy.<sup>235</sup> The rule always favors employers. A unanimous Court appeared dismissive of the idea that religious employees should have their day in court. The Court forgot that to exempt religious organizations from “neutral laws of general applicability”<sup>236</sup> “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every [religious organization] to become a law unto himself.”<sup>237</sup>

The Court had less drastic options than to accept a ministerial exception that puts religious organizations above and outside the law. As noted above, the favorite straw woman is that without the exception courts will force denominations with all-male clergy to accept women priests. Using the ministerial exception to address that problem, however, is like swatting a fly with a sledgehammer. Title VII allows employers to use religion, sex, or national origin as a bona fide occupational qualification (BFOQ) whenever “reasonably necessary to the normal operation of that particular business or enterprise.”<sup>238</sup> Gender-based BFOQs are disfavored and

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defamation were internal affairs and so not subject to lawsuit).

231. See *Ballaban v. Bloomington Jewish Cmty., No. 53A01-1207-CT-315, Inc.*, 2013 Ind. App. LEXIS 15, at \*25 (Ind. Ct. App. Jan. 17, 2013) (because there was evidence in the record that Rabbi Ballaban was dismissed for other reasons, the court need not answer the question whether the ministerial exception applies when a minister reports child abuse or neglect). *But see id.* at 32–33 (Vaidik, J., concurring) (“the ministerial exception does not allow a congregation to fire a spiritual leader who refuses to commit a criminal offense”; in Indiana, failure to report child abuse is a criminal offense).

232. See *supra* Part II.

233. See *supra* Part III.

234. See *supra* Part IV.

235. See *supra* Part V.

236. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 901 (1990) (O’Connor, J., concurring).

237. *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145 (1878)).

238. 42 U.S.C. § 2000e–2(e) (2006) (“Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-

may be invoked “only when the *essence* of the business operation would be undermined” by hiring individuals of both sexes.<sup>239</sup>

Gender-based BFOQs have been allowed in some circumstances, such as airport security screeners and prison guards. It is likely that religions would have at least as easy a time as a government employer in proving BFOQ in the context of ordaining women. The Roman Catholic Church, for example, argues that Scripture, the experience of Jesus and the Apostles, and its two-millennia-old tradition require an all-male priesthood. Moreover, theologically speaking only men can represent Jesus—

when Christ’s role in the Eucharist is to be expressed sacramentally, there would not be this “natural resemblance” which must exist between Christ and his minister if the role of Christ were not taken by a man: in such a case it would be difficult to see in the minister the image of Christ. For Christ himself was and remains a man.<sup>240</sup>

In these circumstances, the church could easily prove by a preponderance of the evidence “1) that the job qualification justifying the discrimination is reasonably necessary to the essence of its business; and 2) that [sex] is a legitimate proxy for the qualification because (a) it has a ‘substantial basis for believing that all or nearly all [women] lack the qualification.’”<sup>241</sup> The BFOQ is a much more satisfactory, narrow defense to Susan Rockwell’s ordination lawsuit than the broad ministerial exception.

The BFOQ solution would allow lawsuits against religious employers when they discriminate against the women they hire. As Judge Becker wrote, “where an employment decision is devoid of religious or doctrinal content, and is based solely on sexism, we fail to see how the decision relates to the free exercise of religion.”<sup>242</sup> Thus the first ministerial exception case of Salvation Army minister Billie McClure, who sued because she wanted equal pay to her male coworkers, should have been litigated. An argument that religious organizations may discriminate against the women they hire is simply another way of stating that religious organizations do not have to obey the law.

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management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .”).

239. *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (emphasis in original) (quoting *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971)).

240. SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION *INTER INSIGNIORES* ON THE ADMISSION OF WOMEN TO THE MINISTERIAL PRIESTHOOD (1976), available at [http://www.doctrinafidei.va/documents/rc\\_con\\_cfaith\\_doc\\_19761015\\_inter-insigniores\\_en.html](http://www.doctrinafidei.va/documents/rc_con_cfaith_doc_19761015_inter-insigniores_en.html).

241. *EEOC v. Boeing Co.*, 843 F.2d 1213, 1214 (9th Cir. 1988) (citation omitted).

242. *Petruska v. Gannon Univ.*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at \*47 (3d Cir. May 24, 2006) *vacated on reh’g*, 461 F.3d 294 (3d Cir. 2006), available at <http://www.ca3.uscourts.gov/opinarch/051222p.pdf>.

Under existing law, religious race discrimination poses a harder question because Title VII prohibits employers from using race as a BFOQ.<sup>243</sup> Medical employers, for example, may not hire white workers because their patients prefer them to blacks.<sup>244</sup> What should happen if the Nation of Islam or the Church of Jesus Christ of Latter-day Saints requires that its ministers be black or white?<sup>245</sup> The only rationale left for the practice is that religions are free to disobey the law and may discriminate on the basis of race.

Should the ministerial exception exist in order to allow churches to exclude employees on the basis of their race? As in the gender context, the case law does not involve blacks trying to become ministers in white churches or the reverse. Instead employees sue for racial discrimination in churches that do not advocate it. Those are the cases that the ministerial exception aborts.

Consider the circumstances of Father Justinian Rweyemamu, a “black African ordained Catholic priest from Tanzania, East Africa,”<sup>246</sup> whose race discrimination case established the ministerial exception in the Second Circuit.<sup>247</sup> Indeed, a Connecticut court stated there could not be a “clearer case” of the need for judicial abstention than Father Justinian’s.<sup>248</sup> Father Justinian alleged that despite his ten years experience as a diocesan priest and his five years of service at St. Bernard’s Church in Rockville, Connecticut, he was refused a promotion to administrator of the parish and a less-qualified white deacon was appointed in his place. He also claimed that he was harassed over his work for a nonprofit organization that supported economic development for poor children.<sup>249</sup> Much later, after his initial lawsuits were dismissed under the ministerial exception, he was fired from his parish and sued for retaliation, defamation, tortious interference in business relations, and intentional infliction of emotional distress; those claims were also dismissed under the ministerial exception.<sup>250</sup>

In the retaliation lawsuit, the church argued it had “just cause” to remove Father Justinian because there were “complaints regarding his homilies, complaints regarding his interaction with parish staff,” concern that his charitable work

243. See 42 U.S.C. § 2000e–2(e)(1) (mentioning religion, sex, and national origin but not race as allowed for BFOQ).

244. *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010).

245. See *Betha v. Nation of Islam*, 248 F. App’x 331 (3d Cir. 2007) (per curiam) (pleading racial discrimination by Nation of Islam); *Peterson v. Wilbur Commc’ns, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002) (explaining that World Church of the Creator believes in Creativity, which teaches white supremacy); Southern Poverty Law Center, *Active Christian Identity Groups*, S. POVERTY LAW CTR. (2012), [http://www.splcenter.org/get-informed/intelligence-files/ideology/christian-identity/active\\_hate\\_groups](http://www.splcenter.org/get-informed/intelligence-files/ideology/christian-identity/active_hate_groups) (identifying white-supremacist members of Christian Identity movement).

246. *Rweyemamu v. Comm’n on Human Rights & Opportunities*, 911 A.2d 319, 323 (Conn. App. Ct. 2006).

247. *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008).

248. *Rweyemamu v. Conn. Comm’n on Human Rights & Opportunities*, No. CV054003388S, 2005 WL 2981758, at \*2 (Conn. Super. Ct. Oct. 21, 2005) (“This case could not present a clearer case wherein the courts and governmental agencies are mandated and required to abstain or else violate the Free Exercise clause of our Constitution.”).

249. *Rweyemamu*, 911 A.2d at 323.

250. *Rweyemamu*, 520 F.3d at 200–01.

“interfered with his full-time parochial duties” and left him “not sufficiently devoted to” his duties.<sup>251</sup> Another reason given was “the necessity of giving a unified and positive witness to the people of the parish,”<sup>252</sup> which may be another way of saying that good priests do not file lawsuits.

Except for the last item, presumably that list also provided reasons why Father Justinian failed to get the promotion over the white deacon. Notice that the core of the defense was not the disputed theological content of the homilies, but the fact that parishioners had complained about them. The other criticisms were about the amount of time that Father Justinian put into his job. This is all evidence of whether it was race or religion that motivated the employment decision. A jury could have determined whether Father Justinian was fired for religious reasons or for racial discrimination.

Post *Hosanna-Tabor, Rweyemamu* is an even clearer case of the ministerial exception for two reasons. First, no one doubts he is a minister because he is an ordained priest in a hierarchical church where priests have a different status from nonpriests. Second, the Court ruled that ministers may be fired for nonreligious reasons; Father Justinian may be fired for racially discriminatory reasons.

That is what the ministerial exception amounts to, namely a First Amendment justification for disobeying the law even when it does not violate anyone’s conscience.

As noted above, 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. One 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.”<sup>253</sup> Another advantage is that, because freedom of association protects expressive association,<sup>254</sup> it forces organizations to be clear about their membership rules and about what membership in their organizations represents and expresses.<sup>255</sup> It would be better to force religious organizations to state openly their willingness to discriminate on the basis of race, gender, disabilities, sexual orientation, national origin, and age than to give them the free pass to disobey the laws for any reason that the Court awarded them in *Hosanna-Tabor*.

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251. *Id.* at 200.

252. *Id.*

253. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

254. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

255. *See Ira C. Lupu, Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 436 (1987).