
Summer 2022

Ministerial Employees and Discrimination Without Remedy

Charlotte Garden
Seattle University, gardenc@seattleu.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [First Amendment Commons](#), [Labor and Employment Law Commons](#), [Legal Remedies Commons](#), [Religion Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Garden, Charlotte (2022) "Ministerial Employees and Discrimination Without Remedy," *Indiana Law Journal*: Vol. 97: Iss. 3, Article 7.

Available at: <https://www.repository.law.indiana.edu/ilj/vol97/iss3/7>

This Symposium is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Ministerial Employees and Discrimination Without Remedy

CHARLOTTE GARDEN*

The Supreme Court first addressed the ministerial exemption in a 2012 case, Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC. The ministerial exemption is a defense that religious employers can invoke in discrimination cases brought by employees who qualify as “ministerial,” and it is rooted in the First Amendment principle that government cannot interfere in a church’s choice of minister. However, Hosanna-Tabor did not set out a test to determine which employees are covered by this exemption, and the decision was susceptible to a reading that the category was narrow. In 2020, the Court again took up the ministerial exemption, this time staking out a broad test that will cover swaths of teachers at religious schools, among others.

This Article explores the costs to employees of the ministerial exemption—especially those who have no idea that they will not have legal recourse if their employer discriminates against them based on a protected characteristic. It closes by raising the possibility that state legislatures could adopt measures intended to blunt these costs, either by helping to close the information gap, or by addressing head-on the costs of discrimination without remedy.

* Professor, Seattle University School of Law. I am grateful for feedback on this article received at the *Indiana Law Journal* symposium, *Compelled Speech: The Cutting Edge of First Amendment Jurisprudence*, and to the editors of the *Indiana Law Journal* for their careful editing.

INTRODUCTION.....	1008
I. THE MINISTERIAL EXEMPTION IN THE SUPREME COURT	1009
A. CHERYL PERICH	1010
B. KRISTEN BIEL.....	1012
C. AGNES MORRISSEY-BERRU.....	1012
II. THE MINISTERIAL EXEMPTION AND THE PROBLEM OF EMPLOYEE IGNORANCE	1015
III. THE PROSPECT OF LONG-TERM CONSEQUENCES FOR MINISTERIAL EMPLOYEES WHO LOSE THEIR JOBS.....	1018
IV. RESPONDING TO THE MINISTERIAL EXEMPTION	1021
A. DISCLOSURE AND EDUCATION	1022
B. THE GOVERNMENT PAYS	1024
CONCLUSION	1024

INTRODUCTION

In 2012, the Supreme Court held in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* that the religion clauses of the First Amendment require what is known as the “ministerial exemption” or “ministerial exception.”¹ That exemption, an affirmative defense that employers can raise when their “ministerial”² employees attempt to enforce their rights under discrimination law, is grounded in the principle that religious employers must be free to decide who will convey their religious messages. The *Hosanna-Tabor* Court decided that the employee involved in the case—a “called” teacher named Cheryl Perich—qualified as a ministerial employee; the consequence of that determination was that Perich lost her disability discrimination case without getting an opportunity to prove that discrimination occurred.

Hosanna-Tabor did not direct lower courts to apply a particular test in distinguishing ministerial from other employees, leaving that issue for another day. Then, in 2020, the Court again took up the ministerial exemption. In two consolidated cases, each involving a Catholic-school teacher, the Court announced a test focused on whether an employee’s duties lay “at the very core of the mission of a private religious school.”³ That test is relatively broad; it will mean that large numbers of employees, including thousands of teachers at religious elementary and high schools, will lack a legal remedy even if they are fired for a reason ordinarily covered by antidiscrimination law.

This Article uses these three ministerial exemption cases as case studies to explore some of the consequences of the ministerial exemption for the employees it affects.

1. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

2. Who is treated as a ministerial employee is discussed in detail in Part I of this Article. In general, a ministerial employee is one whose job duties involve conveying the employer’s religious message; exactly how to operationalize that definition in the context of an employee whose duties are partly religious and partly secular is the subject of the cases discussed in this Article.

3. *Our Lady of Guad. Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020).

It makes three main points. First, we should not assume that ministerial employees understand that they are ministerial or why that status matters, and this lack of knowledge can work to their detriment. Second, the ministerial exemption can shift significant costs onto individual employees when they are fired without recourse, and it can reduce religious employers' incentives to comply with antidiscrimination rules and norms, even if they have stated a commitment to those rules and norms. And third, legislatures could consider policies designed to blunt the effects of the ministerial exemption on employees.⁴ The Article closes with some preliminary avenues for legislatures to consider, and proposes that legislatures can usefully look to adapt solutions developed in a context with some parallels to the ministerial exemption: the First Amendment right of union-represented public sector workers to refuse to pay their share of the costs of union representation.

I. THE MINISTERIAL EXEMPTION IN THE SUPREME COURT

This Section discusses three cases involving the ministerial exemption, each of which eventually reached the Supreme Court. All three cases began with a religiously affiliated school firing a teacher, allegedly in violation of federal antidiscrimination law. In each case, there was at least a plausible allegation that discrimination had occurred, yet no teacher was permitted to litigate the merits of their claim. Instead, the Court concluded that each teacher was ministerial, and that the schools had a First Amendment right to fire them without having to face legal consequences.

The purpose of this Section is to lay the groundwork for the argument that employees' incorrect beliefs that they have enforceable rights under discrimination

4. This Article is not intended to be a comprehensive examination or critique of the ministerial exemption, but instead as an exploration of its consequences for employees, including the large number of K-12 teachers at religious schools who will not be able to sue their employers for many instances of discrimination because of the decisions in *Morrissey-Berru* and *St. James School v. Biel*, 140 S. Ct. 680 (2019), which is the case that was consolidated with *Morrissey-Berru* in the Supreme Court. There is presently a circuit split regarding whether the ministerial exemption applies in cases involving hostile work environment claims. *Compare* *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (stating that ministerial exemption did not categorically bar sexual harassment claims, and concluding that the plaintiff could proceed on "narrower and thus viable sexual harassment and retaliation claims that do not implicate protected employment decisions") with *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010) (holding plaintiff could not proceed on harassment claim because "any Title VII action brought against a church by one of its ministers will improperly interfere with the church's right to select and direct its ministers free from state interference"). For an analysis and discussion of these and other cases, see Rachel Casper, *When Harassment at Work is Harassment at Church: Hostile Work Environments and the Ministerial Exception*, 25 U. PA. J. L. & SOC. CHANGE 11 (2021). In addition to claims brought under discrimination law, there is also potential for employers to raise the ministerial exemption in other contexts. *See, e.g.*, *Shalichsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004) (applying statutory ministerial exemption in wage-and-hour case, and stating that the FLSA ministerial exemption was coextensive with the constitutional ministerial exemption); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018) (applying ministerial exemption to breach-of-contract claim).

law can influence their choices in ways that can ultimately—and perhaps avoidably—harm them. Therefore, it provides relatively little discussion of the Court’s reasoning regarding the ministerial exemption, nor does it critique these decisions. Instead, it relies on court documents to describe the events that led to litigation: the schools’ decisions and the teachers’ responses. To be clear, some of these documents reflect allegations made by the teacher-plaintiffs that were never evaluated by a factfinder; it is possible that they would have been contested in various ways if these cases had gone to trial. For purposes of the discussion and analysis that follows, I treat these statements as true.

A. Cheryl Perich

Cheryl Perich was hired by Hosanna-Tabor in 1999 as a contract teacher for a one-year, renewable term. As a contract teacher, Perich was not required to be a member of the Lutheran church. The following year, Perich completed the process to become a “called” teacher, which involved completing a “colloquy” program at a Lutheran college and then being selected by a congregation.⁵ This meant that she became a “commissioned minister,” receiving job security, but continuing to perform the same job duties.⁶

As both a lay teacher and a called teacher at Hosanna-Tabor, Perich taught secular subjects as well as a religion class, attended chapel service with her class (and occasionally led that service), and led her class in prayer each day.⁷ But this work was interrupted when Perich became ill in 2004; she was eventually diagnosed with narcolepsy.⁸ Because Perich’s illness interfered with her ability to do her job, she began the 2004–05 school year on disability leave. However, Hosanna-Tabor’s school principal, Stacy Hoeft, reportedly assured Perich she would still “have a job with” the school when she was able to return to work.⁹

Hosanna-Tabor initially dealt with Perich’s medical leave by combining three grade levels into one classroom. But when that arrangement proved unsatisfactory to both parents and teachers, the school decided to hire a long-term substitute teacher.¹⁰ In mid-December, Perich told Hoeft she expected to be cleared to work within two to three months, once her illness was controlled by medication.¹¹ But on January 10,

5. A “colloquy” program is a program for Lutheran teachers that can be completed in eight months and covers various topics related to religious doctrine and teaching in Lutheran schools. The current curriculum for the program that Perich completed is available online. See CONCORDIA UNIV. EDUC. NETWORK, cuenet.edu/colloquy/.

6. Brief for the Petitioner at 4, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 2414707 at *4 (describing that lay teachers are hired for one year at a time, whereas called teachers are hired for “open-ended terms, and their call can be rescinded only for cause and only by a supermajority vote of the congregation”).

7. *Hosanna-Tabor*, 565 U.S. at 178.

8. *Id.*

9. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 773 (6th Cir. 2010).

10. *Id.* at 773 n.1.

11. *Id.* at 773.

2005, Hoeft informed Perich that the school had a long-term substitute teacher in place.¹² Nine days later, Hoeft asked Perich “to begin considering and discussing with her doctor what she might be able to do upon return,” and Perich replied that, with medication, she would be able to perform all of her job duties.¹³

However, on January 21, “Hoeft informed Perich that the school board intended to amend the employee handbook to request that employees on disability for more than six months resign their calls to allow Hosanna-Tabor to responsibly fill their positions.”¹⁴ By then, Perich had already been on medical leave for more than five months, and so it would have been reasonable for her to have understood Hoeft’s message to mean that her job was in jeopardy, or at least that the school board had become unhappy about the length of Perich’s medical leave.

Perich responded less than a week later, on January 27, to indicate that she would be able to return to work by late February.¹⁵ Hoeft expressed doubt that this was true, and also indicated that the long-term substitute teacher hired to teach Perich’s class was under contract through the end of the school year.¹⁶ Three days later, Hoeft repeated these doubts during a congregational meeting, and school administrators “opined that Perich would not be able to return to teaching that school year or the next.”¹⁷ The congregation then “adopted the Board’s proposal to request that Perich accept a peaceful release agreement wherein Perich would resign her call in exchange for the congregation paying for a portion of her health insurance premiums through December 2005.”¹⁸ (A “peaceful release” is a resignation agreement that would have left Perich eligible for employment at another Lutheran school.)

Around the same time, Perich received clearance from her doctor that she could return to work on February 22.¹⁹ She met with the school board and presented her doctor’s note, but the Board asked for her resignation anyway.²⁰ Perich refused the Board’s request on February 21 and reported to work the next day.²¹

When she arrived at Hosanna-Tabor, Perich was informed there was no job for her. However, Perich refused to leave the school—the employee handbook indicated that “failure to return to work on the first day following the expiration of an approved medical leave is viewed as a voluntary termination,” and Perich’s medical leave was over because her doctor had approved her to work.²² In other words, Perich could reasonably have been afraid that if she went home, the school would later take the position that she had resigned her job as of February 22. This situation was resolved after Hoeft and the school board’s chairman gave Perich a letter asking that she

12. *Id.* at 773 n.1.

13. *Id.* at 773.

14. *Id.*

15. *Id.*

16. *Id.*

17. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 884 (E.D. Mich. 2008).

18. *Hosanna-Tabor*, 597 F.3d at 774.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Hosanna-Tabor*, 582 F. Supp. 2d at 885.

continue her leave and asserting that she had given “improper notification of her return to work.”²³ Perich left the school.

Later that day, Perich and Hoeft spoke on the phone, and Perich “indicated that she would assert her legal rights against discrimination.”²⁴ Following this conversation, the school board sent Perich a letter stating that she had to either accept the previously offered “peaceful release,” or be fired for “insubordination and disruptive behavior,” and for “threatening to take legal action.”²⁵ Perich did not accept the offer and retained counsel. When the school board went through with its threat of termination, Perich filed a charge of discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC).²⁶

B. Kristen Biel

Kristen Biel began her teaching career by working at tutoring companies, and as a “substitute teacher at several public and private schools,” before being hired first as a long-term substitute, and then as a full-time teacher at St. James School.²⁷ Biel taught first grade as a long-term substitute beginning in March 2013, and then was hired as a full-time fifth grade teacher for the 2013–14 school year; her title was “teacher,” and the school directed her to consult the benefits guide for “lay employees.”²⁸ St. James was a Catholic school; Biel was Catholic, but she did not have any formal training in religious pedagogy.²⁹

Biel’s career at St. James was cut short after she was diagnosed with breast cancer in April 2014, near the end of her first year of full-time teaching.³⁰ After Biel informed the school of the diagnosis, indicating that she would need to take time off for treatment, the school principal told Biel that her contract would not be renewed for the following year. While the school principal maintained that this decision was due to problems with Biel’s classroom management, Biel alleged that the real reason was her cancer diagnosis.³¹

C. Agnes Morrissey-Berru

Agnes Morrissey-Berru came to teaching as a second career; she was hired at Our Lady of Guadalupe School in 1998, when she was forty-seven years old.³² Our Lady of Guadalupe (OLG) was a Catholic school, but Morrissey-Berru did not consider herself a practicing Catholic. Still, like Biel, Morrissey-Berru had some teaching duties related to religious instruction, and she was considered a “catechist”—a

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 885–86.

27. *Biel v. St. James Sch.*, 911 F.3d 603, 605 (9th Cir. 2018).

28. *Id.*; Appendix to Petition for Writ of Certiorari, *Biel*, 911 F.3d at 103a (No. 17-55180).

29. *Biel*, 911 F.3d at 605.

30. *Id.* at 606.

31. *Id.*

32. *Morrissey-Berru v. Our Lady of Guad. Sch.*, No. 2:16-cv-09353-SVW-AFM, 2017 WL 6527336, at *1 (C.D. Cal. Sept. 27, 2017).

designation that signals that she was a “lay member[] of the Christian faithful” whose work included “setting forth the teaching of the gospel.”³³ However, Morrissey-Berru’s main duties involved teaching secular subjects, and she had not received formal religious training. Morrissey-Berru spent ten years as a full-time sixth-grade teacher, and then switched to fifth grade, where she remained a full-time teacher from the 1999–2000 school year through the 2013–14 school year.³⁴ In 2014, Morrissey-Berru learned that her school principal, April Beuder, was dissatisfied with Morrissey-Berru’s performance, and at the end of that year, Beuder offered Morrissey-Berru only a part-time position for the following year. Morrissey-Berru testified in a deposition that Beuder asked her if she “wanted to retire,” and criticized her “reading and writing instruction.”³⁵ Morrissey-Berru unhappily accepted the part-time job.³⁶

In a letter to the EEOC, Morrissey-Berru recounted that after she learned from Beuder that she would not be renewed in a full-time position, she began seeking a new full-time position at another school.³⁷ She then applied for a position teaching fifth grade at St. James school³⁸—in a remarkable coincidence, this was presumably the position that had opened when Kristen Biel lost her job. However, Morrissey-Berru did not get the job; she stated that she had learned that Beuder said “good things about [Morrissey-Berru]” during a reference check, but also said that she was “retiring.”³⁹ Morrissey-Berru further stated that Beuder was later “furious” that Morrissey-Berru was trying to get a new full-time position so close to the beginning of the school year, after she had accepted a part-time post at OLG.⁴⁰

The 2014–15 school year was Morrissey-Berru’s last at OLG. In her letter to the EEOC, Morrissey-Berru explained that she had asked to stay on even if she could not work full time, but the school decided not to renew her contract in any capacity.⁴¹ Morrissey-Berru reported the situation to the “downtown Catholic archdiocese personnel representative,”⁴² and ultimately filed a charge with the EEOC.⁴³

* * *

33. Code of Canon Law, available at https://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib3-cann781-792_en.html [<https://perma.cc/AGC5-EZFK>].

34. *Id.*

35. Joint Appendix on Writs of Certiorari at 85, *Our Lady of Guad. Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (Nos. 19-267 & 19-348).

36. *Id.*

37. *Id.* at 104. This letter reflects only Morrissey-Berru’s own account of what happened.

38. *Id.* In her letter to the EEOC, Morrissey-Berru explained that she applied “for a 5th grade teaching position at St. James Catholic school two miles down the street.”

39. *Id.* (recounting Morrissey-Berru’s conversation with Principal Sister Margaret of St. James school).

40. *Id.*

41. *Id.* at 105.

42. *Id.*

43. Joint Appendix, *supra* note 35, at 169.

The *Hosanna-Tabor* Court decided that Perich was covered by the ministerial exemption for several reasons: the school held Perich out as a minister;⁴⁴ she had “a significant degree of religious training followed by a formal process of commissioning”;⁴⁵ Perich held herself out as a minister, including by claiming a tax exemption for ministers;⁴⁶ and her duties “reflected a role in conveying the Church’s message and carrying out its mission.”⁴⁷ However, the Court did not announce a test or threshold to apply to future cases, and some later courts—including the Ninth Circuit in the *Morrissey-Berru* and *Biel* cases⁴⁸—read the scope of the exemption relatively narrowly.

The Supreme Court rejected the narrow approach in *Morrissey-Berru*, writing that “[w]hat matters, at bottom, is what an employee does,” in that “educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.”⁴⁹ Under that standard, the Court added, teachers at religious schools who lack formal training in religious doctrine or pedagogy, and who do not hold religious titles such as “minister,” may nonetheless be ministerial employees;⁵⁰ moreover, it is not a requirement that the employee be a practicing member of the faith, or even belong to the same faith as the employing institution.⁵¹ Conversely, the Court continued, religious institutions’ own “definition and explanation” of their employees’ roles “in the life of the religion in question [are] important.”⁵²

Dissenting, Justice Sotomayor, joined by Justice Ginsburg, argued that the ministerial exemption should be limited to positions involving religious leadership.⁵³ Beyond that, they also criticized the majority’s analysis for “priz[ing] a functional importance that it appears to deem churches in the best position to explain,” an

44. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190–91 (2012).

45. *Id.* at 191.

46. *Id.* at 191–92.

47. *Id.* at 192.

48. In *Morrissey-Berru*, the Court considered (1) whether the employer held the employee out as a minister by bestowing a formal religious title; (2) whether the employee’s title reflected ministerial substance and training; (3) whether the employee held herself out as a minister; and (4) whether the employee’s job duties included “important religious functions,” and concluded that—although she “did have significant religious responsibilities”—*Morrissey-Berru* was not a ministerial employee because she held a secular job title (“teacher”), had little religious training, and did not hold herself out as a minister. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2058, 2074. Similarly, in *Biel*, the Court considered the same four factors, and concluded *Biel* was not a ministerial employee because she had little religious training, no religious title, and did not hold herself out as a minister. *Biel*, 911 F.3d at 608–09. Further, the Court noted that *Biel*’s duties included relatively little religious instruction or leadership, as compared to Perich’s duties. *Id.* at 609.

49. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064.

50. *Id.* at 2066.

51. *Id.* at 2068–69.

52. *Id.* at 2066.

53. *Id.* at 2071–73.

approach that they wrote “traded legal analysis for a rubber stamp.”⁵⁴ The crux of the dissenters’ argument was that the Court’s approach would deprive many employees working at religious institutions of the protections of employment-discrimination law,⁵⁵ and that the Court’s deference to religious entities’ own assessments of their employees’ duties was flawed because those assessments could be self-serving.⁵⁶

II. THE MINISTERIAL EXEMPTION AND THE PROBLEM OF EMPLOYEE IGNORANCE

Among the reasons Justices Sotomayor and Ginsburg dissented was their fear that religious employers would strategically cast plaintiff-employees’ jobs as having a substantial religious component in order to avoid discrimination law:

So long as the employer determines that an employee’s ‘duties’ are ‘vital’ to ‘carrying out the mission of the church,’ then today’s laissez-faire analysis appears to allow that employer to make employment decisions because of a person’s skin color, age, disability, sex, or any other protected trait for reasons having nothing to do with religion.⁵⁷

They might have put an even finer point on their critique: the ministerial exemption allows employers to mislead their employees about their rights at the recruitment and hiring stages, and then to invoke the ministerial exemption if the employee sues.

Consider the school in *Hosanna-Tabor*. Hosanna-Tabor was a “member congregation” of the Lutheran Church-Missouri Synod,⁵⁸ and the Synod publishes an *Employment Resource Manual for Congregations and Districts*. That manual (at least in its 2016 iteration) implies that Synod policy was to follow the Americans with Disabilities Act (ADA) with respect to employment. Specifically, the manual contains a chapter entitled “Federal Employment Law” that discusses the ADA; that chapter describes both the employment and the public accommodations provisions of the ADA, adding that “[c]hurch and school employers should be aware of all applicable rules and regulations” set forth in the ADA, and then that “[e]mployers need to understand the legal restrictions about discriminating against disabled individuals.” The manual then states that

[w]hen the rules and regulations are not applicable to a church and/or school, christian care and concern should be exercised by the organization by not discriminating against persons with disabilities and

54. *Id.* at 2076. In a concurrence joined by Justice Gorsuch, Justice Thomas wrote that “judges do not shirk their judicial duty or provide a mere ‘rubber stamp’ when they defer to a religious organization’s sincere beliefs.” *Id.* at 2069–70 (citation omitted). This observation seems like less a refutation of the “rubber stamp” charge than an assertion that a rubber stamp is constitutionally required.

55. *Id.* at 2082 (citing amicus brief estimating that “over a hundred thousand secular teachers” could be affected by a broad ministerial exemption).

56. *Id.* (writing that the Court’s rule permits “religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs”).

57. *Id.* (Sotomayor, J., dissenting) (internal citation omitted).

58. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 177 (2012).

should, where reasonably possible without undue hardship, take the lead in making reasonable accommodations for disabled workers as set forth in the ADA.⁵⁹

That last statement immediately follows the manual's discussion of the ADA's public accommodations provision, which, the manual states, "specifically exempt[s]" churches.⁶⁰ Therefore, a reader might assume that the language about the ADA's non-application was intended to refer to public accommodations, and not employment. A close reader of the manual might also notice that a later discussion of Title VII of the Civil Rights Act of 1964 states that "the law provides a ministerial exemption" that covers "ordained and commissioned ministers."⁶¹ The absence of a similar caveat in the discussion of the ADA might lead that reader to assume that the ministerial exemption was not available under that statute.

The employment contracts that Biel and Morrissey-Berru signed at the beginning of each school year were similarly unclear about the ministerial exemption. Biel's employment contract for the 2013–14 school year stated that St. James "may terminate your employment if you are unable to perform the essential functions of your position and reasonable accommodation is not available or required under applicable laws."⁶² It also stated that St. James teachers lacked tenure rights,⁶³ though it did not say anything about teachers' inability to invoke statutory employment protections. Morrissey-Berru's contract was substantially the same as Biel's; in addition, Our Lady of Guadalupe's faculty handbook "promised not to discriminate on the basis of any protected characteristic, including 'race,' 'sex,' 'disability,' or 'age.'"⁶⁴

Of course, this ambiguity will not matter if employees know about the ministerial exemption (and the likelihood that they will fall under it) for another reason. But this seems unlikely. Research suggests that, even outside of the ministerial exemption context, employees generally have an inflated sense of the extent to which they are protected from being arbitrarily or discriminatorily fired. Professor Pauline Kim concluded based on survey evidence that employees "consistently *overestimate* the degree of job protection afforded by law,"⁶⁵ and there is no readily apparent reason

59. A version of the Lutheran Church-Missouri Synod *Employment Resource Manual for Congregations and Districts* dated June 2016 is currently available online at <https://files.lcms.org/wl/?id=gK1GGEUooouogF4QRDoxX3UDhsir8SNJf> [<https://perma.cc/49WN-WN7G>]. The above quote is found on page four of the 2016 manual. Perich's brief in the Supreme Court quotes some of this language from a 2003 version of the same manual. Brief for Petitioner at 6, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (No. 10–553).

60. *Employment Resource Manual*, *supra* note 59, at 3.

61. *Id.* at 12.

62. Joint Appendix at 95, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (No. 19-267) (2020); Petition for Writ of Certiorari, Appendix at 100a, *St. James Sch. v. Biel*, 140 S. Ct. 2049 (19-267) (2020).

63. Joint Appendix at 96, *Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049 (No. 19-267).

64. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2078 (Sotomayor, J., dissenting) (quoting record excerpts).

65. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997);

to believe that employees would have greater knowledge of the ministerial exemption—to the contrary, it is routinely reflected in popular media and news reporting that employment discrimination based on protected characteristics is illegal; the same cannot be said of the ministerial exception.

This matters in part because employees who believe they can resort to legal protections against employment discrimination might behave in ways that—in the absence of those protections—might ultimately hurt them. Perich’s case offers a case-in-point. Assuming the facts were as Perich alleged, she likely realized that her job was in danger in January 2005. By then, Perich had told Hoeft that she expected to be able to return to work sometime between mid-February and mid-April. But on January 10, Perich learned that the school had hired a long-term substitute teacher—with the implication that, once Perich returned, the school would have to pay an extra salary, for which it had presumably not budgeted. Then, Hoeft asked Perich what she “might be able to do upon return,”⁶⁶ implying that Hoeft did not believe that Perich’s narcolepsy was controlled. Finally, Hoeft told Perich that the school board was planning to “amend the employee handbook”⁶⁷ to make clear that employees on disability leave for more than six months should resign. Whether Perich thought that amendment would apply to her, or instead would be applied only to future situations, the amendment at least underscored that the school hoped for Perich’s resignation.

Those and other events, discussed in Section I.A, could be interpreted to suggest that the school had two concerns: first, the financial burden of paying for Perich’s salary and the substitute teacher’s; and second, that Perich had not controlled her narcolepsy, and therefore would not be a safe classroom teacher.⁶⁸ Perich’s behavior suggests that she was understandably frustrated by this response—after all, Hoeft had promised her job would be safe, and the school’s concerns about her condition appeared to be speculative and not based in any specific knowledge about Perich’s prognosis.⁶⁹

Perich’s next steps made sense if one starts from the premise that she was protected by anti-discrimination laws, including the ADA. Essentially, Perich stood on her rights as she understood them, rejecting the school’s demand that she resign in exchange for a one-year health-insurance subsidy and eligibility to be hired at another Lutheran school, instead insisting on returning to work. Of course, it turned out that Perich’s premise was incorrect.

It is worth briefly considering how Perich’s situation might have played out if she had known that she was a ministerial employee. To begin, Perich might have decided that her best path forward would be to address the school’s concerns. Perhaps she

see also Jesse Rudy, *What They Don’t Know Won’t Hurt Them: Defending Employment-at-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 330 (2002) (concluding, based on a survey of employees in two states, that “[n]ot only do they not know about or misapply the at-will doctrine, they hold beliefs about their current level of legal job security that are simply wrong. Employees erroneously believe that the law prevents employers from discharging them in a wide variety of situations where the law does not protect them”).

66. EEOC v. Hosanna-Tabor Church and Sch., 597 F.3d 769, 773 (6th Cir. 2010).

67. *Id.*

68. *See supra* notes 16–17 and accompanying text.

69. *See supra* notes 9, 16–17 and accompanying text.

might have tried to do that by offering to take a period of unpaid leave that would end once the long-term substitute was off the books—a strategy that would also allow more time to demonstrate to the school’s satisfaction that her condition was under control. Alternatively, Perich might have concluded that there was no hope for a good outcome, and that her best course was to take the offered settlement and seek a position with another school. Other paths might occur to readers—the goal here is not to enumerate all possible options, but simply to illustrate that Perich *had* alternatives, and that she might have taken one of them if she had known that her preferred strategy—a disability discrimination lawsuit—would be a non-starter.

Ignorance of the ministerial exemption might also affect employees’ and job applicants’ choices before anything goes wrong. For example, employees who know that they are likely to be considered ministerial employees might decide they are not willing to effectively forego the ability to bring a successful civil-rights claim, and decide to seek another job rather than to accept work with a religious employer. Kristin Biel, for example, might have made that decision—particularly because the facts do not show that she was drawn to St. James because of its religious character.⁷⁰ As the Ninth Circuit put it, “Biel appears to have taken on teaching work wherever she could find it: tutoring companies, multiple public schools, another Catholic school, and even a Lutheran school.”⁷¹ Employees who believe themselves to be at particular risk of discrimination might be especially likely to go this route. Alternatively, these applicants might seek other assurances from the employer, for example, by negotiating for the employer to make available a specific benefit, such as paid or unpaid disability or parental leave.⁷²

III. THE PROSPECT OF LONG-TERM CONSEQUENCES FOR MINISTERIAL EMPLOYEES WHO LOSE THEIR JOBS

It is worth briefly discussing the consequences of remedy-less discrimination that results in job loss.⁷³ Some of these consequences are obvious, severe, and immediate—loss of financial security and psychological harm, for example.⁷⁴ In addition, if the employee plans to work again, they will have to seek another job. But

70. See *supra* note 27 and accompanying text. The facts surrounding Biel’s employment history are at least consistent with a story in which Biel was applying broadly for teaching jobs and happened to land at a Catholic school.

71. *Biel v. St. James Sch.*, 911 F.3d 603, 608 (9th Cir. 2018).

72. Some courts have held that religious employers can invoke the ministerial exemption defense in breach of contract cases. See, e.g., *Lee*, *supra* note 4. If that is right, then the value of a negotiated agreement with a religious employer will be limited. Professor Charlie Sullivan has pointed out that this result puts religious employers at a disadvantage, leaving them essentially unable to negotiate an enforceable employment contract. Accordingly, he has convincingly argued that many “clergy contracts” should be enforceable, even if courts ultimately refuse to enforce contracts in certain cases that raise “religious questions in violation of ecclesiastical abstention.” Charles A. Sullivan, *Clergy Contracts*, 22 EMP. RTS. & EMP. POL’Y J. 371, 407 (2018).

73. A similar set of harms can apply to workers who are discriminated against in other ways, such as being passed over for promotion.

74. See Stephanie Pappas, *The Toll of Job Loss*, 51 MONITOR ON PSYCH. 54 (2020) (summarizing psychological research on the effects of job loss).

job searching while unemployed means contending with difficult questions about what happened at the previous job. It also means contending with potential employer bias: research shows that employers often harbor bias against unemployed job applicants,⁷⁵ and there is also the possibility that prospective employers will discriminate based on the same characteristic as did the previous employer. Of course, non-ministerial employees also face these harms, but employment discrimination remedies like back pay, front-pay, and reinstatement are intended to deter discrimination and blunt its costs when it does occur.⁷⁶

Morrissey-Berru's situation illustrates how the consequences of unremedied discrimination can reverberate. Compared to Biel and Perich, Morrissey-Berru had a fairly long tenure at Our Lady of Guadalupe. The district court implicitly referenced that fact in the following passage:

In 1998, Morrissey-Berru began working at Our Lady of Guadalupe as a substitute teacher. When she began working for the school, Morrissey-Berru was forty-seven years old. She began as a full-time 6th grade teacher in the fall of 1999. She taught 6th grade for 10 years, after which she switched to teaching 5th grade. The intervening period is unimportant for the purposes of the instant motion. The next significant event occurred in 2014.⁷⁷

When the court wrote that Morrissey-Berru's fifteen-year tenure was "unimportant for the purposes of the instant motion," it was correct in one sense: the ministerial exemption inquiry focuses on job duties, not length of tenure. But for Morrissey-Berru herself, the fifteen years between when she was hired and when she was fired would have mattered for multiple reasons: her sense of professional identity and belonging; the seniority and school-specific expertise she had acquired; and—critically for purposes of this Article—the difficulty or ease with which she would be able to find a new job.

Morrissey-Berru was forty-seven when she began working for Our Lady of Guadalupe, and she was in her early sixties when she was fired.⁷⁸ These facts alone make it likely that she would have had a hard time finding a new job after she was fired—research shows that older employees who lose their jobs often have a very difficult time finding new jobs. One pair of researchers characterized age

75. Geoffrey C. Ho, Margaret Shih, Daniel J. Walters & Todd L. Pittinsky, *The Stigma of Unemployment: When Joblessness Leads to Being Jobless*, INST. FOR RES. ON LAB. & EMP. (2011), available at <https://escholarship.org/uc/item/7nh039h1> [<https://perma.cc/ULU3-CLQN>]; Rand Ghayad, *The Jobless Trap* (2013), available at http://media.wix.com/ugd/576e9a_f6cf3b6661e44621ad26547112f66691.pdf [<https://perma.cc/XZ2X-XL65>] (finding employer bias against the long-term unemployed).

76. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (discussing purpose of Title VII's remedial scheme to "make possible the 'fashion[ing of] the most complete relief possible'") (quoting 118 CONG. REC. 7168 (1972)).

77. *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, No. 2:16-cv-o9353, 2017 WL 65227336, at *1 (C.D. Cal. Sept. 27, 2017) (internal record citations omitted).

78. *Id.*

discrimination in hiring as “pervasive”;⁷⁹ another study found that, compared to their younger counterparts, older workers tend to be unemployed longer, to have a harder time getting rehired, and to be less likely to find a new job that pays as well as the old job.⁸⁰ Finally, women are more likely than men to be discriminated against based on their age.⁸¹

In other words, Morrissey-Berru’s many years of service at Our Lady of Guadalupe left her at greater risk of age discrimination at other schools to which she might apply.⁸² To be clear, any worker whose identity places them at risk of discrimination in hiring may face a lengthy and painful job search, compounding the harm that occurs when a worker loses a job because of discrimination. But age discrimination becomes more likely as workers get older,⁸³ meaning that the more time Morrissey-Berru spent at Our Lady of Guadalupe, the more she could expect to face discrimination-related obstacles to finding a new job. And Perich’s and Biel’s situations show how a similar dynamic can affect workers who come to need disability accommodations or time off to deal with illness while working as ministerial employees. If these employees are fired because their employer does not

79. David Neumark & Joanne Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?*, 108 J. PUB. ECON. 1, 1–2 (2013) (citing studies); see also Scott J. Adams & David Neumark, HANDBOOK ON THE ECONOMICS OF DISCRIMINATION 203 (William M. Rogers III, ed., 2006); David Neumark, *Experimental Research on Labor Market Discrimination*, 56 J. ECON. LIT. 799, 802 (2018) (“During and after the Great Recession unemployment durations rose particularly sharply for older workers, as did ADEA claims filed with the U.S. Equal Employment Opportunity Commission.”).

80. Scott J. Adams & David Neumark, *Age Discrimination in US Labor Markets: A Review of the Evidence*, in HANDBOOK ON THE ECONOMICS OF DISCRIMINATION 203 (William M. Rogers III, ed., 2006); see also David Neumark, Ian Burn & Patrick Button, *Is it Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment*, 127 J. POL. ECON. 922 (2019).

81. David Neumark, *Age Discrimination in the U.S. Labor Market*, 43 GENERATIONS: J. OF THE AM. SOC’Y ON AGING 51, 56 (2019) (noting that “women experience more age discrimination than do men”); Joanna N. Lahey, *Age, Women, and Hiring: An Experimental Study*, 43 J. HUM. RES. 30, 46 (2008).

82. Of course, while an employee who suspects discrimination in hiring by a secular employer can usually sue, it is often still extremely difficult for a job applicant to prove discrimination. Among other reasons, applicants may lack the information necessary to make out a prima facie case of discrimination. To make out a prima facie case of discrimination, a plaintiff must show they are a member of a protected class; they were qualified for the position; they applied for the position and were not hired; and the position was filled by someone with similar or inferior qualifications. See, e.g., *Taite v. Bridgewater State Univ.*, 999 F.3d 86, 93 (1st Cir. 2021). One reason it can be difficult to establish a prima facie case is that it is often difficult for a plaintiff to learn which candidate was ultimately hired, and what their qualifications were. Discrimination cases are never easy to win. See generally Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001). But employees can have an easier time proving discrimination by their current employers as compared to applicants considering a lawsuit against an employer to whom they have only applied.

83. Neumark, *supra* note 81, at 56 (“[O]lder applicants near the age of retirement experience more age discrimination.”).

want to provide these measures, then they will then have to deal with all the disruption and distress of losing a job, plus the greater risk of (hard-to-prove) discrimination by prospective future employers.

So far, this Article has explored some of the consequences of the ministerial exemption for employees. The next Section explores whether legislatures might be able to blunt these consequences.

IV. RESPONDING TO THE MINISTERIAL EXEMPTION

In brainstorming strategies to minimize the effects of the ministerial exemption on employees while also not impinging on employers' rights, legislatures might look to an unlikely source: laws and policies governing the relationship between unions and represented workers. In 2014, the Supreme Court held that certain unionized home healthcare workers who were paid by state governments had a First Amendment right to refuse to pay anything to the union that represented them.⁸⁴ Then, in 2018, the Court extended that rule to all public employees.⁸⁵ These cases, like the ministerial exemption cases, involved highly contested First Amendment questions that were also culturally and politically salient. But there are also some more specific parallels between the two lines of cases. For one, both employers who can invoke the ministerial exemption and public employees who have a right to refrain from paying union dues or fees each have a financial incentive to invoke their rights that is separate from the religious or ideological reasons that gave rise to the right. Put more concretely, union-represented workers have a financial incentive to free ride on dues paid by others, especially because they are entitled to fair representation by the union even if they do not pay.⁸⁶ Similarly, religious employers have a financial incentive to dodge legal liability even if their reason for firing a ministerial employee had nothing to do with religion and was instead, say, a bare desire not to incur the costs associated with accommodating the employee's disability. Moreover, in both situations, the costs of exercising the First Amendment right are ultimately borne by identifiable others: ministerial employees who lose otherwise-viable discrimination claims, or union-represented workers who pick up the slack so that the union has the funds it needs to function as bargaining representative for a group of employees.

In the union context, states and unions have adopted a number of strategies to blunt the effects of *Harris* and *Janus*, and some of those strategies might be usefully adapted into the ministerial exemption context. In their article, *After Janus*, Professors Catherine Fisk and Marty Malin catalog and evaluate these strategies, which include shifting some of the union's costs to the government, creating a mechanism to educate employees about the union's role, and building solidarity that counters the desire to free ride on one's co-workers. The remainder of this section

84. *Harris v. Quinn*, 573 U.S. 616, 656 (2014).

85. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2459–60 (2018).

86. See Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CAL. L. REV. 1821, 1826–33 (2020) (discussing in detail the collective action problem that results from the combination of a right not to pay union dues and the union obligation to provide fair representation even to nonpaying workers).

briefly discusses how two of these strategies—disclosure and shifting costs to the government—might be adapted to the ministerial exemption context.

A. Disclosure and Education

Section III of this Article suggests that employees who know they are likely to be considered ministerial will be better positioned to protect their own interests than employees who assume they will be able to rely on discrimination law. A knowledge problem suggests a disclosure solution—for example, that religious employers be required to inform employees and applicants in advance that the employer considers their duties to “lie at the very core of the mission of a private religious school.”⁸⁷ After all, the *Morrissey-Berru* Court emphasized that the religious employer is the entity most likely to possess this information; it seems only fair that the employer share that information with the employee or applicant. The information could be accompanied by state-drafted plain-language information about what the ministerial exemption is, and how it works.

There are at least three ways in which an advance disclosure could be valuable to an applicant or employee. First, they may decide to seek a job with a different employer, prioritizing meaningful employment law protections over working for the religious employer. Second, they might ask their employer questions about its policies regarding disability accommodation, or pregnancy leave, or attempt to negotiate contractual protections, subject to the caveat that the employer may also be able to invoke the ministerial exemption in a breach-of-contract claim.⁸⁸ Third, once in the job, the employee might approach the employer differently (or not at all) about certain topics. For example, a pregnant employee might keep their status under wraps for longer than they would if they had effective protection under the Pregnancy Discrimination Act—a fraught choice to be sure, but nonetheless one that employees should be able to make for themselves with complete information.

Still, there are legal and practical drawbacks to this solution. One legal barrier concerns the development of an enforcement mechanism to ensure that employers actually give the required notice. Legislatures might try conditioning employers’ abilities to raise the ministerial exemption on the provision of the notice at the time the employee accepts a job that involves ministerial duties—but it is not clear that this solution would work, because courts may hold that employers cannot waive the ministerial exemption, including by failing to make a required disclosure.

Some circuit courts have already held in other contexts that employers cannot waive the ministerial exemption through their conduct. The Sixth Circuit concluded that an employer did not waive the ministerial exception by writing on its website that it would not discriminate based on protected characteristics;⁸⁹ the court wrote that the exemption could not be waived because it was a “structural” protection that “categorically prohibits federal and state governments from becoming involved in religious leadership disputes.”⁹⁰ Similarly, the Seventh Circuit concluded that a

87. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020).

88. *See supra* note 72.

89. Appellant’s Brief on Appeal at 4, *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015) (No. 14-1549).

90. *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015).

church had not waived the ministerial exemption by describing itself as an “equal opportunity” employer, writing that “the ministerial exception, like the rest of the internal-affairs doctrine, is not subject to waiver or estoppel.”⁹¹ Scholars Peter Smith and Robert Tuttle have made a similar argument, writing that the ministerial exemption cannot be waived because it “applies not just to protect the liberty of religious organizations but also because civil government lacks competence to resolve religious questions”; they reason that treating the ministerial exemption as waived could leave courts in the untenable position of having to resolve ecclesiastical questions.⁹²

On the other hand, the *Hosanna-Tabor* Court described the ministerial exemption as “an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”⁹³ Here, the *Hosanna-Tabor* Court seemed to be saying that courts need not independently assure themselves that the ministerial exemption did not apply before proceeding to hear a case. But affirmative defenses can typically be waived if they are not pleaded, which suggests that procedural hurdles like a notice requirement could also be enforced. Adopting that view, the Eleventh Circuit has held that a religious school waived the argument that the ministerial exemption applied when it failed to argue on appeal that the district court had erred in rejecting the defense.⁹⁴

Providing a theoretical justification for that view, Professor Michael Helfand writes that the *Hosanna-Tabor* Court’s statement that the ministerial exemption is an affirmative defense “reorient[s] our religion clause jurisprudence away from the structural and jurisdictional limitations we place on courts and towards the autonomy and authority we grant religious institutions.”⁹⁵ Helfand contextualizes *Hosanna-Tabor* and earlier church autonomy cases as reflecting a principle that “religious institutions retain authority over cases where the institution’s jurisdiction can both be justified on the front end via implied consent.”⁹⁶ In other words, Helfand analogizes the ministerial exemption to arbitration in which parties actually or impliedly consent to resolve their disputes in a non-judicial forum. A disclosure requirement would be consistent with this understanding of the ministerial exemption in that it would make the idea of implied consent more meaningful, by improving employees’ understanding of what they are consenting to.

Assuming legal barriers could be overcome, there are also practical barriers to a disclosure rule. Employees may have a difficult time grasping the meaning or importance of the disclosure, or the disclosure may get lost in a sea of “onboarding” paperwork and never be read closely—a critique that is commonly (and justifiably)

91. *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

92. Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 *FORDHAM L. REV.* 1847, 1884–85 (2018).

93. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012) (collecting cases and writing that “the issue presented by the exception is ‘whether the allegations the plaintiff makes entitle him to relief,’ not whether the court has ‘power to hear the case’”).

94. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012).

95. Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 *MINN. L. REV.* 1891, 1901 (2013).

96. *Id.* at 1903.

leveled at disclosure rules.⁹⁷ Conversely, if employees do understand the warning, then there is a risk that over-designation will deter employees who would not be covered by the ministerial exemption from pursuing a claim.⁹⁸ In short, states considering this type of requirement should not actually implement a notice requirement without studying whether and how job applicants are likely to understand and act on the notice.

B. The Government Pays

In the union context, this solution refers to shifting some of the costs of union representation to the public employer. In the ministerial exemption context, it would involve shifting costs of employer discrimination from the employee to the state. This might look like providing extended unemployment benefits or other support to employees who can make an abbreviated showing that they lost their job for a reason that would violate discrimination law, even though they are likely ministerial employees. Alternatively, the government could prioritize workers who can make such a showing for near-equivalent public-sector jobs. For example, many (though not all) employees likely to be affected by the ministerial exemption will be K–12 teachers, and these employees could be prioritized for open positions in public schools—a strategy that would help blunt the set of difficulties likely to be associated with finding new work that were discussed in Part IV. A government adopting this strategy should also consider waiving requirements that normally apply before an employee can access benefits like pregnancy or medical leave, so that an employee who is fired because they sought or took a leave can transition relatively seamlessly.

CONCLUSION

This Article's focus is the consequences of the ministerial exemption for individual workers who effectively lose the ability to seek enforcement of discrimination law in court. These costs are compounded when workers' unfamiliarity with the exemption leads them to choose a course of action that assumes effective recourse to discrimination law. Employment policy cannot eliminate the ministerial exemption—but it may be able to lower the costs to individual employees. There are strong fairness and equity arguments for states to consider these policies—though there are also tricky design problems that should be the subject of future research.

97. See, e.g., MARGARET JANE RADIN, *BOILERPLATE* (2012).

98. If providing notice is a condition of raising the ministerial exemption defense, then religious employers will have an incentive to provide a notice to everyone on the payroll. One countervailing consideration is that the notice might make it harder to hire—though, as discussed above, that will not be the case if the notice is not often read and understood.