



May 2014

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### Recommended Citation

Kevin J. Murphy, *Administering the Ministerial Exception Post-Hosanna-Tabor: Why Contract Claims Should Not Be Barred*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383 (2014).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol28/iss1/11>

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# ADMINISTERING THE MINISTERIAL EXCEPTION POST-*HOSANNA-TABOR*: WHY CONTRACT CLAIMS SHOULD NOT BE BARRED†

KEVIN J. MURPHY\*

## INTRODUCTION

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court was presented with the question whether the First Amendment barred an Americans with Disabilities Act (ADA) claim against a religious organization by one of the organization's ministers.<sup>1</sup> The Court unanimously held that both the Free Exercise Clause and the Establishment Clause of the First Amendment bar employment discrimination claims by a minister against his employer, thereby affirming the existence of the ministerial exception.<sup>2</sup> The Court explained:

Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.<sup>3</sup>

At the end of Chief Justice Roberts's opinion for the Court, he expressly limited the scope of the Court's holding:

The case before us is an employment discrimination suit . . . . We 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. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.<sup>4</sup>

Since the Court first placed its imprimatur on the ministerial exception in *Hosanna-Tabor*, the question of the applicability of the ministerial exception to tort and contract claims has begun to arise. This Note will focus exclusively on the applicability of the ministerial

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† Winner of the first annual *Notre Dame Journal of Law, Ethics & Public Policy* Writing Competition.

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1. 132 S. Ct. 694 (2012).

2. *Id.*

3. *Id.*

4. *Id.* at 710.

exception to contract claims.<sup>5</sup> These contract claims may be premised on express contracts or implied through informal sources, such as an employee handbook;<sup>6</sup> this Note simply refers to both as contracts.

Courts before and after *Hosanna-Tabor* have addressed the ministerial exception's applicability to a minister's claim that he was terminated in violation of his contract. The ministerial exception does not apply to a minister's contract claims against his employer outside the context of termination;<sup>7</sup> in fact, multiple cases since *Hosanna-Tabor* have held that contract claims by a minister against his employer for backpay can progress without even citing *Hosanna-Tabor*.<sup>8</sup> The crux of the issue is whether a minister's claim that he was *terminated in violation of his contract* is barred by the ministerial exception. Claims of this nature may arise even more often than the antidiscrimination claims of *Hosanna-Tabor*.<sup>9</sup> Courts addressing this issue post-*Hosanna-Tabor* have found that the ministerial exception bars these wrongful termination contract claims because adjudicating these disputes interferes with a religious organization's exclusive ability to control who teaches and spreads its faith.<sup>10</sup>

Currently pending before the Kentucky Supreme Court<sup>11</sup> are two cases that squarely address the question of the ministerial exception's applicability to wrongful termination contract claims.<sup>12</sup> One of these cases, *Kant v. Lexington Theological Seminary*, has garnered widespread

5. Courts post-*Hosanna-Tabor* have also addressed the issue of the ministerial exception's applicability to a minister's tort claims. See, e.g., *Erdman v. Chapel Hill Presbyterian Church*, 286 P.3d 357, 364 (Wash. 2012) (dismissing negligent retention and negligent supervision claims under the ministerial exception based on their potential to "implicate a religious organization's First Amendment right to select its clergy").

6. See David J. Overstreet, *Does the Bible Preempt Contract Law?: A Critical Examination of Judicial Reluctance to Adjudicate a Cleric's Breach of Employment Contract Claim Against a Religious Organization*, 81 MINN. L. REV. 263, 277-78 (1996). Overstreet analyzes many of the same issues as this Note, emphasizing the importance of the voluntariness of contractual obligations. This Note's analysis differs from Overstreet's in several ways: (1) this Note analyzes the more recent doctrinal development of the ministerial exception, including *Hosanna-Tabor* and its progeny; (2) it analyzes the historical ability of ministers to sue religious organizations; (3) it considers the implications for religious organizations of applying the ministerial exception to bar wrongful termination claims; and (4) it analyzes the issue in terms of mutuality of obligation.

7. See *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594, 611 (N.D. Tex. 2008) (describing the relationship between the ministerial exception and the broader ecclesiastical abstention doctrine).

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

9. See Mark E. Chopko & Marissa Parker, 10 FIRST AMEND. L. REV. 233, 294 (2012) ("An examination of the actual claims to which the ministerial exception applies yields many more examples of tort and contract claims than statutory anti-discrimination claims.").

10. See, e.g., *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 889 (Wis. 2012).

11. The cases discussed are pending before the Supreme Court of Kentucky as of April 8, 2014.

12. See *Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR, 2012 WL 3046472 (Ky. Ct. App. July 27, 2012) (noting that discretionary review was granted by the Supreme Court of Kentucky); *Kirby v. Lexington Theological Seminary*, No. 2010-CA-001798-MR, 2012 WL 3046352 (Ky. Ct. App. July 27, 2012) (same).

national attention.<sup>13</sup> *Kant* deals with breach of contract claims by Laurence Kant, previously a tenured faculty member at Lexington Theological Seminary (LTS).<sup>14</sup> Mr. Kant's employment relationship with the seminary was governed by the Faculty Handbook, which provided that "[t]he only grounds for dismissal of a tenured faculty member are moral delinquency, unambiguous failure to perform the responsibilities outlined in this Handbook, or conduct detrimental to the Seminary."<sup>15</sup> In 2009, LTS encountered financial difficulties as a result of the nation's economic downturn and decided to terminate Mr. Kant's employment.<sup>16</sup> Shortly thereafter, Mr. Kant filed suit alleging, *inter alia*, breach of employment contract. LTS moved to dismiss the case on the grounds that it was barred by the ministerial exception and the circuit court did so.<sup>17</sup> In 2012, relying heavily on *Hosanna-Tabor*, the Kentucky Court of Appeals affirmed the decision.<sup>18</sup> The court explained: "[I]t does not matter that Kant has fashioned his case around a contract cause of action; this does not trump the constitutional protections and freedoms of the church."<sup>19</sup>

The issue of whether the ministerial exception bars contract claims like Mr. Kant's presents a clash of values of fundamental importance. On one hand, religious organizations must be free to decide who will minister to the faithful.<sup>20</sup> Imposing an unwanted minister upon a church, or punishing the church for removing one, "depriv[es] the church of control over the selection of those who will personify its beliefs."<sup>21</sup> As the Fifth Circuit in *McClure v. Salvation Army* explained: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose."<sup>22</sup> Given the Court's clarity and unison in

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13. See Amicus Curiae Brief of Alliance Defending Freedom and Association of Christian Schools International on Behalf of Appellee Lexington Theological Seminary, *Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR (Ky. Apr. 29, 2013) [hereinafter Alliance Defending Freedom Brief]; Brief of Amicus Curiae, Anti-Defamation League, in Support of Appellant, *Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR (Ky. Apr. 29, 2013); Amicus Curiae Brief of the American Association of University Professors in Support of Dr. Laurence H. Kant, *Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR (Ky. Apr. 26, 2013); Brief of Amicus Curiae on Behalf of Appellant, Dr. Laurence H. Kant, *Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR (Ky. Apr. 23, 2013) [hereinafter Griffin Brief]. These briefs are all available online at <http://apps.courts.ky.gov/Supreme/CALENDAR/SCOAUG13.pdf>.

14. *Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR, at \*2 (Ky. Ct. App. July 27, 2012), available at <http://statecasefiles.justia.com/documents/kentucky/court-of-appeals/2011-ca-000004-mr.pdf?ts=1343397799>.

15. *Id.* at \*5.

16. *Id.*

17. *Id.* at \*7.

18. *Id.* at \*24.

19. *Id.*

20. See Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. REV. COLLOQUY 175, 176 (2011).

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

22. *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972).

holding that a church must be free to select and remove its ministers in *Hosanna-Tabor*, it would seem that the ministerial exception would likewise bar claims of termination in violation of an employment contract.

On the other hand, private contracts between a religious organization and its ministers are *voluntary* obligations over which a church has complete dominion. Whereas the employment discrimination claims barred by *Hosanna-Tabor* imposed public law obligations upon churches, contracts are private agreements a church submits to of its own volition. A church can certainly enforce these obligations against breaching ministers; why then should ministers be unable to avail themselves of these very same contractual words? And if courts give no meaning to these words, how would this impact the relationship between a minister and a religious organization, a relationship largely dependent on trust? These concerns are magnified even further given the Court's flexible definition of a "minister" in *Hosanna-Tabor*.

This Note argues that the ministerial exception should not be extended to bar wrongful termination contract claims for damages<sup>23</sup> by a minister against his employer. Instead, courts should only dismiss these claims under the broader ecclesiastical abstention doctrine when interpreting the contractual provision would lead to excessive entanglement in religious affairs. Part I of this Note explains the Court's decision in *Hosanna-Tabor*, with particular focus on the parts of the opinion that are most relevant to the question whether the ministerial exception should bar contract claims by a minister. Part II discusses several cases that address the application of the ministerial exception to breach of contract claims by a minister both before and after *Hosanna-Tabor*. This Part concludes that since *Hosanna-Tabor*, courts appear more willing to summarily dismiss ministers' wrongful termination contract claims under the ministerial exception without inquiring whether interpreting the contract would require the court to enmesh itself in religious doctrine.

Part III argues that the ministerial exception should not be applied to ministers' contract claims against their employers. Part III concedes that many of the same concerns that drove the result in *Hosanna-Tabor* are present in wrongful termination suits, but argues there are persuasive reasons for not extending the ministerial exception to cover breach of contract suits for damages. Section III.A explains that, as a historical matter, a minister's contract claims against his employer were not thought to be barred by the First Amendment. Section III.B explains that contract suits are distinguishable from employment discrimination because they involve voluntary obligations a church freely assumes. This Section argues that Free Exercise Clause concerns are ameliorated in situations where a religious organization is held to its own self-imposed standards, which are far different from the standards imposed by the federal government through employment discrimination law.

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23. This Note concedes that the ministerial exception must bar a minister's contract claim when the requested remedy is reinstatement. See *infra* notes 106–10 and accompanying text.

Section III.C argues that an extension of the ministerial exception to cover contract suits could have serious harmful consequences for the minister-employer relationship and ultimately churches and religious communities.

Finally, Section III.D explains that those wrongful termination contract suits that truly involve interpretation of contracts that are religious in substance, even if not categorically barred by the ministerial exception, would still be dismissed under the ecclesiastical abstention doctrine. The ecclesiastical abstention doctrine bars adjudication of cases when resolution would require courts to become excessively entangled with religious doctrine. Thus, this Section explains that the practical implications of this Note's argument are that courts will resolve ministers' wrongful termination claims against their employer when these claims involve neutral principles of law. This Section concludes that the ecclesiastical abstention doctrine is sufficient to protect religious liberty and strikes the proper balance between church autonomy and contract law notions of mutuality of obligation.

### I. *HOSANNA-TABOR*

*Hosanna-Tabor* involved a claim by Cheryl Perich, a former fourth-grade teacher at a school run by Hosanna-Tabor Evangelical Lutheran Church and School.<sup>24</sup> Perich served as a "called" teacher at Hosanna-Tabor (as opposed to a "lay" teacher), meaning she was "regarded as having been called to [her] vocation by God through a congregation."<sup>25</sup> In addition to teaching classes like math, language arts, and science, Perich led religion class four times a week, led the students in daily prayer exercises, and attended chapel services once a week.<sup>26</sup>

In 2004, Perich became ill and was eventually diagnosed with narcolepsy.<sup>27</sup> Perich was asked by the congregation's leadership to resign, but refused to do so, indicating that she intended to assert her legal rights.<sup>28</sup> She was thereby terminated for "insubordination and disruptive behavior" and because her threat of legal action damaged her working relationship with the school.<sup>29</sup> Perich filed a claim with the EEOC that her employment had been terminated in violation of the retaliatory discharge provisions of the ADA.<sup>30</sup> Hosanna-Tabor moved for summary judgment, claiming that the suit was barred by the "ministerial exception" rooted in the First Amendment.<sup>31</sup> Though the district court agreed that the suit was barred by the ministerial exception, the

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24. *Hosanna-Tabor*, 132 S. Ct. at 700.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 701.

31. *Id.*

Sixth Circuit reversed, finding that Perich did not qualify as a “minister” under the exception.<sup>32</sup>

A. *The Ministerial Exception Is First Recognized by the Supreme Court*

The Supreme Court began its discussion with a historical analysis, explaining that “[c]ontroversy between church and state over religious offices is hardly new.”<sup>33</sup> The Court described how the First Amendment was enacted against a backdrop of a nationalized church and religious oppression in England. “By forbidding the ‘establishment of religion’ and guaranteeing the ‘free exercise thereof,’ the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices.”<sup>34</sup>

The Court turned next to its precedent, concluding that prior cases “confirm that it is impermissible for the government to contradict a church’s determination of who can act as its ministers.”<sup>35</sup> The Court discussed how its precedent stood for the proposition that the First Amendment prevents courts from questioning ecclesiastical decisions made by church authorities.<sup>36</sup>

Turning to the issue at hand, the Court observed that the circuits had “uniformly recognized the existence of a ‘ministerial exception,’ grounded in the First Amendment” and that this exception precluded employment discrimination claims by a minister of a religious organization against his employer.<sup>37</sup> The Court explained:

[M]embers of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.<sup>38</sup>

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32. *Id.* at 701–02 (citing *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 778–81 (6th Cir. 2010)).

33. *Id.* at 702.

34. *Id.* at 703.

35. *Id.* at 704.

36. *Id.* (citing *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)).

37. *Id.* at 705; *see also* Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL’Y 839, 850 (2012) (“For forty years, the judges of the trial and appellate courts have said, with remarkable unanimity, that they cannot decide these cases.”).

38. *Hosanna-Tabor*, 132 S. Ct. at 706; *see also* Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 980 (2012) (“[T]he state itself [is] simply not author-

Thus, the Court held that the First Amendment provided a ministerial exception to employment discrimination law. The Court noted that this interpretation accords with the text of the First Amendment, which gives “special solicitude” to the rights of religious organizations.<sup>39</sup> “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>40</sup>

The Court proceeded to reject the EEOC and Perich’s contention that *Employment Division v. Smith*<sup>41</sup> foreclosed the possibility of a ministerial exception being recognized under the Free Exercise Clause of the First Amendment.<sup>42</sup> *Smith* stands for the proposition that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”<sup>43</sup> The Court explained that though the ADA’s prohibition on retaliatory firing was a “valid and neutral law of general applicability,” *Smith* was distinguishable because it involved “government regulation of only outward physical acts,” whereas *Hosanna-Tabor* involved “government interference with an internal church decision that affects the faith and mission of the church itself.”<sup>44</sup>

### B. *The Scope of the Ministerial Exception*

After determining a ministerial exception did exist, the Court then set out to determine whether Perich qualified as a “minister,” thereby triggering the exception. The Chief Justice opted for a flexible approach, rejecting the adoption of any “rigid formula.”<sup>45</sup> The Court considered how *Hosanna-Tabor* held Perich out as a minister, Perich’s

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ized to intervene in life at the heart of the church. At a deep level, these questions lie beyond the reach of the state altogether. The two kingdoms of temporal and spiritual authority, of church and state, constitute two separate sovereigns.”)

39. *Hosanna-Tabor*, 132 S. Ct. at 706.

40. *Id.* at 710.

41. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

42. *Hosanna-Tabor*, 132 S. Ct. at 706; see also Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 106 Nw. U. L. REV. 951, 954–57 (2012) (criticizing this distinction).

43. *Hosanna-Tabor*, 132 S. Ct. at 706 (quoting *Smith*, 494 U.S. at 879).

44. *Id.* at 707. This language has precipitated much discussion on an “internal church decisions” exception to the *Smith* doctrine. See, e.g., Carl H. Esbeck, *A Religious Organization’s Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 J. FED. SOC’Y 168, 169 (2012) (“The types of lawsuits that fall into the *Hosanna-Tabor* category of internal church governance are likely few because . . . no reply is permitted based on governmental interests. That is, once it is determined that a suit falls within the subject-matter class of church governance, there is no judicial balancing.”); Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 834–35 (2012) (“The Court’s analysis raises many questions. Future litigants will want to know: What are ‘outwards physical acts’? Are some acts ‘inward’? Are some acts not ‘physical’? . . . Are there any religiously motivated acts by individuals, as opposed to religious organizations, that qualify for protection because they are not outward or physical? . . . What is ‘an internal church decision that affects the faith and mission of the church itself?’”).

45. *Hosanna-Tabor*, 132 S. Ct. at 707.

title of minister, the training Perich had undergone to become a “called” minister, and the fact that Perich held herself out as a minister by accepting a formal call and claiming a special housing allowance.<sup>46</sup> Finally, the Court looked to Perich’s job duties, which included teaching religion four days a week, leading students in prayer three times a day, taking students to chapel once a week, and leading the liturgy about twice a year. “In light of these considerations—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—we conclude that Perich was a minister covered by the ministerial exception.”<sup>47</sup>

The Court explained that the Sixth Circuit committed three errors in concluding that Perich was not a minister: it neglected to consider the fact that Perich was a commissioned minister, relied too much on the fact that “lay” teachers performed similar duties to “called” teachers, and overemphasized that Perich performed secular duties for a majority of her work days.<sup>48</sup>

Before concluding, the Court disposed of two final arguments put forth by Perich and the EEOC. First, the Court explained that Perich seeking damages and not reinstatement was immaterial to its analysis and no less of an infringement on the First Amendment.<sup>49</sup> The Court stated that granting relief in the form of damages would depend on a finding that Hosanna-Tabor wrongly terminated Perich, precisely the determination the Court was unwilling to make.<sup>50</sup> Additionally, the Court rejected the argument that Hosanna-Tabor was liable because its asserted religious reason for firing Perich was pretextual. The Court explained that this argument “misses the point” of the ministerial exception, which “is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason.”<sup>51</sup> Instead, the exception “ensures that the authority to select and control who will minister

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46. *Id.* at 707–08.

47. *Id.* at 708. Justice Thomas parted ways with the majority in his analysis of who qualifies as a minister, explaining that under his view the Religion Clauses compel deference to a religious organization’s “good-faith” determination of who qualifies as a minister. *Id.* at 710 (Thomas, J., concurring).

48. *Id.* at 709 (majority opinion) (“The issue before us, however, is not one that can be resolved by a stopwatch.”).

49. *Id.*

50. *Id.*

51. *Id.* Commentary on this particular point was sharply divided. *Compare* Laycock, *supra* note 37, at 849–50 (“Even if there is no doctrinal issue at stake, the evaluation of a minister’s performance is a decision reserved to the church . . . Whether or not there is a doctrinal reason . . . evaluation of a minister’s qualifications or performance is committed to the churches.”), *with* Leslie Griffin, *The Sins of Hosanna-Tabor*, 88 *IND. L.J.* 981, 994 (2013) (“[The Court] 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.”).

to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone.”<sup>52</sup>

Finally, and of specific relevance to this Note, the Court concluded by explicitly limiting the scope of its holding to the employment discrimination context:

We 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. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.<sup>53</sup>

Thus, one of the key questions that remains after *Hosanna-Tabor* is whether the ministerial exception will be treated as a categorical bar to a minister’s claim that he was terminated in violation of his contract. Part II of this Note explores how courts have handled this question both before and after *Hosanna-Tabor*.

## II. BREACH OF CONTRACT CLAIMS AND THE MINISTERIAL EXCEPTION

Many courts—both prior and subsequent to *Hosanna-Tabor*—have addressed the ministerial exception’s applicability to contract claims. Recall that courts do not find the ministerial exception to bar *all* contract suits by a minister against the religious organization that employs him.<sup>54</sup> The ministerial exception applies when a religious organization’s right to select and remove its clergy is at stake.<sup>55</sup> Thus, the relevant inquiry is whether the ministerial exception bars a minister’s claim that he was terminated in violation of his employment contract. This Part analyzes cases before and after *Hosanna-Tabor* addressing this issue.

Section II.A explains that prior to *Hosanna-Tabor*, a majority of courts summarily dismissed contract claims of wrongful termination under the First Amendment. However, some courts considered to what degree interpreting the contractual provision at stake would actually require the court to become enmeshed in ecclesiastical matters. These courts evinced a willingness to hear contractual claims that did not involve substantive religious determinations. This Section focuses on the recent history of the ministerial exception, leaving analysis of the historical roots of the ministerial exception for Section III.A. Section II.B discusses contract claims by ministers subsequent to *Hosanna-Tabor*. Section II.B explains that post-*Hosanna-Tabor*, courts appear even more willing to summarily dismiss of ministers’ contract claims of wrongful termination, even when interpreting the contract would *not* require the

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52. *Hosanna-Tabor*, 132 S. Ct. at 709 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119 (1952)).

53. *Id.* at 710; *see also* McConnell, *supra* note 44, at 835 (“[The Court’s limitation of the holding to the employment discrimination context] is a commendable example of judicial minimalism; the Court decides the case, and states a general principle, but does not try to work out all its implications in advance, in the abstract.”).

54. *See supra* notes 7–8 and accompanying text.

55. *See Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594, 611 (N.D. Tex. 2008) (explaining that the ministerial exception is only implicated in cases involving church employment decisions).

court to delve into religious doctrine, but merely to apply neutral principles of law.

A. *The Ministerial Exception and Contract Claims Pre-Hosanna-Tabor*

Generally, courts prior to *Hosanna-Tabor* held that a minister's contract claim of wrongful termination was barred by the First Amendment regardless of whether the substance of the claim involved any doctrinal determinations.<sup>56</sup> These courts regularly found that reviewing church employment determinations was per se a violation of the First Amendment.<sup>57</sup> While courts acknowledged that civil adjudication of disputes involving church "fraud or collusion" was permissible, they generally refused to inquire further about the substance of the contract claim.<sup>58</sup>

However, a number of courts were more willing to adjudicate wrongful termination contract suits when doing so did not pose a risk of entanglement in ecclesiastical affairs. The seminal case engaging in this type of analysis is *Minker v. Baltimore Annual Conference of United Methodist Church*.<sup>59</sup> In *Minker*, plaintiff Ralph Minker, a Methodist minister, filed suit against his employer, the United Methodist Church, alleging age discrimination and two claims of breach of contract.<sup>60</sup> Minker's first breach of contract claim was based on the Methodist Book of Discipline—"the book of law of the United Methodist Church"—which Minker argued constituted a binding contract between the church and its ministers.<sup>61</sup> A section of the Book of Discipline forbade appointment decisions based on age, which Minker argued the church violated. His second breach of contract claim was predicated upon a promise the district superintendent made to Minker regarding a transfer to a more suitable parish at the earliest time possible, a promise Minker argued the superintendent and his church did not live up to.<sup>62</sup>

The D.C. Circuit affirmed dismissal of both the employment discrimination claim and the contract claim based on the Methodist Book of Discipline.<sup>63</sup> The court dismissed the contract claim based on the Book of Discipline because interpreting the provision would require the court to make determinations that are "highly subjective, spiritual, and ecclesiastical in nature."<sup>64</sup> However, the court found that the First Amendment did not bar Minker's claim of breach of oral contract. "A church is always free to burden its activities voluntarily through con-

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56. See, e.g., *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 942-43 (6th Cir. 1992); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1576-78 (1st Cir. 1989); see also *Overstreet*, *supra* note 6, at 283 & nn.91-92 (collecting cases).

57. See, e.g., *Hutchinson v. Thomas*, 789 F.2d 392, 393-96 (6th Cir. 1986).

58. *Id.* (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711-13 (1976)).

59. 894 F.2d 1354 (D.C. Cir. 1990).

60. *Id.* at 1355.

61. *Id.*

62. *Id.* at 1358.

63. *Id.* at 1359.

64. *Id.*

tracts, and such contracts are fully enforceable in civil court,” the court explained.<sup>65</sup> Citing *Jones v. Wolf*,<sup>66</sup> the court described how civil courts “may always resolve contracts governing ‘the manner in which churches own property, hire employees, or purchase goods.’”<sup>67</sup> In turning to the oral promise allegedly made to Minker, the court explained:

As a theoretical matter, 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. Similarly, Minker’s injury can be remedied without court oversight. Money damages alone would suffice since Minker already has a new pastorate. Maintaining a suit, by itself, will not necessarily create an excessive entanglement. Furthermore, as the remedy would be limited to the award of money damages, we see no potential for distortion of church appointment decisions from requiring that the Church not make empty, misleading promises to its clergy.<sup>68</sup>

The court closed by introducing a caveat into its decision, noting that if in resolving the contract claim the district court was forced to inquire into “matters of ecclesiastical policy,” the court could always grant summary judgment to avoid an “excessive entanglement” with religion.<sup>69</sup> In other words, the court found that Minker was “entitled to prove up his claim of breach of an oral contract to the extent he can divine a course clear of the Church’s ecclesiastical domain.”<sup>70</sup>

Several courts after *Minker* similarly analyzed whether the First Amendment barred a minister’s wrongful termination suit by asking whether interpretation of the substance of the contract would require ecclesiastical determinations or merely application of neutral principles of law.<sup>71</sup> Some courts found that interpreting the contractual provisions at issue did not require courts to probe into matters of church doctrine and thus allowed the contract claims to proceed. For example, in *Petruska v. Gannon University*, the plaintiff, former University

65. *Id.* (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 714 (1871)).

66. 443 U.S. 595 (1979).

67. *Minker*, 894 F.2d at 1359 (quoting *Jones v. Wolf*, 443 U.S. 595, 606 (1979)).

68. *Id.* at 1360.

69. *Id.*

70. *Id.* at 1361.

71. See, e.g., *Friedlander v. Port Jewish Ctr.*, 347 F. App’x 654, 655 (2d Cir. 2009); *Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 949 (9th Cir. 1999); *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1025–28 (N.D. Iowa 2007); *Bible Way Church of Our Lord Jesus Christ of Apostolic Faith v. Beards*, 680 A.2d 419, 432–33 (D.C. 1996); *Jenkins v. Trinity Evangelical Lutheran Church*, 825 N.E.2d 1206, 1213 (Ill. App. Ct. 2005); *Music v. United Methodist Church*, 864 S.W.2d 286, 288 (Ky. 1993); *McKelvey v. Pierce*, 800 A.2d 840, 851 (N.J. 2002); *Mundie v. Christ United Church of Christ*, 987 A.2d 794, 798–802 (Pa. Super. Ct. 2009); *El-Farra v. Sayed*, 226 S.W.3d 792 (Ark. 2006). For a discussion of the El-Farra case and how Sharia law intersects with the ministerial exception, see Eun-Jung Katherine Kim, *Islamic Law in American Courts: The Good, Bad, and Unsustainable Uses*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 287, 290–92 (2014).

Chaplain of Gannon University, brought state contract claims alleging that her duties as leader of the Chaplain's Division and member of the President's Staff were removed in violation of her employment agreement.<sup>72</sup> The Third Circuit allowed the claim to proceed past a motion to dismiss, explaining that "[e]nforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights."<sup>73</sup> The court did explain, however, that if resolution of the claim yielded "excessive government entanglement with religion," the suit would need to be dismissed.<sup>74</sup>

Similarly, in *McKelvey v. Pierce*, the New Jersey Supreme Court found that the plaintiff, a former Catholic Seminarian, could pursue his claims of breach of implied contract and breach of the implied covenant of good faith and fair dealing<sup>75</sup> based on allegations that priests of his diocese subjected him to unwanted sexual advances.<sup>76</sup> The court echoed *Minker*, explaining that "[t]he critical factor in the application of the ministerial exception to a given cause of action must be that resolution of the claim requires an impermissible inquiry into the propriety of a decision of core ecclesiastical concern . . . where the *dispute* is truly *religious*."<sup>77</sup> In each of these cases the decisive factor was the court's determination that interpretation of the contractual provision at issue would not cause the court to become excessively entangled in ecclesiastical matters.

Other courts engaged in a similar analysis but found that interpretation of the contractual provisions at issue *would* cause excessive entanglement in core ecclesiastical matters and was thus barred by the First Amendment. For instance, in *Friedlander v. Port Jewish Center*, the Second Circuit found that the ministerial exception barred determination of whether a rabbi was terminated for "gross misconduct or willful neglect of duty" in accordance with his employment contract.<sup>78</sup> The court reasoned that resolving this dispute would "involve impermissible judicial inquiry into religious matters."<sup>79</sup> Similarly, the Supreme Court of

72. *Petruska*, 462 F.3d at 310.

73. *Id.*

74. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971))

75. The court explained that the plaintiff was free to argue that his agreement with the Diocese, like all secular contracts, carried with it an implied covenant of good faith and fair dealing and that the defendants' conduct violated this covenant. *McKelvey*, 800 A.2d at 859. Many states recognize the claim of breach of the implied duty of good faith and fair dealing. See *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1256 (Mass. 1977); see also RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). Though the court in *McKelvey* held this claim was not barred by the ministerial exception, the voluntariness rationale for holding wrongful termination claims outside of the scope of the ministerial exception, see *infra* Section III.B, does not apply for claims of breach of the implied covenant. A religious organization cannot be said to voluntarily submit to the implied covenant the same way it voluntarily submits to an express contract. Thus, this Note does not argue that a minister's claims against his employer for breach of the implied covenant are outside of the scope of the ministerial exception.

76. *McKelvey*, 800 A.2d at 852.

77. *Id.* at 856.

78. *Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654, 655 (2d Cir. 2009).

79. *Id.*

Kentucky found in *Music v. United Methodist Church* that the First Amendment barred a minister's claim that he was placed on a leave of absence in violation of the Book of Discipline of the United Methodist Church.<sup>80</sup> As in *Minker*, the Court found that interpretation of the Book of Discipline was an inherently ecclesiastical matter that a court could not perform.<sup>81</sup>

These cases indicate a willingness of some courts prior to *Hosanna-Tabor* to ask whether the substance of a minister's wrongful termination claim against his employer is ecclesiastical in nature or could be resolved using "neutral methods of proof."<sup>82</sup>

### B. *The Ministerial Exception and Contract Claims Post-Hosanna-Tabor*

Courts subsequent to *Hosanna-Tabor* appear even more willing to summarily dismiss ministers' wrongful termination suits under the ministerial exception. While one court indicated a willingness to inquire whether interpretation of an employment contract would "entangle [the court] with the internal doctrinal policies of [the church],"<sup>83</sup> most read *Hosanna-Tabor* to bar all wrongful termination claims by ministers regardless of the substance of the employment contract.

In *DeBruin v. St. Patrick Congregation*,<sup>84</sup> the Wisconsin Supreme Court determined that the ministerial exception barred a claim for wrongful termination by Kathleen DeBruin, the Director of Faith Formation at St. Patrick's Church.<sup>85</sup> DeBruin's employment contract provided that "the Director of Faith Formation shall not be discharged during the term of this contract, without good and sufficient cause, which shall be determined by the Parish."<sup>86</sup> St. Patrick's terminated DeBruin in 2009 and she filed suit for damages through the remainder of her contract, arguing that her termination lacked "good and suffi-

80. *Music v. United Methodist Church*, 864 S.W.2d 286, 288 (Ky. 1993)

81. *Id.*

82. *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990).

83. Order Granting Defendant's Motion for Summary Judgment, *Woodward v. Saint John Vianney Theological Seminary*, No. 2011 CV6277, 2012 WL 7746927 (Colo. Dist. Ct. Sept. 13, 2012). In *Woodward*, a Colorado district court was confronted with the question whether the ministerial exception barred wrongful termination claims by Dr. Michael Woodward, previously an assistant professor at Saint John Vianney Theological Seminary (SJV). Woodward was terminated after posting pictures on his Facebook page predicting that the Catholic Church would one day openly accept gay priests and argued that his termination was without "just cause" and in violation of the Faculty Handbook, which guaranteed "freedom in discussing subject matter both in and out of the classroom." *Id.* at 10–11. The court found that the ministerial exception, as explicated by the Court in *Hosanna-Tabor*, barred any argument that Dr. Woodward's termination lacked "just cause," because resolution of this matter would necessarily entangle the court in SJV's doctrinal policies. *Id.* Further, the court dismissed Dr. Woodward's argument that the termination violated the Faculty Handbook guarantee of academic freedom, concluding that evaluation of the meaning of "academic freedom" in the context of a Catholic Seminary would draw the court into "forbidden doctrinal waters." *Id.* at 11.

84. 816 N.W.2d 878 (Wis. 2012).

85. *Id.* at 882.

86. *Id.* at 883.

cient cause.”<sup>87</sup> A plurality of the court believed that the contract dispute could not be resolved without inquiring as to what “good and sufficient cause” entailed, an inquiry that the court could not make without transgressing the First Amendment.<sup>88</sup> The plurality explained that though DeBruin’s claim was contractual in nature, “the First Amendment protections that drove the result in *Hosanna-Tabor* are the same protections that bear on [her] claim.”<sup>89</sup> Justice Bradley, in dissent, argued that the ministerial exception did not bar DeBruin’s contract claim because of factors distinguishing contract claims from employment discrimination claims.<sup>90</sup> Justice Bradley admitted that if facts surrounding DeBruin’s termination caused the court to “wade[ ] into the doctrinal waters” of church policy, the doctrine of ecclesiastical abstention would bar the suit.<sup>91</sup> However, Justice Bradley saw nothing in the record indicating this was the case and advocated remanding the case to the circuit court to make this determination.

Broader language in the *DeBruin* plurality’s opinion suggests that the ministerial exception bars *all* wrongful termination claims by a minister, even when interpreting the contractual language would not require the court to make any ecclesiastical determinations at all. The *DeBruin* plurality explained that “the First Amendment gives St. Patrick the absolute right to terminate DeBruin for any reason, or for no reason, as it freely exercises its religious views. It is the decision itself, i.e., who shall be the voice of St. Patrick, that affects the faith and mission of the church.”<sup>92</sup> This language suggests that the *DeBruin* plurality read *Hosanna-Tabor* to mean that the ministerial exception bars wrongful termination suits regardless of whether the contract could be interpreted using neutral principles of law.

This understanding of the ministerial exception, which is broader than the pre-*Hosanna-Tabor* understanding, was adopted by the Kentucky Court of Appeals in *Kant v. Lexington Theological Seminary*,<sup>93</sup> a case that has attracted much national attention and is currently pending before the Kentucky Supreme Court.<sup>94</sup> In *Kant*, Laurence Kant, a man of Jewish faith and scholar in Jewish studies, brought suit alleging that Lexington Theological Seminary (LTS), a seminary affiliated with the

87. *Id.*

88. *Id.* at 887–91.

89. *Id.* at 890.

90. *Id.* at 902 (Bradley, J., dissenting) (“[A] church is always free to burden its activities voluntarily through contracts.” (citing *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990))).

91. *Id.* at 908.

92. *Id.* at 888 (plurality opinion).

93. No. 2011–CA–000004–MR, at \*2 (Ky. Ct. App. July 27, 2012), available at <http://statecasefiles.justia.com/documents/kentucky/court-of-appeals/2011-ca-000004-mr.pdf?ts=1343397799>.

94. See *supra* note 13 and accompanying text. *Kant* has received national attention because it presents a number of interesting issues, including whether a Jewish theologian could be considered a minister of a Christian organization. Compare Alliance Defending Freedom Brief, *supra* note 13, at 11 (arguing yes), with Griffin Brief, *supra* note 13, at 9–10 (arguing no). This Note confines its discussion of *Kant* to the issue of whether the ministerial exception bars a claim that a minister was terminated in violation of his contract.

Disciples of Christ, wrongfully terminated his employment.<sup>95</sup> Mr. Kant began teaching at LTS in 2000 and received tenure in 2006. LTS's Faculty Handbook explained: "Tenure at Lexington Theological Seminary means appointment to serve until retirement, resignation, or dismissal for adequate cause."<sup>96</sup> The Handbook further provided: "The only grounds for dismissal of a tenured faculty member are moral delinquency, unambiguous failure to perform the responsibilities outlined in this Handbook, or conduct detrimental to the Seminary."<sup>97</sup> In 2009, because of unfavorable economic conditions, LTS declared financial emergency and terminated Mr. Kant. Mr. Kant filed suit for breach of contract and LTS moved to dismiss on the grounds that the ministerial exception barred the claims.

Judge Moore and Chief Judge Acree of the Kentucky Court of Appeals, a majority of the panel, agreed that the ministerial exception barred the suit.<sup>98</sup> Chief Judge Acree explained that he read *Hosanna-Tabor* to mean that "if we first decide that Kant is a minister and therefore the exception applies, we need not, and cannot, inquire into the reason for firing."<sup>99</sup> The Chief Judge explained that the ministerial exception is as "absolute as a rule of law can be," leaving no room for judicial scrutiny of a religious organization's decisions to terminate ministers.<sup>100</sup> Judge Moore explained that "it does not matter that Kant has fashioned his case around a contract cause of action; this does not trump constitutional protections and freedoms of the church."<sup>101</sup> Notably, none of Chief Judge Acree's analysis of the ministerial exception discusses whether the LTS Faculty Handbook could be interpreted based on neutral principles of law, as opposed to religious doctrine; for Chief Judge Acree, *Hosanna-Tabor* rendered this question irrelevant.

Case law post-*Hosanna-Tabor* thus reveals an emerging trend in ministerial exception jurisprudence. Relying on *Hosanna-Tabor's* reasoning, courts appear less willing to inquire whether interpreting the substance of the wrongful termination claim would actually lead to excessive entanglement in ecclesiastical matters. Instead, courts appear willing to categorically refuse to adjudicate a minister's claim that he was wrongfully terminated under his employment contract.

### III. THE MINISTERIAL EXCEPTION SHOULD NOT BAR A MINISTER'S CONTRACT CLAIMS AGAINST HIS EMPLOYER

The question whether the ministerial exception should bar a minister's claim that he was wrongfully terminated under his employment

95. *Kant*, 2011-CA-000004-MR, at \*2.

96. *Id.* at \*4.

97. *Id.* at \*5.

98. *Id.* at \*24, \*26 (Acree, C.J., concurring). Notably, Chief Judge Acree *disagreed* with Judge Moore's conclusion that the doctrine of ecclesiastical abstention required dismissal of the suit. *Id.* at \*26. Thus, a majority of the Kentucky Court of Appeals believed the ecclesiastical abstention doctrine did not bar the suit.

99. *Id.* at \*29-30.

100. *Id.* at \*30 (citation omitted).

101. *Id.* at \*24 (majority opinion).

contract has no simple or inevitable answer.<sup>102</sup> On one hand, the core concerns that drove the result in *Hosanna-Tabor* seem to be similarly present in the context of contract claims. *Hosanna-Tabor* explained:

Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.<sup>103</sup>

Contract claims of wrongful termination, no less than employment discrimination claims, are punishing a church for failing to retain an unwanted minister. As Chief Justice Roberts plainly stated at the close of *Hosanna-Tabor*: “The church must be free to choose those who will guide it on its way.”<sup>104</sup> This robust freedom protects not just the right to decide to terminate a minister for religious reasons, but more broadly protects the exclusive right to make this decision.<sup>105</sup> In many ways, adjudication of a wrongful termination contract claim deprives a religious organization of the exclusive right to make employment decisions in the same manner as adjudication of employment discrimination claims would. Further, *Hosanna-Tabor* was not a case where the balancing of religious liberty against other interests presented a close call. The Supreme Court *unanimously* agreed that the ministerial exception barred the suit.

But despite the broad language in *Hosanna-Tabor* and one-sided result, there are compelling reasons not to extend the ministerial exception to wrongful termination contract claims for damages. This Part addresses these reasons and argues that courts should not find contract claims for damages barred by the ministerial exception. First, Section III.A discusses the historical ability of ministers to sue religious organizations on valid contracts. Section III.B then distinguishes contract claims from employment discrimination claims because of the voluntary nature of contracts. This Section argues that the voluntariness of contracts mitigates Free Exercise Clause concerns present in *Hosanna-Tabor* and provides independent reasons not to categorically bar wrongful termination contract claims under the ministerial exception. Section III.C discusses the detrimental effects for religious organizations that would follow from a refusal to enforce a church’s contractual obligations. Finally, Section III.D argues that the ministerial exception’s inapplicability to contract claims does not truly impair religious freedom. The doctrine of ecclesiastical abstention would still

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102. Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“Candor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”).

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

104. *Id.* at 710.

105. *Id.* at 709; see also Berg et al., *supra* note 20, at 176 (“[The ministerial exception] rests on the overriding and foundational premise that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law’s corrective reach.”).

bar those contract claims by a minister against his employer that would require a court to become excessively entangled with religion. This more nuanced approach, though less absolute, strikes the appropriate balance between the two fundamental values of church autonomy and the mutuality of obligation.

As one final preliminary matter of clarification, this Part does not argue that a minister's contract claim against his employer should survive regardless of the remedy requested. As many courts have recognized,<sup>106</sup> when a minister requests a remedy of reinstatement based on a contractual violation, a church's First Amendment interests are at their apex; the ministerial exception must bar the suit. Scholars, too, have acknowledged that "having courts forcibly reinstate ministers raises deep religious liberty problems."<sup>107</sup> Requiring a religious organization to retain a minister imposes an enormous burden. Further, as a historical matter, government appointment of clergy was one of the primary attributes of an established church.<sup>108</sup> While it is true that the Court in *Hosanna-Tabor* rejected any distinction based on whether the plaintiff requested a remedy of damages or reinstatement in the context of employment discrimination claims,<sup>109</sup> the calculus in the context of contract claims need not be the same. Courts regularly refuse to order specific performance in personal service contracts while allowing damages.<sup>110</sup>

#### A. *Historical Status of a Minister's Contract Claim Against His Employer*

The historical record establishes that, at the time of the Founding, adjudication of a minister's contract claims against his employer was not thought to offend the First Amendment.<sup>111</sup> Though governmental appointment of church ministers was of great concern to the Founders,<sup>112</sup> courts regularly resolved ministers' contract claims of wrongful

106. See, e.g., *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999) ("Had [plaintiff] brought a state law claim for breach of contract with an associated remedy of reinstatement, that would run afoul of the Free Exercise Clause because the remedy would require the church to employ [plaintiff], thereby interfering with the church's constitutionally protected choice of its ministers."); *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990); *McKelvey v. Pierce*, 800 A.2d 840, 859 (N.J. 2002).

107. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 38 (2011) (discussing the "reinstatement problem").

108. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2015, 2136-44 (2003).

109. See *Hosanna-Tabor*, 132 S. Ct. at 709 ("An award of [damages] would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination."); see also Lund, *supra* note 107, at 40 ("But giving front pay in lieu of reinstatement does not really fix the core problem. It still gives the government control over the church's clergy, just in a different way.")

110. See RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981) ("A promise to render personal service will not be specifically enforced.")

111. See Brief Amicus Curiae of the National Employment Lawyers Association in Support of Respondents at 4-11, *Hosanna-Tabor*, 132 S. Ct. 694 (2012) (No. 10-553) [hereinafter National Employment Lawyers Brief].

112. See Berg et al., *supra* note 20, at 179-84.

termination against their employers as early as 1799.<sup>113</sup> Given the fundamental role of history in First Amendment jurisprudence,<sup>114</sup> this historical evidence provides a strong reason not to extend the ministerial exception to cover contract claims.

In *Runkel v. Winemuller*, Justice Chase, then Chief Judge of the General Court of Maryland, issued a writ of mandamus ordering restoration of Reverend William Runkel as minister of the High Dutch Reformed Christian Church in Fredericktown, Maryland.<sup>115</sup> Runkel alleged that he was forcibly removed from his position as minister in violation of his contract, which guaranteed a ten-year term and emoluments consisting of eighteen cords of wood annually, eighty pounds annually, and use of a parsonage house. Justice Chase no doubt understood the crucial role that ministers play in religious organization. He explained, "The principles of the Christian religion cannot be diffused, and its doctrines generally propagated, without . . . teachers and ministers, to explain the scriptures to the people, and to enforce an observance of the precepts of religion by their preaching and living."<sup>116</sup> Nevertheless, "pastors, teachers, and ministers, of every denomination of Christians, are equally entitled to the protection of the law, and to the enjoyment of their religious and temporal rights."<sup>117</sup> Justice Chase granted the request for a writ of mandamus, finding that Runkel had a valid claim against the elders of the religious organization, "who signed the vocation and contract for the emoluments stipulated to be provided."<sup>118</sup>

Similarly, in *Avery v. Inhabitants of Tyringham*, the Supreme Judicial Court of Massachusetts rejected the argument that religious organizations could dismiss a minister for any reason notwithstanding contractual obligations.<sup>119</sup> In *Avery*, minister Joseph Avery filed suit against the parish of Tyringham for damages resulting from the parish's alleged breach of his employment contract.<sup>120</sup> The parish contended that it had an absolute right to terminate the minister, a right it argued was inherent in the parish's ability to exercise its faith and protected by the Massachusetts Constitution.<sup>121</sup> The three sitting judges all rejected this contention, each writing seriatim to express his opinion. Judge Parker explained: "It is true the religious societies are left at liberty to make such a contract, and for such term of time as shall be agreed between them and their minister; but the contract once made, is subject to all such rules of law as govern other engagements."<sup>122</sup> Judge Parker fur-

113. See, e.g., *Runkel v. Winemuller*, 4 H. & McH. 429 (Md. 1799).

114. Cf. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

115. *Runkel*, 4 H. & McH. at 452.

116. *Id.* at 450.

117. *Id.*

118. *Id.* at 451.

119. 3 Mass. (2 Tyng) 160 (Mass. 1807).

120. *Id.* at 161.

121. *Id.* at 168 (Parker, J.).

122. *Id.* at 169.

ther questioned how the parish's argument could be squared with the mutual intentions of the parties when making the contract and expressed concerns about the instability a ruling would inject into the parish's relationship with the minister.<sup>123</sup> Judge Sedgwick agreed, describing the consequences that would derive from such a result as "mischievous in the extreme."<sup>124</sup> Judge Sedgwick and Chief Judge Parsons questioned whether religious organizations would even be able to attract ministers if such an interpretation were adopted.<sup>125</sup> The Chief Judge concluded: "[A] town [has] no right to violate its own contracts solemnly and deliberately made."<sup>126</sup>

*Runkel*, *Avery*, and other cases in early American jurisprudence<sup>127</sup> are illustrative of the fact that early American judges did not believe a minister's contract claim against his employer implicated the First Amendment. Further evidence comes from the state constitutions of Massachusetts, Maine, Connecticut, and New Hampshire, each of which secured to religious societies the exclusive right to elect their own public ministers and contract with them for services.<sup>128</sup> For example, article III of part I of the Massachusetts Constitution read: "The several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive right of electing their public teachers, and of contracting with them for their support and maintenance."<sup>129</sup> This provision, like the similar ones in the Maine, Connecticut, and New Hampshire constitutions,<sup>130</sup> is an embodiment of the idea that religious institutions must be free to select who will minister to the faithful.<sup>131</sup> But additionally, the fact that these state constitutions protected the right of religious organizations to *contract* with ministers lends support to the idea that these contracts were expected to be effectuated by courts. The Supreme Court of Massachusetts adopted this understanding of the Massachusetts Constitution in *Avery*.<sup>132</sup>

To be sure, government appointment of church personnel was one of the key elements of an established church and of great concern of the Founders.<sup>133</sup> But, as the historical evidence establishes, resolution

123. *Id.* at 170.

124. *Id.* at 173 (Sedgwick, J.).

125. *See id.* ("Would ministers, who regarded the comfort of their families, of their own personal quiet and security, be willing to make a contract on such terms?"); *id.* at 177 (Parsons, C.J.) ("A consequence of this power in a parish, will be the deterring of young men of information and genius, from entering into the clerical profession . . .").

126. *Id.* at 179 (Parsons, C.J.).

127. National Employment Lawyers Brief, *supra* note 111, at 4 n.6 (citing contract actions by dismissed ministers throughout the 1800s).

128. *See* Joshua Dunlap, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2016 (2007).

129. MASS. CONST. pt. I, art. III (amended 1833).

130. *See* Dunlap, *supra* note 128, at 2016–18.

131. *Id.* ("[T]he framers of the New England constitutions, in order to grant religious freedom genuine protection, sought to ensure that civil government could not regulate the selection of church employees.")

132. *Avery*, 3 Mass. (2 Tyng) 160, 169 (Mass. 1807).

133. *See* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 703 (2012) ("By forbidding the 'establishment of religion' and guaranteeing the

of a minister's wrongful termination claim is not the kind of government appointment of church personnel about which the First Amendment is concerned. This historical evidence of adjudicating contract disputes stands in stark contrast to the regular refusal of courts to adjudicate employment discrimination claims by ministers against their employers under the ministerial exception. Not long after the passage of Title VII of the Civil Rights Act of 1964, the Fifth Circuit found a minister's employment discrimination suit barred by the First Amendment.<sup>134</sup> By the time of *Hosanna-Tabor*, the courts of appeals have uniformly recognized the ministerial exception's existence.<sup>135</sup> Thus, the historical record of judicial resolution of a minister's contract claims against his employer provides a compelling reason for finding contract claims beyond the scope of the ministerial exception.

### B. *Voluntariness of Contracts*

Contractual obligations, as opposed to employment discrimination laws, are self-imposed obligations from which a church benefits. They are private, not public, in nature. In all likelihood, whether the contract be express or implied through informal sources, the religious organization drafted the contract's language. The voluntary nature of contractual obligations ameliorates Free Exercise concerns present in *Hosanna-Tabor* and provides another compelling reason not to extend the ministerial exception to wrongful termination contract claims.

As the D.C. Circuit recognized in *Minker v. Baltimore Annual Conference of United Methodist Church*, "a church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court."<sup>136</sup> Even courts finding employment discrimination claims barred under the ministerial exception have explained that religious organizations "may be held liable . . . upon their valid contracts."<sup>137</sup>

A court that determines a religious organization terminated a minister in violation of federal employment law imposes a state standard upon the hiring and firing practices of a religious organization.<sup>138</sup> But a court that interprets a contract to which a religious organization agreed of its own volition imposes no state standard.<sup>139</sup> Free Exercise

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'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices."); Berg et al., *supra* note 20, at 179–84; McConnell, *supra* note 108, at 2136 ("The power to appoint and remove ministers and other church officials is the power to control the church.").

134. See *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

135. See *Hosanna-Tabor*, 132 S. Ct. at 705.

136. *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.3d 1354, 1359 (D.C. Cir. 1990).

137. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

138. See *Hosanna-Tabor*, 132 S. Ct. at 706.

139. See *Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006); *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 906 (Wis. 2012) (Bradley, J., dissenting); see also *Overstreet*, *supra* note 6, at 284 ("Unlike anti-discrimination legislation, which imposes society's moral and political values upon a religious organization, judicial enforcement of

concerns at the heart of *Hosanna-Tabor* are simply not present when a religious organization is deciding the standards by which it is judged. The Free Exercise Clause and Establishment Clause together drove the result in *Hosanna-Tabor*. The absence of Free Exercise concerns in the context of contract claims militates against stretching the ministerial exception to categorically bar wrongful termination contract claims.

A common response to the argument that Free Exercise concerns are assuaged when a church freely burdens itself with a contract is that contract law “does not trump constitutional protections and freedoms of the church.”<sup>140</sup> Put otherwise, the argument states that a religious organization cannot waive its religious freedom by agreeing to an employment contract. The idea that churches cannot contract away religious freedom is an intuitively attractive one given the emphasis in American jurisprudential tradition on the separation of church and state.<sup>141</sup> However, *Hosanna-Tabor* itself seems to refute the argument that a religious organization is unable to waive some of its religious freedom. The Court, in footnote four, resolved a circuit split by explaining that the ministerial exception is an affirmative defense to employment discrimination claims, not a jurisdictional bar.<sup>142</sup> Thus, the ministerial exception is not a structural limitation on civil courts’ jurisdiction; should a religious organization choose to waive the ministerial exception defense, a suit for employment discrimination could proceed. This lends strong support to the idea that a church could similarly waive some religious freedom by voluntarily agreeing to be bound by a contractual instrument. In both instances, the Free Exercise rights of the religious organization are not encroached upon because they are acting *of their own volition*. A religious organization remains free to terminate ministers as it pleases, limited only by any secular bounds it previously imposed upon itself. If religious organizations do wish to have the ability to terminate a minister for any reason at all, they remain free to say so in the employment contract.

Thus the voluntariness of contractual obligations and consequent amelioration of Free Exercise concerns that drove the result in *Hosanna-Tabor* provide a second reason not to extend the ministerial exception to bar contract claims.

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contracts results from a voluntary decision by the organization to burden itself.” (footnote omitted)).

140. *Kant v. Lexington Theological Seminary*, No. 2011–CA–000004–MR, at \*24 (Ky. Ct. App. July 27, 2012), available at <http://statecasefiles.justia.com/documents/ken-tucky/court-of-appeals/2011-ca-000004-mr.pdf?ts=1343397799>.

141. See Berg et al., *supra* note 20, at 177–79.

142. See *Hosanna-Tabor*, 132 S. Ct. at 709 n.4; see also Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1892 (2013) (suggesting that *Hosanna-Tabor’s* footnote four “rests on a radically new conception of the relationship between church and state, gesturing towards an increasingly symbiotic relationship between religious institutions and civil courts”).

### C. *Effects on Church-Minister Relations*

If ministers' wrongful termination claims are barred by the ministerial exception, termination clauses "would not be worth the paper they are printed on."<sup>143</sup> All termination clauses, even ones limiting termination to defined circumstances that are not ecclesiastical in nature, would be unenforceable in court. Such a rule would adverse consequences for ministers and religious organizations.

To begin with, great uncertainty and instability would be injected into the relationship between a minister and the religious organization that employs him.<sup>144</sup> The Fifth Circuit has described the relationship between a religious organization and its ministers as its "lifeblood."<sup>145</sup> This relationship is undoubtedly a delicate one, dependent upon trust. If a church can terminate a minister at any time, for any reason, even if explicitly in violation of the terms of his employment contract, the trust inherent in this relationship could be damaged. These concerns do not turn on the cynical assumption that churches will in fact terminate ministers in violation of their contracts. This instability would exist regardless of whether the church would even consider terminating the minister; merely knowing that the religious employer *could* do so would introduce precariousness into the church-minister relationship. Leaving a minister's job security less certain could even lead to adverse effects for the congregation as a whole.<sup>146</sup> This concern is especially poignant given the *Hosanna-Tabor* Court's flexible definition of who constitutes a minister.<sup>147</sup>

Consequently, religious organizations may place themselves at a competitive disadvantage in attracting employees. To be sure, myriad considerations beyond (and more significant than) the enforceability of an employment contract impact a minister's decision to join a parish. However, some individuals who might otherwise become, for example, a parochial school teacher may look elsewhere out of a concern for job stability.<sup>148</sup> If termination provisions were unenforceable in court, "[w]ould ministers, who regarded the comfort of their families, or their own personal quiet and security, be willing to make a contract on such terms?"<sup>149</sup> Admittedly, any disincentivization to join a religious organization as a minister would be difficult to show or measure. But, given that the definition of "minister" in *Hosanna-Tabor* is broad enough to

143. *DeBruin*, 816 N.W.2d at 907 (Bradley, J., dissenting).

144. *See Avery v. Inhabitants of Tyringham*, 3 Mass. (2 Tyng) 160, 170 (Mass. 1807) (Parker, J.) ("The minister, who is settled to-day, may be dismissed to-morrow.")

145. *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

146. *See DeBruin*, 816 N.W.2d at 912 (Bradley, J., dissenting).

147. *See Hosanna-Tabor*, 132 S. Ct. at 707 (considering "all the circumstances" of plaintiff's employment in determining her to be a minister); *see also id.* at 711–12 (Alito, J., concurring) (deemphasizing the majority's consideration of plaintiff's title of "minister" and arguing that the ministerial exception covers all church employees who perform "key functions" of the church).

148. *See Avery*, 3 Mass. (2 Tyng) at 178 (Parsons, C.J.) (arguing that allowing a parish the power to terminate without reason would "deter[ ] young men of information and genius, from entering into the clerical profession"); *DeBruin*, 816 N.W.2d at 907 & n.9.

149. *Avery*, 3 Mass. (2 Tyng) at 173 (Sedgwick, J.).

include positions like parochial school teachers,<sup>150</sup> it is reasonable to think that religious organizations may struggle to compete with secular employers who can provide greater job stability.

Moreover, finding wrongful termination claims outside the scope of the ministerial exception will incentivize drafting of employment agreements and handbooks that accurately reflect the true nature of the employment relationship. Though a duty to treat ministerial employees equitably after *Hosanna-Tabor* surely exists regardless of legal obligations,<sup>151</sup> potential liability on contracts provides an added incentive to religious organizations to represent accurately the nature of the employment relationship to their ministers.

Finally, while the Supreme Court has endorsed the notion that an individual who joins a religious organization implicitly consents to be bound by the decisions of ecclesiastic tribunals,<sup>152</sup> that implicit consent is notably absent in the context of a minister's contract claims. A minister who signs an employment agreement exhibits implicit consent not to be bound by the decision of the religious organization, but instead by courts of law. Thus, potential adverse effects on the church-minister relationship provide yet another reason not to find wrongful termination claims categorically barred by the ministerial exception.

#### D. *The Ecclesiastical Abstention Doctrine Adequately Protects Religious Liberty*

This Note argues that the ministerial exception should not bar wrongful termination claims by a minister against his employer. For those wrongful termination actions that would require a court to make determinations of a religious nature, the ecclesiastical abstention doctrine nonetheless bars the suit. This Section argues the ecclesiastical abstention doctrine sufficiently protects religious liberty interests and appropriately balances these interests against the contract law's interest in mutuality of obligation.

The ecclesiastical abstention doctrine is the general body of case law standing for the principle that civil courts cannot rule on matters that are "strictly and purely ecclesiastical."<sup>153</sup> The Supreme Court in *Kedroff v. St. Nicholas Cathedral* explained that religious organizations have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."<sup>154</sup> This doctrine is broader than the ministerial exception; it operates

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150. See *Hosanna-Tabor*, 132 S. Ct. at 707.

151. See Horwitz, *supra* note 38, at 976.

152. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871).

153. *Id.* at 733; see also *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 42–51 (1998) (describing this doctrine).

154. *Kedroff*, 344 U.S. at 116.

beyond just the realm of church employment decisions.<sup>155</sup> Perhaps the ministerial exception is best conceptualized as a specific application of the doctrine of ecclesiastical abstention to the context of employment discrimination claims. As Chief Justice Roberts explained, “[w]hen a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.”<sup>156</sup>

The doctrine of ecclesiastical abstention coexists in our constitutional jurisprudence with the principle that civil courts may always resolve disputes involving a church when the dispute depends upon “neutral principles of law.”<sup>157</sup> In practice, courts regularly ask whether resolution of a church dispute would cause “excessive entanglement” with ecclesiastical matters or could be resolved solely by reference to neutral principles of law.<sup>158</sup> This is the proper inquiry for a court to engage in when a minister brings a contract claim against his employer for wrongful termination. Instead of barring *all* ministers’ wrongful termination claims, this inquiry separates the wheat from the chaff; contract claims that depend on neutral principles of law proceed, while those requiring entanglement in ecclesiastical matters do not.<sup>159</sup>

Though this inquiry may lack the absoluteness of the ministerial exception, it strikes the appropriate balance between religious liberty and contract law’s interest in mutuality of obligation. Mutuality of obligation, as a doctrinal matter, is the idea that “unless both parties to an agreement are bound, neither is bound.”<sup>160</sup> The requirement of mutuality of obligation has largely been rejected as a requirement for a valid contract.<sup>161</sup> But the idea that both parties to a contract should be able to seek a remedy, or neither should, still resonates strongly in contract law.<sup>162</sup> Notions of fundamental fairness and equality under the law yield a reflexive discomfort with the idea of a one-way-street of contractual liability. Though situations exist where enforcement of one party’s

155. See *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594, 611 (N.D. Tex. 2008) (describing the relationship between the ministerial exception and the broader ecclesiastical abstention doctrine).

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

157. *Jones v. Wolf*, 443 U.S. 595, 597 (1979).

158. See, e.g., *Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR, at \*14 (Ky. Ct. App. July 27, 2012) (quoting *Music v. United Methodist Church*, 864 S.W.2d 286, 288-89 (Ky. 1993)).

159. But see Griffin, *supra* note 51, at 1012 (expressing concern that “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”).

160. *Econ. Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 650 (Iowa 1995); see also *McMichael v. Price*, 58 P.2d 549, 551-52 (Okla. 1936).

161. See RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981) (rejecting an additional requirement of “mutuality of obligation” if consideration is present); Henry Winthrop Ballantine, *Mutuality and Consideration*, 28 HARV. L. REV. 121, 131-32 (1914).

162. See Val D. Ricks, *In Defense of Mutuality of Obligation: Why “Both Should Be Bound, Or Neither,”* 78 NEB. L. REV. 491, 495-96 (1999).

promise may be inappropriate, mutual promises presumptively bind both parties.<sup>163</sup>

At least in cases dealing with express contracts<sup>164</sup> between a religious organization and its minister, failure to enforce a promise made by the religious organization is inimical to the idea of mutuality of obligation. A church could indisputably sue its minister on the contract, but in some instances a minister would be left without a legal remedy. In cases where interpretation of the contractual provision at issue is truly ecclesiastical in nature, courts have good reason to stay their hand. But where the contractual provision could be interpreted solely by reference to neutral principles of law, but a court nonetheless refuses to adjudicate the claim under the ministerial exception, mutuality of obligation is cast aside. Analyzing a ministers' wrongful termination claims under the ecclesiastical abstention doctrine is thus the proper avenue for courts to take. Religious organizations remain free to structure their affairs and control who ministers to the faithful as they see fit. But when a religious organization agrees to terms of a contract and interpreting those terms involves no inquiry into church doctrine, courts must give effect to the contractual obligations.

Some courts prior to *Hosanna-Tabor* appeared willing to follow this approach.<sup>165</sup> These courts differentiated between contracts that involved an impermissible religious inquiry (e.g., interpreting the Methodist Book of Discipline<sup>166</sup> or asking whether a rabbi engaged in "gross misconduct"<sup>167</sup>) and those that involved purely secular determinations (e.g., an oral promise to transfer an individual to another parish<sup>168</sup> or removal of job responsibilities<sup>169</sup>). However, post-*Hosanna-Tabor*, courts have evinced a willingness to dismiss all contractual claims of wrongful termination under the ministerial exception without even inquiring as to whether the contract could be interpreted under neutral principles of law.<sup>170</sup> Courts should jettison this approach and revert to the inquiry established by the D.C. Circuit in *Minker v. Baltimore Annual Conference of United Methodist Church*: Does interpretation of

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163. *Id.* at 525–27 (“Once a court has found assent and mutual promises, to treat the parties equally and fairly the court should presumably enforce both contracts.”).

164. In the context of contracts implied from informal sources, such as an employee handbook, the mutuality of obligation concerns are not as pointed. Because a minister without an express contract would be free to leave the religious organization as he pleases, neither party would have a remedy in cases of the minister leaving or being terminated by his religious employer. *See id.* at 542 & n.225 (discussing implied contract claims based on employee handbooks).

165. *See supra* Section II.A.

166. *See Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1358–59 (D.C. Cir. 1990); *see also* Overstreet, *supra* note 6, at 293–95 (explaining why secular courts should dismiss contract claims based on obligations implied from religious documents).

167. *See Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654, 655 (2d Cir. 2009).

168. *See Minker*, 894 F.2d at 1359–61.

169. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006).

170. *See, e.g., Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR, at \*24 (Ky. Ct. App. July 27, 2012); *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 888 (Wis. 2012).

the contractual provision at issue involve an inherently ecclesiastical matter that civil courts are powerless to resolve, or can it be resolved simply by resorting to neutral principles of law?

Revisiting the *Kant v. Lexington Theological Seminary*<sup>171</sup> case discussed in the introduction is illustrative. Laurence Kant was employed as a tenured professor at Lexington Theological Seminary (LTS). The LTS Faculty Handbook provided that “[t]he only grounds for dismissal of a tenured faculty member are moral delinquency, unambiguous failure to perform the responsibilities outlined in this Handbook, or conduct detrimental to the Seminary.”<sup>172</sup> In 2009, LTS terminated Mr. Kant because of financial difficulties. In *Kant*, the Kentucky Court of Appeals affirmed dismissal of Mr. Kant’s breach of contract claim under the ministerial exception and the case is now pending before the Supreme Court of Kentucky.<sup>173</sup>

Mr. Kant’s case reveals the fundamental problem with applying the ministerial exception to categorically bar ministers’ wrongful termination claims. LTS fired Mr. Kant for reasons other than those set forth in the Faculty Handbook; to determine this would require no judicial entanglement with ecclesiastical matters, merely application of neutral principles of contract law.<sup>174</sup> Though an implied right to terminate a minister based on financial difficulty may exist as a matter of *state contract law*, the Kentucky Court of Appeals instead found the ministerial exception barred the suit.<sup>175</sup> This result seems profoundly unjust—LTS agreed it would only terminate Mr. Kant for reasons A, B, or C, then terminated him for reason D, but nonetheless cannot be held liable on its contract, even though interpreting the contract involves no engagement with ecclesiastical doctrine. For the reasons set forth in this Part, the Kentucky Supreme Court, and future courts to address this matter, should find that the ministerial exception does not bar a minister’s contract claim against his employer.

## CONCLUSION

At the end of Chief Justice Roberts’s opinion in *Hosanna-Tabor*, he explicitly limited the scope of the holding to the context of employment discrimination, stating that the ministerial exception’s application to contract and tort claims was a question for another day. For many ministers and religious organizations, that day has come.

Since *Hosanna-Tabor*, courts have found that the ministerial exception bars wrongful termination claims by a minister against his

171. *Kant*, No. 2011–CA–000004–MR (Ky. Ct. App. July 27, 2012).

172. *Id.* at \*5.

173. *Id.*

174. Had Mr. Kant, for example, engaged in conduct directly contrary to church teaching, interpreting whether this constituted “conduct detrimental to the seminary” would likely require an impermissible judicial inquiry. However, Mr. Kant was terminated for financial reasons, which fall outside the valid reasons for termination of a tenured professor under the Faculty Handbook; no inquiry into ecclesiastical matters is necessary to determine this.

175. See *Kant*, No. 2011–CA–000004–MR, at \*34 (Keller, J., dissenting).

employer. These courts have read the broad language of *Hosanna-Tabor* to mean that no matter what the context, a church must have the exclusive right to select and terminate its clergy. However, this approach neglects many countervailing considerations that distinguish contract suits from employment discrimination suits. First, at the time of the Founding, suits by a minister against his employer for wrongful termination were not thought to offend the First Amendment. Second, the voluntary nature of contracts assuages Free Exercise concerns; a religious organization's self-imposed standards are a far cry from the public law standards imposed upon it by federal employment discrimination law. Third, extending the ministerial exception to contract claims would have universally bad effects on the minister, the minister-church relationship, and potentially the congregation as a whole. Finally, the doctrine of ecclesiastical abstention provides sufficient protection of religious liberty interests and properly strikes a balance between those interests and contract law's emphasis on mutuality of obligation. Thus, courts should hold the ministerial exception inapplicable to contract claims by a minister against his employer.

