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“OF SUBSTANTIAL RELIGIOUS IMPORTANCE”:  
A CASE FOR A DEFERENTIAL APPROACH TO  
THE MINISTERIAL EXCEPTION

Allison H. Pope\*

*Closed on Sunday, you my Chick-Fil-A . . .  
Follow Jesus, listen and obey  
No more livin’ for the culture, we nobody’s slave  
Stand up for my home . . .  
I pray to God that He’ll strengthen my hand  
They will think twice steppin’ onto my land  
I draw the line, it’s written in the sand<sup>1</sup>*

INTRODUCTION

As artist Kanye West proclaims, protection from outside influences is essential for religious groups to maintain their identity and carry out their mission. The Framers of the Constitution, by enshrining the right to the “free exercise” of religion and prohibiting the “establishment” of religion in the First Amendment,<sup>2</sup> sought to ensure the new federal government would not unduly interfere with the religious lives of Americans.

In 2012, the United States Supreme Court fortified this concept of religious autonomy in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* by adopting the “ministerial exception” doctrine, which had previously been recognized by every United States court of appeals.<sup>3</sup> According to this doctrine, the Religion Clauses of the First Amendment preclude application of employment discrimination laws “to claims concerning the employment relationship between” a “religious group” and its “ministers.”<sup>4</sup> Because the Court

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\* Candidate for Juris Doctor, Notre Dame Law School, 2021; Bachelor of Science in Biology, University of Kansas, 2016. I would like to thank my family for their never-ending love and support, and Professor Gerard V. Bradley, Zachary Pohlman, and Jack Dahm for their helpful comments and suggestions. I would also like to thank my peers on the *Notre Dame Law Review* for their thorough edits. All errors are my own.

1 KANYE WEST, *Closed on Sunday*, on JESUS IS KING (GOOD Music 2019).

2 U.S. CONST. amend. I. These clauses are also known as the “Religion Clauses.”

3 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 & n.2 (2012) (listing cases from each circuit applying the ministerial exception).

4 *Id.* at 188.

did not adopt a clear definition of the term “minister” in this landmark case, questions remain as to which employees qualify.<sup>5</sup>

In December 2019, the Supreme Court granted certiorari and consolidated *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel*, two cases from the Ninth Circuit, which had ruled two Catholic school teachers with religious duties were not ministers for purposes of the ministerial exception.<sup>6</sup> In its decision, the Court will revisit *Hosanna-Tabor*, which also involved a teacher in a religious school,<sup>7</sup> and should provide more guidance to lower courts in their application of the term “minister.”

This Note argues that, in order to remain consistent with the Religion Clauses’ protection of religious autonomy, civil courts must defer to the religious group’s determination of which of its employees play a role “of substantial religious importance”<sup>8</sup> within the organization in carrying out its religious mission under its tenets, and are therefore “ministers,” rather than investigate and make that determination themselves. Part I provides background information on the First Amendment and an overview of the circuit court and Supreme Court decisions that laid the foundation for, built, adopted, and applied the ministerial exception as described in *Hosanna-Tabor*. Part II analyzes several potential definitions of “minister” and argues that a civil court when applying the term must defer to the religious group’s determination of which of its employees play a role “of substantial religious importance.” Such a deferential standard is necessary in order to preserve the religious autonomy contemplated by the Religion Clauses.

## I. BACKGROUND

### A. Foundational Principles

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>9</sup> Incorporated against the states via the Fourteenth Amendment,<sup>10</sup> these Religion Clauses guarantee religious freedom and protect against government entanglement with religion. The courts, when building and adopting

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5 Although this Note centers on the term “minister,” there also remains a question as to which groups constitute a “religious group” for purposes of the ministerial exception. For discussions of this question, see generally Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013); Brian M. Murray, *The Elephant in Hosanna-Tabor*, 10 GEO. J.L. & PUB. POL’Y 493 (2012); Zoë Robinson, *What Is a “Religious Institution”?*, 55 B.C. L. REV. 181 (2014).

6 *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 680 (2019) (mem.); *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App’x 460 (9th Cir.), *cert. granted*, 140 S. Ct. 679 (2019).

7 *Hosanna-Tabor*, 565 U.S. at 177–78.

8 *Id.* at 200 (Alito, J., concurring).

9 U.S. CONST. amend. I.

10 See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (incorporating the Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause).

the ministerial exception doctrine, relied on a series of Supreme Court cases regarding church property disputes. These cases established that the Religion Clauses protect churches' autonomy from governmental interference.

The first such case, *Watson v. Jones*, involved a property dispute between proslavery and antislavery factions of a local Presbyterian church.<sup>11</sup> The Court held it must defer to the decision of the General Assembly of the Presbyterian Church, as "the highest judicatory of the Presbyterian Church," to recognize the antislavery faction as the true owner of the property.<sup>12</sup> This case established the principle that courts must defer to hierarchical churches on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law."<sup>13</sup>

In 1929, the Court reiterated a similar principle in *Gonzalez v. Roman Catholic Archbishop of Manila*, a case involving the Catholic Church's denial of a chaplaincy position to a ten-year-old boy.<sup>14</sup> Rejecting the boy's claim that he was entitled to the chaplaincy by virtue of the will of the chaplaincy's foundress, the Court explained, "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive . . . ."<sup>15</sup>

In 1952, the Court heard another church property dispute, *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*.<sup>16</sup> The Court of Appeals of New York had declared that the right to use a Russian Orthodox cathedral belonged to the North American churches, rather than the Supreme Church Authority in Moscow, under a New York law requiring every Russian Orthodox church in New York to recognize the authority of the governing body of North American churches.<sup>17</sup> The United States Supreme Court reversed, holding that the New York law violated the First Amendment because it passed from one church authority to another the right to use the

11 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 681–85 (1872).

12 *Id.* at 682, 690–91, 694.

13 *Id.* at 727; *see also id.* at 728–29 ("In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all . . . . The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned . . . . It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.")

14 *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 12 (1929).

15 *Id.* at 11–12, 16 ("Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.")

16 *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952).

17 *Id.* at 97–99.

cathedral and the power to appoint a ruling hierarchy, which were “strictly ecclesiastical” matters.<sup>18</sup> The Court described *Watson v. Jones* as “radiat[ing] . . . a spirit of freedom for religious organizations,” which have “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>19</sup> It declared, “Freedom to select the clergy, where no improper methods of choice are proven, . . . [has] federal constitutional protection as a part of the free exercise of religion . . . .”<sup>20</sup>

Finally, in 1976, the Court decided *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevic*.<sup>21</sup> The Illinois Supreme Court had held that the proceedings under which the hierarchy of the Serbian Orthodox Church had defrocked and replaced a bishop were defective under the church’s own regulations and therefore arbitrary and invalid.<sup>22</sup> In its review, the United States Supreme Court rejected the proposition suggested in *Gonzalez* that “arbitrary” decisions by church tribunals may be reviewed by civil courts consistent with the First and Fourteenth Amendments. It reasoned that an analysis of whether a church complied with its own laws and regulations “must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judiciary to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits . . . .”<sup>23</sup> Accordingly, the Court reversed,<sup>24</sup> holding:

[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.<sup>25</sup>

Together, these cases established that churches have the exclusive, constitutional right to make judgments regarding church doctrine and governance, and these judgments must not be reevaluated by civil courts.

### B. *Courts of Appeals Decisions Pre-Hosanna-Tabor: Building the Ministerial Exception*

From these principles, the circuit courts began to build the ministerial exception doctrine. First, in 1972 in *McClure v. Salvation Army*, the Fifth Cir-

18 *Id.* at 107–08, 119, 121 (“Legislation that regulates church administration, the operation of the churches, [and] the appointment of clergy . . . prohibits the free exercise of religion.”).

19 *Id.* at 116.

20 *Id.* (footnote omitted).

21 426 U.S. 696 (1976).

22 *Id.* at 708.

23 *Id.* at 713.

24 *Id.* at 725.

25 *Id.* at 709.

cuit declined to apply Title VII of the Civil Rights Act of 1964<sup>26</sup> to the employment of a female commissioned officer of the Salvation Army who had brought an action for sex discrimination.<sup>27</sup> The court, considering the officer a “minister” and the Salvation Army a “church,” held application of the Act in this context would violate the First Amendment.<sup>28</sup> It reasoned, “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. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.”<sup>29</sup>

Other circuits followed suit. The first court to use the term “ministerial exception” was the Fourth Circuit in *Rayburn v. General Conference of Seventh-Day Adventists* in 1985.<sup>30</sup> The court held that the sexual and racial discrimination claims of a woman denied a pastoral position in the Seventh-day Adventist Church were barred by the First Amendment because “state scrutiny of the church’s choice would infringe substantially on the church’s free exercise of religion and would constitute impermissible government entanglement with church authority.”<sup>31</sup> The court rejected ordination as a necessary prerequisite for an employee to qualify as a “minister,” and asserted, rather, that ministerial status depended on “the function of the position.”<sup>32</sup> It held the “associate in pastoral care” position was ministerial because it played a “significant [role] in the expression and realization of Seventh-day Adventist beliefs.”<sup>33</sup> The court also acknowledged that “the church is entitled to pursue its own path” even when “the values of state and church clash,” and expressed its concern that application of employment discrimination laws would cause churches to make their decisions “with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.”<sup>34</sup>

The Eighth Circuit relied on similar principles in 1991 in *Scharon v. St. Luke’s Episcopal Presbyterian Hospitals*.<sup>35</sup> In this case, an ordained female Epis-

26 42 U.S.C. §§ 2000e to 2000e-17 (2012).

27 McClure v. Salvation Army, 460 F.2d 553, 555, 560–61 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).

28 *Id.* at 554, 560. Neither the commissioned officer nor the Equal Employment Opportunity Commission, as *amicus curiae*, disputed that the Salvation Army was a religion or that the officer was a minister. *Id.* at 556.

29 *Id.* at 558–59.

30 *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).

31 *Id.* at 1165.

32 *Id.* at 1168.

33 *Id.* (reasoning an employee in that position would be responsible for “introduc[ing] children to the life of the church,” “lead[ing] . . . Bible study,” acting “[a]s counselor and as pastor” and as “a liaison between the church . . . and those whom it would touch with its message,” “lead[ing] . . . rites,” and “preach[ing] occasionally from the pulpit”).

34 *Id.* at 1171.

35 929 F.2d 360 (8th Cir. 1991).

copal priest working as a chaplain with religious duties had been fired from a church-affiliated hospital.<sup>36</sup> She subsequently alleged age discrimination under the Age Discrimination in Employment Act (ADEA) of 1967<sup>37</sup> and sex discrimination under Title VII.<sup>38</sup> The court held that applying these statutes in this case would violate both the Establishment Clause and the Free Exercise Clause.<sup>39</sup> Because the hospital was affiliated with a church and had “substantial religious character,”<sup>40</sup> and the priest’s position as chaplain was the equivalent of “clergy,”<sup>41</sup> application of the statutes “would require ‘excessive government entanglement with religion,’” in violation of the Establishment Clause.<sup>42</sup> In addition, the court laid out a rule that “[p]ersonnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts.”<sup>43</sup> It explained:

[R]eview [of] such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court’s view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made. This is precisely the kind of judicial second-guessing of decision-making by religious organizations that the Free Exercise Clause forbids.<sup>44</sup>

The Fourth Circuit applied the ministerial exception again in 2000 in *EEOC v. Roman Catholic Diocese of Raleigh*.<sup>45</sup> In this case, a lay Catholic music teacher and later director of music ministry for a Catholic cathedral claimed sex discrimination and retaliation under Title VII after her duties were redesigned and reassigned to men, both Catholic and non-Catholic.<sup>46</sup> The court held that the First Amendment barred the suit because, given the “integral role of music in the spiritual life of the church,”<sup>47</sup> the music ministry and teaching positions were “‘important to the spiritual and pastoral mission’ of the church” and therefore ministerial.<sup>48</sup>

36 *Id.* at 361.

37 29 U.S.C. §§ 621–634 (2012).

38 42 U.S.C. §§ 2000e to 2000e-17 (2012); *Scharon*, 929 F.2d at 361.

39 *Scharon*, 929 F.2d at 363.

40 *Id.* at 362 (quoting *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 736 F. Supp. 1018, 1019 (E.D. Miss. 1990)) (taking into consideration the inclusion of church representatives on the hospital’s board of directors and the requirement of church approval before amendment of its articles of incorporation).

41 *Id.* (taking into consideration that chaplains had to be ordained and were tasked with “[p]rovid[ing] a religious ministry of pastoral care, pastoral counseling . . . and liturgical services for persons in the hospital” and that *Scharon* “performed numerous formal religious ceremonies” (first alteration and omission in original)).

42 *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

43 *Id.* at 363.

44 *Id.*

45 213 F.3d 795 (4th Cir. 2000).

46 *Id.* at 798.

47 *Id.* at 804.

48 *Id.* at 802 (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)); see also *id.* at 804 (“[T]he role of the music minister ‘is so significant in the expression and realization of [the church’s] beliefs that state interven-

The Sixth Circuit in 2007 in *Hollins v. Methodist Healthcare, Inc.* heard an appeal from a former resident in a Methodist hospital's accredited Clinical Pastoral Education program.<sup>49</sup> The appellant claimed that the hospital violated the Americans with Disabilities Act (ADA)<sup>50</sup> by terminating her employment because of a psychiatric evaluation.<sup>51</sup> The court, which had previously adopted the principle of the ministerial exception,<sup>52</sup> held that the former resident's claim could not be maintained in court because she was a "minister" given her pastoral role.<sup>53</sup> In addition, the hospital, by agreeing to adhere to the accreditation association's nondiscrimination policy, did not waive its First Amendment right to the ministerial exception.<sup>54</sup>

The courts of appeals building the ministerial exception justified it on the grounds that a religious group's ministers are essential to its mission, and a civil court's scrutiny of its choice of minister would violate the First Amendment both by infringing upon the group's free exercise rights and by impermissibly entangling itself with religion. They applied the term "minister" to not only ordained clergy, but a variety of positions, including nonordained pastors and music directors. By the time the Supreme Court heard *Hosanna-Tabor* in 2012, every United States court of appeals had adopted some form of the ministerial exception doctrine.<sup>55</sup>

### C. Hosanna-Tabor

#### 1. The Facts

The suit was brought against Hosanna-Tabor Evangelical Lutheran Church and School, a member congregation of the Lutheran Church–Missouri Synod, which ran a small, Christian K-8 school.<sup>56</sup> The synod classified teachers as either "called" or "lay."<sup>57</sup> Called teachers, who were given the title "Minister of Religion, Commissioned," were "called" by a parish after satisfying certain academic requirements.<sup>58</sup> Called teachers were considered to be answering a vocation by God to teach for that congregation.<sup>59</sup> When called teachers were not available, Hosanna-Tabor would hire

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tion in the appointment process would excessively inhibit religious liberty.'" (quoting *Rayburn*, 772 F.2d at 1168) (second alteration in original)).

49 *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 224 (6th Cir. 2007).

50 42 U.S.C. §§ 12101–12213 (2012).

51 *Hollins*, 474 F.3d at 224.

52 See *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 942–43 (6th Cir. 1992); *Hutchinson v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986).

53 *Hollins*, 474 F.3d at 226.

54 *Id.* at 226–27.

55 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 & n.2 (2012) (listing a case from each circuit applying the ministerial exception).

56 *Id.* at 177.

57 *Id.*

58 *Id.* (quoting Joint Appendix at 42, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553)).

59 *Id.*



lay teachers, who did not need to be Lutheran or trained by the synod.<sup>60</sup> Lay teachers performed essentially the same duties as called teachers.<sup>61</sup>

Hosanna-Tabor hired Cheryl Perich initially as a lay teacher.<sup>62</sup> Soon after, Perich accepted Hosanna-Tabor's call to serve the congregation as a called teacher.<sup>63</sup> She received a "diploma of vocation," which designated her as a "commissioned minister."<sup>64</sup> During her service, Perich taught children both secular and religious subjects.<sup>65</sup> She also led students in prayer and attended and occasionally led a weekly school-wide chapel service.<sup>66</sup>

Perich began experiencing symptoms of narcolepsy and went on disability leave.<sup>67</sup> After several months, she notified the school principal that she would soon be able to return to work.<sup>68</sup> The principal replied, expressing her concern that Perich would not yet be ready to return to teaching and informing her that they had already hired a lay teacher to fill her position for the rest of the school year.<sup>69</sup> The congregation decided to propose to Perich a "peaceful release" from her call, offering to pay for a portion of her health insurance premiums in exchange for her resignation.<sup>70</sup> Perich refused the offer.<sup>71</sup>

The next month, Perich "presented herself at the school" and refused to leave before being provided written documentation that she had reported to work that morning.<sup>72</sup> Later that afternoon, the principal informed Perich she would likely be fired, and she responded that she would be asserting her legal rights.<sup>73</sup>

The school board chairman informed Perich that the school board was considering "rescinding her call in light of her 'regrettable' actions," including her "insubordination and disruptive behavior" and "the damage she had done to her 'working relationship' with the school by 'threatening to take legal action.'"<sup>74</sup> The congregation voted to rescind her call, and Hosanna-Tabor sent her a termination letter.<sup>75</sup>

Perich, alleging Hosanna-Tabor had violated the ADA by terminating her, filed a charge with the Equal Employment Opportunity Commission

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60 *Id.*

61 *Id.*

62 *Id.* at 178.

63 *Id.*

64 *Id.* (quoting Joint Appendix, *supra* note 58, at 42).

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.* (quoting Joint Appendix, *supra* note 58, at 186).

71 *Id.*

72 *Id.* at 179.

73 *Id.*

74 *Id.* (quoting Joint Appendix, *supra* note 58, at 55, 229).

75 *Id.*

(EEOC).<sup>76</sup> The EEOC agreed and filed suit against Hosanna-Tabor, claiming Hosanna-Tabor had unlawfully retaliated against Perich by firing her for threatening to sue under the ADA.<sup>77</sup> Perich intervened in the suit, claiming unlawful retaliation under both the ADA and state law.<sup>78</sup> Hosanna-Tabor moved for summary judgment on the grounds that the ministerial exception barred Perich's claims.<sup>79</sup>

## 2. The Courts Below

The United States District Court for the Eastern District of Michigan granted Hosanna-Tabor's motion for summary judgment.<sup>80</sup> The court, after examining the "function and actual role"<sup>81</sup> of Perich's position, determined she was a ministerial employee.<sup>82</sup> It noted her title of "commissioned minister" and reasoned that the school had "treated [her] like a minister and held her out to the world as such long before [the] litigation began."<sup>83</sup> In addition, it determined that inquiring into Hosanna-Tabor's decision to fire Perich would impermissibly entangle church and state.<sup>84</sup>

The United States Court of Appeals for the Sixth Circuit reversed.<sup>85</sup> It noted that "the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the [ministerial] exception."<sup>86</sup> Because "Perich's employment duties were identical when she was a [lay] teacher and a called teacher,"<sup>87</sup> and her "primary function was teaching secular subjects,"<sup>88</sup> she was not a "minister" within the meaning of the ministerial exception, no matter her title.<sup>89</sup> In addition, the court asserted that "Perich's claim would not require the court to analyze any church doctrine."<sup>90</sup>

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76 *Id.*

77 *Id.* at 180.

78 *Id.*

79 *Id.*

80 *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 883 (E.D. Mich. 2008).

81 *Id.* at 887.

82 *Id.* at 891.

83 *Id.*

84 *Id.* at 891–92.

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

86 *Id.* at 778.

87 *Id.* at 779.

88 *Id.* at 780.

89 *Id.* at 780–81.

90 *Id.* at 781.

### 3. The Supreme Court's Opinion

The Supreme Court granted certiorari<sup>91</sup> and reversed the judgment of the court of appeals.<sup>92</sup> It officially adopted the ministerial exception doctrine, stating that both the Establishment Clause and the Free Exercise Clause “bar the government from interfering with the decision of a religious group to fire one of its ministers.”<sup>93</sup>

The Court began its analysis with the history of “[c]ontrovers[ies] between church and state over religious offices” leading to the adoption of the First Amendment—from Magna Carta’s declaration of church autonomy in England in 1215, to the Act of Supremacy’s designation of the English monarch as the supreme head of the church, to the Puritans’ flight to New England in search of greater religious autonomy, to the reactions of the southern colonists who, although they had brought the Church of England with them, “sometimes chafed at the control exercised by the Crown and its representatives over religious offices.”<sup>94</sup> The Court explained that the Religion Clauses were meant to “ensure[ ] that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices.”<sup>95</sup> It pointed to statements by James Madison, “the leading architect of the religion clauses of the First Amendment,”<sup>96</sup> who said “that the selection of church ‘functionaries’ was an ‘entirely ecclesiastical’ matter” left to the church’s discretion and who vetoed a bill that regulated the “election and removal of . . . [m]inister[s]” because of his understanding of the Establishment Clause.<sup>97</sup> Finally, the Court considered the church property disputes discussed above<sup>98</sup> that established church autonomy principles.<sup>99</sup>

The Court then officially adopted the ministerial exception that the courts of appeals had “uniformly recognized” to “preclude[ ] application of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers.”<sup>100</sup> It explained:

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or pun-

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91 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 563 U.S. 903 (2011) (mem.).

92 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012).

93 *Id.* at 181.

94 *Id.* at 182–83.

95 *Id.* at 184 (“The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”).

96 *Id.* (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011)).

97 *Id.* at 184–85 (emphasis omitted) (first quoting Letter from James Madison to Bishop John Carroll (Nov. 20, 1806), *reprinted in* 20 RECORDS AM. CATH. HIST. SOC’Y PHILA. 63 (1909); and then quoting 22 ANNALS OF CONG. 983 (1811)).

98 See discussion *supra* Section I.A.

99 *Hosanna-Tabor*, 565 U.S. at 185–87.

100 *Id.* at 188.

ishing 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 to 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>101</sup>

The Court next applied the ministerial exception to the case.<sup>102</sup> For the determination of whether an employee is a "minister" under the ministerial exception, the court declined "to adopt a rigid formula" and instead found it sufficient to conclude that Perich *was* a minister, "given all the circumstances of her employment."<sup>103</sup> It then described the four "considerations" that went into this conclusion: (1) "the formal title given Perich by the Church," (2) "the substance reflected in that title," (3) "her own use of that title," and (4) "the important religious functions she performed for the church."<sup>104</sup> It criticized the court of appeals for not "see[ing] any relevance in the fact that Perich was a commissioned minister,"<sup>105</sup> for giving "too much weight to the fact that lay teachers at the school performed the same religious duties as Perich,"<sup>106</sup> and for "plac[ing] too much emphasis on Perich's performance of secular duties."<sup>107</sup> The Court explained that the First Amendment barred it from providing the relief Perich sought because "requiring the Church to accept a minister it did not want . . . would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers," and awarding "frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees . . . would operate as a penalty on the Church

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101 *Id.* at 188–89.

102 *Id.* at 190.

103 *Id.*

104 *Id.* at 191–92 ("Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members . . . . Perich's title as a minister reflected a significant degree of religious training followed by a formal process of commissioning . . . . Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms. She did so in other ways as well . . . . Perich's job duties reflected a role in conveying the Church's message and carrying out its mission.").

105 *Id.* at 192–93 ("Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's position.").

106 *Id.* at 193 ("[T]hough relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions—particularly when, as here, they did so only because commissioned ministers were unavailable.").

107 *Id.* at 193–94 ("The heads of congregations themselves often have a mix of duties, including secular ones . . . . The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation . . . .").

for terminating an unwanted minister.”<sup>108</sup> The Court also affirmed that a religious group is free to fire, without government interference, its ministers for any reason, religious or not, so an inquiry into whether Hosanna-Tabor’s asserted reason for firing Perich was pretextual was unnecessary.<sup>109</sup>

The Court concluded with an acknowledgement of the competing interests at stake in ministerial exception cases. It acknowledged that society has an important interest in the enforcement of employment discrimination statutes.<sup>110</sup> It also affirmed that religious groups have an important interest, too, in “choosing who will preach their beliefs, teach their faith, and carry out their mission.”<sup>111</sup> In cases where fired ministers claim their termination was discriminatory, the courts need not and may not inquire into the church’s reasoning, because “the First Amendment has struck the balance for us.”<sup>112</sup>

Justice Alito, joined by Justice Kagan, concurred, writing a separate opinion asserting that because the term “minister” and the practice of “ordination” are not used by many religions, courts should focus on the *function* of the employee to determine who is a “minister” for purposes of the ministerial exception.<sup>113</sup> Under his reasoning, the ministerial exception exists because the First Amendment protects religious groups’ right to practice “certain key religious activities,” and consequently also their right to choose who will perform those “functions.”<sup>114</sup> Therefore, “[t]he ‘ministerial’ exception should be tailored to this purpose” and “apply to any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”<sup>115</sup> Because Perich “played a substantial role in ‘conveying the Church’s message and carrying out its mission,’” she was a minister, and the ministerial exception barred her suit.<sup>116</sup> Justice Alito agreed with the majority that it was irrelevant whether Hosanna-Tabor’s reason for firing Perich was pretextual and went even further to say that it would be “dangerous[ ]” to allow such an inquiry, because “[i]n order to probe the *real reason* for [Perich’s] firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine.”<sup>117</sup>

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108 *Id.* at 194.

109 *Id.* at 194–95 (explaining that the EEOC and Perich’s suggestion that Hosanna-Tabor’s reason for firing her was pretextual “misses the point of the ministerial exception,” because a church’s choice of minister “is the church’s alone”).

110 *Id.* at 196.

111 *Id.*

112 *Id.*

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

114 *Id.* at 199.

115 *Id.* at 204.

116 *Id.* at 204 (quoting majority opinion).

117 *Id.* at 205–06 (“The credibility of Hosanna-Tabor’s asserted reason for terminating [Perich’s] employment could not be assessed without taking into account both the importance that the Lutheran Church attaches to the doctrine of internal dispute resolution and the degree to which that tenet compromised [Perich’s] religious function . . . . [W]hatever the truth of the matter might be, the mere adjudication of such questions would pose

Justice Thomas wrote a concurring opinion as well, agreeing that “the Religion Clauses require civil courts to apply the ministerial exception” but asserting that civil courts must also “defer to a religious organization’s good-faith understanding of who qualifies as its minister.”<sup>118</sup> He explained that the Religion Clauses protect religious groups’ “autonomy in matters of internal governance,” including the right to select its ministers, and argued that this right would be “hollow” if civil courts were allowed to “second-guess” the religious group’s “sincere determination that a given employee is a ‘minister’ under the organization’s theological tenets.”<sup>119</sup> Underlying his argument was the premise that “[t]he question whether an employee is a minister is itself religious in nature,” and “the answer will vary widely,” given the variety of leadership structures and doctrines of religious groups.<sup>120</sup> A “bright-line test” or “multifactor analysis” for the determination of who is a “minister” would put at a disadvantage religious groups whose teachings or practices are unusual or disagreeable to the public.<sup>121</sup> In addition, such groups who are uncertain about whether their employment decisions would be protected by civil courts would be pressured to conform to mainstream ideas to avoid liability.<sup>122</sup> For Justice Thomas, the ministerial exception applied in this case merely because “Hosanna-Tabor sincerely considered Perich a minister.”<sup>123</sup>

#### D. *Courts of Appeals Decisions Post-Hosanna-Tabor: Applying the Ministerial Exception*

The Supreme Court’s decision to decline to adopt a “rigid formula” for the determination of who is a minister, combined with the concurring opinions’ presentations of competing clearer rules, has unsurprisingly led to a lack of consistency among the circuit courts in the application of the ministerial exception.

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grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church’s overall mission.”).

118 *Id.* at 196 (Thomas, J., concurring).

119 *Id.* at 196–97.

120 *Id.* at 197.

121 *Id.*

122 *Id.* For example, many Christian denominations use the titles “Pastor,” “Reverend,” or “Father” when referring to the leaders of their churches. A court evaluating the employment relationship between a church and an employee with one of these titles would almost certainly conclude that this employee is a minister. Knowing this, a religious group who would not otherwise use a formal title such as these may be induced to do so, in order to increase its likelihood of protection under the ministerial exception. In addition, if ordination or formal religious training were specific “factors” in the analysis, a religious group may be induced to require its employees to participate in a ceremony or to undergo religious training and acquire a certificate, in order to ensure the group’s protection under the ministerial exception.

123 *Id.* at 198.

Less than a year after *Hosanna-Tabor* was decided, the Fifth Circuit applied the newly stated ministerial exception in *Cannata v. Catholic Diocese of Austin*.<sup>124</sup> Cannata, the former music director of a Catholic church, sued the diocese, claiming his employment had been terminated in violation of the ADEA and the ADA.<sup>125</sup> Because he “lacked the requisite education, training, and experience” for “liturgical responsibilities,” Cannata had been responsible for other tasks, including overseeing the budget of the music department, managing and maintaining the sound equipment in the music room and music area of the sanctuary, and rehearsing with and accompanying choir members and cantors during church services.<sup>126</sup> Following *Hosanna-Tabor*’s lead, and describing its method as a “totality-of-the-circumstances analysis,” the Fifth Circuit concluded that the ministerial exception applied in the circumstances of the case.<sup>127</sup> The court affirmed that Cannata’s secular duties and lack of formal religious training were not dispositive.<sup>128</sup> Rather, after looking at the evidence, it accepted the diocese’s assertion that music plays an “important role . . . in the celebration of Mass.”<sup>129</sup> The Court reasoned that because Cannata played piano during Mass and “made unilateral important decisions regarding the musical direction at Mass,” he “played an integral role in the celebration of Mass,” thereby “further[ing] the mission of the church” and “help[ing to] convey the church’s message and carry out its mission.”<sup>130</sup>

Three years later, in a case called *Conlon v. InterVarsity Christian Fellowship/USA*, the Sixth Circuit applied the ministerial exception to the employment discrimination claims of a former spiritual director of an evangelical campus mission.<sup>131</sup> The court determined that the mission, called InterVarsity Christian Fellowship/USA (IVCF), although neither a church nor an organization “tied to a specific denominational faith,” was “an organization that can assert the ministerial exception” because its Christian name and “mission of Christian ministry and teaching” were “marked by clear [and]

124 700 F.3d 169 (5th Cir. 2012).

125 *Id.* at 170.

126 *Id.* at 171.

127 *Id.* at 176.

128 *Id.* at 177.

129 *Id.* (“[The diocese] introduced evidence that all musicians, regardless of whether they are professional or volunteer or work full- or part-time, ‘exercise a genuine liturgical ministry,’ meaning that they ‘work[ ] in collaboration with the parish pastor in carrying out the Church’s mission by participating in the threefold ministry of Christ.’ In particular, [the diocese] produced evidence that the Music Director provides a major service by overseeing the planning and coordination of the church’s music program, fostering the active participation of the ‘liturgical assembly’ in singing, and promoting the various musicians—choir members, psalmists, cantors, and organists—all of whom play instruments in service of the liturgy. Thus, the person who leads the music during Mass is an integral part of Mass and ‘a lay liturgical minister actively participating in the sacrament of the Eucharist.’” (second alteration in original) (quoting Brief of Appellees at 14–15, *Cannata*, 700 F.3d 169 (No. 11-51151)).

130 *Id.* at 177–78.

131 *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 831 (6th Cir. 2015).

obvious religious characteristics.”<sup>132</sup> The Sixth Circuit, while acknowledging that the *Hosanna-Tabor* Court declined to “adopt a rigid formula” for the determination of who qualifies as a minister, then applied the same “four factors” considered by the Supreme Court.<sup>133</sup> It found that two of the four factors—formal title and religious function—were present in the case, and held that these two factors together are sufficient to conclude that an employee is a minister.<sup>134</sup> This rather formulaic analysis arguably conflicts with the Fifth Circuit’s looser totality-of-the-circumstances approach.<sup>135</sup>

In 2017, the Second Circuit applied the ministerial exception to the sex discrimination and retaliation claims of Fratello, a former principal of a Catholic school.<sup>136</sup> After carefully examining the archdiocese’s administrative manual for its schools, which detailed the mission of the schools and the role of their principals, the court took into consideration Fratello’s religious job functions and her performance evaluations.<sup>137</sup> The court emphasized that the factors considered in *Hosanna-Tabor* were not exclusive in the determination of whether an employee is a minister.<sup>138</sup> Because *Hosanna-Tabor* provided “only limited direction,” it explained, it decided to “receive and accept substantial further guidance from the concurrence of Justice Alito,” which it found to be “persuasive and extremely helpful.”<sup>139</sup> After holding that courts should primarily focus on the function of the employee in their determination of who is a minister,<sup>140</sup> it applied the four “considerations” listed in *Hosanna-Tabor* and concluded that although Fratello’s formal title “weigh[ed] against application of the ministerial exception,” she was a minister because “she served many religious functions to advance the School’s Roman Catholic mission.”<sup>141</sup> This focus on religious function puts the Second Circuit at odds with the Fifth Circuit’s totality-of-the-circumstances approach and the Sixth Circuit’s rule that formal title and religious function together are sufficient.

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132 *Id.* at 833–34 (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)); *see also id.* at 831 (“IVCF’s purpose ‘is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God’s Word, God’s people of every ethnicity and culture and God’s purposes in the world.’”).

133 *Id.* at 834–35.

134 *Id.*

135 *Compare Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) (“Any attempt to calcify the particular considerations that motivated the Court in *Hosanna-Tabor* into a ‘rigid formula’ would not be appropriate.”), *with Conlon*, 777 F.3d at 835 (“[W]here both factors—formal title and religious function—are present, the ministerial exception clearly applies.”).

136 *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 192 (2d Cir. 2017).

137 *Id.* at 193–97.

138 *Id.* at 204 (“*Hosanna-Tabor* instructs only as to what we *might* take into account as relevant, including the four considerations on which it relied; it neither limits the inquiry to those considerations nor requires their application in every case.”).

139 *Id.* at 205.

140 *Id.*

141 *Id.* at 206–09.



In 2018, the Seventh Circuit heard an appeal from Grussgott, a former Hebrew teacher for a Jewish day school, who claimed her employment had been terminated due to her cognitive issues resulting from a brain tumor, in violation of the ADA.<sup>142</sup> The court held that the school was a religious institution entitled to the ministerial exception because of its religious mission, despite its nonobservance of Orthodox principles, lack of ordained clergy in a supervisory role, and nondiscrimination policy.<sup>143</sup> Per the court, whether Grussgott was a minister was a “closer question.”<sup>144</sup> While noting that the Court in *Hosanna-Tabor* “expressly declined to delineate a ‘rigid formula’ for deciding when an employee is a minister,” it examined the four factors considered in *Hosanna-Tabor* because they “provide a useful framework.”<sup>145</sup> The court found that Grussgott’s job title and the use of her title weighed against, but the substance reflected in her title and her important religious functions supported, application of the ministerial exception.<sup>146</sup> It suggested that “where there is no sign of subterfuge,” a court should defer to “a religious organization’s designation of what constitutes religious activity.”<sup>147</sup> Rejecting a rule focused on function, the Seventh Circuit concluded that, under the totality of the circumstances, Grussgott was a minister because “[h]er integral role in teaching her students about Judaism and the school’s motivation in hiring her, in particular, demonstrate that her role furthered the school’s religious mission,” so the ministerial exception barred her claim.<sup>148</sup> The Seventh Circuit therefore adopted a totality-of-the-circumstances approach similar to that of the Fifth Circuit, but with deference to a religious organization’s determination of what constitutes a religious activity when analyzing an employee’s religious function.

## II. WHY DEFERENCE TO RELIGIOUS GROUPS IS CONSTITUTIONALLY REQUIRED

This lack of consistency in analysis among the circuits is evidence that the courts of appeals need more guidance from the Supreme Court as they apply the ministerial exception. *Hosanna-Tabor* confirmed that the Free Exercise Clause “protects a religious group’s right to shape its own faith and mission through its appointments,” and the Establishment Clause “prohibits government involvement in . . . ecclesiastical decisions,” including the determination of “which individuals will minister to the faithful.”<sup>149</sup> Together, they support the existence of a ministerial exception that “precludes applica-

142 Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 656–57 (7th Cir. 2018).

143 *Id.* at 657–58.

144 *Id.* at 658.

145 *Id.* at 658–59 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012)).

146 *Id.* at 660.

147 *Id.*; *see also id.* (“[D]rawing a distinction between secular and religious teaching . . . [is] difficult [and] impermissibly entangles the government with religion.”).

148 *Id.* at 657; *see id.* 661–62 (rejecting a rule focused on function).

149 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012).

tion of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers.”<sup>150</sup> The parameters of who qualifies as a minister should be set keeping in mind this rationale for the existence of the ministerial exception in the first place—the importance of religious groups’ autonomy in deciding religious matters.<sup>151</sup>

The term “minister” itself is problematic and may be adding to the inconsistency in the courts’ determination of which employees a religious group may hire and fire without interference by the government. There are many conflicting common usages of the word. The current version of the Oxford English Dictionary provides a variety of definitions, including, “a person holding authority by virtue of his rank within a Christian religious order or similar organization,” “a person appointed to perform a liturgical duty or other service in the Christian church,” “a member of the clergy; an ordained pastor,” and “an official of a non-Christian religion.”<sup>152</sup> These conflicting common usages may confuse the inquiry and obscure the meaning of “minister” as a legal term of art in the ministerial exception context.<sup>153</sup> In addition, because the term “minister” is primarily used by Protestant religions,<sup>154</sup> there is a danger that the ministerial exception will be “tether[ed] . . . too close[ly] to the Protestant Christian concept of ministers.”<sup>155</sup> Judge Posner of the Seventh Circuit has criticized the terms “ministerial exception” and “ministers exception” as “too narrow” and has suggested the doctrine be called the “internal affairs doctrine” instead.<sup>156</sup>

However, given the widespread use of the term “minister” in the ministerial exception context, it is unlikely to be replaced. The conflicting common usages, though, make it all the more important for the Supreme Court to provide a clear definition or test for “minister” as a legal term of art. Uncertainty in the definition undermines the desire of religious organizations and lower courts to “structure their actions in accordance with the law”<sup>157</sup> and may disadvantage nonmainstream religious groups.<sup>158</sup> It has also caused some courts of appeals to apply *Hosanna-Tabor*’s four considerations as a framework for their analysis despite their acknowledgement that the Court in *Hosanna-Tabor* did not intend to adopt a “rigid formula.”<sup>159</sup> As noted above, the Supreme Court recently granted certiorari in two cases arising out of the

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150 *Id.* at 188.

151 *See id.* at 199 (Alito, J., concurring) (“The ‘ministerial’ exception should be tailored to [its] purpose.”).

152 *Minister, n.*, OXFORD ENGLISH DICTIONARY (3d ed. 2002).

153 *See Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 569–70 (7th Cir. 2019) (discussing confusion inherent in the term “ministerial exception”).

154 *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 198 (2012) (Alito, J., concurring).

155 *Biel v. St. James Sch.*, 911 F.3d 603, 621 (9th Cir. 2018) (Fisher, J., dissenting).

156 *Schleicher v. Salvation Army*, 518 F.3d 472, 474–75 (7th Cir. 2008).

157 *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012).

158 *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

159 *See, e.g., Biel*, 911 F.3d at 607–09; *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 659–60 (7th Cir. 2018); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 206 (2d Cir.

Ninth Circuit,<sup>160</sup> which has adopted a fairly restrictive definition of “minister,” limiting it to include only those employees who “serve a leadership role in the faith.”<sup>161</sup> Although the oral arguments were postponed,<sup>162</sup> the Court will give its take on the Ninth Circuit’s definition soon.

This Part describes a variety of approaches the Court could choose to adopt to determine who qualifies as a “minister” for purposes of the ministerial exception. This Note argues that “minister” should be defined as an employee who plays a role “of substantial religious importance”<sup>163</sup> in furtherance of the religious group’s mission. It also expands on Justice Thomas’s concurring opinion in *Hosanna-Tabor* by arguing that because an accurate application of the legal term of art “minister” to any employee of a religious group requires an investigation into and an analysis of the religious group’s particular doctrine and beliefs, and civil courts are constitutionally barred from performing such investigations, civil courts must defer to the religious group’s determination of which of its employees play a role “of substantial religious importance” and are therefore ministers.

#### A. Option 1: Only Clergy

One option for the definition of “minister” is to limit it to clergy. Although the relative ease in applying this definition is appealing, a requirement of formal ordination or title was not supported by any member of the Court in *Hosanna-Tabor* or any of the circuits. Rather, this definition has been explicitly rejected,<sup>164</sup> and the term “minister” has been applied in the ministerial exception context to a variety of nonclergy, including a lay choir director,<sup>165</sup> a canon-law faculty member of a university,<sup>166</sup> a nonordained associate in pastoral care,<sup>167</sup> and faculty of a seminary.<sup>168</sup> One problem with using this restrictive definition is that it would pigeonhole religious groups and pressure them to use ordination or certain formal titles for their employ-

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2017); *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 834 (6th Cir. 2015); *Cannata*, 700 F.3d at 176.

160 See *supra* notes 6–7 and accompanying text.

161 *Biel*, 911 F.3d at 611; see also *infra* Section II.B (discussing the possibility of defining a “minister” as a religious group’s leaders and decisionmakers).

162 *St. James School v. Biel*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/st-james-school-v-biel/> (last visited Mar. 30, 2020).

163 *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

164 See *id.* at 190 (majority opinion) (“Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree.”); see, e.g., *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010) (en banc) (“[T]he ministerial exception encompasses more than a church’s ordained ministers.”).

165 *Starkman v. Evans*, 198 F.3d 173, 175 (5th Cir. 1999).

166 *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996).

167 *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).

168 *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. Unit A July 1981).

ees in order to defend themselves under the ministerial exception. This type of government-caused coercion is inappropriate under the Establishment Clause and its underlying principles of religious autonomy. Some circuits have, however, laid down a rule that although not all ministers are clergy, all members of the clergy are *per se* ministers.<sup>169</sup>

### B. Option 2: Leaders and Decisionmakers

A less restrictive definition of “minister” could be a religious group’s leaders and decisionmakers, i.e., those employees who make decisions regarding the religious group’s governance, faith, worship, message, and mission. These employees are held out as models of the faith and representatives of the values of the religious group. Examples of positions that would qualify as “ministers” under this definition include priests, imams, pastors, worship leaders (including musicians), and religion teachers, but it would likely exclude teachers of secular subjects without religious duties, janitorial staff, cooks, and similar positions with little influence on decisions regarding religious matters.

This definition is supported by *Hosanna-Tabor*’s discussion of the history leading to the Establishment Clause and the Founders’ intention to “foreclose the possibility of a national church.”<sup>170</sup> *Hosanna-Tabor* described how the king in the Magna Carta accepted the English Church’s right to “freedom of elections,” but after the English monarchy again took control over who may be the church’s officials and required ministers to assent to certain tenets of faith and follow certain modes of worship, the Puritans fled to the New World “to elect their own ministers and establish their own modes of worship.”<sup>171</sup> All of these concerns dealt with who had the authority to make decisions regarding the faith—the church or the Crown. *Hosanna-Tabor* also asserted that the Religion Clauses were meant to “ensure[ ] that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices”<sup>172</sup> and supported this assertion by referencing statements and actions of James Madison, “the leading architect of the religion clauses of the First Amendment,”<sup>173</sup> who maintained that the Constitution precluded the federal government from influencing the “selection,” “election,” or “removal” of “ecclesiastical individuals.”<sup>174</sup> These officials and

169 See, e.g., *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991) (“Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts . . . .”); *Alcazar*, 627 F.3d at 1291 (“The paradigmatic application of the ministerial exception is to the employment of an ordained minister . . . .”).

170 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182–85 (2012).

171 *Id.* at 182 (quoting J.C. HOLT, *MAGNA CARTA* app. IV, at 317, cl. 1 (1965)).

172 *Id.* at 184.

173 *Id.* (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011)).

174 *Id.* at 184–85 (quoting Letter from James Madison, *supra* note 97) (in response to the Catholic bishop’s request for his opinion regarding who should direct the affairs of the

“ecclesiastical individuals” were the decisionmakers. If the new federal government could influence who could be the decisionmakers, like the English Crown could, it could influence the resulting decisions directing the religious group and thereby effectively establish a national church. This result is what the Establishment Clause was intended to prevent.

This concern over the power of the government to influence a religious group’s decisionmakers, and thereby its decisions, underlies the holdings of the church property dispute cases that *Hosanna-Tabor* cites. In *Watson v. Jones*, the Court stated, “[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been *decided* by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such *decisions* as final, and as binding on them.”<sup>175</sup> In *Kedroff*, the Court held, “[R]eligious organizations [have] . . . power to *decide* for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>176</sup> Multiple circuit courts have quoted this statement in the context of the ministerial exception, indicating this religious decision-making autonomy described in *Kedroff* lives on as reasoning underlying the ministerial exception doctrine.<sup>177</sup>

The language other circuit courts have used before and after *Hosanna-Tabor* to describe the principles underlying the ministerial exception also indicates the importance of keeping religious leaders and decisionmakers out from under the influence of the government. The Fourth Circuit has declared, “Any attempt by government to restrict a church’s free choice of its *leaders* . . . constitutes a burden on the church’s free exercise rights.”<sup>178</sup> The Seventh Circuit said the ministerial exception is based on the assumption that “Congress does not want courts to interfere in the *internal management* of churches,” including *decisions* as to “whom to ordain (or retain as an ordained minister), how to allocate authority over the affairs of the church, or which rituals and observances are authentic.”<sup>179</sup> The Fifth Circuit in *Can-nata* determined that a church music director was a minister “[b]ecause he made unilateral, important *decisions* regarding the musical direction at

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Catholic Church in the newly acquired Louisiana Purchase, replying that the “scrupulous policy of the Constitution in guarding against a [p]olitical interference with religious affairs” precluded the federal government from giving its opinion on the “selection of ecclesiastical individuals”); and quoting 22 ANNALS OF CONG. 983 (1811) (vetoing a bill that would have incorporated the Protestant Episcopal Church within the District of Columbia because it would have violated the Establishment Clause, especially because it “comprehend[ed] even the election and removal of the Minister of the [Church]”).

175 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872) (emphasis added).

176 *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (emphasis added).

177 *See, e.g., Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

178 *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (emphasis added).

179 *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008) (emphasis added).

Mass.”<sup>180</sup> The Seventh Circuit, citing *Hosanna-Tabor*, asserted that under both Religion Clauses, “religious organizations are free to hire and fire their ministerial *leaders* without governmental interference.”<sup>181</sup>

The Ninth Circuit in *Biel v. St. James School* adopted this definition of “minister.”<sup>182</sup> It said that although “[r]eligious organizations enjoy a broad right to select their own leaders,” the First Amendment “does not provide carte blanche to disregard antidiscrimination laws when it comes to other employees who do not serve a leadership role in the faith.”<sup>183</sup> The court suggested that an employee must be tasked with “pronounced religious leadership and guidance” in order for him or her to be considered a “minister.”<sup>184</sup> It referenced the “historical backdrop to the First Amendment” focusing on “heads of congregations and other high-level religious leaders” as support for the notion that, “to comport with the Founders’ intent, the [ministerial] exception need not extend to every employee whose job has a religious component.”<sup>185</sup>

Despite the support described above, defining “ministers” as the leaders and decisionmakers of a religious group is insufficient to protect the religious autonomy contemplated by the Religion Clauses. The Establishment Clause’s text, historical backdrop, and intention suggest it prohibits the establishment of a national church and therefore also governmental interference in the selection of religious leaders. However, this clause is only part of the basis of the ministerial exception doctrine. The First Amendment also protects the “free *exercise*” of religion,<sup>186</sup> which encompasses not only religious beliefs and decisions, but also actions and practices in accordance with those beliefs, including religious functions. For the same reason it would be dangerous for the government to interfere in the selection of religious leaders because of its resulting influence on their decisions, it would be dangerous for the government to interfere with the selection of those who will perform religious functions because of its resulting influence on their actions. To protect the religious autonomy contemplated by the First Amendment and reiterated in the Supreme Court cases regarding church property disputes, the circuit court decisions building the ministerial exception, and *Hosanna-Tabor*, any definition of “minister” must include not only the leaders but also those employees who perform religious functions for the religious group.<sup>187</sup>

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180 *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 178 (5th Cir. 2012) (emphasis added).

181 *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 657 (7th Cir. 2018) (emphasis added).

182 *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 680 (2019) (mem.).

183 *Id.* at 606, 611.

184 *Id.* at 610.

185 *Id.* at 610–11.

186 U.S. CONST. amend. I (emphasis added).

187 *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring) (“The First Amendment protects the freedom of religious

C. *Option 3: Those Who Perform Key Religious Functions*

In his concurrence, Justice Alito advocated a functional definition of minister, expanding it from religious leaders to “any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”<sup>188</sup> He explained, “Religious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance.”<sup>189</sup> He acknowledged that different religious groups will have different views as to which positions qualify as being “of substantial religious importance,” but he justified his list of “key” religious functions by saying that these functions are “essential to the independence of practically all religious groups.”<sup>190</sup>

Prior to *Hosanna-Tabor*, many circuits had adopted a functional definition of “minister” for purposes of the ministerial exception. A common functional definition was that “ministers” included ordained ministers in addition to employees whose “primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.”<sup>191</sup> The Fourth Circuit, this definition’s original judicial source, admitted that the application of this functional definition “necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church.”<sup>192</sup>

This requirement is problematic. The purpose of the ministerial exception is to protect religious groups’ autonomy in religious matters, for the sake of both the religious group and the polity. Part of the problem with the application of employment discrimination laws to the employment relationship between a religious group and its minister is that investigation into the claims would entail impermissible government entanglement with religion, in violation of the Establishment Clause.<sup>193</sup> An investigation into the impor-

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groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions.”).

188 *Id.*

189 *Id.* at 200.

190 *Id.* at 199–200.

191 *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)). Many other cases used this functional definition, as well. *See, e.g.*, *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 778 (6th Cir. 2010); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 887 (E.D. Mich. 2008).

192 *Rayburn*, 772 F.2d at 1169.

193 *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) (describing a “concern . . . that in investigating employment dis-

tance of an employee's role to the mission of the church would likely entangle the government in a religious question even more problematically than would an investigation into why the church fired the employee. In addition, civil courts are simply "inept" to "inquir[e] into the value of an employee in furthering a religious institution's sectarian mission."<sup>194</sup> As this question is religious in nature, the religious group, not a civil court, is in the best position to answer this question, and the civil court is actually prohibited from doing so. Finally, the Free Exercise Clause protects not only religious activity but also religious beliefs, and religious beliefs and doctrine are central to the determination of the importance of an employee's role in furthering a religious group's mission. A religious group has a First Amendment right to declare whether its employee plays an important religious role in accordance with its own religious beliefs and doctrine, as this is essentially a religious question, so a court must defer to the religious group's determination.

In addition, a specific list of activities crucial to the autonomy of "practically all" religious groups could still leave some groups out in the cold. Depending on a given religion's specific beliefs, a person may be a messenger or a teacher of the faith merely by living his or her life in accordance with the religion's values,<sup>195</sup> yet a civil court using a functional definition might disagree that this practice is a religious "function." The importance of other more unusual practices of nonmainstream religious groups also are at risk of being misunderstood by civil courts.

#### *D. Option 4: Those Who Are Ministers Under the Totality of the Circumstances*

The *Hosanna-Tabor* Court declined to adopt a "rigid formula" to determine whether an employee qualifies as a minister for purposes of the ministerial exception, opting instead for, arguably, a "totality-of-the-circumstances test."<sup>196</sup> Its opinion does provide principles and considerations with elements from all of the definitions discussed above, suggesting that the term

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crimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal"); see *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019); *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 426–29 (2d Cir. 2018); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 202 (2d Cir. 2017); *Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 956–57 (9th Cir. 2004).

194 *Hosanna-Tabor*, 582 F. Supp. 2d at 891.

195 In June 2015, Pope Francis proclaimed, using a quote popularly attributed to St. Francis of Assisi, "Preach the Gospel always, and if necessary, use words!" Pope Francis, Homily at the Holy Mass and Blessing of the Sacred Palladium for the New Metropolitan Archbishops on the Solemnity of Saints Peter and Paul, Apostles (June 29, 2015), [http://w2.vatican.va/content/francesco/en/homilies/2015/documents/papa-francesco\\_20150629\\_omelia-pallio.html](http://w2.vatican.va/content/francesco/en/homilies/2015/documents/papa-francesco_20150629_omelia-pallio.html).

196 *Grussgott*, 882 F.3d at 661; see also *Biel v. St. James Sch.*, 911 F.3d 603, 607 (9th Cir. 2018), cert. granted, 140 S. Ct. 680 (2019) (mem.). But see *Biel v. St. James Sch.*, 926 F.3d 1238, 1244 (9th Cir. 2019) (Nelson, J., dissenting).



“minister” encompasses not only “the head of a religious congregation” but also employees who “personify [the religious group’s] beliefs” or “preach their beliefs, teach their faith, and carry out their mission.”<sup>197</sup> It proclaimed that the Free Exercise Clause “protects a religious group’s right to shape its own faith and mission through its appointments.”<sup>198</sup>

Some courts have embraced this totality-of-the-circumstances approach. In *Grussgott*, the Seventh Circuit, after applying the four “factors” considered in *Hosanna-Tabor*, concluded, “[I]t is fair to say that, under the totality of the circumstances in this particular case, the importance of Grussgott’s role as a ‘teacher of [ ] faith’ to the next generation outweighed other considerations.”<sup>199</sup> Even prior to *Hosanna-Tabor*, courts had used similar multifactor tests.<sup>200</sup>

However, there are problems with applying the general principles of *Hosanna-Tabor* to other cases without the aid of a clear test. Theoretically, all mere followers of a religious group—including all employees—could be expected to “personify its beliefs.”<sup>201</sup> In addition, it may be argued that practically all church employees, from the pastor to the custodian, “minister” to (i.e., attend to the needs of)<sup>202</sup> the faithful.<sup>203</sup> Surely a custodian serves the congregation by ensuring the facilities are kept clean and stocked, even if he or she does not lead a bible study. It may also be argued that every mere follower conveys the church’s message by preaching its beliefs, teaching its faith, or carrying out its mission. These general principles from a totality-of-the-circumstances test easily broaden the definition of minister to encompass every employee of a religious group. Without an underlying specific definition of “minister,” the term is too ambiguous to be useful, especially given its conflicting common usages. A single clear definition is needed.

In addition, the looseness of a totality-of-the-circumstances test gives courts broad discretion in its application, creating a risk of inconsistency and bias. Courts are able to pick and choose which circumstances and factors they will emphasize, potentially disadvantaging nonmainstream religious groups and leading to inconsistent results.

197 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188, 190, 196 (2012).

198 *Id.* at 188.

199 *Grussgott*, 882 F.3d at 661 (second alteration in original) (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)).

200 *See, e.g., Starkman v. Evans*, 198 F.3d 173, 175–77 (5th Cir. 1999).

201 *Hosanna-Tabor*, 565 U.S. at 188; *see, e.g., EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 780 (6th Cir. 2010) (“*Hosanna-Tabor* . . . characterizes its staff members as ‘fine Christian role models’ . . . .”); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (“[F]aculty members are expected to serve as exemplars of practicing Christians . . . .”).

202 *See Minister, v.*, OXFORD ENGLISH DICTIONARY (3d ed. 2002) (“To serve, perform the function of a servant; to attend to the comfort or needs of another; to assist, be of use . . . .”).

203 *Hosanna-Tabor*, 565 U.S. at 194–95.

Finally, and most importantly, courts are still put in the position of deciding how important an employee's role is to the mission of the religious group. This is essentially a religious question that is for the religious group alone to decide.

These weaknesses illustrate that the Court must provide a clearer definition of "minister," yet none of the definitions discussed above are sufficient to protect the religious autonomy interests embodied in the Establishment Clause and the Free Exercise Clause.

### *E. Option 5: Deference to the Religious Group*

Recognizing the problems inherent in tasking the court with deciding what is essentially a religious question, Justice Thomas concluded that a civil court must defer to the religious group in the determination of whether its employee is a "minister." He asserted, "[T]he Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister."<sup>204</sup> He argued that in order for religious organizations to have "autonomy in matters of internal governance, including the selection of those who will minister the faith," secular courts cannot "second-guess" their "sincere determination that a given employee is a 'minister' under the organization's theological tenets."<sup>205</sup> He claimed deference is required because "[t]he question whether an employee is a minister is itself religious in nature," and creating a more substantive test would create the risk of disadvantaging nonmainstream religious groups because a judge might not "understand [their] religious tenets and sense of mission."<sup>206</sup>

This view is supported, implicitly or explicitly, by other courts and even Justice Alito in his concurrence. When Justice Alito explained why it was inappropriate for a civil court to inquire into whether a religious group's asserted reason for firing its minister was pretextual, he asserted:

The mere adjudication of . . . questions [regarding the importance of a religious doctrine] would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission.<sup>207</sup>

Adjudication of the importance of the employee to the mission of a religious group, which would involve a determination of religious doctrine, poses the same problems. This concern played out in *Cannata*.<sup>208</sup> When the Fifth Circuit investigated whether the church's former music director had been a "minister," it evaluated "evidence" put forth by the church in support

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204 *Id.* at 196 (Thomas, J., concurring).

205 *Id.* at 197.

206 *Id.*

207 *Id.* at 205–06 (Alito, J., concurring).

208 *See supra* notes 124–30 and accompanying text.

of its claim that musicians “carry[ ] out the Church’s mission.”<sup>209</sup> The *civil court* determined that music played an “important role . . . in the celebration of Mass” and that therefore the music director did, too.<sup>210</sup> These are clearly evaluations of religious doctrine, which civil courts are barred from undertaking under the Establishment Clause. The religious importance of the roles of aspects of worship, whether art or persons, are for religious groups, not civil courts, to determine.<sup>211</sup> The Seventh Circuit echoed this sentiment in the context of the application of the term “minister” to a church organist:

If the Roman Catholic Church believes that organ music is vital to its religious services, and that to advance its faith it needs the ability to select organists, who are we judges to disagree? Only by subjecting religious doctrine to discovery and, if necessary, jury trial, could the judiciary reject a church’s characterization of its own theology and internal organization. Yet it is precisely to avoid such judicial entanglement in, and second-guessing of, religious matters that the Justices established the rule of *Hosanna-Tabor*.<sup>212</sup>

Deference to the religious group in the application of the term “minister” in the ministerial exception is essential. What was missing from Justice Thomas’s opinion, however, was a clear definition of “minister.” He claimed that “[j]udicial attempts to fashion a civil definition of ‘minister’ through a bright-line test or multifactor analysis risk disadvantaging” nonmainstream religious groups.<sup>213</sup> However, without a definition, this legal term of art is meaningless. A religious group could not accurately determine whether its employee is a “minister” without some guidance as to what that term means. In addition, the First Amendment grants religious groups autonomy to decide religious questions but not legal questions.

*F. Option 6: Those Who Play a Role “of Substantial Religious Importance” as Determined by the Religious Group*

This Note argues that “minister” for purposes of the ministerial exception should be defined as any employee who plays a role “of substantial religious importance”<sup>214</sup> within the organization. This role may include involvement in teaching the religious group’s tenets, conveying its message, leading its worship or ceremonies, or otherwise furthering its mission, as defined by the religious group.

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209 See *supra* note 129.

210 *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177–78 (5th Cir. 2012).

211 Cf. *Biel v. St. James Sch.*, 911 F.3d 603, 619 (9th Cir. 2018) (Fisher, J., dissenting) (“The courts may not evaluate the relative importance of a ministerial duty to a religion’s overall mission or belief system.”).

212 *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019).

213 See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 197 (2012) (Thomas, J., concurring).

214 This phrase was taken from Justice Alito’s concurrence in *Hosanna-Tabor*. *Id.* at 200 (Alito, J., concurring). Although he did not intend to use it as a test for “minister,” it is a useful definition.

Skeptics may be concerned that if civil courts defer to a religious group's determination, religious groups will unfairly take advantage of this protection. One response to this valid concern is that this risk may be mitigated by limiting deference, as Justice Thomas did, to determinations made by religious groups in good faith.<sup>215</sup> If there are "sign[s] of subterfuge" indicating the religious group is merely attempting to avoid a statutory obligation in its determination, deference may not be appropriate.<sup>216</sup> Although Justice Thomas and multiple circuits have proposed this solution, it is difficult to see how enforcing it will not cause the entanglement concerns the deferential approach was meant to prevent. An investigation into why a religious group determined an employee played a role "of substantial religious importance" would impermissibly entangle the government with religion as much as an investigation into why the religious group fired the employee would. Although a deferential approach incorporates a risk of abuse by religious groups, this risk must be accepted, because the First Amendment prohibits civil courts from second-guessing a religious group's answers to religious questions, and any application of the term "minister" in the ministerial exception context will involve a religious question. Religious groups' legal and moral obligations to tell the truth must be relied on to settle this concern.

#### CONCLUSION

In conclusion, the full realization of the religious autonomy established by the First Amendment requires a ministerial exception that precludes civil courts from investigating employment discrimination claims by employees whom a religious group has determined played a role "of substantial religious importance" in furtherance of the religious group's mission. Since the nineteenth century, the Supreme Court has protected churches' exclusive right to make judgments involving church doctrine and governance. The courts of appeals have respected this principle of religious autonomy by building the ministerial exception doctrine to protect the free exercise of religion and to prevent excessive government entanglement with religion, and by applying the doctrine to a variety of employees whom they deemed to be "ministers." The *Hosanna-Tabor* Court blessed the courts of appeals' efforts by officially adopting the ministerial exception, but the Court neglected to provide a clear definition of the all-important term "minister." The courts of appeals,

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215 See *id.* at 196 (Thomas, J., concurring) ("[T]he Religion Clauses require civil courts . . . to defer to a religious organization's good-faith understanding of who qualifies as its minister.").

216 *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018); see *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc) (quoting *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006)) ("[I]f a church labels a person a religious official as a mere 'subterfuge' to avoid statutory obligations, the ministerial exception does not apply."); see also *Tomic*, 442 F.3d at 1039 ("[I]f to avoid having to pay the minimum wage to its janitor a church designated all its employees 'ministers,' the court would treat the designation as a subterfuge.").

attempting to apply *Hosanna-Tabor* in subsequent cases, have used inconsistent approaches to apply the term “minister” in the circumstances of each case. The Ninth Circuit has chosen to limit ministers to those employees who are “leaders” of the religious group; the Second Circuit has chosen to focus on the function of the employee; and the Seventh Circuit contemplates some role for deference to a religious organization, at least in the determination of which activities constitute a religious function.

As Justice Thomas argued, however, deference to religious groups in the ministerial exception context is required by the Religion Clauses. The United States is home to a great variety of religious groups, not just those who adhere to traditional Protestant doctrine and concepts of “minister.” Some faiths, like Jehovah’s Witnesses and Catholicism, consider all their members to be ministers.<sup>217</sup> For this reason, a clear definition of “minister” as a legal term of art is needed. This Note’s proposed definition of “minister,” an employee who plays a role “of substantial religious importance” in furthering the religious group’s mission, is sufficiently broad to protect all religious groups yet sufficiently precise to give the term an identifiable meaning. This and any other definition of “minister” will incorporate concepts such as “message” and “mission” and center on the religious importance of the employee to the religious group. Because the church itself defines its message and mission, the civil courts must defer to the church’s determination of who spreads that message and carries out that mission. Adjudication of such questions by civil courts would inevitably require the courts to make evaluations of religious doctrine, which the Religion Clauses prohibit them from making.

Civil courts must defer to the religious group’s determination of whether its employee served an important religious role. Otherwise, civil factfinders would be involved in the evaluation of religious doctrine, because the religious importance of an employee’s role can only be determined by the application of religious doctrine. This government evaluation of religious doctrine would infringe on the religious group’s free exercise rights and violate the Establishment Clause. In its upcoming ministerial exception cases, *Biel* and *Our Lady of Guadalupe School*, the Supreme Court should provide a clearer definition of “minister” and call for deference to a religious group’s determination of which of its employees play a role “of substantial religious importance.”

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217 See *Who Are God’s Ministers Today?*, WATCHTOWER, Nov. 15, 2000, 15, 16, (“According to the Bible, all Jehovah’s worshippers—heavenly and earthly—are ministers.”); U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 6–7 (6th ed. 2018) (“By virtue of their Baptism, lay faithful are called to participate actively in the Church’s life and mission.” (citing POPE JOHN PAUL II, CHRISTIFIDELES LAICI no. 29 (1988))).