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Religious Ministers and the Scope of Their Rights to Non-Discrimination in Employment

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Abstract

The First Amendment is currently thought to bar ministerial employees from any recourse against their religious employer under a wide variety of non-discrimination statutes and other forms of legal protection. The typical critique of this state of affairs seeks to narrow the class of persons who count as ministerial employees. This paper focuses instead on an important, and peculiar, aspect of the ministerial exception doctrine. At present, the law generally prohibits any recovery by ministerial employees for employment discrimination by their religious employer even where the employer's reasons for the discrimination have nothing to do with any religious doctrine, belief, article of faith, or religious practice. And it is not clear whether the religious employer can freely waive this unduly broad immunity, even for the most laudable reasons. This Article criticizes this state of the law as unjustified.

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I. Introduction

It is well-established that all employees who are deemed to be religious ministers of their religious employer fall entirely outside the protection of a wide range of employment discrimination statutes.[1] Whatever the logic of this principle, its costs are clear and substantial.[2] Criticism of this principle, however, has been confined largely to the broadly inclusive scope of who the law treats as a religious minister.[3] This Article discusses these criticisms, but

1. *See* discussion *infra* Part II (discussing the widely recognized 'ministerial exception' to employment non-discrimination statutes). As for context and significance, it has been said that "[e]mployment discrimination cases are . . . the largest single category of federal civil rights cases, comprising nearly ten percent of the total federal civil docket." Deanna C. Brinkerhoff, Note, *A More Employee-Friendly Standard For Pretext Claims After Ash v. Tyson*, 8 NEV. L.J. 474, 474 (2007).

2. *See infra* Part III (describing the substantial deprivation of employees' rights caused by broad application of the ministerial exception).

3. *See infra* Parts IV–V (reasoning that the over-inclusive nature of the ministerial exception is due in part to poorly defined boundaries in the Supreme Court's First Amendment jurisprudence).

points to an entirely different approach to the values, costs, and tradeoffs involved.[4]

In particular, this Article emphasizes the curious fact that the law denies protection to ministers from employment discrimination quite regardless of whether the discriminatory employment decision has even the slightest relation to any religious doctrine, practice, belief, or article of faith.[5] Ministers are thus denied the most basic employment discrimination protections even when the religious employer concedes that the adverse employment decision had nothing to do with any religious tenet.[6]

This odd, if quite typical, result does not optimally accommodate the plainly important value conflicts that commonly attend ministerial employment discrimination cases. This Article proposes most importantly that, at a first approximation, non-discrimination statutes should apply in all cases involving religious ministers where it is determined that no relevant religious belief, broadly understood, played any significant role in the adverse employment decision at stake.[7]

Various complications are then addressed.[8] However, it is important to recognize that the above proposal could reasonably be endorsed by the most conscientious defenders as well as critics of religious beliefs and religious institutions. It is hardly obvious that the most effective way to protect important religious liberties over the long term is to insist on the universal exclusion of ministers from basic civil rights protections, where no relevant religious belief is implicated, and even where the religious employer's beliefs are apparently flouted by the discrimination in question.

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4. *See infra* Part VI (suggesting that more narrow applications of the ministerial exception would preserve employees' rights, while still providing religious employers with the benefits of First Amendment protection).

5. *See infra* Part II (distinguishing the treatment of employment discrimination claims involving non-religious employers from those subject to the ministerial exception).

6. *See* infra Part II (assessing the absence of judicial inquiry into the personnel decisions of religious employers).

7. *See infra* Part III (arguing that the ministerial exception, as currently applied, affords too much deference to religious employers to engage in baseless discrimination).

8. *See infra* Parts IV–VI (enumerating the complexities inherent to reforming the ministerial exception).

II. The Current Supreme Court Case Law on the Scope of the Ministerial Exception

A constitutionally-based ministerial exception to the protection of basic employment discrimination laws was recognized in the 2012 case of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[9] *Hosanna-Tabor* involved the employment termination of a "called"[10] religious elementary school teacher, Cheryl Perich, allegedly in violation of the American with Disabilities Act.[11] Perich and the EEOC sought Perich's reinstatement or front pay, backpay, compensatory and punitive damages, as well as injunctive relief, along with attorney's fees.[12]

Chief Justice Roberts, writing for the Court, declared that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[13] The Court thus validated numerous appellate court opinions[14] adopting a 'ministerial exception'[15] to employment non-discrimination statutes.[16]

In this respect the Court declared that:

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9. 565 U.S. 171, 190 (2012) (finding there is a ministerial exception within the First Amendment).

10. *See id.* at 177 ("'Called' teachers are regarded as having been called to their vocation by God through a congregation.").

11. *See id.* at 179 (citing the Americans with Disabilities Act of 1990 42 U.S.C. § 1201 et seq.); *id.* at 180 ("The EEOC brought suit against Hosanna–Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit.").

12. *Id.* at 180.

13. *Id.* at 181.

14. *See id.* at 188.

> The Courts of Appeals . . . have had extensive experience with this issue. Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a "ministerial exception," grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.

15. *See id.* ("We agree that there is such a ministerial exception.").

16. *See id.* at 190 ("Having concluded that there is a ministerial exception grounded in the Religion Clauses of the First Amendment, we consider whether the exception applies in this case. We hold that it does.").

> 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 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.[17]

This result was thought to flow from both the Free Exercise Clause[18] and the Establishment Clause.[19] In particular, "[b]y imposing an unwanted minister, the state infringes the Free Exercise . . . right to shape [the church's] own faith and mission through its appointments."[20] "According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits governmental involvement in such ecclesiastical decisions."[21] Thus the claims at issue in *Hosanna-Tabor* were held to involve "government interference with an internal[22] church decision that affects the faith and mission of the church."[23]

On this basis, the Court was required to determine whether Perich, as a "called"[24] but not formally ordained 'minister,' should be classified as a minister for purposes of the constitutional

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17. *See id*. at 188. Of course, arresting and imprisoning a minister on grounds of church-related fraud, or any number of other criminal offenses, equally clearly deprives the church of the ability to determine who shall be its ministers, regardless of who, inside or beyond the religious employer, may have been victimized by the offense.

18. *See id.* ("By imposing an unwanted minister, the state infringes the Free Exercise Clause . . . ").

19. *See id*. at 189 ("[T]he power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.").

20. *Id*. at 188.

21. *Id*. at 188–89.

22. *See id.* at 190. The idea of an "internal" church employer decision is inevitably contestable in its scope and meaning; an 'internal' church decision may have substantial effects on 'external' parties as in the case, for example, of a church decision to close or relocate a social service or outreach activity.

23. *Id*. at 190.

24. *See id.* at 177 ("To be eligible to receive a call from a congregation, a teacher must complete certain academic requirements.").

ministerial exception.[25] The Court, in answering the question, declined to adopt a "rigid formula"[26] for distinguishing ministers from non-ministers. Instead, the Court opted to consider "all the circumstances"[27] of Perich's employment.

The Court then referred to a number and variety of such circumstances in Perich's case and summarized its conclusions in the following fashion: "[i]n 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"[28] and thus barred from any redress.[29]

The Court offered no explanation for why courts are both able and entitled to determine, in this context, but not others, what counts as an "important" religious function.[30] Crucially, though, the Court then addressed the claim that the Church's asserted religious reason for dismissing Perich was pretextual, rather than a genuinely motivating consideration.[31] Here, the Court rejected broadly any judicial inquiry into any possible employer pretextualism in ~~any~~ instances of the discipline of employee ministers.[32]

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25. *See id.* at 188 (finding that the 'ministerial exception' applies in *Hosanna-Tabor*).

26. *Id.* at 190.

27. *Id.*

28. *Id.* at 192.

29. *See id.* at 194 ("Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.").

30. *See id.* at 192 (highlighting that the Justices did not elaborate on the definition of "important religious functions").

31. *See id.* at 194–95.

32. *See id.* at 194.

> The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual. That suggestions misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason.

The Court's blanket rejection of any judicial inquiry into the sincerity or insincerity of the religious employer's proffered reason for any ministerial disciplinary action is surprising because courts routinely inquire into the sincerity, candor, honesty, and credibility of professed religious beliefs.[33] But the Court's rationale for barring any judicial inquiry into pretext or sincerity was not restricted to cases in which the ministerial discipline was motivated by religious reasons.[34]

Instead, the Court declared that

> The purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful – a matter 'strictly ecclesiastical' . . . – is the church's alone.[35]

Thus, on *Hosanna-Tabor*'s approach, whether the minister was disciplined for entirely religious reasons, mixed religious and secular reasons, entirely secular reasons, or indeed legally invidious secular reasons is legally irrelevant.[36]

Chief Justice Roberts' opinion for the Court then concluded by holding open the question of whether the ministerial exception

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33. *See, e.g.*, Yellowbear v. Lampert, 741 F.3d 48, 54 (2014) (citing United States v. Seeger, 380 U.S. 163, 184–85 (1965)) (reasoning that to determine a claimant's sincerity the Court must look to whether the claimant "actually holds the beliefs he claims to hold"); Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) (applying this test to non-mainstream religious prisoner accommodation cases); *see also* United States v. Hoffman, 436 F. Supp. 3d 1272, 1283–85 (D. Ariz. 2020) (noting that when a court concludes a defendant's beliefs are religious, the court must inquire into the sincerity of those religious beliefs). For judicial skepticism as to particular claims of religious sincerity, see United States v. Christie, 825 F.3d 1048, 1051 (9th Cir. 2016) (disputing religious sincerity in marijuana enterprise cases); United States v. Zimmerman, 514 F.3d 851, 854 (9th Cir. 2007) (discussing judicial concern for apparent inconsistencies in the RFRA claimants' asserted beliefs).

34. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194 (2012) (citing Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952)) (noting that "the authority to select and control who will minister to the faithful . . . is the church's alone").

35. *See id.* at 194–95 (internal quotations omitted).

36. *See id.* at 194–95 (stating that the suggestion that the employee's firing was pretextual "misses the point of the ministerial exception").

should apply to cases other than employment termination.[37] In particular, the Court expressed "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."[38]

In closing, though, *Hosanna-Tabor* apparently focused on the importance to religious employers of distinctively religious beliefs, faith, and mission.[39] By way of summary, the Court declared that

> [t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The Church must be free to choose those who will guide it on its way.[40]

In declaring that the First Amendment itself dictates a broad ministerial exception, even apart from any religious grounds for employment termination, the Court adopted an absolutist interpretation of the relevant First Amendment considerations.[41] No familiar judicial balancing test of any kind is thus to be applied.[42] In particular, and despite the undoubted importance of

37. *See id.* at 196 (limiting the Court's opinion to the question of whether an employment discrimination suit may be brought by a minister fired by her church).

38. *Id.* Of course, a termination of a minister that is alleged to violate some employment discrimination or civil rights statute may in some instances involve, as well, a purported breach by the employer of a legally binding employment contract. These two theories of recovery are hardly mutually exclusive. *See* Petruska v. Gannon Univ., 462 F.3d 294, 310–12 (3d Cir. 2006) (concluding that the Free Exercise Clause does not bar a state law contract claim).

39. *See Hosanna-Tabor,* 565 U.S. at 196 (discussing the latitude given to religious employers under the ministerial exception).

40. *Id.*

41. *See id.* at 181 (finding that the "Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers").

42. *See id.* at 195–96 (applying the ministerial exception immediately upon concluding that the employee qualified for the exception).

a range of anti-discrimination statutes and principles,[43] the ministerial exception cannot, regardless of circumstances, be overcome even by a narrowly tailored statute effectively promoting any appropriately compelling government interest.[44]

In *Hosanna-Tabor*, concurring opinions were issued respectively by Justice Thomas[45] and Justices Alito and Kagan.[46] Both concurring opinions addressed questions of ministerial status.[47] Justice Thomas wrote that on questions of who counts as a minister, the courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister."[48] Interestingly, this deferential approval itself requires a more or less intrusive judicial inquiry into the religious organization's good faith or sincerity.[49]

Justices Alito and Kagan, in contrast, sought to clarify the scope of the ministerial exception in substantive, criterial terms.[50] While still embracing the value of judicial deference,[51] the ministerial exception should, in their view, "apply to any

43. *See id.* at 196 (emphasizing the importance of employment discrimination statutes).

44. *See id.* (discussing the ministerial exception without regard to a traditional balancing test which would consider government interest and the scope of a statute). Or perhaps the idea is that even where the religious employer's interest is entirely secular, if not plainly pretextual, the civil rights or non-discrimination interest at stake simply cannot rise to the level of 'compelling,' or of any other sufficient degree of relative importance. *See* Sarah Fulton, Petruska v. Gannon University: *A Crack in the Glass Ceiling*, 14 WM. & MARY J. WOMEN & L. 197, 200–01 (summarizing the balancing tests used by courts in ministerial exception cases).

45. *See generally* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196–98 (2012) (Thomas, J., concurring).

46. *See generally id.* at 198–206 (Alito & Kagan, JJ., concurring).

47. *See id.* at 196 (describing a deferential approach to determining the employee's status) (Thomas, J., concurring); *see id.* at 198 (proposing a definition of minister that relates to the function of the role, rather than simply the title) (Alito & Kagan, JJ., concurring).

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

49. *See id.* (highlighting that even a deferential standard requires inquiry by courts).

50. *See id.* at 198–99 (Alito & Kagan, JJ., concurring) (outlining the functional aspects of an employee's role that would qualify them as a minister).

51. *See id.* at 199 ("[W]e have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.").

'employee' who leads a religious organization, conducts worship services or important religious ceremonies, rituals, or serves as a messenger or teacher of its faith."[52] This formulation apparently requires some degree of judicial inquiry into how "important" a religious practice is to its practitioners.[53] In any event, the formulation allows for breadth of the ministerial exception, in substantive terms, through the unavoidable vagueness of the idea of service "as a messenger or teacher"[54] of the organization's faith.[55]

Justices Alito and Kagan expressed no objection to extending the ministerial exemption to entirely secular reasons for the dismissal of a ministerial employee.[56] But the focus of their logic in providing for a ministerial exception is on protecting the preservation and expression of the employer's religious doctrine.[57] In particular, "[t]he 'ministerial' exception gives concrete protection to the free expression and dissemination of any religious doctrine."[58] Of course, ministerial employees can be subjected to discipline for entirely secular, if not anti-doctrinal, reasons.[59] But Justices Alito and Kagan reject any judicial inquiry into pretextual, as distinct from actual, reasons for dismissing a ministerial employee.[60]

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52. *Id.*

53. *See id.* at 200 (discussing how "[r]eligious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance" and noting that "[d]ifferent religions will have different views on exactly what qualifies as an important religious position").

54. *See id.* at 199 (offering a method of inquiry into whether an employee of a religious organization meets the ministerial exception).

55. *See id.* (reiterating that the purpose of the exception is to respect an organization's faith under the First Amendment).

56. *See generally id.* at 198–206.

57. *See id.* at 199–201 ("Religious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance.").

58. *Id.* at 202.

59. *See* Elvig v. Ackles, 123 Wash. App. 491, 496 (Wash. Ct. App. 2004) (finding that if liability is predicated on secular conduct and does not involve religious belief or interpretation, then the First Amendment does not protect the church).

60. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 205–06 (2012) (Alito & Kagan, JJ., concurring) (arguing that a pretextual inquiry would undermine religious autonomy).

Their logic in this respect focuses on a case in which the credibility of a religious reason for the dismissal depends upon a judicial assessment of the religious importance of that asserted reason.[61] In such cases, inquiry into pretext "would require calling witnesses to testify about the importance and priority of the religious doctrine in question."[62] The court would then have to determine "what the accused church really believes, and how important that belief is to church's overall mission."[63]

How troubling this concern on the part of Justices Alito and Kagan should be is at best unclear. The courts routinely inquiry not only into religious sincerity,[64] but into the more or less subjective substantiality of burdens on religious beliefs and practices.[65] Courts thus commonly inquire, without undue cost, into claims as to the degree of burdensomeness of legal rules bearing upon religious exercise and belief.[66]

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61. *See id. (*"The credibility of Hosanna-Tabor's asserted reason for terminating respondent's employment could not be assessed without taking into account both the importance that the Lutheran Church attaches to the doctrine of internal dispute resolution and the degree to which that tenet compromised respondent's religious function.").

62. *Id.* at 206.

63. *Id.*

64. *See, e.g.*, the discussion by then Judge Gorsuch in Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014) (citing the "centrality" of a religious belief as beyond judicial determination in Religious Land Use and Rights of Institutionalized Persons cases); *see also* Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) (finding a particular practice deemed "central and fundamental to the religion in question"); *see also* Holt v. Hobbs, 574 U.S. 352, 360–61 (2015) ("[A] prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation.").

65. *See, e.g.*, *Holt*, 574 U.S. at 361–62 ("RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise."); Marianist Province of U.S. v. City of Kirkwood, 944 F.3d 996, 1000–01 (8th Cir. 2019) (citing a Congressional mandate stating that RLUIPA "shall be construed in favor of broad protection of religious exercise"); Fox v. Washington, 949 F.3d 270, 276–77 (6th Cir. 2020) (citing the RLUIPA statutory language requiring a judicial inquiry into whether a government rule would impose "a substantial burden on . . . religious exercise").

66. *See Holt*, 574 U.S. at 360–61 (emphasizing the degree of burdensomeness relating to religious exercise and belief); *Marianist Province*, 944 F.3d at 1000–01 (using RLUIPA to protect religious exercise under the First Amendment); *Fox*, 949 F.3d at 276–77 (identifying the burden that judicial inquiries place on religious exercise).

The significance of the Justices' concerns in this regard also depends on the choice of particular tests, standards of required proof, evidentiary burden placements, and the existence and strength of any evidentiary presumptions. If the courts choose to place crucial evidentiary burdens on the discharged clerical employee, to presume the truth of the employer's claims, to defer more or less strongly to the employer's assertions, and to require that the discharged employee prove her case beyond a mere preponderance of the evidence, then the judicial burden on, and intrusiveness into, religious exercise would be even further reduced. The stringency of any required showing of causation can also be varied.[67]

In addition, it should be borne in mind that in most typical cases, there need be no inquiry at all into whether some specified religious value or belief is, in any sense, important or unimportant.[68] The recommendation herein is to require the employer to offer only some minimally sufficiently credible assertion of any religious justification at all, whatever the doctrinal importance or unimportance of the religious tenet in question.[69] Only in the rarest of cases will there be any need for inquiry into, let alone testimony addressing, the importance or unimportance of a religious belief in order to determine whether

67. *Compare* Wright v. Lassiter, 921 F.3d 413, 419 (4th Cir. 2019) (requiring actual causation and "but-for" causation to succeed on a First Amendment and RLUIPA claim), *with* Yaacov v. Mohr, No. 1:16-CV-2171, 2021 U.S. Dist. LEXIS 254066, at *21–24 (N.D. Ohio Nov. 9, 2021) (stating that when ruling on RLUIPA at the summary judgment stage, causation is the single element, and that with § 1983 claims, the burden is establishing liability only based on involvement with the alleged constitutional deprivation).

68. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 205–06 (2012) (Alito & Kagan, JJ., concurring) (rejecting an inquiry into the religious organization's beliefs when adjudicating a ministerial exception case).

69. *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 57–58 (2011) (advocating for the ministerial exception and highlighting the standard set in Employment Division, Department of Human Resources of Oregon v. Smith which argues that burdens on exercise of religion did not require a justification if they were neutral and generally applicable).

there is any minimally sufficient religious grounds for the employment action at issue.[70]

Finally, religious employers who are potentially subject to non-discrimination rules generally face much higher costs for dishonesty in respect of their purported religious beliefs.[71] Most institutional religious entities care, and are required by their constituencies to care, about their public image, their actual and perceived integrity, doctrinal integrity, and general institutional credibility.[72] To fall short in any of these respects invites defections, schisms, diminished revenues, demoralization, fewer converts, and a general loss in public standing and credibility.[73] These are substantial and commonly increasing vulnerabilities.[74]

More specifically, institutional religious employers face relatively strong incentives to avoid disingenuousness or hypocrisy in their own policy and employment decisions.[75] Offering what appears to be a contrived, after-the-fact, inconsistent, or dubious religious rationale for an employment decision risks further erosion of already insecure public support. Even on the religious doctrinal merits, most religious institutions themselves condemn mendacity and hypocrisy as a matter of general principle.[76]

In particular, any perception of institutional religious dishonesty in the form of employment discrimination or civil rights violation is especially costly, and increasingly so in the current

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70. *See Hosanna-Tabor*, 565 U.S. at 205–06 (Alito & Kagan, JJ., concurring) (rejecting the need for an inquiry into the religious organization's beliefs when determining if the ministerial exception applies).

71. *See* ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 191–230 (2012) (tracing major declines in Church affiliation over time).

72. *See id.* at 121 (highlighting the growing dissatisfaction and retreat of American youth who view religion as "judgmental, homophobic, hypocritical, and too political").

73. *See id.* at 121–60 (explaining how poor public opinion correlates with major declines in religious affiliation and/or conversions to other religions).

74. *See id.* at 121–23 (illustrating the growing objections to religious leaders).

75. *See* JAMES EMERY WHITE, THE RISE OF THE NONES 111–26 (2014) (emphasizing that in order for Churches to retain or gain followers they must be truthful).

76. *See, e.g.*, *Exodus* 20:16 (prohibiting the bearing of false witness in court and not lying in the service of one's interest).

era.[77] The perception of institutional discrimination or of discriminatory attitudes is apparently among the reasons for substantial numbers of individual departures from one's religious tradition.[78] Institutional religions already pay some price even for entirely sincere, doctrinally grounded judgments that are widely perceived as discriminatory.[79] But it can hardly help to engage in discrimination against protected categories of persons where the asserted religious grounds are widely perceived as insincere, hypocritical, contrived, or ad hoc.[80]

The concerns of Justices Alito and Kagan, and of the Court more generally in this respect, are thus excessive at best. Whatever the more specific rules and presumptions the law might care to adopt, legally requiring merely a minimally credible, on-the-record, public declaration of some religious grounds for adverse and otherwise discriminatory employment decisions regarding

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77. *See, e.g., Poll: Large Majorities, Including Republicans, Oppose Discrimination Against Lesbian, Gay, Bisexual, and Transgender People by Employers and Health Care Providers*, KFF (June 24, 2020) (finding that 90% of adults agree that it should be illegal for employers to fire or refuse to hire people because they are lesbian, gay, bisexual or transgender) [perma.cc/46UN-PFK7]; *New HRC Poll Finds Vast Majority of Voters Support Employment Anti-Discrimination Laws*, HUM. RTS. CAMPAIGN (Dec.13, 2011) ("[S]upport for employment protections [for LGBT people] spans an array of demographics including: the majority of Democrats, Republicans, Independents, Catholics, Protestants, weekly churchgoers, and even born-again Christians, and across age and race.") [perma.cc/E765-4D85]; *Overwhelming Public Support For the Americans with Disabilities Act, But Disagreements Exist on What Should Count as a Disability*, THE HARRIS POLL (June 24, 2015) (reporting that roughly 90% of adults support the idea that employers may not discriminate against qualified candidates on the basis of a disability) [perma.cc/LBD6-STWM].

78. *See, e.g.,* Dan Merica, *7 Reasons Catholics Leave the Church*, CNN (Mar. 30, 2012) (finding that the most cited reasons for leaving the Catholic Church include the Church's discriminatory views of gay people and women) [perma.cc/7PE5-62W2].

79. *Id.* (highlighting that the Catholic Churches discriminatory thoughts and practices has caused people to leave the church).

80. Consider the case of a religious employer that doctrinally objects to, say, all consensual sexual activity outside of marriage but apparently disciplines disproportionately only particular subcategories of such activity. *See, e.g.,* Nathaniel Frank*, World Vision Tongue-Tied on Anti-Gay Religious Hypocrisy*, SLATE (Apr. 1, 2014) ("World Vision is not, in fact, upholding the Biblical covenant of marriage, as it chooses to allow divorced and remarried people to be employees, which the Bible clearly condemns as sinful . . . the ban on married gay employees is a matter of World Vision selectively reading the Bible to rationalize anti–gay bias.") [perma.cc/KP6N-9D54].

ministerial employees need not significantly impair the religious rights of institutional employers.

In *Hosanna-Tabor*, the dismissed ministerial employee had alleged discrimination on the doctrinally uncontroversial grounds of disability discrimination.[81] The more recent Supreme Court case *Our Lady of Guadalupe School v. Morrissey-Berru*[82] involved similarly religiously uncontroversial, if not indeed doctrinal prohibitions against, claims of statutory discrimination on grounds of age[83] as well as disability.[84] In *Morrissey-Berru*, the primary focus of the Court's attention was on the distinction between ministerial and non-ministerial employees.[85] But the Court in *Morrissey-Berru* also developed *Hosanna-Tabor's* broad immunity of religious employers with respect to discriminatory treatment of their ministerial employees.[86]

The majority in *Morrissey-Berru* quoted *Hosanna-Tabor* as to "the right of . . . religious institutions to decide matters of faith and doctrine without government intrusion."[87] But this principle, with which we take no issue herein, is then extended into the realm of "church govern[ance]."[88] Autonomy in what is referred to as 'church governance' does not entail "a general immunity from

81. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (describing a disability discrimination claim where a Lutheran church allegedly fired the plaintiff for taking sick leave for a chronic narcolepsy condition).

82. 140 S. Ct. 2049 (2020).

83. *See id.* at 2058 (explaining an age discrimination claim arguing that a Catholic primary school demoted the plaintiff and failed to renew her contract so that they could replace her with a younger teacher).

84. *See id.* at 2059 (describing a disability discrimination claim against a Catholic primary school that allegedly fired the plaintiff for requesting leave for breast cancer treatment).

85. *See id.* at 2060 ("Under this [ministerial exception] rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.").

86. *See id.* at 2062 ("The application of the 'ministerial exception' should 'focus on the function performed by persons who work for religious bodies' rather than labels or designations that may vary across faiths.") (citing *Hosanna-Tabor*, 565 U.S. at 198).

87. *Id.* at 2060 (internal quotation marks omitted).

88. *Id.* (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC., 565 U.S. 171, 186 (2012)).

secular laws."[89] But the autonomy principle does apply, ambiguously, to "internal management decisions that are essential to the institution's central mission."[90]

The Court in *Morrissey-Berru* interpreted the scope of management decisions essential to the employer's central mission to encompass "the selection of the individuals who play certain key roles,"[91] or ministerial employees.[92] The ambiguity, and the fundamental problem, is that the Court extends the scope of employer immunity well beyond the religious, doctrinal, or faith-based mission into areas irrelevant to any such matters.[93] The Court's own logic in endorsing such employer autonomy simply does not reasonably encompass employment decisions made on secular grounds.

The Court thus observes that without the power to maintain its own institutional faith and doctrine, "a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith."[94] This concern, issues of academic freedom aside, is certainly understandable. And it is this kind of concern that apparently underlies and motivates the basic idea of a ministerial exception.[95]

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89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.* (explaining the ministerial exception, which prevents courts from getting involved with employment disputes regarding any employees considered to be ministers).

93. *See id.* at 2072 (Sotomayor & Ginsburg JJ., dissenting) ("The Court reaches this result even though the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic.").

94. *Id.* at 2060 (majority opinion); *see also* Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 553 F. Supp. 3d 616, 618 (S.D. Ind. Aug. 11, 2021) (describing a situation where a private Catholic school terminated an employee when it learned she had a same-sex marriage); *see also* Rehfield v. Diocese of Joliet, 182 N.E.3d 123, 137 (Ill. Feb. 4, 2021) (explaining that without the employer's broad power to remove on both religious and non-religious grounds, "a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith").

95. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020) (explaining that the ministerial exception is meant to "protect [schools'] autonomy with respect to internal management decisions that are essential to the institution's central mission").

However, there is clearly a difference between the dismissal of a ministerial employee for what is thought to be heretical teaching and dismissing a ministerial employee because their disability is thought to require, say, additional record keeping by the employer. The Court appears to recognize that not all matters of internal governance will be "closely linked"[96] to matters of faith and doctrine.[97] What the Court appears not to appreciate, however, is that dismissing a ministerial employee on grounds bearing not the slightest relation to, if not actually contradicting, institutional doctrine, faith, and belief has no direct relationship, by definition, to maintaining or advancing that religious mission.

No doubt there will be closer cases. Ministerial school teachers may be terminated not because of alleged heresy, or out of disdain for civil rights and non-discrimination norms, but because of religious school closings and consolidations.[98] Fairly undertaken, such terminations need not involve any discriminatory decisions. And in any event, a religious entity that finds itself financially overextended can certainly justify its fiscal belt-tightening priorities in terms of protecting the ability to carry out its religious mission with scarce resources.[99]

In their dissent in *Morrissey-Berru*, Justices Sotomayor and Ginsburg are concerned primarily with what they see as the undue breadth of the ministerial exception.[100] But Justices Sotomayor and Ginsburg rightly observe that

> [w]hen it applies, the [ministerial] exception is extraordinarily potent: It gives an employer free

96. *Id.* at 2061.

97. *See id.* (describing prior applications of the ministerial exception, noting that they relied on the "broad principles" and were not "exclusively concerned with the selection or supervision of clergy.").

98. *See* Giulia McDonnell Nieto del Rio, *A Growing Number of Catholic Schools are Shutting Down Forever*, N.Y. TIMES (Sept. 5, 2020) (updated Oct. 27, 2021) (detailing widespread closures of Catholic high schools across America, due to debt, declining enrollment, and the Coronavirus pandemic) [perma.cc/H7JV-QPJG].

99. *See id.* (noting that many Catholic schools were forced to close to due financial hardships).

100. *See Morrisey-Berru*, 140 S. Ct. at 2075 (2020) (Sotomayor & Ginsburg, JJ., dissenting) (expressing their belief that the decision in this case was a re-write of the *Hosanna-Tabor* decision, making the ministerial doctrine less of a legal framework and more of a vague test).

> rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their "ministers," even when the discrimination is wholly unrelated to the employer's religious beliefs or practices . . . . That is, an employer need not possess a religious reason at all; the ministerial exception even condones animus.[101]

It is one thing to infer from this, as do Justices Sotomayor and Ginsburg,[102] that the ministerial exception should not be extended to certain kinds of employees.[103] That amounts to a "who should count as a minister?" approach. Our primary focus herein is instead on the religious employer's publicly-presented justification for disciplining a ministerial employee where a non-ministerial employee might bring a claim of employment discrimination on prohibited grounds. In particular, the appropriate course would involve, with whatever burdens, rules, tests, and presumptions are deemed best, a judicial distinction between religious doctrinal, belief, or faith-based grounds on the one hand, and non-religious or secular grounds on the other.

III. The Fundamental Problems With the Ministerial Exception

Any approach to the question of ministerial exceptions must bear some relation to even more fundamental questions, including what should count as a 'religion' in the first place, and of the proper relationships between religious entities and the state.

There is no consensus on what counts as a religious employer, or as a religious belief.[104] In fact, there is no consensus even on what a definition of religion would look like.[105] The philosopher Philip Devine usefully distinguishes between two main approaches

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101. *Id.* at 2072.

102. *See id.* (stating that the ministerial exception was applied to teachers that "taught primarily secular subjects, lacked substantial religious titles, and training, and were not even required to be Catholic.").

103. *Id.* (same).

104. *See* Victoria S. Harrison, *The Pragmatics of Defining Religion in a Multi-Cultural World*, 59 INT'L J. PHIL. & RELIGION 133, 135 (2006) (detailing the difficulty of defining religious beliefs).

105. *See* Philip E. Devine, *On the Definition of "Religion"*, 3 FAITH & PHIL. 270, 270–71 (1986) (discussing the ambiguity of the definition of religion).

in attempting to define religion: "One looks for necessary and sufficient conditions – for sets of properties possessed by all and only religions. A second abandons the search for necessary and sufficient conditions and looks instead for a set of religion-making characteristics, establishing a family resemblance among the various phenomena called 'religion.'"[106]

In substantive terms, some attempts to define religion have focused on non-worldly rewards and punishments, or other fates and consequences.[107] Other attempts have focused on faith in some greater power.[108] One might also look to considerations such as the kind, strength, and sincerity of belief.[109] One might turn one's attention to some more or less distinctive function or purpose of religious belief, with an emphasis on whatever a believer's ultimate concerns might be.[110] One might seek an alternative to a definitional approach,[111] or some alternative that is less ambitious than many classical attempts to define religion.[112]

As a general matter, and certainly for our purposes, no distinctive definition of religion, or of religious belief, need be adopted. After all, as has been classically observed, "the Supreme Court has never seriously discussed how the term should be defined for constitutional purposes."[113] Little is lost, for our present purposes, if there is no consensus on why typically mainstream, or

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106. *Id.* at 271.

107. *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 603 (1982) (revealing that some attempts to define religion have centered around a paradigm of supernatural consequences).

108. *See* Andrew Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1, 42 (1991) ("[R]eligious beliefs are founded not only in faith, but in a faith that there is some greater power . . .").

109. *See* Mark Strasser, *Definitions, Religion, and Free Exercise Guarantees*, 51 TULSA L. REV. 1, 1 (2015) (explaining that the definition of religion depends upon "the sincerity of the beliefs, sometimes the strength of the beliefs or the role that they play in an individual's life, and sometimes the kind of beliefs").

110. *See* Note, *Towards a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1067 (1978) (stating that religions are derived from "the underlying concern which gives meaning and orientation to a person's whole life"). .

111. *See* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 769 (1984) (advocating for the analogical approach).

112. *See* Eduardo Penalver, Note, *The Concept of Religion*, 107 Yale L. J. 791, 794 (1997) (proposing that "religion" should be construed "under the First Amendment in its evolving, everyday sense").

113. Choper, *supra* note 107, at 579.

otherwise reasonably recognizable, religious entities should count as religious.

Nor is there any practical need to adopt herein any distinctive approach to the fundamental question of the proper division between religious and secular authority, or what is parochially referred to as church and state relations. Approaches to such questions have varied dramatically even within a particular religious tradition, over even a limited segment of time.[114] And there is no current consensus as to the proper understanding of church-state relations under the Constitution.[115] Professor John Witte argues, for example, that "[a]t least five understandings of separationism became commonplace in the opening decades of the American republic."[116] And in the contemporary era, Professor Stephen Carter has observed that "when we use the phrase

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114. Consider, initially, the ambivalence of St. Augustine: "When it is considered how short is the span of human life, does it really matter to a man whose days are numbered what government he must obey, so long as he is not compelled to act against God or his conscience?" ST. AUGUSTINE, THE CITY OF GOD Book V 113 (Gerald G. Walsh et al., trans.) (Image Books abridged ed., 1958) (~420). But then consider the range of later disputed views. *See, e.g.*, John of Salisbury, POLICRATICUS 32 (Cary J. Nederman trans., 1990) (~1159)

> This sword is . . . accepted by the prince from the hand of the Church, although it still does not possess the bloody sword entirely. For while it has this sword, yet it is used by the hand of the prince, upon whom is conferred the power of bodily coercion, reserving spiritual authority for the papacy.

Dante, Monarchy book III, § xvi, at 94 (Prue Shaw trans., 1996) (~1315) (stating that while temporal authority flows from God without any intermediary, yet "[l]et Caesar . . . show the reverence toward Peter which a firstborn son should show his father"); Marsilius of Padua, The Defender of the Peace 551 (Annabel Brett trans., 2005) (1324) ("It is a matter for the faithful human legislator alone to judge with coercive judgment candidates for ecclesiastical orders and their adequacy."); William of Ockham, A Dialogue, in A Letter to the Friars Minor and Other Writings part III, tract II 239 (Arthur Stephen McGrade & John Kilcullen eds., 1995) (~1340) ("[J]ust as spiritual matters are controlled by priests and ecclesiastics so are temporal matters by secular rulers and laymen."); Nicolas of Cusa, The Catholic Concordance III, 1, no. 293 (Paul E. Sigmund trans., 1996) (1433) (describing the emperor as "the one ruler of the world exercising his authority over the others in a plenitude of power, and in his own sphere he is the equal of the Roman pontiff in the temporal hierarchy").

115. *See* John Witte, *The Serpentine Wall of Separation*, 101 MICH. L. REV. 1869, 1889 (2003) (detailing separationism's complicated history).

116. *Id.* at 1889.

'separation of church and state,' I suspect that few of us can really guess what the other is talking about."[117]

Neither the idea of religion and religious belief nor a conception of the proper division between secular and religious authority would conflict with the approach taken herein recognizing the rights of ministerial employees, however defined, against basic employment discrimination on grounds not reflecting religious employer doctrine, tenet, or belief. Whatever their preferences on the policy merits, scholars tend to acknowledge that ministerial employers have essentially no protection, under the major non-discrimination statutes, from dismissal even where the religious belief of the employer plays no role.[118] Simply put, the variously discriminatory dismissals of ministerial employees "need not be religiously motivated."[119] Or a bit more elaborately, religious employers are immune from ministerial discrimination suits "regardless of the reasons for their employment actions."[120] In all such cases, "the courts may not even look into the reasoning."[121]

There is a basic concern at work here for avoiding 'entanglement' between the religious employers and the state, and more precisely, for avoiding undue or excessive entanglement between the religious employer and the state.[122] It is hardly clear, though, that a concern to avoid any excessive entanglement must rule out any entanglement at all, especially where some degree of

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117. Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 293 (2002). For further complications, see Kent Greenawalt, *History as Ideology: Philip Hamburger's Separation of Church and State*, 93 CAL. L. REV. 367 (2005) (discussing different theories on how separation of church and state relates to the first amendment).

118. *See, e.g.,* Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. 175, 177 (2011) (explaining that the ministerial exception applies even when that interference "is for ostensibly 'neutral' or 'secular' reasons that do not involve the government making explicit theological determinations").

119. Carl Esbeck, *An Extended Essay on Church Autonomy*, 22 FED. SOC. REV. 244, 251 (2021).

120. Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 978 (2013).

121. *See* Lee v. Sixth Mount Zion Baptist Church, 903 F.3d 113, 122 (3d Cir. 2018) (ruling that courts can decide disputes that do not implicate ecclesiastical matters).

122. *Id.* at 123 (citing Minker v. Balt. Annual Conf. of United Methodists, 894 F.2d 1355, 1359–61 (D.C. Cir. 1990)).

church-state entanglement pervades the law in many contexts.[123] The 'excessiveness' of any such entanglement requires a judgment that accommodates the most directly crucial interests of the affected parties, along with that of the public.

At the level of first principles, in this regard, one court has recently observed that "the ministerial exception was created to demarcate the line where a religious organization's First Amendment rights outweigh the government's compelling interest in eradicating employment discrimination."[124]

As a matter of general First Amendment logic, a narrowly tailored advancement of a genuinely compelling public interest should typically override First Amendment speech or religious interests.[125] In the realm of free speech, for example, content-based restrictions have been upheld, given the presumed compelling public interest at stake, in a number of instances.[126]

Questions of tailoring aside, advancing a compelling public interest in crucial forms of employment non-discrimination against ministerial employees should justify significant burdens on religious doctrine, belief, and practice. This is simply what the

123. Consider the tax-subsidization, ultimately received largely by private religious schools. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 402 (1988) (explaining that a state tax statute that allows a tax deduction for private school education does not offend the Establishment Clause of the First Amendment); Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) ("We believe that the program here is a program of true private choice, consistent will *Muller*, *Witters*, and *Zobrest*, and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion.").

124. *See* Billard v. Charlotte Cath. High Sch., No. 3:17-cv-00011, 2021 WL 4037431 at *25 (W.D.N.C. Sept. 3, 2021) (finding that the churches autonomy, the Religious Freedom Restoration Act, and freedom of association all do not shield the defendant from liability).

125. *See, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 40 (2010) (finding that the material-support statue is constitutional as applied to the plaintiffs who wished to provide support to foreign terrorist organizations); Burson v. Freeman, 504 U.S. 191, 211 (1992) (arguing that the fundamental right to free speech conflicts with the fundamental right to cast a ballot free from intimidation and fraud); Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) (citing the racial affirmative action case of Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995)).

126. *See generally* Starkey v. Roman Cath. Archdiocese, 553 F. Supp. 3d 616 (N.D. Ind. 2021).

logic of strict scrutiny implies.[127] And the nature and weight of basic non-discrimination norms is often immense.[128] Thus as Professor Andrew Koppelman observes, "[t]here's a reason to promote religious liberty, but it is not a reason to elevate religious liberty over equally valid human ends."[129] More broadly, it seems clear that "protection of institutional dignity often comes at the expense of human dignity."[130]

Plainly, to be informed that one is being dismissed, in apparent violation of one's civil rights or non-discrimination norms, whether one is a minister or not, is, in any case, among the most fundamental harms and most elemental insults that can be imposed in an employment context.

This Article's point, however, focuses on a broad range of especially egregious cases.[131] In the relevant cases, there is no interesting balancing or tradeoff between the religious doctrinal rights of the employer and the non-discrimination rights of a ministerial employee.[132] There is no need to rigorously weigh the

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127. *See* Bob Jones Univ. v. Simon, 416 U.S. 725, 750 (1974) (illustrating a compelling public interest with respect to religious doctrinal freedom in a tax-exempt status non-employment case).

128. *See* Sophia Moreau, *What Is Discrimination?*, 38 PHIL. & PUB. AFFS. 143, 144–45 (2010) ("Because they combat the systemic subordination and stigmatization of groups identified by the prohibited grounds of discrimination, anti-discrimination laws have been seen as a tool of effecting distributive justice between these groups and those that are more privileged.").

129. *See* Andrew Koppelman, "*Freedom of the Church" and the Authority of the State*, 21 J. CONTEMP. LEGAL ISSUES 145, 156 (2013) (recognizing that religion is only one of the many human goods that the state is bound to respect in the United States).

130. Frederick Mark Gedicks, *Dignity, History, and Religious-Group Rights*, 21 J. CONTEMP. LEGAL ISSUES 273, 276 (2013).

131. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2011) ("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."); *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru 140 S. Ct. 2049, 2055 (2020) (deciding the rights of two different teachers to sue their religious schools for wrongful termination, one based on age discrimination and the other because of her request for a leave of absence to obtain treatment for breast cancer).

132. *See Morrissey-Berru*, 140 S. Ct. at 2068 ("Think of the quintessential case where a church wants to dismiss its minister for poor performance. The church's objection in that situation is not that the minister had gone over to some other

employee's non-discrimination claim. This is simply because in the broad range of ministerial employee discrimination cases, the religious employer's evident grounds for dismissal simply do not implicate any relevant religious employer doctrine, tenet, belief, principle, or faith.[133] There is, in this sense, essentially nothing of significant constitutional weight on the employer's side.

The courts have, however, consistently declared that dismissal of a ministerial employee for entirely secular, non-religious reasons is as essentially exempt from judicial scrutiny as would be a dismissal justified solely on interpretation of some particular holy writ.[134] All such cases, by definition, involve no meaningful conflict between any religious right of the employer and the basic non-discrimination rights of the disciplined ministerial employee.[135] Thus, the invokement or overriding of meaningful, religious institutional rights in these cases is unwarranted.

Ironically, it may even be plausible in some cases for the dismissed employee to claim that discharge on ordinarily statutorily discriminatory grounds, in the absence of any religious doctrine, actually amounts, prime facie, to a violation by the employer of one or more of its own well-recognized religious principles and obligations. Even more interestingly and more problematic would be cases involving claims of employer 'pretext' in which the religious employers offers a religious doctrinal reason for terminating the ministerial employee in question. Furthermore, there will inevitably be mixed-motive cases, in which the employer's actual motivation draws, in some sort, on religious as well as non-religious considerations.

Before we address the various ways in which claims of employer pretext, and of mixed motive, in dismissal cases can be

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faith but simply that the minster is failing to perform essential functions in a satisfactory manner.").

133. *See, e.g.*, Elizabeth Sepper, *Ever-Expanding Immunity For Religious Institutions Augurs Trouble for Worker Protection*, AM. CONST. SOC'Y (July 14, 2020) (providing background information on Our Lady of Guadalupe Sch. v. Morrissey-Berru and Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC) [perma.cc/R27V-ES9R].

134. As established clearly and authoritatively in *Hosanna-Tabor* and *Morrissey-Berru,* both cases are discussed in part II of this Article.

135. *See generally Hosanna-Tabor*, 565 U.S. at 180; *Morrissey-Berru*, 140 S. Ct at 2069.

addressed, however, it would be useful to refresh our sense of the dignity, as distinct from purely economic, interest in the lived experience of discrimination in employment. Consider, in particular, the case of the talented young stone mason protagonist in Thomas Hardy's novel "Jude the Obscure."[136] At one point, the self-educated Jude Fawley seeks admission to Christminster as a ministerial student.[137] After a succession of bureaucratic, if not also disdainful, snubs, the already disheartened Jude receives a note from the Master of what is referred to as "Biblioll College" reading as follows:

> Sir – I have read your letter with interest; and judging from your description of yourself as a working-man, I venture to think that you will have a much better chance of success in life by remaining in your own sphere and sticking to your trade than by adopting any other course. That, therefore, is what I would advise you to do.
>
> Yours faithfully,
> T. Tetuphenay
> To Mr. J. Fawley, Stone-mason[138]

This rejection does not reach any question of any particular aptitude, gifts, talents, commitment, or motivation.[139] Jude's gifts and efforts are irrelevant. Internal locus of control, as the social science jargon has it, is in Jude's case thus dominated by external locus of control.[140] Socio-economic status, in this case, as distinct from, say, gender, age, or disability status, is the decisive consideration, with Jude's aptitude, perseverance, and motivation simply set aside.

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136. See THOMAS HARDY, JUDE THE OBSCURE 3 (Patricia Ingham, 3rd ed. 2002) (1895) (following the journey of working-class stonemason Jude Fawley who dreams of becoming a scholar).

137. *Id.* at 107–08.

138. *Id.* at 119–120.

139. *Id.*

140. *See generally* Julian B. Rotter, *Generalized Expectancies for Internal and External Locus of Control of Reinforcement*, 80 PSYCH. MONOGRAPHS: GEN. & APPLIED 1, 1 (1966) (explaining that the effects of reward or reinforcement on preceding behavior depends in part on whether the person perceives the reward as contingent on his own behavior or independent of it).

Among Jude's initial reactions to the dismissal of his ministerial educational prospects was his scriptural sense that "I have understanding as well as you; I am not inferior to you . . ."[141] Crucially, the next morning, Jude "laughed at his self-conceit. But the laugh was not a healthy one. He re-read the letter from the master, and the wisdom in its lines, which had at first exasperated him, chilled and depressed him now. He saw himself as a fool indeed."[142]

Hearing of Jude's career aspirations, some decadent Christminster students challenge him to recite the Nicene Creed in Latin.[143] Downing a whiskey, standing his full height, and with occasional hesitation amidst the distractions, mock cheers, and ignorant challenges, Jude successfully recites the Creed, concluding with the word 'Amen,' which turned out to be perhaps the single part of the recitation the boisterous crowd could have recited.[144] Jude stared at his privileged challengers: "You pack of fools!" he cried "Which one of you knows whether I have said it or not?"[145]

Unjust employment discrimination thus entails a wide range and variety of harms, including dignitary costs, in this case, for a would-be ministerial student and employee.[146] We might well stipulate that under some circumstances, a stone mason might earn a greater financial income than would some employed ministers. But as Jude Fawley's case illustrates, the costs, the damage, and the depth of injury inflicted by unjust employment discrimination, here on economic class grounds, far outweigh any

141. HARDY, *supra* note 136, at 121.

142. *Id.*

143. *See id.* at 123–24 ("If you are such a scholar as to pitch yer hopes so high as that, why not give us a specimen of your scholarship? Canst say the Creed in Latin, man?").

144. *See id.* ("'Et unum Catholicam et Apostolicam Ecclesiam. Confiteor unum Baptisma in remissionem peccatorum. Et exspecto Resurrectionem mortuorum. Et vitam venturi saeculi. Amen.' "Well done!" said several, enjoying the last word, as being the first and only one they had recognized.").

145. *Id*. at 124.

146. Lauren B. Nielson, Ellen C. Berrey & Robert L. Nelson, *Dignity and Discrimination: Employment Civil Rights in the Workplace and in Courts*, 92 CHI.-KENT L. REV. 1185, 1202 (2018) ("Employment discrimination and the legal processes for litigating it often furthers the destruction of workers' dignity.").

primarily secular motive for barring Jude Fawley.[147] In particular, employment discrimination on non-religious grounds can undermine, unjustifiably and profoundly, the fundamental dignity, self-respect, and capacity for camaraderie of its victim.

On the other side of the balance, of course, would be merely the religious employer's perceived interest in rejecting the application of an otherwise qualified person from an unseemly socio-economic background, apart from any purported religious grounds or justifications.

Inevitably, though, the question of employer pretext in classifying employees as ministers, and in seeking to justify a ministerial employee's dismissal, must arise. It is sometimes thought that nearly all major religious employers will face similar boundaries and limits in classifying job functions as ministerial or non-ministerial. In some mainstream contexts, for example, it may seem obvious that a bus driver, a custodian, or a cafeteria line worker could be classified as a 'minister' only as a matter of sheer pretext.[148]

But what if a religious employer insists on apparently sincere and well-established religious grounds that to take on any fulltime employment at all for the particular religious employer is to freely embrace genuinely ministerial employee status? Therefore, to work for the religious employer is 'to minister' in other words. Perhaps all fulltime employees of religious employers are required, in their own diverse roles and stations, to regularly engage in recognizably ministerial activity.[149]

In any event, it may well be, as the court held in *Sterlinski*,[150] that even in these contexts, the courts are generally capable of "separating pretextual justifications from honest ones."[151] In such

147. *See* HARDY, *supra* note 136, at 119–24 (illustrating the difficulty Fawley faced in finding employment due to his classification as a working man).

148. *See, e.g.*, Sterlinski v. Catholic Bishops of Chi., 934 F.3d 568, 571 (7th Cir. 2019) (distinguishing those who "chant, sing, or play music during a service").

149. *See* Gordon Coll. v. DeWeese-Boyd 142 S. Ct. 952, 952 (2022) (describing the mission of the university as one which integrates the Christian faith into daily life and expecting that every employee do the same).

150. *Sterlinski*, 934 F.2d at 571.

151. *Id.*; *see also* Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 661 (7th Cir. 2018) (explaining that courts can avoid undue entanglement in these contexts, while detecting and declining to validate employer subterfuge,

cases any possible 'entanglement' of religious employer and the state need not rise to the level of 'excessive' or unjustifiable entanglement as long as some appropriate set of evidentiary burdens, tests, standards, and presumptions is adopted.[152]

For purposes of this article, there is no need to discuss the range of possible pretext-inquiry options, let alone to settle upon some optimal combination thereof.[153] In this context, and more generally, one can simply assume that an employer pretext "means a lie, specifically, a phony reason for some action,"[154] or "an employer's efforts to cover their tracks or hide their real reason . . .,"[155] with the plaintiff then bound, on some legal standard, to show that the pretextual explanation actually covered a statutorily prohibited reason, or animus.[156] Generally, the courts will not inquire into whether an apparently legitimate primary motivation was "wise, fair, or even correct."[157]

Courts inquiring into pretext in ministerial exception cases would then confront, as in any non-religious employer case, issues of causation, and of the required legal standards of proving

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insincerity, and disingenuousness in assigning ministerial employee classifications).

152. *See Sterlinski*, 934 F.2d at 571 (discussing alternative methods by which the plaintiff could fulfill their evidentiary burden).

153. *See* Ash v. Tyson Food, 546 U.S. 454, 457 (2006) ("[P]laintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) (requiring a showing "*both* that the [employer's proffered] reason, was false, *and* that discrimination was the real reason"); Tex. Dep't of Cmty. Aff's v. Burdine, 450 U.S. 248, 258 (1981) (imposing "the requirement that the plaintiff be afforded a full and fair opportunity to demonstrate pretext") (internal quotations omitted).

154. Chatman v. Bd. of Educ., 5 F.4th 738, 746 (7th Cir. 2021).

155. *Id.* at 746–47 (citing Millbrook v. IBP, Inc., 280 F.3d 1169, 1175 (7th Cir. 2002)).

156. *See id.* at 747 (citing Hitchcock v. Angel Corps., 718 F.3d 733, 740 (7th Cir. 2013)). As opposed, presumably, to some other embarrassing, or even illegal, reason, not involving any discrimination on the charged grounds. *See* Hitchcock, 718 F.3d at 740 (discussing whether the issue was discrimination or a failure to complete a proper medical assessment).

157. Canning v. Creighton Univ., 995 F.3d 603, 612 (8th Cir. 2021) (quoting Main v. Ozark Health, Inc., 959 F.3d 319, 325 (8th Cir. 2020)).

causation.[158] Especially in multiple or mixed-motive cases, the courts typically seek "the factor that made a difference,"[159] or else, less ambitiously, a "motivating factor" underlying the job dismissal,[160] or perhaps a showing of a "but-for"[161] reason or motive for the dismissal.[162]

However, here, there is no need to settle upon and establish the superiority of any particular approach to causation requirements in cases dealing with the discriminatory dismissal of ministerial employees. Each possible standard will tend, in practice, to rebalance the rights of employers and employees.

Thus, there is no objection, in principle, to a standard that allows the religious employer to prevail, as against a ministerial employee alleging a civil rights violation, where the employer can publicly offer and defend, with testable sincerity, some grounds for the termination that can reasonably be characterized as reflecting any relevant religious doctrinal, belief, or faith-based grounds. This test would apply even where others might view the cited grounds as translatable into secular terms. The weightiness, cogency, or judiciousness of the proffered religious grounds for dismissal should be left judicially unexamined, except insofar as those considerations might impeach the sheer sincerity of the proffered ground.

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158. *See* Tusing v. Des Moines Indep. Cmty. Sch. Dist., 639 F.3d 507, 515–16 (8th Cir. 2011) (showing that for the evidence to demonstrate that the proffered reasons are pretextual it is necessary that the reasons given by the employer be false and that discrimination was the real reason).

159. *Canning*, 995 F.3d at 612 (citing Tramp v. Associated Underwriters, Inc., 768 F.3d 793, 801 (8th Cir. 2014)).

160. *See* Goudeau v. Nat'l Oilwell Varco, LP., 793 F.3d 470, 475 (5th Cir. 2015) (explaining that a plaintiff can meet the standard by showing that, while the reason given by the employer may be technically true, discrimination was another important factor).

161. *See id.* (noting that the ADEA requires a showing of "but-for" causation). While a legitimate and a non-legitimate reason for dismissing the ministerial employee might in some case be jointly necessary, it is also possible that each such reason could, in another case and context, both be independently sufficient to have motivated the discipline in question. The permutations can be nearly limitless.

162. *See id.* at 474–75 (arguing that under the current standards employees must prove that but-for the prohibited motivation the ministerial employee would not have been terminated or otherwise adversely treated by the employer).

Whether this particular approach is ultimately deemed optimal or not, it valuably protects ministerial employee non-discrimination rights where the religious employer has no religious reasons or beliefs at stake and is in other respects similarly situated with a non-religious employer who has no religious mission.

It is vital as well to remember, particularly in our contemporary culture, that religious employers today generally face public incentives not to engage in any arguable hypocrisy, disingenuousness, or lack of transparency with respect to doctrinal matters and their implications.[163] As noted above, many mainstream religions face decreasing sympathy and identification, at the level of doctrinal credibility, relevance, and institutional performance.[164]

There is also the related problem which is that mainstream culture has become, across a wide range of demographics and political perspectives, generally less tolerant of various sorts of employment discrimination.[165] Any public perception, confirmed or not by the religious employer, that a ministerial employee was dismissed for non-religious and non-doctrinal reasons, where that justification would not legally suffice if offered by a non-religious employer, is likely to undermine the credibility and capacity of the religious institution to carry out its mission.[166] Further erosion of

163. *See supra* note 77 and accompanying text.

164. *See* United States v. Hoffman, 436 F. Supp. 3d 1272, 1277–79 (D. Ariz. 2020) (explaining that the faith-based organization's practice of leaving food and water for public use in the desert prompted the United States Border Patrol to prohibit the leaving of water and food in the desert).

165. *See* Jeffery M. Jones, *U.S. Church Membership Falls Below Majority for First Time*, GALLUP (Mar. 29, 2021) (demonstrating that while membership in some major religious denominations tended to remain relatively steady and high from about 1940 even to about 2000, at around 70% affiliation, the affiliation percentages as of 2020, largely pre-pandemic, had dropped, remarkably, to 47%) [perma.cc/RSC3-L57H].

166. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 733 (2014) (noting that the holding does not permit discrimination to be cloaked as a religious practice for purposes of escaping legal sanction); Sunu P. Chandy & Laura Narefsky, *Fired for Fighting Racism: NWLC Leads Amicus Brief in Support of Employee at Religious School*, NAT'L WOMEN'S L. CTR. (Jan. 21, 2021) (describing a religious school's desire to invoke the ministerial exception as a way to "avoid taking responsibility for this discrimination and retaliation") [perma.cc/7Q4S-8MX7].

congregational, community, and broader cultural support would likely attend such cases.[167]

IV. Can, and Should, the Religious Employer's Immunity From Employment Discrimination Claims by Ministerial Employees be Voluntarily Waived?

Suppose, though, that the immunity of religious employers in terminating ministerial employees on entirely non-religious grounds, contrary to an otherwise available non-discrimination statute, is to remain in place. One entirely sensible response would be to emphasize the value of requiring the immunized religious employer to clearly and publicly articulate, with conspicuousness and public retrievability, their grounds for the ministerial employee termination in question. Thus, whether the religious employer's grounds are secular or religious, one might readily conclude that

> [i]t would be better to force religious organizations to state openly their willingness to discriminate [on secular or religious grounds] on the basis of race, gender, disabilities, sexual orientation, national origin, and age than to give them the free pass to disobey the laws for any reason that the Court awarded them in *Hosanna-Tabor*.[168]

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167. *See* Tod Warner, *When Father Joseph Ratzinger Predicted the Future of the Church*, ALETEIA (Jun. 13, 2016) (referring to a 1969 radio broadcast) [perma.cc/HFZ8-PQWB]. Some adverse public reaction is likely, though, where a religious employer does indeed cite a religious or doctrinal reason for dismissing a ministerial employee who could otherwise rely on non-discrimination law. Some such cases can serve as doctrinal teaching moments for the congregants as well as for the general public. It is up to the religious employer to explain why its religious belief system required, or authorized, the dismissal of some more typically statutorily protected ministerial employee. Of course, this will be all the more difficult if it is widely perceived that the religious employer tolerates other doctrinally comparable ministerial employee offenses. Perhaps consistent clarity of doctrine, extensive education in doctrine, and equity in applying doctrine would be the most that the religious employer could do. On the optimal diminishing size of a church under current cultural circumstances.

168. Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 1019 (2013).

Admittedly, the precise nature and meaning of a waiver of a right, and in particular of a constitutional right, is far from clear.[169] Ordinarily, we think of constitutional rights as accommodating a choice, usually by the right-holder, as to whether to exercise that right on a given occasion.[170] That is, constitutional rights are options, rather than mandates.[171] Thus, it is said to be "possible to waive (intentionally relinquish . . .) First Amendment speech rights."[172] However, there are also cases addressing alleged religious discrimination by religious employers and other cases that suggest that religious employers are, by the Constitution and by statute, simply disempowered to waive their recognized exemptions and immunities.[173] Broadly stated, the concern therein is to avoid excessive government entanglement in distinctively religious matters and to uphold the "constitutional right to be free from government intervention."[174]

More elaborately, it has been argued that religious employer decisions that discriminate on grounds of religion in particular are protected not simply as an optional privilege, but by a congressional judgment that "the government interest in eliminating religious discrimination is outweighed by the rights of those organizations to be free from government intervention."[175]

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169. *See* Matthew H. Kramer, *Rights Without Trimmings*, *in* A DEBATE OVER RIGHTS 7, 71 (1998) (discussing the difficulty rationalizing individual rights and waivers under both civil and criminal law); *see also* Hillel Steiner, *Working Rights*, *in* A DEBATE OVER RIGHTS 233, 286 (1998) ("A standard difference between criminal and civil law claims – that is, that the former are unwaivable ('inalienable') by ordinary citizens whereas the latter are not.").

170. *See* Kramer, *supra* note 169, at 72–73 (contending that a claim qualifies as a right only if it is enforceable and waivable by the right-holder).

171. *Id.*

172. Brittany Scott, *Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract*, 46 HASTING CON. L.Q. 451, 451 (2019) (citing the public figure libel case of Curtis Publ'g Co. v. Butts, 388 U.S. 130, 135 (1967)).

173. *See, e.g.*, Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991) ("We therefore hold that the exemptions to Title VII cover the Parish's decision not to rehire Little because of her marriage"); Egan v. Hamline United Methodist Church, 679 N.W.2d 350, 357–58 (Minn. Ct. App. 2004) (discussing whether the Minnesota court would adopt waivers developed in Title VII cases).

174. Hardi v. Baptist Mem. Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000).

175. *Egan*, 679 N.W.2d 350, 357 (quoting *Little*, 929 F.2d at 951).

The situation has not been appreciably clarified after *Hosanna-Tabor*.[176]

The primary concern herein, though, is with a distinctive set of cases. In these cases, a religious employer has dismissed or otherwise sought to discipline a ministerial employee, but on grounds that do not significantly implicate the religious employer's doctrinal beliefs, faith, or mission. In these cases, there is simply no threat of governmental entanglement, excessive or otherwise, with doctrinal freedom and decision-making. If anything, refusal to allow a free and knowing waiver by the religious employer of the ministerial exception, for any sensible reason, directly impairs meaningful church freedom and autonomy and the ability of the religious entity to protect or advance its religious mission.

Plainly denying the religious employer the option of a voluntary waiver of a right to discriminate on non-religious grounds thus tends to undermine the religious institution.[177] Barring a waiver also denies any meaningful compensation to the ministerial employee whose basic rights against employment discrimination have, in substance, been violated.[178] In the

176. *See* Matthew Junker, Note, *Ending LGBTQ Employment Discrimination by Catholic Institutions*, 40 BERKELEY J. EMP. & LAB. L. 403, 422;428 (2019) (citing a split of appellate authority on waivers). For a sense of the continuing uncertainty, see Carl H. Esbeck, *An Extended Essay on Church Autonomy*, 22 FEDERALIST SOC'Y REV. 244 (2021); Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 85 FORDHAM L. REV. 1847, 1883 (2018) ("T]he ministerial exception should be deemed nonwaivable."); *see id.* at 1884 ("[T]he ministerial exception is a necessary corollary of the Establishment Clause principle that prevents courts from resolving strictly and purely ecclesiastical questions. The exception applies not just to protect the liberty of religious organizations but also because civil government lacks competence to resolve religious questions."); *see also* Michael J. West, Note, *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861, 1869–1900 (2017) (concluding that the Establishment Clause and the Free Exercise Clause in which the ministerial exception is rooted do not entirely prohibit its waiver). For a broader theoretical focus, see generally Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801 (2003).

177. *See* Helen M. Alvaré, *Church Autonomy After Our Lady of Guadalupe School: Too Broad? Or Broad as It Needs to Be?*, 25 TEX. REV. L. & POL. 319, 323 (2021) (emphasizing the importance of autonomy for religious institutions to make their own decisions and dictate internal affairs).

178. *See* Michael P. Moreland, *Religious Free Exercise and Anti-Discrimination Law*, 70 ALB. L. REV. 1417, 1418 (2007) (explaining the impact of the ministerial exception on employment discrimination claims brought by ministerial employees).

aforementioned cases, denial of any right to freely waive the ministerial exception is thus an almost purely lose-lose proposition.

V. But Why Not Focus Instead On the Scope of Who Should Count as a Ministerial Employee?

What counts as an acceptable reason for terminating a ministerial employee is a separate question from who should count as a ministerial employee in the first place. The legal system's answers to both questions affect the gravity of harm suffered by victims of employment discrimination in religious institutions. In particular, a relatively narrow understanding of who should count as a minister tends to reduce the overall harm imposed on victims of employment discrimination.[179]

The current case law, including *Hosanna-Tabor*[180] and *Morrissey-Berru*,[181] plainly extends the category of 'ministers,' however parochial such a term may seem, well beyond any sort of formal ordination or investiture. Instead, the case law looks, more expansively, to something like a "functionalist, fact-specific, and totality of the circumstances"[182] inquiry.

Among the non-exhaustive relevant factors may be the employee's title, education and training, how the employer and the employee represent the employee's status, and the employee's function and responsibilities.[183] The performance of "important religious functions"[184] may be of central concern, depending upon

179. *See, e.g.*, Jack M. Balkin, *The "Absolute" Ministerial Exception*, BALKINIZATION (January 13, 2012) (explaining that once an employee is classified as a minister they are susceptible to termination by the religious body for any reason, therefore it would be beneficial to escape such a categorization) [perma.cc/ZQ9W-J55D].

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

181. *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

182. *See* Alvaré, *supra* note 177, at 324.

183. *See id.* (citing *Hosanna-Tabor*, 565 U.S. at 19–92; *Morrissey-Berru*, 140 S. Ct. at 2055–63.

184. *See* Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception,* 35 HARV. J.L. & PUB. POL'Y 839, 860 (2012) (discussing how merely teaching the faith, leading worship, and representing the church to students qualified Cheryl Perich as a minister); *see also* Jed Glickstein, *Should the Ministerial Exception Apply to*

who is to determine whether a religious function is 'important' or not.[185] But the Court seems disinclined to adopt any rigid formula in distinguishing between ministerial and non-ministerial employees.[186]

Almost any employee can influentially model, or otherwise promulgate, the faith of the institution he or she is employed by. Some religious employers may choose to emphasize this possibility, and indeed to sincerely view all of its employees as in this sense 'ministers.'[187] Therefore, to some degree, who the courts choose to recognize as a ministerial employee for employment discrimination purposes may be sensitive to what the courts perceive to be the scope of a sincerely adopted institutional religious mission.[188]

However, every expansion of the ministerial exception increases the costs, to ministerial employees, in overall protection against a wide range of forms of employment discrimination.[189] Therefore, it is hardly surprising that some critics have called for less deference to the religious employer's judgment in this regard,[190] a narrowing of the category of ministerial employees,[191]

Functions, Not Persons?, 122 YALE L.J. 1964, 1967 (2013) (suggesting that the exception should apply to ministerial functions, not ministerial persons).

185. *See* Paul W. Kahn, *The Jurisprudence of Religion in a Secular Age: From Ornamentalism to* Hobby Lobby*,* 10 L. & ETHICS OF HUM. RTS., 1, 1 (2016) (arguing that, in a secular age, religious belief becomes a matter of subjective opinion to be treated in much the same way as other opinions).

186. *See* Alvaré, *supra* note 177, at 324 ("On the matter of an employee's title, *Guadalupe* eschewed the necessity of a "ministerial" or other clerical title (e.g. rabbit, imam, priest, etc.) on the grounds that it would require a court to delve into theological matters beyond its competence, or even result in its granting more religious freedom to some religions than others.").

187. *See* DeWeese-Boyd v. Gordon College, 163 N.E.3d 1000, 1002 (2021) (rejecting defendants' argument that "the ministerial exception applies to an associate professor of social work at a private Christian liberal arts college").

188. *See id.* at 1010 ("[A]n employer need not be a traditional religious organization, so long as its "mission is marked by clear or obvious religious characteristics.") (internal citations omitted).

189. See Balkin, *supra* note 179 ("The more categorical the rule that exempts employment decisions from legal scrutiny, the narrower the class of "ministers" will have to be to avoid manifest injustices.").

190. *See, e.g.*, Griffin, *supra* note 168, at 1006 ("[T]he test for a minister remains problematic and excessively deferential to religious institutions.").

191. *See, e.g.*, Maxine Goodman, *The Expanding Role and Dwindling Protection for Private Religious School Teachers During the Pandemic: Rethinking*

and for a reconceived balancing of the rights and interests at stake in these types of cases.[192]

Ultimately, courts are likely to resolve complex, detailed, fact-specific questions of the scope and application of the ministerial exception with some attention to the proper balancing of the multiple interests at stake.[193] Part of the problem, though, can be expressed by invoking the technical idea of a "range property."[194] As it turns out, the property of being a ministerial employee in this contexts turns out to not amount to a range property.[195]

The term 'range property' suggests, at its simplest, that there is some threshold, fixed or debatable, such that if one crosses that minimal threshold, then one exhibits that property to the same extent as everyone else who has also crossed that minimal

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the Ministerial Exception After Morrissey-Berru, 54 U.C. DAVIS L. REV. ONLINE 61, 87 (2021) (noting that "courts should apply the exception to 'the deciders'" regarding religious matters); *see also* Allison R. Ferraris, Comment, *The Expansive Scope of the Ministerial Exception After Our Lady of Guadalupe School v. Morrissey-Berru*, 62 B.C. L. REV. E-SUPPLEMENT II. 280, 302 (2021) ("[C]ourts should construe the ministerial exception narrowly to protect the interest of as many employees of religious institutions as possible.").

192. *See* Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U.L. REV. 951, 962 (2012) ("[I]n granting blanket immunity to Hosanna-Tabor, the Court did not consider, much less balance, any countervailing interests."); *see also* Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 303–04 (2021) (critiquing the application of the ministerial exception to situations where discriminatory hiring is not only required by a congregation's theology, but also prohibited by the church doctrine). For an interesting attempt to balance rights and interests in the case of a gay applicant for a staff attorney position that was claimed to be ministerial in nature, see Woods v. Seattle's Union Gospel Mission, 197 Wash. 2d 231, 250-52, 461 P.3d 1060, 1069-70 (2021) (en banc).

193. For analysis, see Moreland, *supra* note 178, at 1418 (asserting that Title VII does not apply to ministerial employees because "the imposition of secular standards of employment non-discrimination on a church's employment of ministers would burden free exercise" and "the state's antidiscrimination interest is outweighed by the church's constitutional autonomy").

194. For the idea of a "range property" in social philosophy, see JOHN RAWLS, A THEORY OF JUSTICE 444 (rev. ed. 1999); JEREMY WALDRON, ONE ANOTHER'S EQUALS: THE BASIS OF HUMAN EQUALITY 118–19 (2017); Ian Carter, *Respect and the Basis of Equality*, 121 ETHICS 538, 548–49 (2011) (describing range property as "a minimum threshold of empirical capacities").

195. *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 64 (2011) ("The religious significance of a position is a continuous variable, not a dichotomous one.").

threshold.[196] Once the threshold has been crossed, no further degrees or gradations are relevant.[197] Every threshold crosser bears the relevant property equally.[198] A range property is thus a binary.[199] One simply has the property or one doesn't.

Professor John Rawls classically illustrated the idea of a range property by reference to the property of being a point inside a given circle:

> The property of being in the interior of the unit circle is the range property of points in the plane. All points inside this circle have this property although their coordinates vary . . . and they equally have this property, since no point interior to a circle is more or less interior to it than any other interior point.[200]

If ministerial status were a range property, then once the minimum threshold of ministerial status was reached, we would have no reason to care about further degrees of that status. All ministers, as ministers, would be the same for constitutional and employment discrimination purposes. For such purposes, though, we understandably wish to distinguish, in some contexts, between greater and lesser degrees among those who count as ministerial employees.

In particular, if we seek to do any meaningful balancing of the relevant rights and interests at stake, we may want to recognize a stronger religious institutional interest and less of a general non-discrimination interest, in, say, an ordained bishop, rabbi, or imam who speaks authoritatively for the employer, than in a mathematics teacher who escorts students to a religious activity

196. *See* Carter, *supra* note 194, at 548 (noting the "minimum threshold of empirical capacities").

197. *See id.* at 548–49 ("[W]e would pay no attention to variations in the basis of the basis of equality as long as such variations occur above the established minimum threshold.").

198. *See id.* at 548–49 (explaining that range property is shared equally and as such humanity is shared equally as a range property).

199. *See id.* (asserting that range property is binary and that if one owns a range property then they are also the owner of separate scalar property that is within a specified range).

200. *See* RAWLS, *supra* note 194, at 444.

and who occasionally imparts a doctrinal message and is required to model approved doctrine.[201]

Thus, as Professor Christopher Lund[202] has observed, the ministerial employee distinction is not merely "somewhat messy in real life."[203] Beyond the inevitable vagueness and multiplicity of complications, "[the] religious significance of a position is a continuous variable, not a dichotomous one."[204] In other words, whether someone is a minister is less of a 'yes/no' question and more of a 'how much' question."[205]

As it turns out, then, it is especially difficult to formulate any meaningful rule to determine, in substantive terms, who should count as a ministerial employee.[206] In non-substantive terms, the court might defer, to one degree or another, to the religious employer's apparently sincere declarations in this respect.[207] Or the courts might seek, to one degree or another, to narrow the scope of the ministerial exception based on whatever weight they choose to attach to non-discriminatory interests.[208] But there does not seem to be any plausible rule that offers any reasonably definite substantive answer to the question of ministerial status. And the chances for developing any such substantive rule are diminished further by the remarkably wide range of religious institutional settings[209] and the similarly wide range of potential

201. *See id.* (demonstrating how one could vary the roles and functions of the plaintiffs in *Morrissey-Berru*).

202. *See generally* Lund, *supra* note 195, at 64.

203. *See id.* (describing that whether an employee is ministerial is less of a binary and more of a spectrum).

204. *See id.*

205. *See id.*; *see also* Koppelman, *supra* note 129, at 148 (quoting Professor Lund).

206. See Lund, *supra* note 195, at 64–65 (providing that it is difficult for courts to create lines for the ministerial exception that are not seen as imprecise and arbitrary).

207. *See supra* Part II.

208. *See supra* Part II.

209. *See*, *e.g.*, Junker, *supra* note 176, at 414–15 (noting "the wide range" of religious institutions including "relief services, shelters, higher [and other] education institutions, and hospitals").

legal theories, distinct causes of action, and claims for redress in employment discrimination contexts.[210]

VI. Conclusion

The First Amendment is currently thought to bar ministerial employees from any recourse against their religious employer under a wide variety of non-discrimination statutes and other forms of legal protection. The typical critique of this state of affairs seeks to narrow the class of persons who count as ministerial employees. This Article focuses instead on an important and peculiar aspect of the ministerial exception doctrine. At present, the law generally prohibits any recovery by ministerial employees for employment discrimination by their religious employer even where the employer's reasons for the discrimination have nothing to do with any religious doctrine, belief, article of faith, or religious practice. And it is not clear whether the religious employer can freely waive this unduly broad immunity, even for the most laudable reasons. This Article criticizes this state of the law as unjustified.

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210. *See*, *e.g.*, Griffin, *supra* note 168, at 981 (referring to "disabilities discrimination, sexual harassment, unequal pay, hostile work environments, age discrimination, pregnancy discrimination, gender discrimination, race discrimination, assault, retaliation, national origin discrimination, tortious interference with contract, blacklisting, intentional and negligent infliction of emotional distress and breach of contract"). For an intriguing recent example of some of the complications and judicial disputes, *see* Demkovich v. St. Andrew the Apostle Parish, 3 F.4th 968, 980 (7th Cir. 2021) (en banc) ("Just as a religious organization need not proffer a religious justification for termination claims, a religious organization need not do so for hostile work environment claims")*; see also id.* at 985 (Hamilton, Rovner, & Wood, JJ., dissenting).