PLEASE, DO NOT CALL ME MINISTER! REINING IN THE EXPANDING "MINISTERIAL EXCEPTION"

SAMUEL BARDER*

After fifty years of circuit court approval, the Supreme Court first recognized the ministerial exception in 2012. The ministerial exception requires employment discrimination claims brought by a fired employee "minister" be dismissed when brought against religious employers. The 2012 case, Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, left open who qualifies as a minister and what other types of claims could be dismissed under the ministerial exception. The Court weighed in again in 2020 but again failed to clarify a test for who qualifies as a minister. Circuit courts have attempted to define tests for who qualifies as a minister, and some circuits have heard cases seeking to expand the ministerial exception beyond the firing context. Recently, the Seventh Circuit expanded the exception to a hostile work environment claim in* Demkovich v. St. Andrew the Apostle Parish, Calumet City. *This Note describes the development of the exception, analyzes its more recent developments at the Supreme Court and among circuit courts, and proposes a test for who qualifies as a minister, as well as future actions the Supreme Court and state legislatures could take in delineating who and what the exception covers.*

TABLE OF CONTENTS

* J.D. Candidate, University of Illinois College of Law (2023); M.A.T., Dominican University (2018); B.A., New York University (2016). Thank you to the *University of Illinois Law Review* for their hard work on this Note and the entire 2023 Volume. Thank you to my partner, Mara, for suffering through countless hours of law school talk. Thank you to my parents for their support, especially my father, Fred, a lawyer who told me not to go to law school, but then when I did, always wanted to talk about law school. Thank you to my friends and professors—you made my time at Illinois challenging, rewarding, and enjoyable. The views expressed in this Note represent my thoughts at a point in time. My opinions are dynamic.

I. INTRODUCTION

If you are a teacher, your employment is protected from discrimination by the Equal Employment Opportunity Commission ("EEOC").[1] If you are a religious teacher, that may not be the case. Imagine: you are a teacher at a Catholic school, and you have completed the requisite religious and educational training to be considered a "called" teacher, receiving a "diploma of vocation" signifying your status as a minister.[2] The summer before your tenth year there you are diagnosed with cancer. Your doctor encourages you to take a leave of absence to undergo chemotherapy that fall. You do so, taking disability. You return to the school in the spring of that same school year, having completed your chemotherapy, and are excited to continue educating. The administration questions if you are ready to return, even after you produce a doctor's note to prove you are physically fit.[3] The school asks you to leave, your position has been filled in your absence, yet you refuse to do so until your presence at the school is documented.

1. *Equal Employment Opportunity Commission*, USA.GOV, https://www.usa.gov/federal-agencies/equal-employment-opportunity-commission (last visited Mar. 8, 2023) [https://perma.cc/DNP8-9525].

2. This hypothetical is based heavily on the facts of *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, a 2012 Supreme Court case. 565 U.S. 171, 178 (2012).

3. This happened in *Hosanna-Tabor*. The plaintiff, Cheryl Perich, attempted to come back to work for the spring semester, after taking medical leave in the fall for narcolepsy, only to be rebuffed by the school principal, even after she produced a doctor's note stating she was capable of coming to work. *Id.*

After threatening a lawsuit under the Americans with Disabilities Act ("ADA"), the school fires you for "insubordination and disruptive behavior."[4] A filing with the EEOC alleging workplace discrimination in your termination will go nowhere.[5] Your school is protected by the ministerial exception.[6]

In *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, the Supreme Court unanimously ruled Cheryl Perich, a teacher who took disability leave for a health issue, had no recourse when she lost her job and filed a claim with the EEOC arguing she had been fired unjustly after threatening to file an ADA lawsuit.[7] Hosanna-Tabor fired her for "insubordination and disruptive behavior" when she refused to leave the school without documentation saying she had reported to work.[8] This was reason enough for the Lutheran school to terminate her employment.[9]

Why did Perich have no recourse? Because of the ministerial exception, a judge-made doctrine first established in the Fifth Circuit in 1972 and later adopted by the Court in *Hosanna-Tabor* fifty years later.[10] This court-created exception requires employment discrimination claims to be dismissed when brought against religious employers.[11] The exception protects religious institutions from facing lawsuits when "ministers" are fired, but who qualifies as a minister is an evolving area of the law. Currently, the exception does not apply to all discrimination claims brought against a religious employer; thus far it only covers claims brought by employees alleging a wrongful firing.[12] The exception has been weaponized by religious organizations who want an expansive definition of "minister."[13] Religious organizations also hope to broaden the exception to other types of employment-related suits, including hostile work environment claims.[14]

This Note argues the ministerial exception should be abandoned because it is in direct conflict with the Supreme Court precedent in *Employment Division*

4. *See id.* at 179.

5. *See generally id.*

6. *See* Leslie C. Griffin, *Mrs. Billie B. McClure*, VERDICT (June 4, 2021), https://verdict.justia.com/2021/06/04/mrs-billie-b-mcclure [https://perma.cc/7GTF-B4BD] (describing the birth of the ministerial exception).

7. 565 U.S. at 178.

8. *Id.* at 179.

9. *See id.* at 181.

10. *See* Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 982–83 (2013) (describing the advent of the ministerial exception).

11. *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 22, 2008), https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace [https://perma.cc/3JW9-HQVZ] [hereinafter *Questions and Answers*].

12. The Supreme Court restricted its holding in *Hosanna-Tabor* to suits brought based on a religious organization's termination decision of a minister. *Hosanna-Tabor*, 565 U.S. at 196. Circuit courts have since considered the ministerial exception in the context of other workplace discrimination suits. *Compare* Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968, 985 (7th Cir. 2021) (en banc) (ruling a hostile work environment claim brought by a minister is precluded by the ministerial exception), *with* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004) (ruling an ordained minister could pursue their hostile work environment claims).

13. Griffin, *supra* note 6 ("If you are a minister, your case is dismissed.").

14. *See generally Demkovich*, 3 F.4th at 968.

v. Smith.[15] This outcome is unlikely given the current composition of the Supreme Court[16] and the exception's positive reception among circuit courts;[17] however, at the very least, this Note will argue the definition of a minister should be clearly defined by the Supreme Court and the exception should not be expanded beyond hiring and firing decisions.[18] Thus, if the Court chooses to eventually resolve the current circuit split deepened in 2021 by *Demkovich v. St. Andrew the Apostle Parish, Calumet City*, a case concerning a minister's hostile work environment claim, it should rule in favor of the plaintiff-employee to confine the ministerial exception solely to hiring and firing decisions.[19]

Part II of this Note examines the birth of the exception, its evolution, scholarly writing on the topic, the two Supreme Court decisions on the exception, *Hosanna-Tabor* and *Our Lady of Guadalupe School v. Morrissey-Berru*,[20] and circuit court decisions applying *Hosanna-Tabor* and *Guadalupe*. Pending cases in federal and state courts are also discussed.

Part III of this Note analyzes the constitutionality of the ministerial exception considering the Court's decision in *Smith* and discusses how the Court should analyze a case like *Demkovich*.

Part IV recommends the Court restrict the ministerial exception and, in so doing, limit the exception to hiring and firing situations only. Considering the Court has thus far emphatically refused to elucidate a test for determining who is or is not a minister,[21] states and the federal government should identify a clear formula for making these determinations. This Note proposes a formula.

15. *See generally* 494 U.S. 872 (1990). The Supreme Court refused to overrule *Smith* in a recent case, Fulton v. City of Phila., 141 S. Ct. 1868, 1876–77 (2021), by acknowledging *Smith* "need not [be] revisit[ed] . . . here," even though two concurrences thought it should be revisited and overruled. *Id.* at 1877. *See id.* at 1883–84 (Alito, J., concurring); *id.* at 1926 (Gorsuch, J., concurring).

16. Adam Liptak & Alicia Parlapiano, *Tracking the Major Supreme Court Decisions This Term*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/interactive/2021/06/01/us/major-supreme-court-cases-2021.html [https://perma.cc/6K2L-XYFM] (detailing the six Justice conservative majority and how these Justices ruled on high-profile cases in the 2021 term, the first term for the newest Justice, Amy Coney Barrett); *see also Hosanna-Tabor*, 565 U.S. at 199 (ruling unanimously that the ministerial exception allows religious institutions to "be free to choose" its employees who qualify as ministers); Strict Scrutiny, *Law & Religion on the Barrett Court*, STRICT SCRUTINY (Aug. 1, 2022), https://podcasts.apple.com/us/podcast/law-religion-on-the-barrett-court/id1469168641?i=1000574610117 [https://perma.cc/F3SB-JR4E] (detailing the current and future landscape of the Court's religion decisions).

17. Griffin, *supra* note 10, at 982 n.6 (listing various circuit court decisions upholding or recognizing the exception).

18. The exception has been used to dismiss other types of claims. *See generally Demkovich*, 3 F.4th at 968 (dismissing a hostile work environment claim brought by a minister); McCants v. Ala.-W. Fla. Conf. of United Methodist Church, 372 F. App'x 39–41 (11th Cir. 2010) (per curiam) (barring a minister's race discrimination and retaliation claim); Petruska v. Gannon Univ., 462 F.3d 294, 299 (3d Cir. 2006) (barring a minister's Title VII discrimination claim and holding that the exception "applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions").

19. 3 F.4th at 987–88 (Hamilton, J., dissenting) (noting that the Ninth Circuit has come to a different conclusion on hostile work environment claims seeking the application of the ministerial exception in two separate cases, and the Tenth Circuit reached the same conclusion as the majority in *Demkovich*).

20. *See generally* 140 S. Ct. 2049 (2020).

21. *See id.* at 2066–67.

II. BACKGROUND

Generally, employers cannot discriminate in employment decisions based on sex, race, color, religion, national origin,[22] age,[23] or disabilities.[24] Religious institutions in the United States, however, have a robust tradition of autonomy, grounded in both the Free Exercise and Establishment Clauses of the First Amendment to the Constitution.[25] The Supreme Court has considered the scope of these clauses on many occasions.[26] Even the landmark Civil Rights Act ("CRA"), which established a cause of action for employees subject to employment discrimination,[27] allowed religious institutions broad leeway in their employment decisions.[28]

A. The Exception Is Recognized

The ministerial exception began to take shape following the passage of the CRA when the Fifth Circuit considered whether Title VII's statutory exemption applied to religious institutions.[29] Title VII's exception allows a religious group to avoid statutory penalties when they "perform work connected with the carrying on" of the religious group.[30]

In *McClure v. Salvation Army*, the EEOC and Billie McClure argued the Title VII exception only applied to discrimination based on religion.[31] McClure, an ordained minister with the Salvation Army, served as a secretary, Welfare Casework Supervisor, and Corps Commander.[32] After the Salvation Army terminated her as an officer, she filed suit, arguing the Salvation Army had engaged in sex discrimination.[33] She alleged she received "less salary and fewer benefits" than her male counterparts.[34] The court recognized the Salvation Army as a religious organization[35] and ruled it could not "encroach[]" into employment decisions made between a church and its ministers, grounding its decision in the Free Exercise Clause of the First Amendment.[36] The Fifth Circuit cautioned that

22. *Questions and Answers*, *supra* note 11.

23. *See generally* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634.

24. *See* 42 U.S.C. § 12112(a). The Americans with Disabilities Act requires that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

25. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 11–17 (2011).

26. *Id.* at 11 (listing just some of the various cases implicating religious liberty in the United States).

27. 42 U.S.C. § 2000e–2. *See generally* Cynthia Elaine Tompkins, *Title VII at 50: The Landmark Law Has Significantly Impacted Relationships in the Workplace and Society, but Title VII Has Not Reached Its True Potential*, 89 ST. JOHN'S L. REV. 693 (2015).

28. 42 U.S.C. § 2000e–1(a).

29. *See* McClure v. Salvation Army, 460 F.2d 553, 553–61 (5th Cir. 1972).

30. 42 U.S.C. § 2000e–1(a).

31. 460 F.2d at 558.

32. *Id.* at 555.

33. *Id.*

34. *Id.*

35. *Id.* at 556.

36. *Id.* at 560.

restrictions on the free exercise of religion are allowed only to "prevent grave and imminent danger" to state interests.[37] Because the "relationship between an organized church and its ministers is its lifeblood" and the minister serves as the primary "instrument" the church uses to "fulfill its purpose," the court refused to nullify their employment decision.[38]

The ministerial exception expanded throughout the circuit courts until the Supreme Court took up the issue in 2012 in *Hosanna-Tabor*.[39] Hosanna-Tabor, a school run by the Lutheran Church, categorized teachers as either "called" or "lay."[40] Called teachers were "regarded as having been called to their vocation by God through a congregation" whereas lay teachers were not required to be trained by the Synod (the Lutheran clergy) or even be Lutheran.[41] Called teachers needed to satisfy certain requirements to earn this designation.[42] They needed to complete a "colloquy" program and obtain an endorsement of their local Synod.[43] After completing these steps, the called teacher received the formal title of "Minister of Religion, Commissioned."[44] Perich began as a lay teacher in 1999 but became a called teacher following her first year.[45] She went on disability at the beginning of the 2004–2005 school year after being diagnosed with narcolepsy.[46] She returned to school following winter break in January 2005, but school administrators said they had hired a replacement lay teacher to serve the rest of the school year.[47] Perich provided proof from her doctor that she was capable of returning to work in February 2005 and arrived to work on the day she was cleared by her physician.[48] After being asked to leave, she demanded written documentation that she had shown up for work.[49] Hosanna-Tabor fired her; shortly after, Perich filed suit.[50]

The Supreme Court recognized the ministerial exception for the first time in *Hosanna-Tabor*, commenting that "[u]ntil today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment."[51] The Court grounded the exception in the Religion Clauses of the First Amendment,[52] ruling that "imposing an unwanted minister" upon a religious institution violates the

37. *Id.* at 558 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)).

38. *Id.* at 558–59.

39. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 n.2 (2012) (listing circuit court decisions establishing the exception in each court of appeals).

40. *Id.* at 177.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 178.

46. *Id.*

47. *Id.*

48. *Id.* at 178–79.

49. *Id.* at 179.

50. *Id.*

51. *Id.* at 188.

52. *See* U.S. CONST. amend. I (requiring that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

Free Exercise Clause[53] because it "interferes with the internal governance of the church."[54] The Court also recognized the state cannot "determine which individuals will minister."[55] This would violate the Establishment Clause.[56]

The Supreme Court next sought to determine when the exception applies.[57] The Court agreed with the circuit courts that the exception applies to more than just the literal minister of a religious congregation.[58] But the Court left open who qualifies as a minister, explicitly refusing to define a "rigid formula" to decide when an employee qualifies.[59] Still, the Court deemed Perich a minister.[60] Her title was "Minister of Religion, Commissioned," she underwent religious training, she accepted the "formal call to religious service," and she had a "role in conveying the Church's message and carrying out its mission."[61]

In reaching its conclusion, the Court summarized the factors it considered as: (1) "the formal title given Perich by the Church," (2) "the substance reflected in that title," (3) "her own use of that title," and (4) "the important religious functions she performed for the Church."[62] The Court held that because Perich was a minister employed by a religious institution, Hosanna-Tabor could not be forced "to accept a minister it did not want" because this would have "plainly violated the Church's freedom under the Religion Clauses to select its own ministers."[63] The Court characterized the dispute as a minister "challenging her church's decision to fire her" but "express[ed] no view on whether the exception bars other types of disputes."[64] The unanimous decision had two concurrences.[65]

53. *Hosanna-Tabor*, 565 U.S. at 188.
54. *Id.*
55. *Id.* at 188–89.
56. *Id.* at 189.
57. *Id.* at 190.
58. *Id.*
59. *Id.*
60. *Id.*; *see also supra* Part I.
61. *Id.* at 191–92.
62. *Id.* at 192.
63. *Id.* at 194.
64. *Id.* at 196.
65. *See generally id.* at 171. Justice Thomas concurred to argue that courts should defer to religious institutions to decide who qualifies as a minister. *Id.* at 196–97 (Thomas, J., concurring). Justice Thomas said, "[t]he question whether an employee is a minister is itself religious in nature." *Id.* at 197. Justice Alito, joined by Justice Kagan, wrote that though not all religions ordain ministers, or religious leaders, it would "be a mistake" if only those called ministers or those ordained were to be covered under the exception. *Id.* at 198 (Alito, J., concurring). Instead, the court should look at the "function" the person performs when deciding who is or is not a minister. *Id.*

B. The Constitutionality of the Ministerial Exception: Squaring Smith *with* Hosanna-Tabor

In the wake of *Hosanna-Tabor*, a lively debate ensued amongst law professors regarding the constitutional basis for the decision and where the exception may be headed from here.[66]

One scholar argued neither of the Religion Clauses in the Constitution required the Court to embrace the ministerial exception.[67] Because the ADA (which Perich threatened her suit under) is a neutral law of general applicability, it does not violate the Free Exercise Clause.[68] This is because, in *Employment Division v. Smith*, the Supreme Court determined that if a law is neutral and generally applicable it does not violate the Free Exercise Clause even when religious believers are burdened as they comply with it.[69]

The Court in *Hosanna-Tabor* explicitly sought to distinguish *Smith*.[70] In *Smith*, two men used peyote at a ceremony at the Native American Church.[71] They were subsequently fired from their jobs and applied for unemployment benefits.[72] They were denied benefits because they had been fired for misconduct.[73] The *Smith* Court noted it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[74] *Smith* conceivably restricted religious freedom by banning the respondent's use of peyote,[75] but the law's neutrality and general applicability allowed for such a ban.[76] The *Hosanna-Tabor* Court explained *Smith* as concerning "government regulation of only outward physical acts" whereas *Hosanna-Tabor* dealt with an "internal church decision that affects the . . . mission of the church itself."[77]

Smith created a relatively bright-line rule: if the law is neutral and generally applicable, a religious believer must abide by it.[78] One scholar, Leslie C. Griffin, argued *Smith*'s rule must control in ministerial exception cases because the disputes arising under the ministerial exception are even less religious than the situation in *Smith*.[79] They concern an aggrieved employee bringing suit against a

66. *See, e.g.*, Griffin, *supra* note 10, at 981; Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C., 106 NW. L. REV. 951, 951 (2012); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. L. REV. 1183, 1183 (2014).

67. Corbin, *supra* note 66, at 954.

68. *Id.*

69. 494 U.S. 872, 879 (1990).

70. *Hosanna-Tabor*, 565 U.S. at 189–90.

71. *Smith*, 494 U.S. at 874.

72. *Id.*

73. *Id.*

74. *Id.* at 878–79.

75. Caroline Mala Corbin, *supra* note 66, at 954 (arguing that "*Smith* itself upheld a law that made a religious sacrament illegal").

76. *Smith*, 494 U.S. at 879–80 (listing earlier decisions where the Court upheld neutral laws of general applicability in the religious context).

77. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012).

78. *Smith*, 494 U.S. at 878–79.

79. Griffin, *supra* note 10, at 993–94.

religious employer, and thus do not concern a religious dispute, unlike the use of peyote in *Smith*.[80] Further, *Hosanna-Tabor*'s distinguishing between "outward physical acts" (at issue in *Smith*) and internal matters (at issue in *Hosanna-Tabor* and ministerial exception cases, generally) makes little sense, Griffin argued.[81] *Smith* punished individuals for making a religious decision in conflict with a neutral law, whereas Perich was a disabled employee questioning a termination decision.[82] Griffin wondered how one situation affects internal church matters, but the other does not.[83]

Some scholars applauded the Court's decision in *Hosanna-Tabor*.[84] Christopher Lund noted lower courts had consistently embraced an understanding of religious freedom akin to the Court's reasoning in *Hosanna-Tabor* even before the Court took up the issue in 2012.[85] He argued the Court rightly distinguished *Smith* because *Hosanna-Tabor* concerned internal church matters.[86] In fact, *Smith* explicitly distinguished its ruling from cases concerning internal church matters.[87] The Court had been clear on this latter type of case: the church was to be left alone regarding its internal matters.[88]

C. Circuit Courts Weigh in Following Hosanna-Tabor

Following *Hosanna-Tabor*, circuit courts attempted to define the exception more clearly. The Seventh Circuit considered who counts as a minister in *Grussgott v. Milwaukee Jewish Day School*.[89] The Milwaukee Jewish Day School fired Grussgott, a Hebrew teacher; she then alleged discrimination under the ADA, claiming the school fired her because of cognitive issues stemming from a brain tumor.[90] The Seventh Circuit said that determining whether

80. *Id.*

81. *Id.* at 993.

82. *Id.* at 993–94.

83. *Id.*

84. *See, e.g.*, Lund, *supra* note 66, at 1188–90; Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in* Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C., 20 LEWIS & CLARK L. REV. 1265, 1278 (2017).

85. Lund, *supra* note 66, at 1184.

86. *Id.*

87. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 877 (1990).

88. Lund, *supra* note 66, at 1186–87. One such case, *Serbian E. Orthodox Diocese v. Milivojevich*, considered a dispute over control of property and assets. 426 U.S. 696, 698 (1976). The Court ruled that the "First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government . . . ." *Id.* at 724.

89. 882 F.3d 655, 657 (7th Cir. 2018) (per curiam). Now-Justice Amy Coney Barrett served on the three-judge panel in this case. *Id.* at 656.

90. *Id.* at 657. Milwaukee Jewish Day School hired Grussgott to teach Hebrew and Jewish Studies during the 2013–2014 school year. *Id.* at 656–57. The school rehired her for the 2014–2015 school year. *Id.* at 656. The parties disagreed on her exact duties; Grussgott said she only taught Hebrew, and the school said she acted as both a Hebrew and Jewish Studies teacher. *Id.* at 656–57. Grussgot admitted that she discussed prayers, the Torah, and Jewish holidays with her students but insisted she did so from a "cultural and historical" perspective. *Id.* at 656. Grussgott suffered from memory issues after receiving treatment for a brain tumor in 2013. In 2015, she forgot an event during a phone call with a parent. *Id.* at 657. The parent "taunted" her, and in response, her husband sent an email from her work address "criticizing" the parent. *Id.* The school fired her, and she sued under the ADA. *Id.*

Grussgott was a minister is a "fact-intensive" determination.[91] The court determined she was a minister under the exception because she "furthered the school's religious mission" and thus qualified as a minister.[92]

The Seventh Circuit moved systematically through the four factors the Court outlined in *Hosanna-Tabor*.[93] They did this even after the Court in *Hosanna-Tabor* chose not to create a "rigid formula" for deciding who qualifies as a minister.[94] Though her job title counseled against the exception ("grade school teacher"), as did her use of the title (as an "ambassador of the Jewish faith"), the substance of her title weighed in favor of the exception.[95] The school expected her to teach the Hebrew curriculum alongside religious teachings.[96] In addition, she served "important religious functions";[97] she taught students about Jewish holidays, prayer, and the Torah.[98] Grussgott argued she taught from a historical and cultural lens, not a religious one.[99] Instead, reasoning that learning about Jewish holidays, regardless of the perspective given by the educator, teaches about a facet of the Jewish faith, the court found she served a religious function.[100] Finding two factors of the four weighing in favor of the exception, the Seventh Circuit decided because the school "intended" Grussgott to take on a religious role, she was a minister.[101]

The Second Circuit took up a similar issue in *Fratello v. Archdiocese of New York*.[102] This case considered whether Fratello, a principal at a Roman Catholic school, was a minister, and thus if an employment discrimination claim brought against the Archdiocese could proceed.[103] To make this determination, the court echoed the *Hosanna-Tabor* factors[104] used in *Grussgott*.[105] In her role

91. *Id.* at 657.

92. *Id.*

93. *Id.* at 658 (noting that an amicus brief and "other courts of appeals have explained that the same four considerations need not be present in every case involving the exception"). The Seventh Circuit considered the following factors from *Hosanna-Tabor's* analysis: (1) "the formal title" given by the Church, (2) "the substance reflected in that title," (3) "[the teacher's] own use of that title," and (4) "the important religious functions she performed for the Church." *Id.* (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 192 (2012)); *see also supra* Section II.A.

94. *Hosanna-Tabor*, 565 U.S. at 190.

95. *Grussgott*, 882 F.3d at 659.

96. *Id.*

97. *Hosanna-Tabor*, 565 U.S. at 192.

98. *Grussgott*, 882 F.3d at 660.

99. *Id.*

100. *Id.*

101. *Id.* at 661.

102. 863 F.3d 190 (2d Cir. 2017). Fratello, a principal at a Roman Catholic school, alleged she was fired due to gender discrimination and retaliation. *Id.* at 192.

103. *Id.* Fratello filed a claim under Title VII of the CRA and under New York State law. *Id.*

104. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 192 (2012).

105. *Grussgott*, 882 F.3d at 658.

as principal, Fratello hosted a student to present a daily prayer over the loudspeaker.[106] When it ended, Fratello said "Praise to you Lord Jesus Christ."[107]

In deciding if Fratello was a minister, the Second Circuit relied heavily on Justice Alito's concurrence in *Hosanna-Tabor*, which focused on the function of the person at issue and not their title.[108] The court looked at "the relationship between the activities the employee performs for her employer, and the religious activities the employer espouses and practices" in deciding whether Fratello was a minister.[109] The court deemed her a minister because of her religious function at the school and weighed that factor most heavily.[110]

D. The Supreme Court Weighs in Again in Guadalupe

The Supreme Court revisited the exception for the second time in 2020.[111] In *Our Lady of Guadalupe v. Morrisey-Berru* the Court consolidated two cases.[112] The Court considered employment discrimination claims brought by two elementary school teachers against different defendant schools.[113] Neither teacher had the title of "minister," and both had less religious training than Perich, the plaintiff in *Hosanna-Tabor*.[114]

Our Lady of Guadalupe School asked the plaintiff-employee, Agnes Morrisey-Berru, to move to a part-time role in 2014 and then did not rehire her in 2015 after she struggled to implement new curriculums.[115] Morrisey-Berru filed suit under the Age Discrimination in Employment Act.[116] Her contract included an employment agreement that stated the school's mission: "to develop and promote a Catholic School Faith Community."[117] Her responsibilities "were performed within this overriding commitment."[118] Morrisey-Berru "prepared her students . . . [for] Mass and for communion and confession."[119] She also prayed with students[120] and sought to provide a "faith-based education."[121]

Biel, the consolidated case's plaintiff, had a similar employment agreement to Morrisey-Berru's.[122] She also "instructed her students in the tenets of

106. *Fratello*, 863 F.3d at 196.

107. *Id.* She also planned religious assemblies and "communicated religious messages" over the loudspeaker during holidays. *Id.* The school reviewed Fratello early in her tenure and considered her work to "foster[] a Christian atmosphere," among other things. *Id.* at 197.

108. *Id.* at 205.

109. *Id.*

110. *Id.* at 208–09.

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

112. *See generally id. St. James Sch. v. Biel* was the companion case. *Id.*

113. *See id.* at 2055.

114. *Id.*

115. *Id.* at 2057–58.

116. *Id.* at 2058.

117. *Id.* at 2056 (internal citations omitted).

118. *Id.*

119. *Id.* at 2057.

120. *Id.*

121. *Id.*

122. *Id.* at 2058.

Catholicism" and prayed with them daily.[123] St. James School, her employer, chose not to renew her contract after her first year.[124] She alleged it was because she asked for a leave of absence to receive treatment for breast cancer.[125] In both cases, the Ninth Circuit reversed a district court decision that Our Lady of Guadalupe and St. James were covered by the ministerial exception.[126]

Justice Alito, writing now for the majority, discussed the four factors considered in *Hosanna-Tabor*.[127] The majority once again said "a variety of factors may be important" to determining who is a minister and certain factors of importance in one case may not be relevant to another.[128] "Simply giving an employee the title of 'minister' is not enough to justify the exception," but it also is not necessary to qualify for the exception.[129] "What matters, at bottom, is what an employee does."[130] The majority stressed the importance of religious education and its role in educating young people in the faith, surveying multiple religions' views on religious education.[131]

The Court found Biel and Morrisey-Berru to be ministers under the exception.[132] They both were deemed to have performed "vital religious duties" and were "entrusted most directly . . . [to] educat[e] their students in the faith."[133] The decision seemed to recognize Biel and Morrisey-Berru were less "ministerial" than Perich, from *Hosanna-Tabor* (Perich held the title of minister and had received formal religious training).[134] Still, Biel and Morrisey-Berru were "a vital part in carrying out the mission of the church."[135] The Court also doubled-down on the lack of a "rigid formula" for determining who is a minister, scolding the Ninth Circuit for their "rigid" application of a formula during their review of the cases.[136]

Guadalupe spurred a concurrence as well as a dissent.[137] First, Justice Thomas concurred to argue (as he also did in his *Hosanna-Tabor* concurrence[138]) courts should "defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'"[139] Justice Gorsuch, who was confirmed to

123. *Id.* at 2059.
124. *Id.*
125. *Id.*
126. *Id.* In both cases, the district court granted summary judgment in favor of the schools, but the Ninth Circuit reversed. *Id.* at 2058–59.
127. *Id.* at 2062–63. These factors were also relied upon in the cases discussed in Section II.C, *supra*.
128. *Id.* at 2063.
129. *Id.*
130. *Id.* at 2064.
131. *Id.* at 2064–66.
132. *Id.* at 2066.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 2066–67.
137. *See generally id.*
138. *Id.* at 2069 (Thomas, J., concurring).
139. *Id.* at 2069–70.

the Court in 2017, after *Hosanna-Tabor* came down,[140] joined Thomas's concurrence.[141] Justice Sotomayor dissented, joined by Justice Ginsburg.[142] Sotomayor argued, "[t]he 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."[143] She argued the Court's actual analysis was simply whether or not "a church thinks its employees play an important religious role."[144] This "simplistic" approach, she argued, left thousands of teachers without recourse in termination situations.[145] Sotomayor mentioned *Employment Division v. Smith* in asserting applicable laws must be followed by religious institutions, and she relied on *Hosanna-Tabor*'s seemingly limited ruling that applied the judge-made exception only to those with a leadership role within the religious organization.[146] The dissent noted prior circuit court case law that refused to apply the exception to "lay faculty."[147] As she wrote: "[u]ntil today, no court had held that the ministerial exception applies with disputed facts like these and lay teachers like respondents, let alone at the summary-judgment stage."[148] Sotomayor saw the decision as being ripe for abuse because the majority overly valued the religious entity's understanding of the employee's role, thus adopting a functional test that deferred almost completely to the religious institutions themselves.[149]

E. Applying the Ministerial Exception Outside of Termination-Related Suits

The next frontier for the ministerial exception considers its application outside of the hiring and firing context. Following *Guadalupe*, the Seventh Circuit considered whether a hostile work environment claim could be barred by the ministerial exception.[150] In *Demkovich v. St. Andrew the Apostle Parish*,

140. Elana Schor, *Senate Confirms Gorsuch to Supreme Court*, POLITICO (Apr. 7, 2017, 1:22 PM), https://www.politico.com/story/2017/04/senate-confirms-gorsuch-to-supreme-court-237005 [https://perma.cc/4KXZ-VU3Y].

141. *See Guadalupe*, 140 S. Ct. at 2069 (2020) (Thomas, J., concurring). In 2012, Thomas was alone in writing a very similar concurrence in *Hosanna-Tabor* before Gorsuch joined the Court. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 196–97 (2012) (Thomas, J., concurring).

142. *See Guadalupe*, 140 S. Ct. at 2071–82 (Sotomayor, J., dissenting). Sotomayor and Ginsburg joined the 9-0 opinion in *Hosanna-Tabor*. *See generally* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012). Justice Ginsburg died in 2020 and was replaced by Amy Coney Barrett. Andrew Desiderio, *Senate Confirms Barrett to Supreme Court, Sealing a Conservative Majority for Decades*, POLITICO (Oct. 26, 2020, 10:06 PM), https://www.politico.com/news/2020/10/26/senate-confirmation-barrett-supreme-court-432520 [https://perma.cc/57FQ-2CUU]. Barrett served on the panel that decided *Grussgott* when she was a Seventh Circuit judge, prior to her Supreme Court nomination. *See generally* Grussgott v. Milwaukee Jewish Day Sch., 882 F.3d 655 (7th Cir. 2018) (per curiam). This decision applied the ministerial exception to a teacher at a Jewish school. *See supra* Section II.C.

143. *Guadalupe*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

144. *Id.*

145. *Id.*

146. *Id.* at 2072–73.

147. *See id.* at 2073 (listing various circuit court cases finding lay faculty are not ministers).

148. *Id.* at 2075.

149. *Id.* at 2075–76.

150. *See generally* Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021).

Calumet City, St. Andrew hired the plaintiff, Sandor Demkovich, as the church's music director in September 2012 and fired him two years later.[151] Demkovich (a gay man) alleged the church's Reverend (not a defendant in the case) discriminated against him based on his sexual orientation.[152] Demkovich said the Reverend "repeatedly subjected him to derogatory comments and demeaning epithets showing a discriminatory animus toward his sexual orientation" especially after the Reverend learned he planned to marry his partner.[153] The Reverend asked him to resign after learning of his marriage plans.[154] Demkovich refused; the church fired him.[155]

Demkovich filed an amended complaint alleging a hostile work environment, which the district court dismissed in part.[156] The Seventh Circuit panel let his disability-based hostile work environment claim progress (he had diabetes, metabolic syndrome, and weight issues) but dismissed his sexual orientation and marital status claims.[157]

The en-banc Seventh Circuit overruled the earlier panel decision,[158] deciding that although *Hosanna-Tabor* and *Guadalupe* considered termination decisions, the ministerial exception can apply to "the entire employment relationship."[159] The court found Demkovich to be a minister with little discussion.[160] The court determined that "[a]djudicating a minister's hostile work environment claims based on actions between ministers would undermine" the First Amendment protection the exception was created to protect.[161]

In so deciding, the Seventh Circuit deepened a circuit split on whether hostile work environment claims are subject to the ministerial exception,[162] disagreeing with two decisions from the Ninth Circuit[163] and agreeing with an earlier case from the Tenth Circuit.[164] In the Tenth Circuit case, *Skrzypczak v. Roman Catholic Diocese of Tulsa*, the court decided a hostile work environment claim brought by the plaintiff (deemed a minister by the court) was barred under the

151. *Id.* at 973.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 974.
158. *See generally* Demkovich v. St. Andrew the Apostle Par., Calumet City, 973 F.3d 718 (7th Cir. 2020) (panel decision).
159. *Demkovich*, 3 F.4th at 976–77.
160. *Id.* at 977–78 ("This case concerns what one minister . . . said to another, Demkovich.").
161. *Id.* at 985.
162. *Id.* at 978–88 (Hamilton, J., dissenting) (noting that the Ninth Circuit has come to a different conclusion in two separate cases, and the Tenth Circuit reached the same conclusion as the majority in *Demkovich*).
163. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947–48 (9th Cir. 1999) (ruling the ministerial exception does not apply because a hostile work environment claim does not concern choosing a religious institution's clergy); Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004) (ruling the plaintiff, an ordained minister, who brought sexual harassment and retaliation claims by a senior minister, could proceed on her hostile work environment claims).
164. *See* Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1245 (10th Cir. 2010) (dismissing plaintiff's allegations of a sexually hostile work environment because it would infringe on religious autonomy).

exception because it may have infringed on the religious entity's ability to choose ministers free from state interference.[165] The court explicitly distinguished a Ninth Circuit case, *Elvig v. Calvin Presbyterian Church*, disagreeing that "a hostile work environment claim brought by a minister does not implicate a church's spiritual functions."[166] In *Elvig*, the Ninth Circuit ruled the plaintiff's sexual harassment claim would succeed if she could prove a hostile work environment existed at the defendant church, and her retaliation claim could succeed if she showed "retaliatory harassment."[167] Demkovich did not petition the Court for certiorari, though a similar case may eventually reach the Court to resolve this circuit split.[168]

F. Applying the Ministerial Exception in State Court

The ministerial exception has also reached state courts. In New Jersey, St. Theresa School fired art teacher Victoria Crisitello because she was pregnant and unmarried.[169] The school's principal fired her because premarital sex violated the school's ethics code and policies.[170] Crisitello was hired in 2011 as a lay teacher for toddlers and was familiar with the church's teachings, which included a prohibition on premarital sex.[171] Three years later, Crisitello asked to take on additional responsibilities and informed her principal she was pregnant and would need a pay raise; she was fired shortly after that conversation.[172] The sole cause of her termination was the discovery she had engaged in premarital sex.[173] The trial court granted the school's summary judgment motion.[174] The appeals court reversed, finding "the First Amendment does not bar plaintiff's claim."[175] The case is currently pending before the New Jersey Supreme Court, which granted review in May of 2021.[176]

The highest court in Massachusetts recently considered the ministerial exception when a college professor filed a discrimination claim after being denied

165. *Id.* at 1246.

166. *Id.* at 1245.

167. *Elvig*, 375 F.3d at 953.

168. Dan Papscun, *'Ministers' Shielded from Harassment Claims, 7th Cir. Says (1)*, BLOOMBERG L. (July 9, 2021, 3:07 PM), https://news.bloomberglaw.com/daily-labor-report/ministers-shielded-from-harassment-claims-split-7th-cir-says [https://perma.cc/MC6A-KB2Q] (noting Demkovich's attorney expected Demkovich to petition the Supreme Court for review). Demkovich did not petition for Supreme Court review. *Demkovich v. St. Andrew the Apostle Parish*, BECKET, https://www.becketlaw.org/case/demkovich-v-st-andrew-apostle-parish/ (last visited Mar. 8, 2023) [https://perma.cc/BTB5-6PR4].

169. Crisitello v. St. Theresa Sch., NO. A-1294-16T4, 2018 WL 3542871, at *1 (N.J. Super. Ct. App. Div. July 24, 2018).

170. *Id.*

171. *Id.* at *2.

172. *Id.*

173. *Id.*

174. *Id.* at *4.

175. *Id.* at *5.

176. Crisitello v. St. Theresa Sch., 246 N.J. 315, 315 (2021). An article describing this case in detail appeared in the *New York Times*. *See* Tracey Tulley, *An Unmarried Catholic Schoolteacher Got Pregnant. She Was Fired.*, N.Y. TIMES (June 28, 2021), https://www.nytimes.com/2021/06/28/nyregion/pregnant-catholic-school-teacher.html [https://perma.cc/BY2D-WSXY].

promotion to full professor at Gordon College (a private, nondenominational Christian liberal arts college[177]), despite having a unanimous recommendation from the faculty senate.[178] The plaintiff-professor, Margaret DeWeese-Boyd, alleged the school was retaliating against her because of her "vocal opposition" to the school's LGBTQ+ policies.[179] The Gordon faculty handbook said faculty are "committed to imaging Christ in all aspects of their educational endeavors" and must show how they "integrate faith and learning" as they apply for promotion and tenure.[180] In 2016, Gordon added a passage to the faculty handbook labeling faculty members as "both educators and ministers to our students."[181] The handbook had not previously described faculty as ministers.[182] Professors expressed concern over this passage.[183] In 2017, after DeWeese-Boyd received a unanimous recommendation for a promotion, the provost chose not to forward the recommendation to the board of trustees due to her "lack of scholarly productivity, professionalism, responsiveness, and engagement."[184] DeWeese-Boyd was not a minister, though she was employed as teaching faculty, and her "responsibilities were governed by the handbook."[185] She went to church services at Gordon twice per year, but otherwise did not hold herself out as a minister, teach religion, or lead students in "spiritual exercises."[186]

The Massachusetts high court, recognizing the Court's decisions in both *Hosanna-Tabor* and *Guadalupe*, determined DeWeese-Boyd was not a minister and thus her suit could proceed.[187] The court said the primary inquiry was considering "what an employee does."[188] The court found DeWeese-Boyd was a professor of social work who did not teach religion classes, lead services, attend services, or pray with students but did integrate a "Christian perspective" into her work.[189] The court found DeWeese-Boyd not to be a minister, noting her title and training lacked any religious components.[190] Thus, the court allowed the suit to proceed and refused to "expand" the exception to a professor of a secular subject at a religious college.[191] Gordon College then petitioned the Supreme Court for certiorari in August of 2021.[192]

177. DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000, 1007–08 (Mass. 2021).
178. *Id.*
179. *Id.* at 1003.
180. *Id.* at 1005.
181. *Id.* at 1006.
182. *Id.*
183. *Id.*
184. *Id.* at 1007–08.
185. *Id.* at 1008.
186. *Id.*
187. *Id.* at 1009. The court saw this as a "difficult issue." *Id.*
188. *Id.* at 1012 (quoting Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020)).
189. *Id.* at 1013.
190. *Id.* at 1014–18.
191. *Id.* at 1018.
192. *Gordon College v. DeWeese-Boyd*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/gordon-college-v-deweese-boyd/ (last visited Mar. 8, 2023) [https://perma.cc/YKG8-LBRB].

The Court denied certiorari in February 2022.[193] Justice Alito wrote a statement of denial, joined by Justices Thomas, Barrett, and Kavanaugh.[194] The Court denied the petition for procedural reasons.[195] Still, Justice Alito wrote that the Massachusetts court's decision reflects a "troubling and narrow view of religious education."[196] He expressed doubt that DeWeese-Boyd's case is any different than the plaintiffs in *Guadalupe* because DeWeese-Boyd, though not a religious teacher, engaged in "[f]aith infused instruction."[197]

After the explosion of jurisprudence regarding the ministerial exception since 2012, the Court, as well as state and federal legislators, have the opportunity to clarify this evolving area of the law.

III. ANALYSIS

Until 2012, circuit courts were alone in recognizing the ministerial exception.[198] *Hosanna-Tabor*[199] and, eight years later, *Guadalupe*,[200] were the first and only times the Court has recognized the exception.[201] While *Hosanna-Tabor* saw a "called" teacher become eligible for the exception,[202] *Guadalupe* expanded the exception to "lay" teachers at a religious school.[203] In deciding that the lay teachers in *Guadalupe* were covered under the exception, the Supreme Court refused to apply any sort of "rigid formula" for determining who is a minister.[204] The Court said, "the lower courts have been applying the exception for many years without such a formula."[205]

But the Supreme Court waited forty years to formally recognize the exception; *McClure* first acknowledged the existence of the ministerial exception in 1972 and the Court decided *Hosanna-Tabor* in 2012.[206] The exception has not been applied uniformly since 1972. Indeed, the Court's decisions in *Hosanna-Tabor* and *Guadalupe* overturned circuit court decisions applying the exception inappropriately.[207]

193. *See generally* Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 952 (2022) (Alito, J., statement respecting denial of certiorari).

194. *Id.*

195. *Id.* The Court indicated a "threshold jurisdictional issue"—the lack of a final judgment in the case—precluded review at this time, but left the door open to Gordon College refiling following a final judgment entered against them. *Id.* at 955.

196. *Id.* at 954.

197. *Id.* at 954–55.

198. Griffin, *supra* note 10, at 982–83; Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012).

199. *See generally Hosanna-Tabor*, 565 U.S. 171.

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

201. *Id.* at 2055.

202. *Hosanna-Tabor*, 565 U.S. at 178, 190.

203. *Guadalupe*, 140 S. Ct. at 2055–56.

204. *Id.* at 2066–67.

205. *Id.* at 2069.

206. *See Hosanna-Tabor*, 565 U.S. at 188, 196.

207. *Hosanna-Tabor*, 565 U.S. at 196; *Guadalupe*, 140 S. Ct. at 2066–68.

Circuit courts have consistently held that lay teachers are not ministers.[208] *Hosanna-Tabor* offered a clear-cut case of a minister, in that case a "called teacher," applying for the exception, and thus was unanimous.[209] But in *Guadalupe*, two Justices dissented, not because they disagreed with the existence of the exception, but because the exception is "extraordinarily potent" and ripe for abuse if applied to lay teachers.[210]

This Part will begin by examining the ministerial exception's constitutional basis, considering prior Court precedent in *Smith*. A close reading of *Smith* precludes recognition of a ministerial exception.[211] Seeing as the Court has nonetheless unanimously adopted the ministerial exception,[212] this Part will then discuss how the exception may be limited, following *Guadalupe*. Next, it will discuss how the Court may address issues raised in the *DeWeese-Boyd* and *Demkovich* cases. Lastly, the pending *Crisitello* decision in the New Jersey Supreme Court will be discussed.

A. Squaring the Ministerial Exception with Smith

In 1990, the Supreme Court decided *Smith*, ruling that a criminal law punishing two men for using peyote was not "specifically directed at their religious practice" and thus did not infringe on their free exercise of religion under the Free Exercise Clause.[213] Their violation of this law meant they would not receive unemployment benefits.[214] Since the prohibition of using peyote was an "incidental effect" of a generally applicable law, the "First Amendment has not been offended."[215] The holding in *Smith* is that an individual's religious beliefs cannot excuse them from obeying neutral, generally applicable laws.[216]

1. Smith *Forbids a Ministerial Exception*

A close reading of *Smith* precludes any recognition of the ministerial exception.[217] But the Court, having recognized the exception unanimously in *Hosanna-Tabor*, feels differently. The Court has not fully analyzed and distinguished *Smith*. It mentioned *Smith* in just two paragraphs of *Hosanna-Tabor*[218] and not once in *Guadalupe*. The Court's recent decision in *Fulton v. City of*

208. *See Guadalupe*, 140 S. Ct. at 2073 (Sotomayor, J., dissenting) (discussing circuit court decisions ruling that lay teachers are not ministers under the exception).

209. *See Hosanna-Tabor*, 565 U.S. at 175, 178, 190–91.

210. *See Guadalupe*, 140 S. Ct. at 2072. (Sotomayor, J., dissenting).

211. *See* Griffin, *supra* note 10, at 993–94; *cf. generally* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

212. *Hosanna-Tabor*, 565 U.S. at 175, 178.

213. *See Smith*, 494 U.S. at 878–79.

214. *Id.* at 874.

215. *Id.* at 878.

216. *Id.* at 878–90.

217. *See* Griffin, *supra* note 10, at 993–94; *cf. generally Smith*, 494 U.S. 872.

218. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 189–90 (2012).

Philadelphia offers insight into why the Court gave so little attention to *Smith*: many of the Court's members would like to see *Smith* overturned.[219]

It is easy to see how *Smith could* be applicable to the ministerial exception cases.[220] The statutes under which most employment discrimination lawsuits are filed are certainly neutral and generally applicable.[221] *Smith* considered two men who ingested peyote, were subsequently fired from their jobs, and then wanted to claim religious protection to receive unemployment benefits their state denied.[222] *Hosanna-Tabor* considered a religious institution that wanted to claim religious protection from a lawsuit brought by an aggrieved employee under the ADA.[223] The Court in *Hosanna-Tabor* explained this distinction away with ease. The Court mentioned *Smith* in just two consecutive paragraphs.[224] The first explained the plaintiff's argument that *Smith* disallows a recognition of the ministerial exception.[225] The second said that while *Smith* prohibits "outward physical acts," *Hosanna-Tabor* "affects the faith and mission of the church itself."[226] Thus, "[t]he contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit."[227]

The Court makes it look so simple, but is it? To begin with, what is an outwardly physical act? What is not? It seems the Court may be referring to the actual use of peyote as a "physical act" whereas the firing of an employee is "internal." If this is true, why does this distinction matter? And, even if it does, do they not both affect the mission of the religion? If individuals are restricted from using peyote in line with their religious beliefs, the mission of the religion is curbed.[228] For another example, imagine the use of the shofar by Jewish people on the holiest days of the year, Rosh Hashanah and Yom Kippur.[229] The shofar is an instrument often made from a ram's horn.[230] If a law was passed forbidding the killing of rams and the importing of animal horns, that law would pass muster under *Smith*.[231] It is not targeted at Jews; it is targeted at curbing ram killing by

219. *See* Howard Gillman & Erwin Chemerinsky, *The Weaponization of the Free-Exercise Clause*, ATLANTIC (Sept. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/ [https://perma.cc/4J2P-TUM5].

220. *See* Griffin, *supra* note 10, at 992–94.

221. *See, e.g.*, 42 U.S.C. § 2000e–3(a) (making it "unlawful . . . for an employer to discriminate against any of his employees"); *id* § 12112 (barring an employer from discriminating "against a qualified individual on the basis of disability in regard to . . . hiring . . . discharge of employees, [and] employee compensation").

222. *Smith*, 494 U.S. at 874.

223. *Hosanna-Tabor*, 565 U.S. at 179 (noting the plaintiff Perich alleged "that her employment had been terminated in violation of the Americans with Disabilities Act").

224. *Id.* at 189–90.

225. *Id.*

226. *Id.* at 190.

227. *Id.*

228. Leslie C. Griffin offers another critical perspective of the exception in light of *Smith*. *See* Griffin, *supra* note 10, at 992–94.

229. *Rosh HaShanah: The Shofar*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/the-shofar (last visited Mar. 8, 2023) [https://perma.cc/2TH9-RDZM]; *Why Do We Blow the Shofar on Yom Kippur?* JERUSALEM POST (Sept. 28, 2017, 1:09 AM), https://www.jpost.com/promocontent/why-do-we-blow-the-shofar-on-yom-kippur-506193 [https://perma.cc/MGK9-N3AE].

230. *See Rosh HaShanah: The Shofar*, *supra* note 229.

231. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).

all. This law would certainly have an impact on "the faith and mission" of many Jewish congregations.[232] The blowing of the shofar is a key aspect of these services.[233]

This illustration exposes the primary issue with the Court's attempt to explain away *Smith* in the ministerial exception context: any infringement on religious rights has the potential to impact the "faith and mission" of the religious organization.[234] If believers cannot exercise their religious traditions and rituals, the mission of the religion is inherently being limited. The Court was okay with this in *Smith* but not in *Hosanna-Tabor*.[235]

The ministerial exception has recently allowed the Catholic Church to fire employees who have same-sex marriages.[236] This comes after the Supreme Court decided, in *Bostock v. Clayton County*, that an "employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex," an action forbidden under Title VII of the CRA.[237] But the Catholic Church seems willing to fire employees deemed ministers if it finds out they identify as LGBTQ+, even if those people are "lifelong Catholics."[238]

Once again, these decisions become difficult to square with *Smith* and *Hosanna-Tabor*. The firing of a music teacher after his gay marriage[239] is outwardly physical, even if it is not the same as smoking peyote. It is hard to understand what the Court means by "outward physical acts" versus an "internal church decision."[240] Is the approval of the use of peyote by Native American religious groups not an internal church decision? Further, a person's same-sex marriage is an outwardly physical act. That act, which then prompts an internal church decision to fire the person, is also outwardly physical. It tells all prospective employees who are also gay to not come near the Catholic Church if they wish to be employed in a ministerial capacity. It has the outward effect of repelling prospective employees.

232. *See Rosh Hashanah: The Shofar*, *supra* note 229.

233. *Id*.; *Why Do We Blow the Shofar on Yom Kippur?*, *supra* note 229.

234. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012).

235. *Compare Smith*, 494 U.S. at 890 (ruling that because the ingestion of peyote was barred under Oregon law, respondents could be denied unemployment benefits, consistent with the Free Exercise Clause), *with Hosanna-Tabor*, 565 U.S. at 190 (ruling the ministerial exception barred an employment discrimination suit brought by a religious schoolteacher).

236. Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 553 F. Supp. 3d 616, 627 (S.D. Ind. 2021) (ruling a school counselor at a Catholic school who was fired after the school learned of her same-sex marriage could not proceed with her Title VII claim because of the ministerial exception); *see also* Liam Stack, *A Gay Music Teacher Got Married. The Brooklyn Diocese Fired Him.*, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/10/27/nyregion/catholic-school-teacher-fired-same-sex-marriage.html [https://perma.cc/L24P-FEC8] (discussing a man who was fired from his position as music teacher and parish music director at Corpus Christi Church after marrying his same-sex partner).

237. *See generally* 140 S. Ct. 1731, 1737 (2020).

238. *See* Stack, *supra* note 236.

239. *See id.*

240. *See Hosanna-Tabor*, 565 U.S. at 190.

The word "physical" as used by the *Hosanna-Tabor* Court is even more perplexing. The act of smoking peyote is physical. The smoker inhales and exhales. But what acts are not physical?

Hosanna-Tabor granted the plaintiff, Cheryl Perich, disability leave at the beginning of the 2004–2005 school year.[241] Perich arrived at school after being medically cleared by her doctor.[242] When she was not put back to work, she demanded "written documentation" she had arrived at school that day.[243] She walked in and out of the building, spoke to employees and possibly a supervisor at the school, and received written documentation.[244] These are all physical acts. Her eventual termination for the "[insubordinate] and disruptive behavior" of showing up and demanding this documentation is itself a physical act.[245] There is no way to "disrupt" without engaging in outward physical behavior of some kind, even if it is in the form of an email you typed with your own hands. Her firing stemmed from physical acts, and the cause of her firing was from these physical acts, including her threatening to file an ADA claim. The effect of her firing is also outward and physical. She can no longer teach at Hosanna-Tabor and this decision has the physical effect of repelling other prospective employees who are fearful they may face the same wrath from the administration were they to be hired and faced with medical diagnoses, a divorce, the need for an abortion, or engaging in a same-sex marriage. Medical diagnoses are not something a person plans for when seeking out an employer, but people expect to remain employed when taking medical leave. Hosanna-Tabor school administrators decided in January 2005 that Perich would be "unlikely to be physically capable of returning to work that school year or the next."[246] Her own doctor cleared her to work beginning on February 22, 2005, the day she reported to work and exhibited the "[insubordinate] and disruptive behavior."[247]

Hosanna-Tabor offered Perich "a 'peaceful release' from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher."[248] The school gave Perich disability leave at the beginning of the 2004–2005 school year.[249] The facts of the case do not mention Perich was told her position would be usurped or unavailable upon her return. The term "medical leave" is distinct from resigning for medical reasons; she was on leave and thus expecting to return.[250] In addition, even if Hosanna-Tabor replaced her for the current school year, the board recommended she not only stay on leave for the rest of the 2004–2005 school year but that she

241. *Id.* at 178.
242. *Id.* at 179.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 178.
247. *Id.* at 178–79.
248. *Id.* at 179.
249. *Id.* at 178.
250. *See id.*

also not return for the 2005–2006 school year, which would start over six months after being medically cleared by her doctor.[251]

Thus, Perich's physical act of arriving to work to be reinstated was rebuffed on that day and delayed for *at least* sixteen months, even though she was medically cleared.[252] Then, the school fired her for "insubordinate and disruptive behavior" and filing her lawsuit (with the EEOC) alleging that she was fired for "threatening to file an ADA lawsuit" against the school.[253] This threat is physical as well. The EEOC would need to physically draft the complaint, and the court proceedings that followed would involve phone calls, discovery, appearances in court, and client meetings.

2. Smith *After* Fulton

The distinction between "outward physical acts" and "internal church decisions" created in *Hosanna-Tabor*, and the short shrift given to *Smith* in the opinion itself, are even less surprising in the wake of *Fulton v. City of Philadelphia*.[254] In that case, Philadelphia stopped "referring children to C[atholic] S[ocial] S[ervices] upon discovering the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage."[255] The Court answered whether Philadelphia's actions violated the First Amendment.[256]

The six-Justice majority acknowledged *Smith* from the outset in this opinion[257] but decided this decision also falls out of *Smith's* scope. Philadelphia infringed on Catholic Social Services' ("CSS") religious exercise in ways that were not neutral and generally applicable.[258] The Court focused on the general applicability prong.[259] The Court explained why Philadelphia's contract was not generally applicable because it offers exceptions to not allowing same-sex adoptions.[260]

The *Fulton* decision is more important because of its concurrences. These concurrences may explain why *Hosanna-Tabor* gave *Smith* so little attention. Multiple Justices seem interested in overturning *Smith* entirely.[261] Justice Barrett writing in *Fulton* (joined by Justice Kavanaugh) argued "the textual and structural arguments against *Smith* are more compelling" and thus "it is difficult to see why the Free Exercise Clause . . . offers nothing more than protection from discrimination."[262] Barrett asked what should replace *Smith* and sought to avoid

251. *Id.* at 178–79.
252. *See id.*
253. *Id.* at 180.
254. 141 S. Ct. 1868 (2021).
255. *Id.* at 1874.
256. *Id.*
257. *Id.* at 1876.
258. *Id.* at 1877.
259. *Id.*
260. *Id.* at 1878.
261. Each concurrence in *Fulton* hinted at an overturning of *Smith*. *See id.* at 882–83 (Barrett, J., concurring); *id.* at 1883 (Alito, J., concurring); *id.* at 1926 (Gorsuch, J., concurring).
262. *Id.* at 1882 (Barrett, J., concurring).

installing a strict scrutiny regime wherein each neutral and generally applicable law is held up to the strict scrutiny standard if it infringes on religious exercise.[263] In the end, Justice Barrett realized *Smith* lacked relevance to the case because strict scrutiny is required whenever a law "burdening religious exercise . . . gives government officials discretion to grant individualized exceptions."[264]

Justice Alito, joined by Justices Thomas and Gorsuch, also began his concurrence with a discussion of *Smith*, insisting "[t]his severe holding is ripe for reexamination."[265] Alito went further than Barrett and argued *Smith* should have been revisited in *Fulton* because "it has not aged well" based on the "original meaning of the Free Exercise Clause."[266] Alito ruled that *Smith* failed to provide a "clear cut rule that is easy to apply."[267]

The third and final concurrence was written by Justice Gorsuch and joined by Justices Thomas and Alito.[268] He also began by discussing *Smith*, characterizing it as a "mistaken" and "unworkable" decision.[269] Gorsuch called out the majority decision as "sidestep[ping] the question" of whether to overturn *Smith*.[270] These concurrences, written by three Justices (Barrett, Alito, and Gorsuch), all seem amenable to overturning *Smith*.[271] Justice Kavanaugh joined the Barrett concurrence (which, for its part, was the tamest of the three[272]), and then-Justice Breyer even joined all but the first paragraph of the Barrett concurrence, and thus signed on to the second and final paragraphs, which briefly considered what could replace *Smith*.[273] The Alito and Gorsuch concurrences were both joined by Thomas.[274] This indicates there are five Justices willing to overturn *Smith* (Alito, Gorsuch, Barrett, Kavanaugh, and Thomas) who may be listening to arguments against it.[275] Had Justice Roberts not written the majority opinion,[276] it is possible he too may seek to overturn the decision, along with Justice Kagan.[277]

After *Fulton*, it becomes clear why Roberts barely mentioned *Smith* in *Hosanna-Tabor*. *Smith* is on its last legs. The four Justices appointed after *Hosanna-*

263. *Id.* at 1883.
264. *Id.*
265. *Id.* (Alito, J., concurring).
266. *Id.* at 1888.
267. *Id.*
268. *Id.* at 1926 (Gorsuch, J., concurring).
269. *Id.*
270. *Id.*
271. *See id.* at 1882–83 (Barrett, J., concurring); *id.* at 1883 (Alito, J., concurring); *id.* at 1926 (Gorsuch, J., concurring).
272. *Compare id.* at 1882 (Barrett, J., concurring) (arguing there are "serious arguments that *Smith* ought to be overruled"), *with id.* at 1883 (Alito, J., concurring) (arguing *Smith* is a "severe holding" that is "ripe for reexamination").
273. *Id.* at 1882–83 (Barrett, J., concurring).
274. *See id.* at 1883 (Alito, J., concurring); *id.* at 1926 (Gorsuch, J., concurring).
275. *See id.* at 1882–83 (Barrett, J., concurring); *id.* at 1883 (Alito, J., concurring); *id.* at 1926 (Gorsuch, J., concurring).
276. *Id.* at 1868.
277. *See* Ian Huyett, *How to Overturn* Employment Division v. Smith*: A Historical Approach*, 32 REGENT U. L. REV. 295, 297 (2020).

Tabor came down all made their anti-*Smith* opinions clear in *Fulton*.[278] Thus, even if the ministerial exception cannot be justified under *Smith*, the Court seems poised to foreclose any *Smith*-type argument in future ministerial exception cases by overturning *Smith* entirely, if the Justices have the chance.[279]

Two scholars, Ira C. Lupu and Robert Tuttle, argue *Smith* is not relevant to the ministerial exception cases because the exception is rooted in the Establishment Clause.[280] Therefore, the judges had little reason to mention *Smith*, a case considering the Free Exercise Clause.[281] But, as Lupu and Tuttle point out, those representing (and supporting) religious institutions often invoke a Free Exercise argument in ministerial exception cases.[282] If the Establishment Clause is the foundation for the exception, it would create a narrow exception, one wherein the Court considers the functions of the employee at issue.[283] Therefore, religious institutions have instead pushed a Free Exercise Clause justification for the ministerial exception. A free exercise justification would demand courts defer to the "internal affairs" of a religious institution, creating a far broader exception applying to hospital staff, foster care providers, and many others.[284]

The Supreme Court has not yet broadened the exception to the extent that those invoking the Free Exercise Clause would like them to, but if they do so, Lupu and Tuttle correctly argue the Court would need to grapple with *Smith*.[285] It seems though, after *Fulton*, the Court may do away with *Smith* altogether and possibly broaden the ministerial exception as well.

B. Defining (and Limiting) the Ministerial Exception After Guadalupe

The ministerial exception is still a developing area of the law. In recent years, the Third Circuit found that a minister who was terminated as a pastor could not succeed on his breach of contract claim because of the ministerial exception.[286] A recent Fifth Circuit case inquired into whether the ministerial

278. *See Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring); *id.* at 1883 (Alito, J., concurring); *id.* at 1926 (Gorsuch, J., concurring).

279. Overturning *Smith* would have disastrous consequences, but those are beyond the scope of this Note. *See* Lisa Soronen, *Symposium: Defending* Smith *by Ignoring Soundbites and Considering the Mundane*, SCOTUSBLOG (Nov. 2, 2020, 4:19 PM), https://www.scotusblog.com/2020/11/symposium-defending-smith-by-ignoring-soundbites-and-considering-the-mundane/ [https://perma.cc/MZ7U-EQGE].

280. Ira C. Lupu & Robert Tuttle, *The Perils of Relying on the Wrong Clause—Grounding the Ministerial Exception at the Supreme Court*, VERDICT (Mar. 18, 2020), https://verdict.justia.com/2020/03/18/the-perils-of-relying-on-the-wrong-clause-grounding-the-ministerial-exception-at-the-supreme-court [https://perma.cc/P4VK-JM6Y].

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 122–23 (3d Cir. 2018). The Third Circuit recognized that other circuits agree with this understanding. *Id.* at 122; *see also* Bell v. Presbyterian Church (USA), 126 F.3d 328, 323–33 (4th Cir. 1997); Lewis v. Seventh Day Adventists Lake Region Conf., 978 F.2d 940, 942–43 (6th Cir. 1992); Natal v. Christian & Missionary All., 878 F.2d 1575, 1578 (1st Cir. 1989); Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986).

exception could be applied to state law tort claims.[287] In the wake of Covid-19, religious institutions sought to apply the ministerial exception to school mask mandates and closure orders from state and local governments; this effort failed.[288]

The Supreme Court has not heard a ministerial exception case since *Guadalupe*. The Court can move in multiple directions from here, considering the exception thus far has been applied in only two contexts: a "called teacher" who qualified as a minister in the more traditional sense[289] and teachers at a Catholic elementary school.[290] The next ministerial exception case the Court may hear is *DeWeese-Boyd*.[291] If so, the defendant, a Catholic college, will likely prevail, as the Roberts Court continues to broaden religious freedoms; scholars expect this trend to continue.[292] Additionally, the appointment of Amy Coney Barrett following the decision in *Guadalupe* is a boon to religious freedom advocates.[293]

Prior to *Guadalupe*, courts applied the ministerial exception in uneven ways. Justice Alito scolded the Ninth Circuit in *Guadalupe* because its "rigid test produced a distorted analysis" that led to finding Biel and Morrisey-Berru were not subject to the ministerial exception.[294] The ministerial exception, a judge-made doctrine,[295] is ripe for abuse if it is not clearly codified. It is overly simplistic to assume different circuit courts will handle the lack of a rigid formula in similar ways. If anything, it seems the lack of a rigid formula allows the Court to expand the exception at will.[296] The Court already broadened the exception in *Guadalupe* by applying ministerial status to classroom teachers without religious training.[297] The exception could continue expanding via cases like *DeWeese-Boyd* and *Crisitello*.[298]

287. *See* McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc., 966 F.3d 346, 347 (5th Cir. 2020).

288. *See, e.g.*, Resurrection Sch. v. Hertel, 11 F.4th 437, 459 (6th Cir. 2021) (noting that "requiring all persons ages five and older to wear a mask in public—including in the classroom—is not comparable to infringing on the school's authority to select their ministers and religious educators"); Commonwealth v. Beshear, 981 F.3d 505, 510 (6th Cir. 2020) (ruling that "[t]he ministerial exception protects a church's autonomy with respect to matters of doctrine and church government, but those are not affected here").

289. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 194 (2012).

290. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2052 (2020).

291. Though the Court rejected the petition for certiorari, it indicated a "threshold jurisdictional issue" regarding the lack of a final judgment in the case precluded review at this time but left the door open to Gordon College refiling following a final judgment. *See supra* note 195 and accompanying text.

292. Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html#:~:text=%E2%80%9CPlainly%2C%20the%20Roberts%20court%20has,of%20the%20University%20of%20Chicago [https://perma.cc/6KFR-VV6M].

293. *Id.*

294. *Guadalupe*, 140 S. Ct. at 2067.

295. *Id.* at 2072 (Sotomayor, J., dissenting).

296. *Id.* at 2055.

297. *Id.* at 2066.

298. *See generally* Crisitello v. St. Theresa Sch., NO. A-1294-16T4, 2018 WL 3542871, at *1 (N.J. Super. Ct. App. Div. July 24, 2018) (considering whether an art teacher at a religious school is covered under the exception).

1. Qualifying for the Exception: Applying Guadalupe *to* DeWeese-Boyd *and* Crisitello

Though Justice Alito insisted the factors established in *Hosanna-Tabor* are not essential to an analysis of the ministerial exception, he did admit a "variety of factors may be important."[299] But Alito seemingly decided on a much simpler, though possibly more amorphous test: "what a person does."[300] Alito went further—quoting his own concurrence from *Hosanna-Tabor*—which said the exception should cover any employee "who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[301]

In essence, the Court, led by Alito, along with six other Justices who joined his majority opinion in *Guadalupe*, and possibly one more (Barrett, confirmed months after *Guadalupe* came down), has moved toward a function-based test when determining who is or is not a minister that considers the role the person plays in the religious activities of the organization.[302] This test could be used to predict the outcome in multiple ministerial exception cases that may be headed to the Supreme Court in the coming years.

First, in *DeWeese-Boyd*,[303] the Court would have a difficult time finding that professor to be a minister. She taught social work, attended church services only twice a year (on her own), and did not teach any religious content to students.[304] As the Massachusetts high court pointed out, she did not pray with students or even attend chapel with students, as occurred in *Guadalupe*.[305] But the school handbook had recently been adapted to label its faculty as "both educators and ministers."[306] Still, as Alito noted in *Guadalupe*, simply calling staff a minister does not make them subject to the exception.[307] This is unsurprising. If it were that easy to apply for the exception, any religious-based organization would label everyone a minister and never face termination lawsuits again.

The key issue in *DeWeese-Boyd* will be if the professor's responsibility (as described in the school's handbook) to integrate Christian faith into her teaching is enough to make her a minister. The Massachusetts Supreme Court said no,[308] and Alito's functional test would lead to the same result.[309] There is no religious leading from a social work professor. Teaching social work does not involve teaching a religion's faith. Unlike the elementary school teachers in *Guadalupe*

299. *Guadalupe*, 140 S. Ct. at 2063.

300. *Id.* at 2064.

301. *Id.* (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 199 (2012)).

302. *See id.* 2063–65.

303. The Court recently denied review of this case, but it may still be heard again when a final judgment is made by the Massachusetts high court. *See supra* note 195 and accompanying text.

304. DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000, 1008 (Mass. 2021).

305. *Id.* at 47.

306. *Id.* at 37.

307. *Guadalupe*, 140 S. Ct. at 2063.

308. *DeWeese-Boyd*, 163 N.E.3d at 1013–14.

309. *See Guadalupe*, 140 S. Ct. at 2063–65.

who were involved in student prayer,[310] the social work professor in *DeWeese-Boyd* simply happened to teach at a religious school.[311] Thus, the ministerial exception is unlikely to be extended to secular teaching in religious colleges and universities. Indeed, such an expansion would open the door to a slippery slope. Do the janitors at Gordon College (the employer in *DeWeese-Boyd*) sign onto the handbook? If a nurse at a Catholic hospital signs a similar code of conduct saying they will integrate the Catholic faith into their work treating patients, would they too be deemed ministers under the exception? As Alito noted in *Guadalupe*, though, this result is unlikely because the person must be a "messenger or teacher of its faith" to be qualified as a minister.[312] The janitor and nurse are highly unlikely to teach or message their faith through their employment.

Nonetheless, Justice Alito seems convinced DeWeese-Boyd would qualify as a minister under the exception.[313] He wrote in his statement respecting the denial of the case that even though DeWeese-Boyd is not an instructor of religious faith, she may integrate the faith into her teaching and is called on to do so via the faculty handbook.[314]

By applying this functional test from *Guadalupe* to *Crisitello*, a case currently pending before the New Jersey Supreme Court, a similar result would be reached. In *Crisitello*, the Roman Catholic employer fired Crisitello, a teacher at the school, after discovering she had engaged in premarital sex.[315] She worked as an art teacher as well as a teacher's aide for toddlers.[316] Under Alito's test, it is unclear how she became a messenger of the Catholic faith in either of these roles, and there is no evidence in the record she taught or led any religious rituals. The school's strongest argument is that the teacher was expected to be an exemplary Christian in her work duties. As the New Jersey Appellate Court noted, just because she was expected to be an exemplary Christian does not "make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern."[317] As in *DeWeese-Boyd*, the success of this argument would lead to any staff member at the school potentially being deemed a minister.

Crisitello and *DeWeese-Boyd* both concern whether certain employees qualify as a minister.[318] Justice Alito's opinion in *Guadalupe* serves as a test for making this determination.[319] Currently, the ministerial exception has been

310. *Id.* at 2057.

311. *DeWeese-Boyd*, 163 N.E.3d at 1003.

312. *Guadalupe*, 140 S. Ct. at 2064 (emphasis omitted).

313. *See generally* Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952 (2022) (Alito, J., statement respecting denial of certiorari).

314. *Id.* at 955.

315. Crisitello v. St. Theresa Sch., 242 A.3d 292, 300 (N.J. Super. Ct. App. Div. 2020).

316. *Id.* at 299.

317. *Id.* at 236 (internal citations omitted).

318. *Crisitello*, 242 A.3d at 299; *DeWeese-Boyd*, 142 S. Ct. at 954–55.

319. *Crisitello*, 242 A.3d at 299–300; *DeWeese-Boyd*, 142 S. Ct. at 953.

invoked in the hiring and firing context, but it may be applied to other employment claims, including hostile work environment litigation.

2. Limiting the Exception to Hiring and Firing Decisions

The Court may hear the issue raised in *Demkovich* in the coming years, especially if more circuit courts begin to weigh in on the issue. The defendant religious organization in *Demkovich* sought to apply the ministerial exception to a hostile work environment claim.[320] Once again, the Ninth Circuit is the court of appeals on the side of limiting the exception.[321] If given the chance, the plaintiff in such a case may argue *Hosanna-Tabor* applied only to hiring and firing decisions, and any extension of that doctrine would make it nearly impossible for a ministerial employee to bring workplace discrimination claims against their employer if they work in a religious setting. *Guadalupe* lowered the bar for what it takes to become a minister and, coupled with an extension of the ministerial exception to causes of action beyond hiring and firing, religious institutions may have free reign to discriminate at will. Further, if religious institutions are aware they have *carte blanche* in these situations, they may abuse this power.

Still, the exception will likely not be limited in *Demkovich*. The Court has only become more conservative since 2018[322] and did not agree with the Ninth Circuit's limiting of the exception in *Guadalupe*.[323] Further, the current score from the circuit courts that have weighed in on the application of the exception to hostile work environment claims is two to one, in favor of granting the exception. The Tenth and Seventh Circuits would apply the exception, but the Ninth Circuit would not.[324]

The more interesting question is if the Court *should* limit the exception to hiring and firing decisions (at issue in *Hosanna-Tabor*, *Guadalupe*, as well as *DeWeese-Boyd*, and *Crisitello*). Those on the side of religious institutions argue hostile work environment claims should be included under the exception because the exception seeks to protect "the entire employment relationship" between a religious organization and its ministers.[325] The majority in *Demkovich* saw the goal of the ministerial exception as protecting a religious organization's independence in their ministerial relationships.[326] But, in so doing, it ignored a key limitation from *Hosanna-Tabor*. In that case, the Court said quite clearly that its decision bars a suit "challenging [a] church's decision to fire" a minister.[327] The

320. *See generally* Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021).

321. Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004).

322. Laura Bronner & Elena Mejia, *The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/ [https://perma.cc/C7K9-JMPN].

323. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066–67 (2020).

324. *See Demkovich*, 3 F.4th at 976–77 (applying the exception); Skrzypczak v. Roman Cath. Church of Tulsa, 611 F.3d 1238, 1245 (10th Cir. 2010) (applying the exception). *But see Elvig*, 375 F.3d at 953 (allowing the hostile work environment claim to proceed).

325. *Demkovich*, 3 F.4th at 976.

326. *Id.* at 978.

327. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012).

Court explicitly "express[ed] no view on whether the exception" applies to other types of suits.[328] *Guadalupe* again answered the question of who qualifies as a minister under the exception, and again concerned a termination-related suit.[329] *Guadalupe* stayed silent on any application of the ministerial exception to other legal actions. Thus, the Court still has not moved from its position established in *Hosanna-Tabor*, limiting the exception to termination-related suits. The dissent in *Demkovich* acknowledges as much.[330]

More importantly, though, the dissent in *Demkovich* explains why the ministerial exception should not be applied to hostile work environment claims: it draws an "arbitrary" line regarding what is covered under the exception.[331] The current landscape allows a minister injured at work to bring a tort claim, but a minister fired by their employer cannot bring a termination-related suit.[332] A church also must allow interrogation into its internal matters, and its ministers, if a criminal prosecution demands it.[333] The current ministerial exception is a special, unique protection: a religious organization has the ability to terminate ministers as they see fit in order to ensure religious autonomy and independence.[334] Churches would not deny that a criminal prosecution of a minister would also infringe upon religious autonomy and independence, but these suits are allowed to proceed.[335]

The key question should be if the First Amendment requires hostile work environment claims to be barred under the ministerial exception. Courts have answered that question as it relates to criminal and tort suits.[336] Those types of suits do not have a First Amendment issue that supersede their ability to proceed. Religious organizations, under the ministerial exception, have the power to control who they employ, fire, promote, or transfer.[337] But a hostile work environment claim is quite different. A hostile work environment claim concerns an issue with how the workplace functions and does not concern conduct within the scope of an employment relationship.[338] By allowing such claims to proceed, the freedom religious organizations have to select and terminate ministers is not being infringed upon. Further, the religious organizations are not losing "control" over their employees; the hostile work environment claim stems from an issue with how the workplace is functioning. Allowing judicial inquiry into whether the workplace was hostile toward a minister, though intrusive into church practices, has little to do with the workplace's power to control the employment

328. *Id.*
329. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2049 (2020).
330. *Demkovich*, 3 F.4th at 985 (Hamilton, J., dissenting).
331. *Id.* at 988.
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.* at 989.
336. *Id.*
337. *Id.* at 990.
338. *Id.*

relationship, and this is the only protection afforded by the ministerial exception and *Hosanna-Tabor*.

As the Court continues to grapple with the ministerial exception, those involved in these cases, especially prospective employees at religious institutions, may desire greater certainty—are they a minister?

IV. RECOMMENDATION

The ministerial exception is currently available to religious organizations when terminated "ministers" employed by these organizations file suit alleging employment discrimination in their termination.[339] The Court has heard two cases regarding the exception, both in the last ten years, and in each failed to advance a clear formulation of who is and is not a minister.[340] The Court's failure to adopt any sort of formulaic principles for lower courts may impact the number of suits filed, plaintiff-employees' ability to gauge the potential success of a suit, and the uniformity of lower courts' treatment of these suits. At the very least, a teacher at a religious school deserves to know how tenuous their employment really is.

The Court can provide clarity on three fronts when handling the ministerial exception moving forward. First, the Court can resist the temptation to overturn *Smith* and, at the very least, fully consider how *Smith* can be explained away to validate the ministerial exception. *Smith* was given very little attention in *Hosanna-Tabor*[341] and was not mentioned by the majority opinion in *Guadalupe*.[342] Second, the Court can resolve the circuit split deepened by *Demkovich* (when next given the opportunity) to limit the exception to only the hiring and firing context. Third, because the Court has refused to create a test for who is or is not a minister, legislatures should attempt to codify the exception instead. This recommendation offers a framework for doing so.

A. Aligning the Ministerial Exception with Smith

The Court has only mentioned *Smith* once in its two opinions on the ministerial exception, and when it did, the distinction it made between *Smith* and the ministerial exception cases made little sense.[343] As this Note has mentioned, the Court in *Hosanna-Tabor* differentiated the internal church matters at issue in that case with the "outward physical acts" at issue in *Smith*.[344] It is hard to see why

339. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 175 (2012).

340. *See id.* at 190 (deciding not to apply a "rigid formula for deciding when an employee qualifies as a minister"); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2062 (2020) (quoting *Hosanna-Tabor*, 565 U.S. at 190).

341. *See Hosanna-Tabor*, 565 U.S. at 189–90.

342. Justice Sotomayor mentioned *Smith* in her dissent. *See Guadalupe*, 140 S. Ct. at 2072 ("Our pluralistic society requires religious entities to abide by generally applicable laws.").

343. *See supra* Section II.B.

344. *See supra* Subsection III.A.1; *see also Hosanna-Tabor*, 565 U.S. at 189–90.

"physical acts" are suddenly so important. *Smith* only mentions the phrase once (and the word outward or its offshoots does not appear in that opinion).[345]

Further, as the scholar Leslie C. Griffin pointed out following *Hosanna-Tabor*, the issue in *Smith* was the religious practice of ingesting peyote; the issue in these ministerial exception cases is even less religious.[346] These cases concern alleged discrimination by an employer on the basis of sex, race, unequal pay, or other civil rights violations.[347] The religious organization just happens to be the employer. The Court should fully reconcile *Smith* in future ministerial exception jurisprudence.

B. Limiting the Ministerial Exception to Hiring and Firing Decisions

The plaintiff-employee in *Demkovich* did not appeal the Seventh Circuit's decision.[348] The circuit split deepened by *Demkovich* may be resolved by future cases that seek to apply the ministerial exception to hostile work environment claims. When a similar case reaches the Court, it should rule in favor of the employee and in so doing restrict the ministerial exception to hiring and firing decisions, only. That said, the religious employer is likely to win.

First, the plaintiff in *Demkovich* made the right choice in not appealing that decision. The Roberts Court has been a favorable turf for religious freedom advocates.[349] Earlier iterations of the Supreme Court sided with religious institutions 50% of the time, but the Roberts Court has sided with them 81% of the time.[350] Most of the time, these winning religious organizations were a "mainstream Christian organization[]."[351] Even the cases cited in this Note fit that bill; other than *Grussgott* (concerning a Jewish school), each decision concerned a Christian church or school, including *Demkovich*.[352] In addition, both *Hosanna-Tabor* and *Guadalupe* (along with *Biel*, the consolidated case in that suit) all concerned Christian schools—a Lutheran one in the case of *Hosanna-Tabor* and Catholic ones in *Guadalupe* and *Biel*.[353]

Thus, the plaintiff-employee in *Demkovich* faced an uphill battle. He sued a Catholic Church and faced a Court that sides with his opponent 81% of the time.[354] The Court is likely to side with the religious employer if and when the

345. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (noting "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.").

346. Griffin, *supra* note 10, at 993.

347. *Id.*

348. *See generally* Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021).

349. *See generally* Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315 (2022).

350. *Id.* at 315–16.

351. *Id.* at 315.

352. *See supra* Part II.

353. *See generally* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

354. Epstein & Posner, *supra* note 349, at 1.

applicability of the ministerial exception to hostile work environment claims reaches its docket. Thus, by not filing a petition for certiorari, Demkovich allowed suits to continue to progress in other circuits, instead of foreclosing the issue following a Supreme Court ruling. Indeed, other circuit courts may agree with the Ninth Circuit's reasoning from *Elvig*.[355] That case allowed a hostile work environment claim to proceed against a minister.[356]

The current composition of the Supreme Court should give any plaintiff-employee pause before proceeding with a ministerial exception suit. Indeed, in both *Hosanna-Tabor* and *Guadalupe*, the petitioner was the religious organization appealing a loss in the circuit court.[357] The same is likely to be true in suits seeking to further clarify the ministerial exception.

Still, the Court should rule in favor of the plaintiff-employee and allow hostile work environment claims to proceed against a religious organization. First, the Court in *Hosanna-Tabor* explicitly limited its ruling to firing circumstances and had the opportunity in that suit to apply the exception more broadly; it did not.[358] Chief Justice Roberts understood employees were fearful of how far the ministerial exception would reach and assuaged these fears by restricting the holding in *Hosanna-Tabor* to only the firing context.[359] Second, as the Ninth Circuit noted in *Elvig*, hostile work environment claims are "purely secular," and unless there is a "religious justification" for the treatment the plaintiff-employee experiences, it should not be covered under the exception.[360]

Justice Alito, writing for the majority in *Guadalupe*, seemed to open the door to an expansion of the ministerial exception. He said, "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[361] Justice Alito spoke more broadly than Justice Roberts did in *Hosanna-Tabor*; suddenly any "disputes" between teacher and school may fall under the exception, so long as the teacher is a minister and the school's independence is at risk.[362] *Guadalupe* has made it even easier to be qualified as a minister.[363] It is hard to imagine a circumstance where a school's "independence" *would not* be at risk. Any hostile work environment suit would require an inquiry into school procedures or workplace environments, and this would likely be enough to infringe on the "independence" Justice Alito (and the

355. *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004).

356. *Id.*

357. Petition for Writ of Certiorari, *Hosanna-Tabor*, 565 U.S. 171 (2011) (No. 10-553); Petition for Writ of Certiorari, *Guadalupe*, 140 S. Ct. 2049 (2019) (No. 19-267).

358. *Hosanna-Tabor*, 565 U.S. at 196.

359. *Id.* at 195 (noting the "parade of horribles" the plaintiff and the EEOC foresaw following the Court's "recognition of a ministerial exception").

360. *Elvig*, 375 F.3d at 959.

361. *Guadalupe*, 140 S. Ct. at 2069.

362. *Id.*

363. *See* discussion *supra* Section III.B.

six other Justices in the *Guadalupe* majority) views as protected by the First Amendment.[364]

Alito showed his willingness to expand the doctrine in his statement respecting denial of the petition for certiorari in *DeWeese-Boyd*.[365] Justice Alito sees DeWeese-Boyd, a professor of sociology at a Christian college, as someone who engages in "[f]aith infused instruction" because Gordon College asks its teachers to integrate the Christian faith into their teaching.[366] It is unclear how a professor of sociology who says she does not integrate the Christian faith into her teaching of a secular subject can be deemed a minister under the exception, but Alito and three other Justices (Thomas, Kavanaugh, and Barrett) all seem to agree she is a minister under the exception.[367]

That said, the Court has currently not spoken as to whether the ministerial exception will be expanded to other types of employment suits, though the door is open to doing so. Another area where the Court has failed to clarify fully is who counts as a minister under the exception.

C. Codifying the Ministerial Exception

The Supreme Court has explicitly refused to adopt any sort of test for who qualifies as a minister and stated in *Guadalupe* they "were not imposing any 'rigid formula.'"[368] But, in so doing, the Court is leaving lower courts and state courts on their own to make the determination of who is and is not a minister. As evidenced by the case law that developed in circuit courts across the country in the wake of *Hosanna-Tabor*,[369] courts have had difficulty deciding who qualifies as a minister. *Guadalupe* did little to elucidate a test for determining an employee's ministerial status.[370] Instead, the Court rejected any sort of rigid analysis of the factors from *Hosanna-Tabor*.[371] This is a mistake.

By failing to define a clear test for who is and who is not a minister, the Court leaves itself open to expanding the definition of a minister at will. By refusing to keep score on whether an employee is a minister based on the factors the Court considered in *Hosanna-Tabor*,[372] the Court's majority can continue to weigh one factor more heavily in one case, and another more favorably in another, to favor the religious institution by qualifying the employee as a minister

364. *Guadalupe*, 140 S. Ct. at 2069.

365. *See* Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 954 (2022) (Alito, J., statement respecting denial of certiorari).

366. *Id.* at 955.

367. *See id.* ("For those reasons, I have doubts about the state court's understanding of religious education and, accordingly, its application of the ministerial exception.").

368. *Guadalupe*, 140 S. Ct. at 2067 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012)).

369. *See supra* Section II.C.

370. *Guadalupe*, 140 S. Ct. at 2067 (reemphasizing that *Hosanna-Tabor* counseled "courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception").

371. *Id.*; *see also supra* Section II.D.

372. *See supra* Section II.A (listing the factors in *Hosanna-Tabor*).

to shield the religious institution from suit.[373] This may be why employees are not appealing cases to the Court: no one wants to play a game they are going to lose. *DeWeese-Boyd*, which was recently denied review by the Court,[374] was brought by a religious institution (as were *Guadalupe* and *Hosanna-Tabor*[375]).

The conclusion in *Guadalupe*, as explained by Justice Sotomayor in dissent, shows why plaintiff-employees are not bringing ministerial exception suits to the Court—the exception is incredibly broad.[376] She wrote: "[p]ause, for a moment, on the Court's conclusion: Even if the teachers were not Catholic, and even if they were forbidden to participate in the church's sacramental worship, they would nonetheless be 'ministers' of the Catholic faith simply because of their supervisory role over students in a religious school."[377]

Justice Sotomayor is now alone in fighting to restrain the exception.[378] As she noted in her *Guadalupe* dissent, the Court's test is to look at "what an employee does," but this inquiry "certainly does not sound like a legal framework."[379] Indeed, the Court is really providing what she calls a "rubber stamp" because any inquiry into an employee's function is, for the majority, best decided by the church itself.[380]

Because the Court has refused to formulate a legal test for determining ministerial status, legislatures should weigh in to create statutes of their own. The ministerial exception, if expanded too broadly, begins to infringe on antidiscrimination protections afforded to employees of religious organizations.[381] In response, states should begin to codify a ministerial exception.

Hosanna-Tabor listed four factors the Court should consider when deciding ministerial status: (1) formal title; (2) substance of that title; (3) the employee's use of that title; and (4) the important religious functions performed by the employee.[382] These factors should inform any codification passed into law by legislatures.

The codification of the ministerial exception should be a variation of these four factors. State legislatures could pass this codification into law and allow courts to complete the inquiry into who and who is not a minister based on these factors (and subfactors) whenever a religious institution seeks to qualify an employee as a minister. A potential codification is described below. The

373. *See generally* Epstein & Posner, *supra* note 349.

374. *See generally* Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952 (2022) (Alito, J., statement respecting denial of certiorari).

375. *See supra* Section IV.B.

376. *Guadalupe*, 140 S. Ct. at 2081 (Sotomayor, J., dissenting).

377. *Id.*

378. *See id.* at 2071–82. Justice Ginsburg, who joined her dissent in *Guadalupe*, was replaced by Amy Coney Barrett, a conservative Justice who has sided with religious institutions early and often after joining the Court. *See* Ian Millhiser, *The Christian Right Is Racking Up Huge Victories in the Supreme Court, Thanks to Amy Coney Barrett*, VOX (Apr. 12, 2021, 12:20 PM), https://www.vox.com/2021/4/12/22379689/supreme-court-amy-coney-barrett-religion-california-tandon-newsom-first-amendment [https://perma.cc/U3UA-74J9].

379. *Guadalupe*, 140 S. Ct. at 2075 (Sotomayor, J., dissenting).

380. *Id.* at 2075–76.

381. *Id.* at 2082.

382. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 192 (2012).

codification relies on three primary factors in evaluating an employee: leadership, job duties, and training.

1. First Factor: The Employee's Leadership

The statute should not consider the employee's title when evaluating ministerial status unless it does *not* list the employee as a minister. At this point, religious organizations may over-apply the ministerial title (or something similar for other religions) in order to automatically qualify for the ministerial exception. This inquiry should instead look at the employee's place in the organizational structure of the religious entity. Thus, the following subfactors could be considered: (1) Do they manage others? (2) Are they involved in religious leadership either through worship or education? (3) Does the employer hold the employee out as a minister?[383]

2. Second Factor: The Employee's Job Duties

The second factor should consider what the employee does on a day-to-day basis. This factor should consider how the employee engages with others religiously at work. Some factors may speak directly to the exception's application in the educational context, and others apply to religious employees more broadly. Thus, the following subfactors would be considered: (1) Do they teach religion class? (2) Do they lead religious services or just attend them? (3) Are they expected to teach students about religion in any way, and if so, is that teaching applied in class or alongside the educator? (4) Do they lead religious worship? (5) Do they participate alongside others in religious worship as a part of their job duties beyond attending services? (6) Are they integral to religious worship or services?

3. Third Factor: Religious Training

The third and final factor should consider the employee's religious training. This factor should consider the following: (1) Did the employee receive any religious training that is required or recommended for their position? (2) Does the employee rely on this training in their day-to-day work?

4. Possible Strict Scrutiny Challenge

A potential codification may face a strict scrutiny challenge by religious groups concerned with the burden it may place on their religious beliefs and freedoms.[384] State governments codifying the exception may need to show they have both a compelling interest in codifying the ministerial exception and that the

383. This language is borrowed from the *Hosanna-Tabor* opinion. *See id.* at 191 (ruling Hosanna-Tabor "held" the plaintiff, Perich, "out as a minister").

384. Caleb C. Wolanek & Heidi H. Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 281 (2017).

codification uses the least restrictive means possible.[385] A complete strict scrutiny analysis is beyond the scope of this Note. But, on its face, a codification of the ministerial exception serves the compelling governmental interest to ensure its citizens are treated fairly in the workplace, even if that workplace is a religious entity. A potential codification may face issues regarding whether it uses the least restrictive means possible to regulate ministerial status, considering the Court has resisted a test for determining who is a minister.[386] But this codification is only restrictive in the sense that it creates boundaries on who is and who is not a minister while still allowing religious institutions the opportunity to show how their employee is a minister, relying on the factors outlined above.

V. CONCLUSION

The ministerial exception continues to evolve following its initial recognition by the Supreme Court just ten years ago.[387] As it has expanded, religious organizations continue to push the Court to expand its definition of who qualifies as a minister. The Court has refused to adopt a clear test for making this determination.[388] Their failure to do so is unsurprising. The Roberts Court has ruled in favor of religious entities in 81% of cases involving religious groups.[389] But the uncertainty around the ministerial exception leads to varied jurisprudence in the lower courts and state courts.[390] Religious institutions, acting strategically, have continually attempted to broaden who qualifies as a minister since *Hosanna-Tabor*.[391]

Though the exception stands on shaky constitutional ground given earlier precedent established in *Smith*, it is here to stay.[392] Since the Court refuses to create a clear test for religious institutions and employers to follow when evaluating who is and who is not a minister,[393] legislatures should step in on behalf of citizens working for religious organizations, often in schools or places of worship. Judge-made doctrines are no stranger to statutory codification.[394] By relying on the Court's decisions in *Hosanna-Tabor* and *Guadalupe*, a codification of the exception is within reach, and legislatures should act. That said, this codification may face a strict scrutiny challenge by religious institutions. Hopefully this would force the Court to consider the impact the currently amorphous exception has on employees of religious organizations nationwide. The ministerial

385. *Id.*
386. *Hosanna-Tabor*, 565 U.S. at 190.
387. *See generally id.*
388. *See supra* Parts II, III.
389. Liptak, *supra* note 292.
390. *See supra* Parts II, III.
391. *See supra* Part II.
392. *See supra* Sections III.A, IV.A.
393. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 190 (2012).
394. *See, e.g.*, Nathaniel Sobel, *What Is Qualified Immunity, and What Does It Have to Do with Police Reform?*, LAWFARE (June 6, 2020, 12:16 PM), https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform [https://perma.cc/Z9JQ-VY6X] (describing the judge-made doctrine of qualified immunity and potential codifications proposed by Congress).

exception is one of many instances where the Roberts Court has expanded religious rights. It is the most pro-religion Court in at least seventy years.[395] Though the ministerial exception may not generate the same headlines as other religious cases, it is an important battleground in the Court's current crusade to affirm religious rights. The exception as it stands today is too malleable; the Court or state legislatures should create a clear formula for when the exception applies.

395. Ian Prasad Philbrick, *A Pro-Religion Court*, N.Y. TIMES (June 22, 2022), https://www.nytimes.com/2022/06/22/briefing/supreme-court-religion.html [https://perma.cc/MG45-B2F8].