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THE FUNCTIONAL APPROACH TO THE MINISTERIAL EXCEPTION: APPLYING THE EXCEPTION TO EMPLOYEES WHO MINISTER

Maria Ruwe

I. INTRODUCTION

The right to religious freedom is widely endorsed throughout the United States. One way that religious freedom is protected is through a constitutional doctrine called the "ministerial exception." The ministerial exception allows religious organizations to hire and fire their employees who qualify as "ministers" without abiding by antidiscrimination laws.[1]

The Supreme Court first recognized this exception in 2012.[2] In so holding, the Supreme Court affirmed the constitutional legitimacy of the ministerial exception. However, the Supreme Court did not offer a bright-line test that lower courts could apply when classifying religious organizations' employees. As a result of the Supreme Court's narrow and undefined holding, the circuit courts have been inconsistent in their application of the ministerial exception.

This Article will explain the origin and parameters of the ministerial exception, describe the Supreme Court's approach in applying the exception, discuss some of the circuit courts' inconsistencies regarding the exception, and specify why courts should use a functional approach when classifying the employees of religious organizations. First, Section II of this Article will provide the background of the ministerial exception, including a summary of the courts' creation and development of the exception. Next, Section III will explain why both the approach and conclusion in *Biel v. St. James Catholic School*[3] were inaccurate. Section III will continue with an explanation about why courts should use a functional approach when classifying employees of religious organizations. Finally, Section IV will conclude by touching on the possible consequences that might result from future courts applying the functional approach to the ministerial exception.

II. BACKGROUND

The First Amendment of the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or

1. Michael J. West, Note, *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861, 1864-65 (2017).

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

3. 911 F.3d 603 (9th Cir. 2018).

prohibiting the free exercise thereof."[4] Generally, the First Amendment provides religious organizations with the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[5] Simply put, the government may not regulate religious beliefs.[6] The ministerial exception is a constitutional doctrine that bars religious "ministers" from bringing employment discrimination claims against the religious organizations that employ them.[7] This exception is rooted in the Free Exercise Clause and the Establishment Clause of the United States Constitution.[8]

This Section will first explain the constitutional basis for the ministerial exception. Next, this Section addresses the origin of the ministerial exception in the courts and the Supreme Court's application of the exception. Finally, this Section concludes with an analysis of how some federal circuit courts have interpreted the Supreme Court's application of the ministerial exception.

A. The Free Exercise Clause

The Free Exercise Clause prohibits the government from singling out areligious organization for adverse treatment.[9] This constitutional clause gives individuals the right to worship how they want without fearing governmental intervention.[10] In the context of the ministerial exception, the Supreme Court has held that the Free Exercise Clause protects a religious organization's right to "shape its own faith and mission through its appointments."[11] Further, the Court has noted that a religious organization's freedom to select its clergy receives constitutional protection due to a religious organization's freedom to exercise its religion without state interference.[12] Indeed, a religious organization must be free to choose its ministers using any criteria that it wants.[13]

The Free Exercise Clause reserves "special solicitude" for the church-minister relationship.[14] A religious organization's choice about who

4. U.S. CONST. amend. I.

5. Kedroff v. St. Nicholas Cathedral of The Russian Orthodox Church, 344 U.S. 94, 116 (1952).

6. Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 944 (1986).

7. West, *supra* note 1, at 1864-65.

8. Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1776 (2008).

9. Choper, *supra* note 6, at 956.

10. J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 BYU L. REV. 755, 756 (2001).

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

12. Note, *supra* note 8, at 1780.

13. West, *supra* note 1, at 1900.

14. Note, *supra* note 8, at 1776.

qualifies as a minister is a "unique distillation of a belief system."[15] Regulating the choice of who may serve as a religious organization's minister comes perilously close to regulating belief, which is strictly forbidden by Free Exercise rights.[16]

B. The Establishment Clause

The Establishment Clause prevents Congress from enacting any law "respecting an establishment of religion."[17] The purpose of the Establishment Clause is to prevent the government from promoting or discouraging religious worship or belief[18] and from entangling itself with religion.[19]

The Establishment Clause has been interpreted in two ways.[20] First, the provision may be construed as a structural restraint on the government's power to legislate in the religious realm.[21] Under this reading, the Establishment Clause is analogous to a physical wall that separates the church and the State.[22] In other words, the church and State are two completely distinct sovereigns, and the government simply may not legislate in this area.[23]

Second, the Establishment Clause may be interpreted as protecting the liberty of conscience.[24] Under this interpretation, the provision prohibits governmental involvement in ecclesiastical decisions so as to prevent the government's judgment from replacing the religious organization's decisions.[25] This interpretation holds that a religious organization must have independence and freedom over its internal, religious choices.[26]

C. Antidiscrimination Laws in Employment

The Americans with Disabilities Act,[27] the Age Discrimination in

15. *Id.* at 1780.
16. *Id.*
17. U.S. CONST. amend. I.
18. West, *supra* note 1, at 1895.
19. Russell W. Galloway, *Basic Establishment Clause Analysis*, 29 SANTA CLARA L. REV. 845, 845 (1989).
20. West, *supra* note 1, at 1869.
21. *Id.*
22. Galloway, *supra* note 19, at 845.
23. West, *supra* note 1, at 1869-70.
24. *Id.* at 1869.
25. *Id.* at 1894.
26. *Id.* at 1868-69.
27. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2020) (protects individuals who suffer from long-term physical or mental disabilities from discrimination based on disability).

Employment Act,[28] and the Family Medical Leave Act[29] are examples of some federal employment and antidiscrimination laws that affect employers.[30] In addition, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating based on race, color, religion, sex, or national origin.[31] However, Title VII does permit a religious employer to prefer members of its own faith for employment, but leaves the employer liable for discriminating based on other protected classifications.[32]

D. The Ministerial Exception

The ministerial exception encompasses the collision of religious liberty and employment antidiscrimination laws.[33] The exception allows religious employers to hire and fire their ministerial employees without abiding by antidiscrimination laws.[34] For the ministerial exception to apply, two conditions must be met: (1) the employer must be a religious organization and (2) the employee at issue must be a ministerial employee.[35] When religious employers discriminate based on a classification protected by federal law, the interests between religious freedom and civil rights clash.[36] When this happens, courts generally apply strict scrutiny[37] to the antidiscrimination law, weighing the religious organization's[38] interest in the unburdened selection of its spiritual leaders against the government's interest in enforcing antidiscrimination laws.[39] However, even though courts have recognized

28. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2020) (protects individuals over the age of forty from discrimination based on age).

29. *See* Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2020) (enables individuals to take leave after the birth or adoption of a child, to care for the health of an immediate family member, or to care for their own health).

30. *Overview of Employment and Anti-Discrimination Laws*, FINDLAW (Dec. 5, 2019), https://employment.findlaw.com/employment-discrimination/overview-of-employment-and-anti-discrimination-laws.html.

31. Note, *supra* note 8, at 1777.

32. *Id.* at 1777-78.

33. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 2-3 (2011).

34. West, *supra* note 1, at 1864-65.

35. Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007).

36. Note, *supra* note 8, at 1776.

37. "Strict scrutiny" requires the state to show "a compelling interest that justifies and necessitates the law in question." *Strict Scrutiny*, BLACK'S LAW DICTIONARY (11th ed. 2019).

38. There is no precise definition for what constitutes a "religious organization." Previously, in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court denied the distinction made by the NLRB between organizations that are "completely religious" and those that are merely "religiously associated." *See* Francesca M. Genova, *Labor in Faith: A Comparative Analysis of Hosanna-Tabor v. EEOC Through the European Court of Human Rights' Religious Employer Jurisprudence*, 90 NOTRE DAME L. REV. 419, 444 (2014).

39. Note, *supra* note 8, at 1780.

the vital importance of preventing workplace discrimination, courts routinely place the protection of religious freedom over the prevention of an infringement on civil rights.[40] Religious employers may affirmatively defend against a discrimination employment action by invoking the ministerial exception.[41]

The ministerial exception was first formally recognized in *McClure v. Salvation Army*.[42] After the Salvation Army terminated a female employee, she sued, alleging a violation of Title VII.[43] Neither party disputed that the employee, who was an ordained minister of the faith, was a "minister engaged in the religious or ecclesiastical activities of the church."[44] The court therefore found that the employee could be terminated for any reason without violating Title VII because Congress never intended to regulate the employment relationship between a religious organization and its ministers.[45] Specifically, the Fifth Circuit noted: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[46]

In 1985, in *Rayburn v. General Conference of Seventh Day Adventists*, the Fourth Circuit also recognized the ministerial exception.[47] Rooting the exception in the Free Exercise and Establishment Clauses, the court extended the ministerial exception to an employee who was not an ordained minister, but was an "associate in pastoral care" at a church.[48] The court held that the ministerial exception does not depend on the employee's ordination, but rather on the employee's function.[49] In this case, the employee was "important to the spiritual and pastoral mission of the church" and performed duties that consisted of "teaching, spreading the faith, church governance, supervision of a religious order, or

40. *Id.* at 1780-81. *See also* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) ("While an unfettered church choice might create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs"); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (holding that some religious interests are so important that no compelling state interest can justify the government intrusion); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929) ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.").

41. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171,195 n.4 (2012).

42. 460 F.2d 553 (5th Cir. 1972).

43. *Id.* at 555.

44. *Id.* at 556.

45. *Id.* at 560-61.

46. *Id.* at 558-59.

47. 772 F.2d 1164 (4th Cir. 1985).

48. *Id.* at 1168-70.

49. *Id.* at 1168-69.

supervision or participation in religious ritual and worship."[50] Therefore, the court classified the employee as a minister for the purposes of the exception.[51] The *Rayburn* court also noted that an inquiry into whether the employee's position is important to the mission of the religious organization is necessary, but a court may not investigate into whether the reason for the adverse employment action was grounded in theological belief.[52]

Courts continued to expand the ministerial exception, applying it to most class-based protections under Title VII,[53] other federal employment discrimination statutes, and some state law claims—such as defamation and breach of contract.[54] In such cases, the courts held that the exception applies to any claim by a ministerial employee where a court would have to resolve specifically religious questions about an employee's performance in an employment position.[55] In coming to these conclusions, courts have defined "ministers" as employees who perform significant religious duties for their religious organization employers.[56] The Fifth Circuit defined what generally constitutes religious duties: Generally, "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'"[57]

1. Reason Behind the Adverse Employment Action

If a religious organization's employee can be classified as a minister, courts may not inquire into the reason behind the adverse employment decision.[58] The rationale behind this principle is that religious organizations need the freedom to choose who will preach their beliefs, convey their faith, and carry out their mission.[59] Such an inquiry would require a court to judge a religious organization's doctrines, which could

50. *Id.* at 1168-69.

51. *Id.* at 1169.

52. *Id.*

53. Courts have never applied the ministerial exception to claims related to sexual harassment. *See* Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847, 1853 (2018).

54. *Id.* at 1853-54.

55. *Id.* at 1854.

56. Lund, *supra* note 33, at 21.

57. *Rayburn*, 772 F.2d at 1169 (quoting Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)).

58. Failure to hire and termination both constitute an adverse employment action.

59. Francesca M. Genova, *Labor in Faith: A Comparative Analysis of Hosanna-Tabor v. EEOC Through the European Court of Human Rights' Religious Employer Jurisprudence*, 90 NOTRE DAME L. REV. 419, 446 (2014).

jeopardize religious autonomy because a court would ultimately have to decide what the accused religious organization really believes and how important that belief is to the organization's overall mission.[60] This is problematic because evaluating a religious organization's beliefs can violate the Establishment Clause.[61]

In most Title VII cases, courts engage in a pretext inquiry regarding the employer's stated legitimate reason for the adverse employment action.[62] However, the Supreme Court has clarified that a plaintiff-minister who asserts that a religious organization's adverse employment action was pretextual "misses the point of the ministerial exception."[63] Rather, "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister . . . is the church's alone."[64]

2. The Effect of Employment Division Department of Human Resources v. Smith on the Ministerial Exception

In 1990, the Supreme Court decided *Employment Division Department of Human Resources v. Smith*,[65] which limited the scope of the Free Exercise Clause.[66] In *Smith*, the Court held that the Free Exercise Clause is not a defense to those who violate neutral and generally applicable laws, even when their actions are based on religious belief.[67] Although some questioned whether the ministerial exception would survive the strict limitation on religious exemptions articulated in *Smith*, the D.C. Circuit in *EEOC v. Catholic University of America* held that *Smith* did not modify the ministerial exception.[68] According to the court in *Catholic University of America*, *Smith* implicated religious protection for individuals, not religious organizations.[69]

Although *Smith* did not alter the ministerial exception, *Smith* still implicated the exception because employment discrimination statutes are almost always facially neutral and generally applicable.[70] In response to *Smith*, courts did not limit the ministerial exception, but rather expanded the Establishment Clause, which shifted the focus from the religious

60. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 205-06 (2012).
61. Genova, *supra* note 59, at 443-44.
62. *See* Sterlinksi v. Catholic Bishop of Chi., 934 F.3d 568, 571 (7th Cir. 2019).
63. *Hosanna-Tabor*, 565 U.S. at 174.
64. *Id.*
65. 494 U.S. 872 (1990).
66. West, *supra* note 1, at 1866.
67. *Smith*, 494 U.S. at 878-79.
68. 83 F.3d 455, 462-63 (D.C. Cir. 1996).
69. *Id.* at 462.
70. West, *supra* note 1, at 1866.

organizations to the courts.[71] Rather than concentrating on rights vested in religious organizations, the focus shifted to the courts' inherent inability to decide religious questions.[72] *Smith* does not impede a religious organization's ability to determine who is a minister because the Establishment Clause—not the Free Exercise Clause—prevents courts' involvement in religious matters.[73]

3. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC

In 2012, the Supreme Court recognized the ministerial exception for the first time in *Hosanna-Tabor*.[74] Prior to 2012, every federal circuit and several state supreme courts had recognized the existence of the ministerial exception,[75] and most federal circuits had extended the exception beyond merely heads of religious congregations.[76] Although the Supreme Court agreed that the ministerial exception existed, the Court declined to adopt a "rigid formula" for deciding whether an employee qualifies as a minister.[77]

In *Hosanna-Tabor*, the employee, Cheryl Perich, was a "called teacher" and a "commissioned minister" at a Lutheran church and school.[78] Perich taught a religion class four days a week, led students in daily prayer and devotional exercises, and attended a weekly school-wide chapel service.[79] After Perich took disability leave due to narcolepsy, the church did not renew her contract.[80] As a result, the EEOC sued Hosanna-Tabor Church, alleging a violation of the ADA.[81]

Prior to the Supreme Court's grant of certiorari, the Sixth Circuit held that the employee was not a minister for the purposes of the exception.[82] In overruling the Sixth Circuit's decision, the Court noted three errors made by the lower court.[83] First, the Sixth Circuit considered the employee's status of commissioned minister as immaterial to the employee's ministerial classification.[84] Although an employee's title by itself does not automatically make someone a minister, an employee's

71. *Id.*
72. *Id.*
73. *Id.* at 1866-67.
74. 565 U.S. 171, 173 (2012).
75. Smith & Tuttle, *supra* note 53, at 1851.
76. *Hosanna-Tabor*, 565 U.S. at 190.
77. *Id.* at 173.
78. *Id.* at 177-78.
79. *Id.* at 178.
80. *Id.* at 178-79.
81. *Id.* at 180.
82. *Id.* at 181.
83. *Id.* at 192-94.
84. *Id.* at 192-93.

title, religious training, and mission underlying that title are all relevant.[85] Second, the Court noted that the Sixth Circuit overemphasized the fact that "lay" teachers at the school performed the same duties as the employee.[86] Finally, the Sixth Circuit overstated the substantial secular duties that the employee performed.[87] Because even heads of congregations perform both religious and secular duties, the Court held that this consideration was not determinative of the employee's classification.[88]

In deciding that Perich was a minister, the Court took a fact-based approach that examined all the circumstances surrounding the employment.[89] Four considerations dominated the court's analysis: (1) the formal title that the church had bestowed on the employee; (2) the substance reflected in the title; (3) the employee's own use of the title; and (4) the important religious functions that the employee performed.[90] The Court rooted its decision in the Free Exercise and Establishment Clauses, although the Establishment Clause was more prevalent.[91] The Court justified the exception itself on the proposition that some questions are outside the government's authority to decide.[92] Therefore, the exception rests on the recognition that the government is specifically limited in resolving certain ecclesiastical matters, not on a broad freedom for religious organizations.[93] Although the interests of the Free Exercise Clause and the Establishment Clause sometimes overlap, the Establishment Clause imposes the primary justification for the ministerial exception, as articulated by the Court in *Hosanna-Tabor*.[94]

i. Distinguishing Hosanna-Tabor from Smith

The Court's holding in *Hosanna-Tabor* granted greater protection for religious organizations than for religious individuals.[95] The Court distinguished its decision in *Hosanna-Tabor* from *Smith* by noting that a religious organization's selection of its ministers differs from an individual's ingestion of peyote.[96] Specifically, *Smith* involved

85. *Id.* at 193.
86. *Id.*
87. *Id.*
88. *Id.* at 193-94.
89. *Id.* at 190.
90. *Id.* at 191-92.
91. Smith & Tuttle, *supra* note 53, at 1857.
92. *Id.* at 1862.
93. *Id.*
94. *Id.*
95. Carolina Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U. L. REV. 951, 955 (2011).
96. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).

government regulation of only outward physical acts while the antidiscrimination employment laws implicated governmental interference with an internal church decision that affected the faith and mission of the church itself.[97] Even the Court in *Smith* itself noted that the government could regulate physical acts but could not empower "one or the other side in controversies over religious authority or dogma."[98]

ii. Concurring Opinions in Hosanna-Tabor

Justices Alito and Kagan concurred in *Hosanna-Tabor*, clarifying that the term "minister" or the concept of ordination should not be viewed as determining factors when classifying religious employees for purposes of the exception.[99] Rather, according to Justices Alito and Kagan, courts should focus on the function performed by the employee.[100] Further, the Justices noted that the ministerial exception should be tailored to the purpose of the First Amendment, which is to protect the key religious activities of conducting religious rituals and communicating the organization's faith.[101] Consequently, the Justices asserted that religious organizations must be free to choose the personnel who are essential to the performance of these functions.[102]

Justices Alito and Kagan also noted that the First Amendment allows religious organizations to freely govern themselves according to their own beliefs and to choose who may serve in positions of substantial religious importance.[103] While acknowledging the different views among the different religions about what constitutes substantial religious importance, Justices Alito and Kagan identified some general categories of employees that are essential to almost every religious organization: those who serve in positions of leadership, those who perform important functions in worship services and religious ceremonies, and those who teach the faith to others.[104] The Justices explained that applying the ministerial exception to roles of religious leadership, worship, ritual, and expression focuses on the objective functions that are important for the autonomy of any religious organization.[105] The concurring opinion emphasized that virtually every religious organization exists to collectively express and propagate its religious ideals, and that the

97. *Id.*
98. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877-79 (1990).
99. *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).
100. *Id.*
101. *Id.* at 199.
102. *Id.*
103. *Id.* at 199-200.
104. *Id.* at 200.
105. *Id.*

character and conduct of the teachers can greatly affect the content and credibility of a religion's message.[106]

Additionally, Justices Alito and Kagan pointed out that several federal circuits have reached a consensus that a functional approach should be employed when applying the ministerial exception.[107] Notably, their concurring opinion emphasized that "[t]he Court's opinion today should not be read to upset this consensus."[108] Finally, the Justices' main reason for classifying the employee in *Hosanna-Tabor* as a minister was because the employee played the essential role of "conveying the Church's message and carrying out its mission."[109]

Justice Thomas separately concurred in *Hosanna-Tabor*, expressing the view that courts should accept, without further inquiry, a religious organizations' sincere assertion about an employee's status.[110] Specifically, Justice Thomas noted that the courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister. . . . A religious organization's right to choose its ministers would be hollow, however, if secular courts could second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets."[111] Further, Justice Thomas argued that a religious organization should not have to conform its beliefs and practices to the prevailing secular understanding of who should qualify as a minister.[112] Justice Thomas supported this argument by quoting the Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*[113]: "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."[114]

4. After Hosanna-Tabor

Since 2012, several federal circuit courts have attempted to apply the *Hosanna-Tabor* decision in cases involving the ministerial exception. For example, the Fifth Circuit classified a Catholic church's music director as a minister because the director performed an important function during the service and "played a role in furthering the mission of the church and

106. *Id.* at 200-01.
107. *Id.* at 202-04.
108. *Id.* at 204.
109. *Id.*
110. *Id.* at 196-97.
111. *Id.* at 196-97 (Thomas, J., concurring).
112. *Id.* at 197.
113. 483 U.S. 327, 336 (1987).
114. *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

conveying its message to congregants."[115] The Fifth Circuit supported this classification by noting that the religious organization should be able to determine who participates in its religious ceremonies.[116]

In a 2018 decision, *Grussgott v. Milwaukee Jewish Day School*, the Seventh Circuit found that a Hebrew teacher qualified as a "minister" by applying the fact-intensive analysis articulated in *Hosanna-Tabor*.[117] Specifically, the court found that the teacher's role in instructing the students about Judaism, the school's motivation for hiring her, and her role in furthering the school's religious mission demonstrated that the Hebrew teacher was a "minister" of the religious organization.[118] Applying the four considerations from *Hosanna-Tabor*, the court found that the first factor—the teacher's title—disfavored applying the ministerial exception because the teacher was identified as a "grade school teacher."[119] Second, the teacher's use of her title disfavored the use of the exception because the teacher never presented herself to the public as an ambassador of Judaism.[120] Third, the substance of the teacher's title favored applying the exception because the teacher incorporated religious teachings into her lessons and the school hired her, in part, because of her past religious teaching experience.[121] Finally, the teacher's important religious function favored applying the exception.[122] The teacher taught about the Jewish faith, conducted weekly Torah readings, and prayed and performed certain rituals with her students.[123] By looking at all the factors, the court found that the teacher's employment claim—based on her allegedly unlawful discriminatory termination—must be dismissed due to her classification as a minister.[124]

5. Biel v. St. James School

In 2018, the Ninth Circuit decided *Biel v. St. James School*.[125] In that case, a fifth-grade teacher, Kristen Biel, at St. James Catholic School informed the school that she had cancer and would have to take disability leave.[126] After the school failed to renew Biel's contract, she sued,

115. Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 180 (5th Cir. 2012).
116. *Id.* at 180.
117. 882 F.3d 655, 657 (7th Cir. 2018).
118. *Id.* at 657.
119. *Id.* at 659.
120. *Id.*
121. *Id.* at 659-60.
122. *Id.* at 660.
123. *Id.*
124. *Id.* at 661-62.
125. 911 F.3d 603 (9th Cir. 2018).
126. *Id.* at 605.

alleging an ADA violation.[127] The Ninth Circuit held that the teacher was not a minister for the purposes of the ministerial exception.[128]

Biel taught the fifth graders all of their academic subjects, including a standard religion curriculum from a school-prescribed workbook on the Catholic faith for about thirty minutes each day, four days a week.[129] Biel joined—but did not lead—her students in prayers twice a day.[130] She also attended monthly Mass with her students, where her "sole responsibility was to keep her class quiet and orderly."[131]

Biel's contract specified that she would work within St. James's overriding commitment to Church doctrines, laws, and norms and would "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church."[132] St. James's mission statement stated that the school strives to develop "confident, competent, and caring Catholic-Christian citizens prepared to be responsible members of their church[,] local[,] and global communities."[133] The school's faculty handbook provided that St. James's teachers must participate in the Church's mission of educating students academically and in the Catholic faith and values.[134] Further, the handbook instructs teachers to follow both archdiocesan curricula guidelines and California's public-school curricula requirements.[135]

The Ninth Circuit acknowledged a religious organization's broad right to choose its own leaders, and that St. James indisputably qualified as a religious organization.[136] The only dispute was whether Biel should be classified as a "minister" for the purposes of the exception.[137] The Ninth Circuit examined the four considerations that the Court had discussed in *Hosanna-Tabor* and concluded that Biel was not a "minister" for the purposes of the ministerial exception.[138]

First, Biel's formal title did not suggest any special expertise in Church doctrine, values, or pedagogy beyond that of a practicing Catholic.[139] Her title was "Grade 5 teacher," which conveyed no religious meaning.[140]

127. *Id.* at 606.
128. *Id.* at 605.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 605-06.
135. *Id.* at 606.
136. *Id.* at 606-07.
137. *Id.* at 607.
138. *Id.* at 608-10.
139. *Id.* at 608.
140. *Id.*

Second, Biel had no ministerial background, and there was no religious component to her educational degree or teaching credentials.[141] Also, St. James required no religious training for the position of fifth-grade teacher.[142] Even after Biel began work, her religious training was limited to a single half-day conference that contained barely any religious substance.[143] Further, it appeared that Biel did not consider teaching at the Catholic school to be a calling, but instead took work wherever she could find it.[144] For example, she had previously worked for a Lutheran school, multiple public schools, and for tutoring companies.[145]

Third, Biel did not hold herself out to the public as a minister.[146] She called herself a teacher and did not claim any benefits available only to ministers.[147]

Fourth, Biel's job duties included teaching religion in the classroom.[148] She incorporated religious themes and symbols into her overall classroom environment and curriculum, as required by the school.[149] Although Biel likely satisfied this fourth consideration, the majority found that the ministerial exception should not apply based on the satisfaction of one factor alone.[150] Otherwise, the Ninth Circuit reasoned, most of the analysis in *Hosanna-Tabor* would be "irrelevant dicta," given that the employee's didactic, religious role in *Hosanna-Tabor* was just one of four considerations that the Court relied on when deciding that the employee should be classified as a minister.[151]

The majority distinguished its holding in *Biel* from other post-*Hosanna-Tabor* sister circuit cases by noting that these other cases involved employees with pronounced religious leadership and guidance.[152] Because Biel satisfied, at most, only one of the four considerations, the majority found that Biel was not a minister for purposes of the ministerial exception. [153]

The majority also noted that a different holding would render any school employee who teaches religion a minister for purposes of the

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 609.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 610.
153. *Id.*

exception.[154] The majority asserted that such a rule would be unfaithful to *Hosanna-Tabor* because "it would base the exception on a single aspect of the employee's role rather than on a holistic examination of her training, duties, title, and the extent to which she is tasked with transmitting religious ideas."[155]

The majority concluded by considering the purpose of the First Amendment and the Founders' intent.[156] Specifically, the majority noted that the First Amendment does not exempt employees from federal employment laws who do not "serve a leadership role in the faith" or those employees who intermingle secular and religious duties.[157] Rather, *Hosanna-Tabor* protects those employees who "preach their employers' beliefs, teach their faith, . . . carry out their mission . . . [and] guide their religious organization on its way."[158]

i. Judge Fisher's Dissent in Biel v. St. James

Judge Fisher wrote a lengthy dissent that specified explained why Biel should have been classified as a minister for the purposes of the ministerial exception.[159] Consistent with *Hosanna-Tabor*, the dissent tried to get a "complete picture" of Biel's role at St. James.[160] For example, the dissent examined Biel's employment contract, a performance review, and the faculty handbook.[161] Also, Judge Fisher thoroughly analyzed each of the four considerations discussed in *Hosanna-Tabor*.[162]

In analyzing the considerations laid out in *Hosanna-Tabor*, the dissent disputed the majority's analysis as to only the second consideration—the substance reflected in the job title.[163] The dissent argued that the substance reflected in a title is broader than mere educational or practical prerequisites.[164] Buttressing this argument, the dissent noted that a broader interpretation encompasses certain religious organizations that do

154. *Id.* Interestingly, this result is exactly what Justices Alito and Kagan argued for in their *Hosanna-Tabor* concurring opinion. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 199 (2012) ("[The 'ministerial' exception] should apply to any 'employee' who . . . serves as a messenger or teacher of [a religious organization's] faith.").

155. *Biel*, 911 F.3d at 610.

156. *Id.* at 610-11.

157. *Id.* at 611.

158. *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 196).

159. *Id.* (Fisher, J., dissenting).

160. *Id.* at 612.

161. *Id.*

162. *Id.* at 615-20.

163. *Id.* at 616-18.

164. *Id.* at 616.

not require formal training for their ministers.[165] Judge Fisher argued that this second factor should be evaluated based on how the religious organization understood an employee's role.[166] Here, the religious organization understood Biel's role, as specified in her employment contract, as one who would propagate and manifest the Catholic faith in all aspects of teaching.[167] Because the substance of Biel's title as "Grade 5 Teacher" encompassed the role of religion teacher,[168] Judge Fisher argued that this factor favored classifying Biel as a minister for purposes of the exception.[169]

The *Biel* dissent also mentioned *Grussgott*, in which the Seventh Circuit held that the substance underlying the employee's title favored applying the exception to the Hebrew language teacher at a Jewish school, partly because the substance of the teacher's title, as communicated to her and understood by others, entailed teaching the Jewish faith.[170] Biel had agreed in her contract that she understood that St. James's mission was to develop and promote a Catholic School Faith Community within the philosophy of Catholic education as implemented by St. James, and the doctrines, law, and norms of the Catholic Church.[171] For these reasons and all the surrounding circumstances, Judge Fisher argued that Biel, like the employee in *Grussgott*, should have been classified as a minister.[172]

6. Our Lady of Guadalupe v. Morrissey-Berru

In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court noted that the four considerations in *Hosanna-Tabor* were relevant circumstances in Perich's case, not essential, inflexible requirements.[173] Although the Court did not outright adopt the functional approach, the Court noted that what matters when classifying an employee "is what an employee does."[174] The Court held that other courts should decide whether the first three *Hosanna-Tabor* circumstances—a ministerial title, formal religious education, and the employee's self-description as a minister—were present.[175] Then, to check the conclusion suggested by

165. *Id.* at 616-17.
166. *Id.* at 617.
167. *Id.*
168. In fact, Biel was the only religion teacher that the children had.
169. *Biel*, 911 F.3d at 617-18.
170. *Id.* at 617.
171. *Id.*
172. *Id.* at 621-22.
173 140 S. Ct. 2049, 2064 (2020).
174 *Id.*
175 *Id.* at 2068.

these circumstances, courts should ask whether the employee performed a religious function.[176]

III. DISCUSSION

This Section will first explain why the approach used in *Biel v. St. James* was inconsistent with the framework provided by the Supreme Court in *Hosanna-Tabor*. Namely, the *Biel* court misclassified a religious organization's employee by requiring factual similarity between the *Biel* employee and the *Hosanna-Tabor* employee. This approach is misguided because courts should evaluate additional considerations—distinct from the specific employment circumstances in *Hosanna-Tabor*— when classifying employees. Additionally, such a holding could disadvantage religious organizations that are unlike the religious organization in *Hosanna-Tabor*. Next, this section will discuss how the *Hosanna-Tabor* Court expanded the considerations that courts should evaluate when using the functional approach to classify a religious organization's employee. Prior to *Hosanna-Tabor*, most circuit courts used the functional approach when classifying religious organization's employees. But the functional approach was limited to focusing on the employee's job duties. In *Hosanna-Tabor*, the Court examined all the circumstances surrounding the employment when determining whether the employee functioned as a minister, rather than solely considering the employee's duties. Finally, this section will conclude by explaining why this modified functional approach comports with the purposes of the Free Exercise and Establishment Clauses of the First Amendment.

A. In Biel v. St. James, when determining whether the plaintiff was a "minister," the Ninth Circuit evaluated only the four considerations examined in Hosanna-Tabor rather than exploring all the circumstances surrounding the plaintiff's employment.

In *Biel v. St. James*, the Ninth Circuit improperly applied the four *Hosanna-Tabor* considerations—the employee's formal title, the substance underlying the title, the employee's use of the title, and the employee's function—as factors that form a rigid test. Specifically, the Ninth Circuit found that the employee did not qualify as a minister because "[a]t most, only one of the four *Hosanna-Tabor* considerations" favored classifying the employee as such.[177] However, in *Hosanna-Tabor*, the Court explicitly rejected adopting a rigid test when classifying

[176] *Id.*

177. *Id.* at 610.

a religious organization's employee for purposes of the ministerial exception.[178] By requiring that at least two of the *Hosanna-Tabor* considerations be met before the ministerial exception may apply, the court in *Biel* adopted a rigid test to classify the employee, which wholly contradicted the holding in *Hosanna-Tabor*.

The *Hosanna-Tabor* Court did not refer to the employee's formal title, the substance underlying that title, the employee's use of that title, or the function performed by the employee as factors, but simply as "considerations." Nor did the Court state that these considerations composed a multi-factor balancing analysis. In fact, in his concurring opinion, Justice Thomas stated: "Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or *multifactor analysis* risk disadvantaging those religious organizations whose beliefs, practices, and membership are outside of the mainstream or unpalatable to some."[179] The considerations in *Hosanna-Tabor* were relevant for one specific employee at a Lutheran church. In cases involving different types of employees and different religious organizations, courts must analyze different considerations when determining an employee's ministerial classification.

To illustrate, the considerations for an employee of a Buddhist organization may drastically differ from those for an employee of a Lutheran church. For example, an employee's informal title, the employee's handbook or employment contract, the religious organization's mission, whether the employer's hiring process included religious criteria,[180] and the religious organization's expectation or understanding of the employee's role[181] may all be relevant considerations when classifying certain employees. The considerations that are relevant to the classification of a religious organization's employees are endless due to the wide range of differing religious organizations and the differing roles within each organization.

The *Hosanna-Tabor* Court did not begin with the four considerations and discuss whether the employee satisfied each consideration. Rather, the Court derived the considerations from a single employment circumstance. Different considerations may have emerged if a different type of employee or a different religious organization were at issue.

Additionally, *Biel*'s interpretation of *Hosanna-Tabor* inaccurately conveyed that the ministerial exception applies only to cases that are factually similar to *Hosanna-Tabor*. Specifically, the *Biel* court declined to classify the employee as a minister because the case bore "so little

178. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171,173 (2012).

179. *Id.* at 197 (Thomas, J., concurring) (emphasis added).

180. *See* Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999).

181. *See Biel*, 911 F.3d at 617 (Fisher, J., dissenting).

resemblance to *Hosanna-Tabor*."[182] This conclusion is misguided because the *Hosanna-Tabor* Court never required factual similarity to Perich's circumstances in order for a court to classify an employee as a minister. Rather, the Court narrowly held that the employee in *Hosanna-Tabor* was a minister given all the circumstances of her individual employment. This suggests that the correct approach for lower courts is to first examine all the circumstances of the individual's employment and then determine whether the employee is a minister—that is, whether the employee plays a role in preaching or teaching the organization's beliefs and carrying out its mission—based on the employee's circumstances.

Even using the four *Hosanna-Tabor* considerations as general guideposts approaches the question from the wrong direction. In *Hosanna-Tabor*, the Court first examined the employee's circumstances, and then extracted the relevant considerations from those particular circumstances. Although courts may still arrive at the correct holding, courts that use the *Hosanna-Tabor* considerations as general guideposts employ a misguided approach. For example, in *Grussgott v. Milwaukee Jewish Day School*,[183] the Seventh Circuit began its analysis for classifying a Jewish school's Hebrew teacher by examining each *Hosanna-Tabor* consideration and considering the similarities between the Jewish teacher and the *Hosanna-Tabor* employee.[184] Because the employee's circumstances favored applying the exception, the *Grussgott* court held that the Hebrew teacher qualified as a minister.[185] Although the court ultimately was correct in classifying the Hebrew teacher as a minister, the court used a backwards approach to arrive at this holding.

B. Courts should employ a functional approach when determining the classification of a religious organization's employee.

Courts should use a functional approach when classifying a religious organization's employee for two reasons. First, the Supreme Court in *Hosanna-Tabor* essentially used a functional approach when applying the ministerial exception, and lower courts should follow that lead. Second, a functional approach facilitates the true purposes of the Free Exercise and Establishment Clauses.

The functional approach focuses on the function performed by an employee of a religious organization.[186] Before *Hosanna-Tabor* was

182. *Id.* at 610.

183. 882 F.3d 655 (7th Cir. 2018).

184. *Id.* at 659-60.

185. *Id.* at 662.

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

decided, lower courts determined an employee to be a minister by focusing mainly on the employee's job duties—namely, if the employee's job duties consisted of "teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship," then the court determined that the employee performed a religious function.[187] Rather than focusing solely on the employee's job duties, the *Hosanna-Tabor* Court expanded the considerations that courts should evaluate when using the functional approach. Evaluating the totality of the circumstances, the Court considered whether the employee functioned to preach and teach the religious organization's belief and to carry out its mission.[188] In conclusion, when classifying a religious organization's employees, courts must first consider all the circumstances of the plaintiff's employment. Courts should then determine the plaintiff's function from those circumstances.

1. The Hosanna-Tabor Court considered all the circumstances surrounding the plaintiff's employment to determine whether the employee performed a religious function.

Although the majority opinion in *Hosanna-Tabor* did not explicitly adopt any formal test, each consideration that favored the *Hosanna-Tabor* employee's classification as a minister was simply a component of most employees' functions. The first consideration—an employee's formal title—generally describes an employee's function. While there are instances where an employee's title may not relate to the employee's function, an employee's job title and function generally do correlate. A "title" can be defined as "a word or name that describes a person's job in a company or organization."[189] For example, the title of "medical assistant" instantly conveys information about the function of such a position—namely, to offer medical assistance to another. Similarly, the title of "teacher" conveys a function of teaching and instructing,[190] and the title of "minister" conveys a function of ministering and serving.[191]

The second consideration—the substance underlying the title—is necessary only when the employee performs some religious function. For example, the employee in *Hosanna-Tabor* underwent significant religious

187. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985).

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

189. *Title*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/title.

190. "Teacher" is defined as "one whose occupation is to instruct." *Teacher*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/teacher.

191. "Minister" is defined as "to give aid or service." *Minister*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/minister.

training to obtain her position—she received an endorsement from her local Synod district, passed an examination given by faculty at a Lutheran college, and secured the congregation's election.[192] The *Hosanna-Tabor* employee underwent such strenuous requirements because the employee's function was to preach and teach the organization's beliefs to others. Such demanding qualifications would have been unnecessary—and even pointless—if the employee did not perform some religious function.

The third consideration—the employee's use of the title—pertains to an employee's function. The *Hosanna-Tabor* employee held herself out to the public as a minister by accepting the formal call to religious service, claiming a tax break available only to ministers, and indicating that she regarded herself as a minister.[193] When employees' main functions are "ministerial," then such employees would likely hold themselves out to the public as such. On the other hand, employees who perform very limited "ministerial" functions would likely not hold themselves out to the public as a minister. Indeed, it would be strange—and perceptually even fraudulent—for employees to outwardly use their title as if they were ministers if they performed no religious function.

The first three considerations in *Hosanna-Tabor*—the employee's formal title, the substance underlying that title, and the employee's use of that title—are related to the function that the employee performs. Indeed, Justices Alito and Kagan's concurring opinion in *Hosanna-Tabor* noted that majority's opinion supported the functional approach: "The Court's opinion today should not be read to upset this [functional approach] consensus."[194] And, while concurring opinions are not binding law, in some instances, concurrences "may shape the evolution of the law as they limit, expand, clarify, or contradict" the majority opinion.[195] Sometimes, the majority opinion does not contain a clear, easily-extractable legal principle, and a concurring opinion can reveal the concurring justices' "understanding of the majority opinion and their preferences regarding the particular legal issue."[196] In some cases, lower courts may rely on concurring opinions to understand how to apply the majority opinion to

192. *Hosanna-Tabor*, 565 U.S. at 191.

193. *Id.* at 191-92.

194. *Id.* at 204 (Alito, J., concurring). Justices Alito and Kagan were referring to the consensus reached by the lower courts that a religious organization's employee's ministerial classification should be determined using a functional approach. *See* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) ("The 'ministerial exception' . . . does not depend upon ordination but upon the function of the position"); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996) ("[T]he ministerial exception encompasses all employees of a religious institution . . . whose primary functions serve its spiritual and pastoral mission.")

195. PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 5 (Robert J. Spitzer ed., State University of New York Press 2010).

196. *Id.* at 6.

their own cases.[197]

The *Hosanna-Tabor* majority opinion was cautious and vague. The opinion gave the lower courts little guidance on how to apply the ministerial exception. Instead of applying the four considerations as a multi-factor balancing analysis—which explicitly contradicts Justice Thomas's position[198]—the lower courts should look to the concurring opinions in *Hosanna-Tabor* as clarification of the majority opinion.[199]

Indeed, one can see reflections of the concurring opinions in the majority's opinion. For example, Justice Thomas argued that courts should completely defer to a religious organization's determination regarding whether its employees qualify as ministers. This deference is encompassed by the first consideration in *Hosanna-Tabor*—the employee's formal title. Because an employee's formal title is entirely decided by the religious organization, the *Hosanna-Tabor* Court displayed the deference that Justice Thomas suggested by considering the employee's formal title as a circumstance that favored a ministerial classification.

Justices Alito and Kagan's concurring opinion was also incorporated into the majority's considerations. Specifically, Justices Alito and Kagan argued that courts should focus on the function that the employee performs. The *Hosanna-Tabor* Court explicitly incorporated the function performed by the employee as the fourth consideration in determining that the employee qualified as a minister.

2. A functional approach comports with the purposes of the Free Exercise and Establishment Clauses.

A functional approach to the ministerial exception facilitates three of the purposes of the Free Exercise and Establishment Clauses. First, a religious organization must be free to shape its own faith and missions through its appointments.[200] Second, the Free Exercise Clause protects genuine religious freedom, not pretextual or insincere beliefs.[201] Third, every religious organization—even nontraditional or unpopular ones—

197. *Id.* at 7.

198. Justice Thomas stated: "Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or *multifactor analysis* risk disadvantaging those religious organizations whose beliefs, practices, and membership are outside of the mainstream or unpalatable to some." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) (emphasis added).

199. In fact, the Fifth Circuit has construed the concurring opinions in *Hosanna-Tabor* as clarification of the majority's opinion: "Justices Thomas and Alito each concurred separately to attempt to elucidate the application of the ministerial exception." Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 174 (5th Cir. 2012).

200. *Hosanna-Tabor*, 565 U.S. at 173.

201. Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1162 (2013).

must be protected.[202] The purposes of the Free Establishment and Free Exercise Clause would not be satisfied if the first three considerations in *Hosanna-Tabor* were interpreted as separate factors of a test, rather than simply as the circumstances surrounding a plaintiff's employment.

i. A religious organization must be free to shape its own faith and missions through its appointments.

The *Hosanna-Tabor* Court held that the Free Exercise Clause prevents governmental involvement in "a religious group's right to shape its own faith and mission through its appointments."[203] This overarching purpose should be the backdrop against which courts consider whether an employee qualifies as a minister. If the disputed employee plays a role in shaping the religious organization's faith or mission, the religious organization should not have to follow antidiscrimination laws regarding the employment. Because the function that an employee performs directly relates to whether the employee has a role in shaping the religious organization's faith or mission, a functional approach to the ministerial classification facilitates this purpose of the Free Exercise Clause.

ii. The Free Exercise Clause protects sincere religious practices.

Additionally, the Free Exercise Clause protects sincere—not pretextual—religious practices.[204] If the first three considerations in *Hosanna-Tabor* were interpreted as individual factors of a test, the religious organization or the employee could unilaterally—and even pretextually—satisfy those factors. For instance, a religious organization could bestow a formal religious title on an employee or require significant religious training underlying a formal title, simply as a pretense to satisfy a factor of the ministerial classification analysis. Also, employees could hold themselves out to the public as ministers, entirely for the purpose of being classified as ministers—or vice versa. It is contrary to the aim of the ministerial exception for religious organizations to invoke a ministerial classification, or for religious organizations' employees to avoid a ministerial classification, through a spurious, backdoor approach. Rather, the ministerial exception should apply only to the employees of a religious organizations who can genuinely be classified as "ministers.

Additionally, religious organizations should not be forced to comport with a rigid framework in order to invoke the ministerial exception.

202. *See* Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

203. 565 U.S. at 173.

204. Paulsen, *supra* note 197, at 1162.

Specifically, religious organizations should not be obligated to confer a formal title on their ministers, to impose some substance underlying those formal titles, or to compel their ministers to hold themselves out to the public as ministers. Rather, the classification of religious organizations' employees should be flexibly based on the naturally occurring, genuine circumstances surrounding their employment.

iii. The Establishment Clause prevents the government from disadvantaging nontraditional religious organizations.

Finally, the Establishment Clause should operate to avoid disadvantaging obscure and nontraditional religious organizations.[205] The functional approach accomplishes this purpose while the four-factor analysis applied by *Biel* does not. If the first consideration in *Hosanna-Tabor*—an employee's formal title—was interpreted as the first factor of a multi-factor analysis, that factor would disadvantage nontraditional religious organizations. Whether a formal title implies that an employee is a "minister" will differ depending on the religious organization. Even though "teacher" is a facially secular title, some religious organizations use such titles for their minsters. For example, in the Mormon church, the formal title of "teacher" can refer to an office in the church's Priesthood.[206] Additionally, some religious organizations bestow formal titles on their ministers while other religious organizations eschew such titles entirely. Similarly, the second consideration in *Hosanna-Tabor*—the substance reflected in that title—would disadvantage those religious organizations who do not train or recognize a mission underlying their ministers' titles. Finally, the third consideration—whether the employees hold themselves out to the public as a minister—could disadvantage those organizations that do not allow their ministers to publicly benefit from their ministerial status.

The functional analysis accommodates nontraditional and obscure religious organizations. Justices Alito and Kagan identified some general functions that are essential to virtually every religious organization, however diverse.[207] Those religious functions include serving in positions of leadership, performing important functions in worship services and religious ceremonies, and conveying the religious organization's faith.[208] Because such functions are imperative to virtually every religious organization, classifying employees who perform those functions as

205. *See Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.")

206. *Teachers*, MORMONWIKI (Sept. 1, 2010), https://www.mormonwiki.com/Teachers.

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

208. *Id.*

"ministers" will not disadvantage nontraditional or obscure religious organizations.

IV. CONCLUSION

Under a functional approach to the ministerial exception, all teachers employed by a religious organization who convey an organization's beliefs should be classified as "ministers." Justices Alito and Kagan's concurring opinion in *Hosanna-Tabor* stated that the First Amendment enables religious organizations to engage in the "critical process of communicating the faith."[209] Further, the Justices argued that the ministerial exception should apply to any employee who "serves as a messenger or teacher" of a religious organization's faith.[210] Additionally, the Justices noted that conveying the faith to the next generation is an essential function to the freedom of practically all religious organizations, and that the messenger certainly matters when it comes to the inculcation of religious doctrine because the credibility of a religion's message often depends on the character and conduct of its teachers.[211]

Recently, a study was conducted to investigate the influences on students' values in the academic setting.[212] The study examined whether, during a semester, university students' values were influenced by their professors' values.[213] At the beginning and again at the end of the semester, students answered a questionnaire surveying their religious and political preferences.[214]

The study found that, during the semester, the students assimilated their values to their professors' values for values-based[215] classes.[216] Most notably, the study revealed that professors' impact on students' religiosity was the most consistent and robust finding.[217] Specifically, the more the professors valued religion, the more the students valued religion.[218] Conversely, if the professors did not value religion, then the students'

209. *Id.* at 199.

210. *Id.*

211. *Id.* at 200-01.

212. Glory Emmanuel-Aviña & Harold D. Delaney, *The Value Assimilation Effect Between University Professors and Their Students in the Classroom*, 7 J. OF CURRICULUM & TEACHING 158, 158 (2018).

213. *Id.*

214. *Id.* at 161-62.

215. In this study, a values-based class meant that "the purpose of the course was to discuss values-based topics (e.g., human rights, spiritual beliefs)." *Id.* at 164. A "value" was defined as "internalized cognitive structure that guides decision making by establishing basic principles of right and wrong, a sense of priorities, meaning, and patterns." *Id.* at 158.

216. *Id.* at 158.

217. *Id.*

218. *Id.* at 181.

value of religion decreased.[219] In sum, the magnitude and direction of change in the students' values were influenced by their professor's level of religiosity.[220]

The findings of this study bolster the points made in Justices Alito and Kagan's concurring opinion in *Hosanna-Tabor*. The study suggests that if a religious organization employs a teacher to convey its beliefs, the teacher's effectiveness in imparting the organization's values depends, at least in part, on the teacher's own values. A religious organization possesses a critical interest in effectively imparting the organization's beliefs to others. Therefore, to preserve complete religious freedom, all religious teachers should qualify as "ministers" for purposes of the exception.

Additionally, the study revealed that students assimilated their values to their professors' values for non-values-based[221] classes, too.[222] Although Justices Alito and Kagan's concurring opinion in *Hosanna-Tabor* stated that "a purely secular teacher would not qualify" for the ministerial exception,[223] the study's finding suggests that a teacher who teaches nonreligious subjects at a religious organization's school might qualify as a minister for purposes of the exception. Perhaps as new studies come out and demonstrate the effect that every teacher has on students' religious values, the analysis might change on that front.

The Supreme Court caused unnecessary confusion by issuing an extremely narrow and undefined holding in *Hosanna-Tabor*—the only case the Supreme Court has ever heard involving the ministerial exception. Religious organizations and their employees deserve predictability and certainty regarding liability for adverse employment decisions. Although the Supreme Court did not explicitly adopt any rigid test, the functional approach is consistent with the Court's holding in *Hosanna-Tabor* and comports with the purposes of the First Amendment. Therefore, lower courts should use a functional analysis when classifying religious organizations' employees for the purposes of the ministerial exception.

219. *Id.*

220. *Id.* at 158.

221. For the purposes of the study, a non-values-based class meant that "the purpose of the course was to learn a defined set of information (e.g., formulas, facts, methods)." *Id.* at 164.

222. *Id.* at 158.

223. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S 171,204 (2012) (Alito, J., concurring).