

Credentials Not Required: Why an Employee’s Significant Religious Functions Should Suffice to Trigger the Ministerial Exception

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Other Views:

- Brief in Opposition to Petition for a Writ of Certiorari, *Our Lady of Guadalupe School v. Morrissey-Berru*, 769 Fed. Appx. 460 (9th Cir. 2019) (No. 19-267), https://www.supremecourt.gov/DocketPDF/19/19-267/120481/20191028152303479_Brief%20in%20Opposition%20to%20Petition%20for%20Writ%20of%20Certiorari%20No.%2019-267%20Morrissey-Berru%20v.%20Our%20Lady%20of%20Guadalupe%20Church.pdf.
- *Our Lady of Guadalupe School v. Morrissey-Berru*, 769 Fed. Appx. 460 (9th Cir. 2019), *cert. granted* (U.S. Dec. 18, 2019) (No. 19-267), https://s3.amazonaws.com/becketnewsite/agnes_morrissey-berru_v_our_lady_of_guadalupe_school.pdf.
- *St. James School v. Biel*, 911 F.3d 603 (9th Cir. 2018), *cert. granted* (U.S. Dec. 18, 2019) (No. 19-348), <https://s3.amazonaws.com/becketnewsite/17-55180.pdf>.
- Mark Joseph Stern, *The Supreme Court May Exempt Religious Employers From Civil Rights Laws*, SLATE (Dec. 19, 2019), <https://slate.com/news-and-politics/2019/12/supreme-court-religious-employers-discrimination.html>.

The ministerial exception protects religious organizations from lawsuits by their ministers for employment discrimination and other alleged employment-related wrongs. The U.S. Supreme Court unanimously affirmed the exception as a requirement of the First Amendment’s Religion Clauses in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.¹ The Court ruled that holding a church liable for firing or refusing to hire a minister “deprive[s] the church of control over the selection of those who will personify its beliefs,” in violation of the Free Exercise Clause, and creates “government involvement in such ecclesiastical decisions,” in violation of the Establishment Clause.² The exception protects religious organizations’ internal governance and allows them to raise a defense at early stages of a lawsuit, even though nondiscrimination laws are “neutral laws of general applicability” enacted for secular purposes.³ *Hosanna-Tabor* also held that the employee who had sued—a teacher in a religiously affiliated school—was a “minister,” but it based that ruling on the case’s specific facts and left open how far the definition of minister should extend.⁴

Since *Hosanna-Tabor* was decided in 2012, lower courts have divided over whether the category of minister includes teachers in religious schools who have significant religious functions or responsibilities: teaching religion classes, leading prayers or liturgies, or integrating religion into ordinary subjects.⁵ Several early decisions ruled that such teachers were ministers. But three recent decisions from the Ninth Circuit and the California Court of Appeal have ruled the other way, holding that the teachers in question fell outside the definition of minister because they lacked some sort of ministerial training, title, or other credential accompanying the religious functions. Determining who is a minister based on credentials rather than function would significantly reduce protection for religious organizations in choosing who will lead, teach, and preach their faiths. The U.S. Supreme Court has granted certiorari to review the two Ninth Circuit decisions.⁶

The Court should rule that function is sufficient. An employee who performs a significant religious function is a

1 565 U.S. 171 (2012).

2 *Id.* at 188-89. “Church” in this context encompasses religious organizations broadly.

3 *Id.* at 189-90 (distinguishing *Employment Division v. Smith*, 494 U.S. 872, 879 (1990)).

4 *Id.* at 190-94.

5 See *infra* part I (describing the divided case law).

6 *Our Lady of Guadalupe School v. Morrissey-Berru*, 769 Fed. Appx. 460 (9th Cir. 2019), *cert. granted* (U.S. Dec. 18, 2019) (No. 19-267); and *St. James School v. Biel*, 911 F.3d 603 (9th Cir. 2018), *cert. granted* (U.S. Dec. 18, 2019) (No. 19-348), *order available at* https://www.supremecourt.gov/orders/courtorders/121819zr_kjfm.pdf.

minister whom the organization has a right to choose without interference by courts and juries. When such a function is present and the organization holds the employee out as performing the function, then the employee's minister status should not be defeated because the employee lacks ministerial credentials such as title, training, or ordination. Treating religious function as sufficient serves the purposes of the ministerial exception and avoids evils the First Amendment was meant to prevent. There is strong evidence that this best comports with the original understanding of the Religion Clauses.

I. CASE LAW

A. *Hosanna-Tabor*

Hosanna-Tabor was a lawsuit by Cheryl Perich, a fourth-grade teacher at a Lutheran school. She was a "called" teacher: one who had received theological training and been commissioned by the congregation sponsoring the school.⁷ After taking medical leave for narcolepsy, Perich attempted to return to work, but the school had hired another teacher. When Perich threatened to sue, the congregation withdrew her "call" for failing to follow church conciliation procedures.⁸ The EEOC sued on her behalf for disability discrimination.

When the case reached the Supreme Court, the Justices unanimously held that the ministerial exception is required by both Religion Clauses. The Court then found that Perich was a minister within the exception, but it declined to adopt any single "rigid formula for deciding when an employee [so] qualifies," noting that this was its "first case involving the ministerial exception."⁹ Instead, it determined that Perich was a minister, based on "all the circumstances of her employment," four of which the Court discussed.¹⁰

The first circumstance the Court noted was Perich's job title: "Minister of Religion, Commissioned." Second, her title "reflected a significant degree of religious training followed by a formal process of commissioning."¹¹ To become a called teacher, Perich had completed eight college theology courses, obtained the endorsement of her local synod, and passed an oral examination by a faculty committee at a Lutheran college.¹² Third, Perich "held herself out" as a minister by accepting the formal call to religious service, claiming the minister's parsonage exclusion on her income taxes, and labeling herself a minister in her communications with the synod.¹³ Fourth, her job had significant religious duties. In addition to teaching general school subjects, she taught religion and was responsible for leading students in prayer and devotional

exercises, attending weekly chapel services, and leading the chapel service about twice a year.¹⁴

Three Justices concurred to explain that the circumstances identified by the majority were by no means all required: that is, the definition of minister should extend more broadly than reliance on all four circumstances might suggest. Justice Samuel Alito's concurrence, joined by Justice Elena Kagan, emphasized that reliance on ministerial title, specifically, was improper because it could discriminate against minority religions that use unfamiliar titles or none at all.¹⁵ To preserve equality among faiths, Alito and Kagan said, the primary criterion for a minister should be significant religious functions. Justice Clarence Thomas, concurring separately, emphasized that courts should defer to the religious organization's good faith determination of who its ministers are.¹⁶ This focus, he argued, would avoid both inequality among denominations and judicial second-guessing of (i.e. entanglement in) religious organizations' ecclesiastical decision-making.

B. *Lower Courts: Functions Versus Credentials*

By declining for the present to adopt a definitive test for who counts as a minister, the Supreme Court left development of the matter to lower courts, which have now divided over how to determine an employee's minister status. Is function a dominant consideration, a sufficient but unnecessary condition, or merely one factor to be considered among others?

Numerous decisions before *Hosanna-Tabor* held that function was key in determining whether an employee was a minister.¹⁷ In *Rayburn v. General Conference of Seventh Day Adventists*, for example, the Fourth Circuit stated that applicability of the ministerial exception should turn on the "function of the position," not on ordination status.¹⁸ The Ninth Circuit and the California courts were among those that, before *Hosanna-Tabor*, took a functional approach to defining "minister."¹⁹

After *Hosanna-Tabor*, courts continued to place heavy weight on an employee's religious function. In *Fratello v. Archdiocese of New York*, the Second Circuit held that a school principal's lawsuit was barred notwithstanding her secular title of "lay principal."²⁰ The court said that "the most important consideration in this case is whether, and to what extent, the plaintiff performed

⁷ 565 U.S. at 177.

⁸ *Id.* at 179.

⁹ *Id.* at 190.

¹⁰ *Id.* at 190-92.

¹¹ *Id.* at 191.

¹² *Id.*

¹³ *Id.* at 191-92.

¹⁴ *Id.* at 192.

¹⁵ *Id.* at 198 (Alito, J. concurring).

¹⁶ *Id.* at 196 (Thomas, J. concurring).

¹⁷ *Id.* at 203-04 (Alito, J. concurring).

¹⁸ 772 F.2d 1164, 1168 (4th Cir. 1985).

¹⁹ *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (2010). *See also* *Schmoll v. Chapman University*, 70 Cal. App. 4th 1434, 1439 (1999) (stating that the applicability of the ministerial exception "does not depend on the title given to the employee; rather, the determinative factor is the function of the person's position"); *Henry v. Redhill Evangelical Lutheran Church*, 201 Cal. App. 4th 1041, 1053-54 (2011) ("The exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission.").

²⁰ 863 F.3d 190, 207, 210 (2d Cir. 2017).

important religious functions for her religious organization.”²¹ The Seventh Circuit followed suit, holding a teacher to be a minister in *Grussgott v. Milwaukee Jewish Day School*.²² Even though only two of the four circumstances noted in *Hosanna-Tabor* weighed in favor of defendants, *Grussgott* held that the plaintiff’s religious function “outweighed” the other factors.²³ The court did say, however, that “ministers” should be defined “case-by-case,” and it declined to make function alone the “determining” factor.²⁴

The Fifth Circuit also relied on function in *Cannata v. Catholic Diocese of Austin*.²⁵ The court found that the plaintiff was a minister because he “played an integral role in the celebration of Mass” and, “by playing the piano during services, furthered the mission of the church and helped convey its message to the congregants.”²⁶ The court viewed this as an “important function during the service.”²⁷

However, recent cases from the Ninth Circuit and California have departed from the function focus. These decisions require that the employee have significant ministerial credentials—title, training, or ordination—in addition to important religious functions to qualify as a minister. The most striking of these decisions is *Morrissey-Berru v. Our Lady of Guadalupe School*, where the Ninth Circuit ruled that a teacher in a Catholic school was not a minister even though she had “significant religious responsibilities.”²⁸ Those responsibilities included teaching a religion class (involving Catholic doctrine) every year,²⁹ “incorporat[ing] Catholic values and teachings into her curriculum, . . . le[ading] her students in daily prayer, . . . liturgy planning for a monthly Mass, and direct[ing] and produc[ing] a performance by her students during the School’s Easter celebration every year.”³⁰ These functions were insufficient, the court said, because of other factors mentioned in *Hosanna-Tabor*: her title was secular, she lacked any “religious credential, training, or ministerial background,” and she did not hold herself out as a minister.³¹

Morrissey-Berru relied on the Ninth Circuit’s decision in *Biel v. St. James School*,³² the first to require credentials as well as function. *Biel* involved a fifth-grade teacher who taught all academic subjects (including a 30-minute religion class), oversaw

her students in twice-daily prayers, and took her class to the school-wide monthly Mass.³³ The court found these religious duties minimal compared to Perich’s in *Hosanna-Tabor*.³⁴ But it also noted that the teacher lacked a ministerial title or “credentials, training, or ministerial background” and did not hold herself out as a minister.³⁵ A California appeals court, in *Su v. Stephen S. Wise Temple*, similarly relied on *Biel* to hold that teachers at a Jewish day preschool were not ministers despite their function of “transmitting Jewish religion and practice to the next generation.”³⁶ The teachers taught religion in the classroom, taught “Jewish rituals, values and holidays, [led] children in prayers, celebrat[ed] Jewish holidays, and participat[ed] in weekly Shabbat services.” But the court said they were non-ministers because of their secular title of “teacher,” their lack of “any formal Jewish education or training,” and the lack of a requirement that they be ordained or even Jewish.³⁷

The Supreme Court has granted review in *Morrissey-Berru* and *Biel*.³⁸ *Morrissey-Berru*, in particular, neatly frames the issue left open by *Hosanna-Tabor*: Should an employee with unquestionably significant religious responsibilities fall outside the definition of minister because a court determines she lacks a title, training, ordination, or other ministerial credentials?

II. “IMPORTANT RELIGIOUS FUNCTION” VERSUS OTHER FACTORS

When an employee has important religious functions in a religious organization, there should be no further requirement that the employee have a ministerial title, training, background, or other credential. Focusing on important functions without imposing any further credentialing requirements fits the ministerial exception’s rationales, follows from the original understanding of the Religion Clauses and the evils to which it responded, and avoids denominational inequality and judicial intrusion into religion questions.

A. The Ministerial Exception’s Rationales

A function-based definition of minister best fits the chief rationales for the ministerial exception. The first of those rationales, as emphasized in *Hosanna-Tabor*, is to preserve religious organizations’ “control over the selection of those who

21 *Id.* at 208-09 (internal quotations marks and citations omitted).

22 882 F.3d 655, 661-62 (7th Cir. 2018).

23 *Id.* at 661.

24 *Id.*

25 700 F.3d 169, 177 (5th Cir. 2012).

26 *Id.*

27 *Id.* at 180.

28 769 Fed. Appx. at 461.

29 Petition for Certiorari at 7, *Morrissey-Berru v. Our Lady of Guadalupe School*, No. 19-267, https://www.supremecourt.gov/DocketPDF/19/19-267/113998/20190828165339334_Cert%20Petition-%20FINAL.pdf (citing App. 81a, 90a, 93a).

30 769 Fed. Appx. at 461.

31 *Id.*

32 911 F.3d 603.

33 *Id.* at 605.

34 *Id.* at 606-09. The court opined that if the mere presence of one *Hosanna-Tabor* circumstance was sufficient to make that employee a minister, the rest of the Supreme Court’s opinion would be rendered “irrelevant dicta.” *Id.* at 609. This is unpersuasive. Employees with significant religious functions should be considered ministers, regardless of their credentials. But when there is a question whether those functions are significant, courts may look to the title, training, and holding out of employees to determine whether to call them ministers. *See infra* section II.

35 *Id.* at 608-09.

36 32 Cal. App. 5th 1159, 1168-69 (2019).

37 *Id.*

38 *See supra* note 6. For the petitions, *see supra* note 29; Petition for Certiorari, *St. James School v. Biel* No. 19-348 (Sept. 16, 2019), https://www.supremecourt.gov/DocketPDF/19/19-348/115908/20190916170313476_No.%2019-%20PetitionForAWritOfCertiorari.pdf. The Court denied certiorari in *Stephen Wise Temple v. Su*. 140 S. Ct. 341 (Nov. 15, 2019).

will personify [their] beliefs”: those “who will preach their beliefs, teach their faith, and carry out their mission.”³⁹ The Court concluded, “The church must be free to choose those who will guide it on its way.”⁴⁰

Given that rationale, what should trigger the ministerial exception is the employee’s performance of religious functions, since such functions are what the organization needs to control. As Justice Alito’s concurrence put it, “Religious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance.”⁴¹ Whether the point sounds in free exercise (the church’s right to choose persons for such positions) or non-establishment (the ban on government choosing them), religious function is the touchstone.

A second rationale articulated for the ministerial exception is that adjudicating a minister’s discrimination suit will entangle a court in improperly deciding religious questions. This entanglement occurs because any discriminatory intent behind a firing, which an employer seldom expresses explicitly, must usually be proven circumstantially by showing that other proffered reasons were pretexts. As Judge Richard Posner wrote, in applying the exception to dismiss a suit by a church’s organist/music director:

[T]he diocese would argue that [the plaintiff] was dismissed for a religious reason—his opinion concerning the suitability of particular music for Easter services. . . . Tomic would argue that the church’s criticism of his musical choices was a pretext for firing him, that the real reason was his age. The church would rebut with evidence of what the liturgically proper music is for an Easter Mass and Tomic might in turn dispute the church’s claim. The court would be asked to resolve a theological dispute.⁴²

Justices Alito and Kagan made a similar point in their *Hosanna-Tabor* concurrence: if the parties dispute the employer’s intent, then “[i]n order to probe the *real reason* for [the plaintiff’s] firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine.”⁴³ If the religious reason the organization asserts for the firing were shown to be “an obscure and minor part of [its] doctrine, it would be much more plausible” for the plaintiff to argue it was a pretext for discrimination, while an asserted reason that is “a central and universally known tenet . . . would seem much more likely to be nonpretextual.”⁴⁴ The civil court would be setting standards for the effectiveness of a minister, which in other contexts has been found to be clearly impermissible.⁴⁵

³⁹ 565 U.S. at 188, 196.

⁴⁰ *Id.* at 196.

⁴¹ *Id.* at 200 (Alito, J. concurring).

⁴² Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040 (7th Cir. 2006).

⁴³ *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J. concurring) (emphasis in original).

⁴⁴ *Id.*

⁴⁵ Nally v. Grace Community Church of the Valley, 763 P.2d 948, 960 (Cal. 1988), *cert. denied*, 490 U.S. 1007 (1989) (rejecting cause of action for “clergy malpractice” in counseling on ground that court cannot permissibly set clergy standards of care).

The *Hosanna-Tabor* majority made clear that the ministerial exception does not stem solely from the Establishment Clause ban on judges inquiring into religious questions; it also stems from the substantive right of churches to choose their leaders under the Free Exercise Clause. The exception, the Court said, does not “safeguard a church’s decision to fire a minister only when it is made for a religious reason” but “instead ensures that the authority to select and control who will minister to the faithful . . . is the church’s alone.”⁴⁶ Nevertheless, the bar on religious questions is one valid rationale for the exception.

The “no religious questions” rationale, like the substantive right to choose leaders, suggests that the definition of a minister should focus on the employee’s function. An employee’s religious functions are what make the inquiry into the employer’s motive improper and entangling: the court has to determine whether the organization’s complaints about the employee’s performance of such functions were weak enough to be pretextual. Again, the exception’s purposes are served by triggering it for jobs with significant religious functions.

In short, in Justice Alito’s words, the applicability of the ministerial exception “rests not on [the employee’s] ordination status or her formal title, but rather on her functional status as the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees.”⁴⁷

B. Ministerial Credentialing and Original Meaning

The recent Ninth Circuit and California decisions narrow the definition of minister by requiring ministerial credentials as well as religious function. These decisions depart from the original meaning and understanding of the Religion Clauses. Such narrow definitions, especially through requirements of ministerial education or credentials, were among the evils that helped spur adoption of the First Amendment. As *Hosanna-Tabor* noted, religious establishments involved government appointment and control of ministers; it was “against this background that the First Amendment was adopted.”⁴⁸ The founding era public would have understood government setting of credentials for ministers as a violation of the free exercise of religion and as an aspect of an establishment of religion.

The Constitution’s religious freedom guarantees arose in significant part from disputes between established colonial churches and pietistic evangelical dissenters, including both Baptists and New Light Congregationalists.⁴⁹ From 1740 to 1754, the New Lights separated from the Old Light Congregationalist establishment, dissatisfied with its “‘formality’ [and] spiritual

⁴⁶ 565 U.S. at 194-95.

⁴⁷ *Id.* at 206 (Alito, J., concurring).

⁴⁸ *Id.* at 182-83. *See also, e.g.*, Payton v. New York, 445 U.S. 573, 584, 585-86 (1980) (interpreting the Fourth Amendment to apply to cases that raise “the evil the Amendment was designed to prevent” and “against which [its] wording . . . is directed”) (quotation omitted).

⁴⁹ *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437-43 (1990) (emphasizing centrality of the “evangelical impetus toward religious freedom”).

dullness.”⁵⁰ The New Lights, emerging from the revivals of the Great Awakening, spoke “to men’s hearts or souls, to their spiritual emotions, not to their understanding or minds.”⁵¹ Naturally, this attitude reflected who they chose to teach their faith. The New Lights opposed the formally trained “legal preacher,” preferring a “layman who had experienced conversion” personally.⁵² They loathed the “implication that since only an exceptionally intelligent and well-educated man could fathom the doctrinal mysteries of religion, the laws of nature, and the philosophy of science, salvation was only likely for the elite, the intelligentsia.”⁵³ They believed that “the learned clergy had lost touch with the spiritual needs of the common man and no longer really served as ministers of God to them.”⁵⁴

Similar views about ministry arose among the so-called Separate Baptists, who likewise grew as a result of revivals to become a large dissenting group in both New England and the South. Although they differed from New Light Congregationalists by rejecting infant baptism, they likewise affirmed the work of itinerant, evangelistic preachers whose foundational authority was the divine call more than formal learning.⁵⁵

New England colonial legislatures, which reflected the views of the Old Lights, responded by taking steps to restrict or disfavor informally trained ministers.⁵⁶ In 1742, Connecticut passed a law prohibiting “itinerants” from preaching without the approval of an established parish. The same year, it passed legislation preventing any church or parish from choosing a minister who was not “educated at some university, college or publick [*sic*] academy” or who did not have “a degree from some university, college, or such public academy.”⁵⁷ The only alternative for a prospective pastor was to have “obtained testimonials” from the majority of “settled ministers of the gospel” in the county where he sought to minister finding him “to be of sufficient learning to qualifie [*sic*] him for the work of such ministry.”⁵⁸

Similarly, Massachusetts passed a law in 1760 preventing legal recognition of parish ministers unless they had “academy or college training, or had obtained testimonials from the majority of the ministers already settled in the county.”⁵⁹ The law disqualified uncredentialed ministers, primarily Baptists, from receiving

funds that were collected by each town’s authorities for support of worship.⁶⁰

The dissenters viewed these laws as religious freedom violations and religious establishments. Isaac Backus, a leader among Massachusetts Baptists, cited the colony’s law as an example of how the “blend[ing]” of “civil and ecclesiastical affairs . . . depriv[ed] many of God’s people of that liberty of conscience which he has given them.”⁶¹ Backus argued that by “compel[ling] each parish to settle a minister” but then disqualifying teachers who lacked the government’s preferred training, the law clashed with the theological truth that God “gives gifts unto men in a sovereign way as seems good unto him.”⁶² The law therefore forced dissenters to “render unto Caesar” something “that belongs only to God,” since God “always claimed it as his sole prerogative to determine by his own laws what his worship shall be, who shall minister in it, and how they shall be supported.”⁶³ This and other aspects of the religious-tax system led the Massachusetts Baptists in 1773 to begin a “massive civil disobedience campaign” against it.⁶⁴

In Virginia, civil authorities dictated where ministers were permitted to preach and jailed unlicensed ministers (most of whom were itinerant, non-establishment preachers).⁶⁵ A young James Madison wrote to a friend, impassionedly, that such restrictions reflected a “diabolical, hell-conceived principle of persecution.”⁶⁶ The regulations stemmed from a deep-seated fear that the itinerants—who ignored parish boundaries, preached at times and places of their choosing, and disregarded the Book of Common Prayer—would “give great Encouragement to fall off f[r]om the established Church if they [were] permitted to range and raise Contributions over the whole Country.”⁶⁷

Leaders among Virginia’s establishment, both civic and religious, worried about the itinerants, complaining of the “[a]ssemblies, especially of the common People, upon a pretended religious Account; convened sometimes by merely Lay

50 WILLIAM G. McLOUGHLIN, *NEW ENGLAND DISSIDENT 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* 351 (1971).

51 *Id.*

52 *Id.*

53 *Id.* at 352.

54 *Id.*

55 *See id.* at 423-28; *see also* TIMOTHY D. HALL, *CONTESTED BOUNDARIES: ITINERANCY AND THE SHAPING OF THE COLONIAL AMERICAN RELIGIOUS WORLD* 104-05 (1994) (summarizing Separates’ “aggressive itinerant ministries” in New England in 1740s and later in other colonies).

56 WILLIAM G. McLOUGHLIN, *supra* note 50, at 363.

57 *Id.* at 472-73; *see also id.* at 363.

58 *Id.* at 473.

59 JACOB C. MEYER, *CHURCH AND STATE IN MASSACHUSETTS 1740-1833* 51 (1930).

60 *Id.*

61 Isaac Backus, *An Appeal to the Public for Religious Liberty* (1773), reprinted in ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 303, 316 (William G. McLoughlin ed. 1968).

62 *Id.* at 317-18 (italics removed).

63 *Id.* at 317.

64 WILLIAM G. McLOUGHLIN, *supra* note 50, at 546. *See also* Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 N.W. L. REV. COLLOQ. 175, 183 (2011).

65 Berg et al., *supra* note 64, at 183, 188 (citing sources).

66 Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON: 1769-1793, at 12 (1884). Madison himself famously had a powerful firsthand experience with this practice as a young man. As Anson Phelps Stokes puts it, “He stood outside the jail in Orange, Virginia, and heard an imprisoned Baptist minister preach from the window—the only pulpit legally available to him!” 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 340 (1950).

67 FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 127 (2010) (brackets added) (quoting Peyton Randolph, Attorney General of Virginia 1744-67).

Enthusiasts.”⁶⁸ The newcomers were deemed dangerous precisely because they lacked the credentials that traditionally denoted ministers. In 1745, Governor William Gooch wrote against “false teachers . . . who, *without order or license*, or producing any *testimonial of their education* or sect, . . . lead the innocent and ignorant people into all kinds of delusion.”⁶⁹ Upon the arrival of a new contingent of preachers, Anglican clergyman Patrick Henry, Sr. (uncle of the statesman) declared, “I wish they could be prevented, or, at least be oblig’d to show their credentials.”⁷⁰

Disputes like these helped spur the adoption of the First Amendment. By the time the Constitution was being framed, religious dissenters in Virginia had secured freedom from many of these restrictions,⁷¹ and they feared a federal government capable of resurrecting the restrictions. Many New England dissenters had pushed for the new Constitution to provide greater protection than it ultimately did. John Leland, a Baptist minister in both Massachusetts and Virginia, complained that the unamended Constitution provided no “Constitutional defence” against religious oppression of the type Baptists had suffered.⁷² In 1787, most Baptists were antifederalist—opposing the Constitution’s ratification—principally because of their dissatisfaction with its limited protections for religious freedom.⁷³

James Madison owed his 1789 election to Congress to disgruntled Baptists who supported his candidacy in part to address their grievances with the established church in Virginia.⁷⁴ Madison then made good on his promise to dissenters, introducing what became the Bill of Rights and taking a leading role in securing Congress’s approval. He later reported that a Baptist leader assured him that the Bill of Rights “had entirely satisfied the disaffected of his sect.”⁷⁵

68 RHYNS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740–1790* 150 (1999) (quotation omitted).

69 *Id.* (emphases added).

70 *Id.*

71 “The legal status of toleration in Virginia remained uncertain until resolved by the revolutionary Declaration of Rights in 1776.” *Id.* at 153.

72 THOMAS S. KIDD & BARRY HANKINS, *BAPTISTS IN AMERICA: A HISTORY* 73 (2015).

73 1 MCLOUGHLIN, *supra* note 50, at 556–57; 1 STOKES, *supra* note 66, at 309. The Baptists were not a monolith concerning ratification. Backus, although generally representative of Baptist thought, went against the majority of his coreligionists in voting for ratification as a delegate to the Massachusetts ratifying convention, citing the exclusion of religious tests in Article VI as one of “our greatest securities in this constitution.” *Id.* But believing that the test-oath ban was sufficient to justify ratifying the Constitution is perfectly consistent with believing, as he did, that laws other than test oaths also violated religious freedom and established religion.

74 McConnell, *supra* note 49, at 1476–77 (attributing Madison’s “narrow” victory in part to Baptist support given after he promised a “a constitutional provision for religious liberty”). For a detailed study of Madison’s relationship with Leland and the latter’s role in getting him elected, see Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 PENN. ST. L. REV. 733 (2009).

75 McConnell, *supra* note 49, at 1487 (quoting letter from Madison to President Washington).

In short, narrow definitions of minister—notably, those setting educational and other credentials for ministers—were prominent among the evils to which the Religion Clauses were a response. Today, some courts are repeating this evil by effectively requiring that a minister possess “credential[s], training, or ministerial background” in order for an organization to invoke the ministerial exception.⁷⁶ Such requirements impose civil authorities’ assumptions—almost inevitably majoritarian assumptions—that certain training or formalities are inherent in the concept of a minister.

The Eighteenth-Century colonial laws used narrow definitions of minister to deny congregations their choice of preacher or teacher, or to deny ministers public funds that were available to those with training the government deemed adequate. Today, some courts use a similarly narrow definition to deny religious organizations the protection of the ministerial exception, exposing them to employee lawsuits that threaten the organizations’ ability to choose who will teach the faith. The evil is the same in each case: subjecting religious organizations to a legal burden or disability regarding their chosen leaders based on those leaders’ lack of credentials.

It is irrelevant that the colonial establishmentarians and today’s judges may have different reasons for imposing these narrow, credential-based definitions. The colonial legislatures wanted to maintain social order and proper religion and worried that untrained ministers would “give great Encouragement to fall off f[ro]m the established Church.”⁷⁷ The Ninth Circuit panels want to maintain maximum legal protection for employees by minimizing the scope of the ministerial exception. But the nature of the motivation does not matter to the ministerial exception, which protects religious autonomy even against laws that are generally applicable and have secular purposes.⁷⁸ Whatever the motive, civil rules that require credentials for one to qualify as a minister perpetuate historic evils which the First Amendment aimed to prevent.

C. Denominational Inequality and Judicial Second-Guessing

Among the principles promoted by the Religion Clauses are religious non-discrimination and government neutrality on religious questions. Excluding an employee with important religious functions from minister status based on a lack of title, training, or other credentials creates a preference for some faiths over others and invites courts to second-guess religious organizations’ self-understanding, in contravention of those important constitutional principles.

1. Inequality Among Faiths

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”⁷⁹ Requiring ministerial title, training, ordination, or other credentials as criteria for minister status invites

76 *Morrissey-Berru*, 769 Fed. Appx. at 461; *Biel*, 911 F.3d at 608.

77 See Lambert, *supra* note 67, at 127.

78 See *supra* note 3 and accompanying text.

79 *Larson v. Valente*, 456 U.S. 228, 244 (1982).

discrimination against small or minority faiths, religions with non-hierarchical polities, and faiths that use schools to sustain their beliefs. As Justices Alito and Kagan noted in their *Hosanna-Tabor* concurrence, “it would be a mistake if the term ‘minister’ or the concept of ordination were viewed as central to the important issue of religious autonomy.”⁸⁰ Such criteria would disadvantage faiths that do “not employ the term ‘minister,’” that “eschew the concept of formal ordination,” or that (like Quakers, for example) “consider the ministry to consist of all or a very large percentage of their members.”⁸¹ “Because virtually every religion in the world is represented in the population of the United States,” broad application of the ministerial exception is necessary to protect minority religions.⁸²

Justice Thomas likewise warned that definitions of minister must be flexible and deferential because our nation includes religious organizations with “different leadership structures and doctrines that influence their conceptions of ministerial status,” and courts should avoid “disadvantaging those religious groups whose beliefs, practices, and membership are outside of the ‘mainstream’ or unpalatable to some.”⁸³

Conditioning the applicability of the ministerial exception on a religious employer’s use of certain terminology in job titles leads to unequal treatment of different faiths. The term minister itself can produce discrimination among religions, as it has strong Protestant associations and “is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists.”⁸⁴

The Ninth Circuit relied on the absence of formal ministerial titles in finding that religious school teachers were not ministers. These decisions confirm Justice Alito’s warning that such a focus will create improper inequalities among religious organizations. In *Morrissey-Berru*, the panel asserted that although the teacher had “significant religious responsibilities,” her “formal title of ‘Teacher’ was secular”; in *Biel*, the panel majority said that the “teacher” title did not “conve[ny] a religious—as opposed to secular—meaning.”⁸⁵ That approach discriminates, at the very least, against religious groups that rely heavily on teachers and schools to “transmi[t] the[ir] faith to the next generation.”⁸⁶ A number of faiths show such reliance: the Supreme Court has

recognized that teachers commonly play a “critical and unique role . . . in fulfilling the mission of a church-operated school.”⁸⁷

As Judge D. Michael Fisher noted in his dissent in *Biel*, the formal title “Grade 5 Teacher” should be interpreted in the light of the employer’s “expression of [a teacher’s] role in the school,” which was the religious role of “a *distinctively Catholic* Grade 5 Teacher.”⁸⁸ The fact that such schools call their employees by their most conventional, accurate title—teacher—does not detract from the fact that the employees perform a critical religious function. These schools should not be excluded from the protections of the ministerial exception because they choose that accurate title while others choose one that a court deems more minister-like.

Similar problems arise from a focus on whether the employee had official ministerial training. Throughout history—including at the time of the founding—some religious groups have strongly believed that God can anoint or call preachers, teachers, and leaders without formal religious education. Eighteenth-Century Baptists believed, in Isaac Backus’s words, that God “gives gifts unto men [e.g. preaching and teaching] in a sovereign way as seems good unto him.”⁸⁹ Similarly, although Quakers have taken varying positions over time on ministers’ education, in their early years they “repudiated the idea that ministers must be scholastically trained. God called those who were to preach, and that was the only qualification necessary or possible.”⁹⁰ Requiring ministerial training to qualify churches for the legal benefit of the ministerial exception discriminates against such groups.

In addition, a specialized training requirement, like a title requirement, discriminates against religions that rely on school teachers to communicate the faith to their students. In *Morrissey-Berru*, for example, the Ninth Circuit found the teacher’s “substantial religious responsibilities” insufficient because the “teacher” title did not reflect “ministerial substance and training.”⁹¹ That suggests, improperly, that the religious training needs to be of the sort the court deems suitable for a clergy-like minister—a standard that most school teachers, even religiously important ones, will not meet.⁹²

Finally, a training requirement can also discriminate against small and minority religious groups. Such groups may

80 565 U.S. at 198 (Alito, J., concurring).

81 *Id.* at 202 (Alito, J., concurring). See Friends General Conference, *FAQs about Quakers*, <https://www.fgcquaker.org/discover/faqs-about-quakers> (“Quakers believe that we are all ministers and responsible for the care of our worship and community. Rather than employing a pastor, Quaker meetings function by appointing members to offices and committees.”).

82 *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring); see also *American Legion v. American Humanist Ass’n*, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring) (emphasizing the importance of “sensitivity to and respect for this Nation’s pluralism”).

83 565 U.S. at 197 (Thomas, J., concurring) (citing *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987)).

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

85 769 Fed. Appx. at 461; *Biel*, 911 F.3d at 608 (quotation omitted, brackets adjusted).

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

87 *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979); see also *Lemon v. Kurtzman*, 403 U.S. 602, 616-18 (1971).

88 911 F.3d at 616 (Fisher, J., dissenting) (emphasis added).

89 Backus, *supra* note 61, at 317 (italics removed).

90 THOMAS D. HAMM, *THE QUAKERS IN AMERICA* 86 (2003). Early Quaker leader Robert Barclay gave a characteristic explanation:

We do believe and affirm, that some are more particularly called to the Work of the Ministry; and therefore are fitted of the Lord for that purpose. . . . That which we oppose, is, the distinction of *Laity* and *Clergy* . . . whereby none are admitted unto the work of the *Ministry*, but such as are Educated at *Schools* on purpose.

Id. at 86 (quotation omitted; italics in original).

91 *Morrissey-Berru*, 769 Fed. Appx. at 461 (emphasis added).

92 Moreover, the Ninth Circuit compounds its mistake by running title and training together: the panel majority in *Biel* reasoned, in criticizing the dissent, that for the teacher to be a minister, her title should

lack the resources to provide formal training programs or may lack sufficient candidates who have undergone such training. Teachers in these faiths may fail to qualify as ministers under the Ninth Circuit's analysis, even when performing the same religious function as teachers of other faiths with more resources for training.

2. Judicial Second-Guessing and Resolution of Religious Questions

Requiring ministerial title or training invites another First Amendment evil: it requires courts to resolve questions of religious doctrine, second-guessing an organization's own determinations about what features are most important in constituting leadership roles in the organization. As the Supreme Court held in *Serbian Eastern Orthodox Diocese v. Milivojevic*, courts must accept the decisions of ecclesiastical tribunals regarding their own rules and regulations for internal discipline and government.⁹³ Judicial second-guessing of these ecclesiastical decisions is an impermissible substitution of the church's internal governance.⁹⁴ *Milivojevic* forbade courts from second-guessing a church's decision to discipline and defrock of one of its bishops; it held that the decision to fire or discipline a minister was a "quintessentially religious" controversy.⁹⁵ *Hosanna-Tabor* relied on these principles in concluding that "it is impermissible for the government to contradict a church's determination of who can act as its ministers."⁹⁶

But the right to choose or discipline ministers "would be hollow . . . if secular courts could second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets."⁹⁷ Accordingly, a broad, flexible definition of "minister" is necessary to avoid resolving essentially religious controversies. "[C]ivil courts are in no position to second-guess [a religious organization's] assessment" that an employee's "religious function . . . made it essential that she abide by [the employer's] doctrine" and decision-making.⁹⁸

Excluding employees with important religious functions from the category of minister on the ground that they lack adequate titles or training would bring on precisely these evils. It would require courts to determine what sort of title is sufficiently minister-like to qualify. Again, the cases excluding teachers are

instructive. Contrary to the Ninth Circuit's holdings,⁹⁹ there is nothing inherently secular about the title "teacher." It can communicate the important religious function of teaching religious doctrine and values—especially, as already noted, when the title is used in the setting of a school that is grounded in and teaches a religious faith.¹⁰⁰ Yet under the Ninth Circuit's approach, religious schools seeking the shield of the ministerial exception—freedom to select leaders without judicial second-guessing—would be forced to rechristen their employees with titles more aligned with what the court considers to be religious.

Similar problems arise with requiring ministerial training. In entrusting important religious functions to various employees, including teachers, an organization typically prescribes the training it believes necessary or appropriate for those functions. Yet the Ninth Circuit's recent approach holds that an employee who has not received training that the court deems suitable for a minister is not a minister. Under this approach, courts must decide just what sort and extent of training is enough. A more entangling inquiry could hardly be imagined. Thus, as the Seventh Circuit recently observed, the Ninth Circuit's approach improperly embraces "independent judicial resolution of ecclesiastical issues."¹⁰¹

An approach that requires credentials on top of an employee's significant religious functions would allow courts to "second-guess" a religious organization's assessment that an employee's "religious function . . . made it essential that [she] abide by [the employer's] doctrine" and decision-making.¹⁰² In the face of civil liability, some religious groups may be pressured to change their practices: spending additional resources on clergy-like training, relying on ordained persons rather than laymen to teach the faith, or shifting their religious teaching away from K-12 classrooms. The Supreme Court has warned that when judges can second-guess organizations on such religious matters in civil lawsuits, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission."¹⁰³ Organizations will be pressured, as Justice Thomas has put it, to "conform [their] beliefs and practices regarding 'ministers' to the prevailing secular understanding."¹⁰⁴

D. Holding Out as a Minister

The final consideration mentioned in *Hosanna-Tabor* is whether the employee was "held out" as a minister, either by

communicate not just "her duties at the school," but also "her education, qualifications, and employment arrangement." *Biel*, 911 F.3d at 608 (emphasis added); see *id.* (arguing that *Biel*'s title was non-ministerial because it did not suggest "that she had special expertise in Church doctrine, values, or pedagogy").

93 426 U.S. 696, 709-25 (1976).

94 *Id.* at 708; see also *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969) ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.").

95 426 U.S. at 720.

96 *Hosanna-Tabor*, 565 U.S. at 185.

97 *Id.* at 197 (Thomas, J., concurring).

98 *Id.* at 206 (Alito, J., concurring).

99 See *supra* note 85 and accompanying text.

100 See *supra* notes 87-88 and accompanying text.

101 *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568, 570 (7th Cir. 2019) (Easterbrook, J.) (criticizing *Biel* for "essentially disregarding what *Biel*'s employer . . . thought about its own organization and operations" and for largely ignoring "whether the employee served a religious function").

102 *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring); see also *id.* at 197 (Thomas, J., concurring).

103 *Amos*, 483 U.S. at 335 ("[I]t is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious.").

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

the employee herself or by the religious organization.¹⁰⁵ This factor can raise complications. It can be the vehicle for a proper focus on employees' religious functions: courts can legitimately require that the employer communicate those functions, that is, hold out the employee as performing them. But holding out can also prompt the errors of requiring credentials of employees and ignoring their religious functions.

As an example of the first error, the Ninth Circuit in *Biel* ruled that the school did not "hold [the teacher] out as a minister by suggesting to its community that she had special expertise in Church doctrine, values, or pedagogy."¹⁰⁶ By focusing on expertise, the court required the employer to communicate the employee's ministerial training and credentials, not merely her substantial religious function. This is simply another way of requiring such credentials, and thus it suffers from the flaws with credentialing detailed above.

Even if the court properly interprets holding out to communicate function rather than credentials, it can still err unless it focuses on the employer's understanding of function, not just the employee's unilateral view. To focus on the employee's unilateral action of holding out or not invites the civil court to resolve ecclesiastical disputes. In every ministerial exception case where the definition of minister is at issue, the plaintiff claims an understanding of the term different from the organization's understanding and invites the court to impose the employee's understanding on the organization through civil liability. In other words, the plaintiff asks the court to engage in the very second-guessing—the very resolution of ecclesiastical questions—that the Supreme Court has said is improper.

III. THE BOUNDARIES OF IMPORTANT FUNCTIONS

For the reasons above, employees who perform important or significant religious functions should be deemed ministers regardless of whether they also have credentials such as a ministerial title, training, education, or ordination. Those other features should not be irrelevant: when it is a close question whether an employee's religious functions are significant, the employee's status might still be determined with reference to title, training, or other credentials. But the presence of significant religious functions should be sufficient to establish that an employee is a minister, even if it is not necessary in every case.

The focus on functions does not mean that all employees of religious organizations will qualify as ministers. The exception needs to have boundaries, especially because within its bounds it is absolute. The ministerial exception cannot be overridden by a compelling governmental interest; it therefore applies to all claims of discrimination, even discrimination based on race.¹⁰⁷ Moreover, unlike many other free exercise exemptions, the ministerial exception is not limited to cases where discrimination is motivated by religious doctrine, such as the male-only rule for

Catholic priests or Orthodox rabbis: suit is barred even if the church's doctrine does not support the kind of discrimination that the plaintiff alleges.¹⁰⁸

Under the functional approach to minister status proposed by Justices Alito and Kagan and several lower courts, the religious functions should be "substantial," "important," or "significant."¹⁰⁹ Some such test of substantiality is necessary to put boundaries on the exception. But the courts cannot simply second-guess the organization's understanding of the position's religious significance, since that would reintroduce the evil of government intervention in religious questions. The proper stance is substantial but not total deference to the organization's self-understanding. We do not offer a precise standard for significance of religious functions here. We instead focus on showing that when functions are significant, that should suffice even in the absence of title, training, or other credentials.

Some courts have held that the employee's "primary duties" must be religious.¹¹⁰ But if that approach means that the employee must devote the majority or a large share of worktime to religious duties, the Court in *Hosanna-Tabor* rejected it. Although Cheryl Perich's religious duties had occupied only 45 minutes per workday, the Court said that the issue of minister status "is not one that can be resolved by a stopwatch," and that "[t]he amount of time an employee spends on particular activities," while relevant, "cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations [the Court had discussed]."¹¹¹ Avoiding a rigid time-based rule is particularly appropriate as to elementary school teachers like Perich; their students may be unable to absorb more than small portions of distinctively religious instruction, but those portions may still be crucial. If the religious functions are important, then even if the employee spends less than half her time on them, denying the ministerial exception will still bring on the evils the exception was meant to prevent: interference with the religious organization's choice of leaders, inequality among different faiths, and judicial second-guessing of the organization's determination of religious questions.

Another possibility is that courts should focus on employees who in some way lead others: preaching to or teaching them, leading them in rituals or liturgy, or leading the organization as a whole. This focus fits with the exception's title (ministering to others), its rationale (protecting religious organizations' right to choose their leaders), and with the Supreme Court's attention to whether the employee is held out to others as performing significant religious functions (which will tend to make others

105 *Id.* at 191.

106 *See Biel*, 911 F.3d at 608.

107 *Rweyemamu v. Cote*, 520 F.3d 198, 209-10 (2d Cir. 2008); *cf.* *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983) (denying religious exemption because of compelling interest in avoiding government support for racial discrimination in education).

108 *Hosanna-Tabor*, 565 U.S. at 194-95 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."); *Simpson v. Wells-Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974) (rejecting rule limiting the exception "to differences in church doctrine").

109 *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring); *see id.* at 202-04 (citing lower court decisions); *supra* notes 17-27 and accompanying text.

110 *See, e.g., Note, The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1778-79 (2008).

111 *Hosanna-Tabor*, 565 U.S. at 193-94.

look to them as leaders). Of course, this need not mean leading a congregation, or an entire organization. Individual teachers are ministers because they lead their audience—students—in learning religion or engaging in prayers or worship.

Nor will all teachers in religious schools qualify as ministers under a functional definition. However, the following activities, at least, indicate minister status: (1) the teacher teaches a class in religion, with some inculcation of religious principles; (2) the teacher is tasked with integrating religion into other subjects taught; or (3) the teacher engages or supervises students in religious observances such as chapel, prayers, Bible readings, or special religious programs. There should be evidence that the teacher not only is assigned such duties (for example, by a school handbook¹¹²) but also actually carries out the duties.

IV. CONCLUSION

An employee's significant religious functions should be sufficient to make the employee a minister for the purposes of the ministerial exception. In close cases, courts should also look to employees' title and training, but the absence of such credentials should never trump the presence of significant religious function. This function-focused inquiry avoids the evil of state-sponsored ministerial credentialism, a practice that helped motivate the adoption of the First Amendment. Focusing on function also furthers the fundamental Religion Clause principles of equality among denominations and judicial non-involvement in the ecclesiastical decision-making of religious organizations. The Supreme Court should call a halt to the recent trend of credentialism in some lower courts, which threatens to undermine the purposes of the ministerial exception.

112 See, e.g., the handbook description of religious duties in *Morrissey-Berru*, 760 Fed. Appx. at 461; *supra* notes 29-30 and accompanying text.

