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# The Ministerial Exception After *Hosanna-Tabor*: Firmly Founded, Increasingly Refined

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The Supreme Court's unanimous 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* firmly established what the federal courts of appeals had previously recognized for decades: that religious ministries have an absolute First Amendment right to select their own religious ministers, free from government interference.<sup>1</sup> The Court, like many courts of appeals before it, explained that the founders protected this right through both Religion Clauses of the First Amendment. By "forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices."<sup>2</sup>

But as the Court's first foray into defining and applying the "ministerial exception" doctrine, *Hosanna-Tabor* understandably did not answer all questions about how the doctrine operates. Some of those questions are important. Such as how to determine what a religious ministry is, who a religious minister is, what types of government interference are impermissible, and how a substantive right grounded in both Religion Clauses should operate at a procedural level. To give concrete examples: does a Jewish day school count as a ministry, even if it has an equal opportunity policy that forbids religious discrimination in employment, receives government funding, and accepts non-Jewish students? Is the principal of a Catholic elementary school a minister, even if she has neither formal religious training nor an explicitly religious title? Is enforcing a ministerial contract's for-cause termination provision impermissible interference, even where the ministry's basis for termination was not the quality of the minister's sermons? Finally, can the ministerial exception be lost in whole or in part via procedural means, such as waiver or inability to raise it immediately on interlocutory appeal?

To be sure, the Court's analysis in *Hosanna-Tabor* informs, and in some instances largely answers, these questions. But lower courts are now working through the answers to all of them. This article provides a survey of what conclusions the courts are reaching.

## I. THE MINISTERIAL EXCEPTION

The First Amendment to the United States Constitution guarantees individuals the right to the free exercise of religion and prohibits the establishment of religion by the federal government.<sup>3</sup> Through the doctrine of incorporation, the Free Exercise and Establishment Clauses have been applied to the

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1 565 U.S. 171 (2012).

2 *Id.* at 184.

3 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

states via operation of the Due Process Clause of the Fourteenth Amendment.<sup>4</sup> The Supreme Court has long recognized that both Religion Clauses together “radiate[] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation” that places “matters of church government and administration beyond the purview of civil authorities.”<sup>5</sup> Lower courts have also long recognized that this broad principle of religious autonomy includes a subset of specific protections regarding employment decisions made by religious organizations with respect to employees who serve in religiously significant roles: the so-called “ministerial exception.”<sup>6</sup> In 2012, in the context of an employment discrimination case, the U.S. Supreme Court formally agreed.

## II. *HOSANNA-TABOR* V. *EEOC*

Hosanna-Tabor Evangelical Lutheran Church and School operated an elementary school in Redford, Michigan, “offering a ‘Christ-centered education’” to its students.<sup>7</sup> Hosanna-Tabor is a congregation of the Lutheran Church-Missouri Synod, and it employs both “called” and “lay” teachers to educate the children

at its school.<sup>8</sup> Called teachers are regarded as having been called to their vocation by God through a congregation, and they must satisfy certain academic requirements which may include taking courses in theology, obtaining an endorsement from a local synod, and passing an oral examination.<sup>9</sup> A qualified teacher may receive a religious “calling” by a congregation, which entitles the teacher to receive the formal title “Minister of Religion, Commissioned.”<sup>10</sup> A called minister serves for an “open-ended term” and can only be terminated “for cause and by a supermajority vote of the congregation.”<sup>11</sup> By contrast, lay teachers are appointed by the school board for one-year renewable terms and do not have to be Lutheran or “trained by the Synod.”<sup>12</sup> Called and lay teachers “generally perform[] the same duties,” but lay teachers are only hired when called teachers are not available.<sup>13</sup>

In 1999, Cheryl Perich was hired as a lay teacher; she later became a called teacher after she satisfied the requirements and received a “‘diploma of vocation’ designating her a commissioned minister.”<sup>14</sup> Perich initially taught kindergarten, but later taught fourth grade.<sup>15</sup> In addition to several secular subjects, Perich taught a religion class, led students in forty-five minutes of prayer and devotional exercises each day, and brought her students to a weekly chapel service which she led twice a year.<sup>16</sup>

Perich was diagnosed with narcolepsy after presenting symptoms of “sudden and deep sleeps from which she could not be roused.”<sup>17</sup> She took disability leave beginning in her sixth year of teaching, but notified the school that she would be able to return to work in February of 2005.<sup>18</sup> Perich was advised that a lay teacher had been retained to fill the position for the remainder of the year, and concern was expressed that she “was not yet ready to return to the classroom.”<sup>19</sup> Shortly after Perich notified the school that she was ready to return to work, the congregation met and voted to offer Perich a “peaceful release” from her ministerial calling, offering to pay a portion of her health insurance premiums in return for her resignation.<sup>20</sup> Perich refused to resign and refused to participate in the internal dispute resolution required under the school’s Lutheran beliefs, so her employment was terminated.<sup>21</sup>

4 See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating free exercise clause); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating establishment clause). See also U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). On the doctrine of incorporation, see generally Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L. J. 253 (1982). Justice Clarence Thomas has questioned whether the Establishment Clause should have been incorporated, as he sees it as a rule against federal establishments and not state establishments. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (Thomas, J., concurring in the judgment). It is notable, though, that he joined the Court’s opinion in *Hosanna-Tabor*, which disposed of both federal- and state-law claims under the Establishment Clause. Justice Thomas wrote separately only to address how courts should define ministerial status, and he did not address the question of whether the Establishment Clause should have applied to the state-law claims at issue. Of course, the plaintiff had conceded that her state-law claims rose or fell based upon her federal-law claim, *Hosanna-Tabor*, 565 U.S. at 194 n.3, and both sets of claims would have lost under the Free Exercise Clause in any event. So Justice Thomas may not have felt the need to clarify his view on the issue. Another possibility is that his view could leave room for the Establishment Clause acting as a *structural barrier* to both federal- and state-law claims that would entangle the government in internal religious affairs. See *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015) and *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113 (3d Cir. 2018).

5 *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) (describing *Watson v. Jones*, 13 Wall. 679 (1872))); *McClure v. The Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972).

6 See, e.g., *McClure*, 460 F.2d at 559. The principle of religious autonomy comes up in several related and overlapping contexts, including the church-autonomy doctrine and the ecclesiastical abstention doctrine. See, e.g., *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013) (church-autonomy doctrine); *Puri v. Khalsa*, 844 F.3d 1152, 1164 (9th Cir. 2017) (ecclesiastical abstention doctrine).

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

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 178.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 178-79.

Perich filed a charge of disability discrimination with the EEOC. The EEOC brought suit against Hosanna-Tabor under the Americans with Disabilities Act and the Michigan Persons with Disabilities Civil Rights Act, and Perich intervened in the suit. Hosanna-Tabor moved for summary judgment under the First Amendment's ministerial exception, arguing that Perich was a minister and that she was terminated by a religious organization for religious reasons. The district court agreed and granted summary judgment in Hosanna-Tabor's favor.<sup>22</sup> The U.S. Court of Appeals for the Sixth Circuit reversed, finding that Perich did not qualify as a "minister" under the exception because her religious duties as a called teacher were the same as the duties of lay teachers, and in any event only consumed forty-five minutes of each school day.<sup>23</sup>

#### A. *The Supreme Court's Opinion*

In a unanimous decision written by Chief Justice John Roberts, the U.S. Supreme Court reversed the Sixth Circuit and found that the ministerial exception precluded Perich from pursuing her employment claims against Hosanna-Tabor.<sup>24</sup> The Court held that both the Free Exercise and Establishment Clauses of the First Amendment "bar the government from interfering with the decision of a religious group to fire one of its ministers."<sup>25</sup> The Court began its analysis by determining the meaning of the Religion Clauses through a detailed examination of the history of tensions between church and the state, from the time of the Magna Carta and through the time of the founding of the United States. The Court ruled that "[i]t was against this background" of church-state conflict "that the First Amendment was adopted," and that part of the founders' purpose was to prevent the kind of state-sanctioned ministerial selection that had created so much conflict in England and its colonies.<sup>26</sup> The Court then explained how this principle of religious autonomy was reflected in early Supreme Court decisions addressing property disputes between religious entities.<sup>27</sup> Finally, the Court acknowledged the "extensive experience" that the federal courts of appeals had obtained in administering the ministerial exception over previous decades, and how the lower courts had "uniformly recognized" that the

First Amendment required a ministerial exception to certain state and federal employment claims brought by ministers against religious organizations.<sup>28</sup>

After recognizing the ministerial exception's existence, the Court turned to its application.<sup>29</sup> There was no dispute that Hosanna-Tabor was the kind of entity that could assert the ministerial exception. It was also undisputed that nondiscrimination laws could be applied to inappropriately interfere with internal church affairs. So the primary question before the Court was whether Perich held a ministerial role for the school.

The Court noted that the courts of appeals were in agreement that the ministerial exception was "not limited to the head of a religious congregation," and so that Perich was a teacher instead of a pastor was not dispositive.<sup>30</sup> But the Court declined to "adopt a rigid formula" to determine ministerial status in its "first case involving the ministerial exception." Instead, the Court concluded that the facts before it were sufficient to find that Perich was a minister. The Court identified four "considerations" supporting its conclusion: Perich's (1) "formal title," (2) "the substance reflected in that title," (3) her "use of th[e] title," and (4) "the important religious functions she performed."<sup>31</sup> The first consideration showed that Hosanna-Tabor saw Perich "as a minister, with a role distinct from that of most of its members."<sup>32</sup> The second consideration looked to Perich's religious training, her election by the congregation recognizing God's call for her to teach, and endorsement by her local synod to confirm the substance of her religious title. The third consideration examined Perich's view of her role—shown by her "accepting the formal call to religious service" and by claiming "a special housing allowance on her taxes that was available only to" ministers—as further confirmation of her ministerial status. Finally, the Court examined Perich's job duties, which "reflected a role in conveying the Church's message and carrying out its mission."<sup>33</sup> The Court recounted that:

Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and—about twice a year—she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning. As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation.<sup>34</sup>

<sup>22</sup> *Id.* at 180-81.

<sup>23</sup> *Id.* at 181.

<sup>24</sup> *Id.* at 195.

<sup>25</sup> *Id.* at 181.

<sup>26</sup> *Id.* at 182-86.

<sup>27</sup> *Id.* at 185-87. See *Watson*, 13 Wall. at 727 ("[W]henver the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."); *Kedroff*, 344 U.S. at 116 ("[Our opinion in *Watson*] 'radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976) (the First Amendment "permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters," free from judicial gainsaying).

<sup>28</sup> *Hosanna-Tabor*, 565 U.S. at 188.

<sup>29</sup> *Id.* at 190.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 192.

<sup>32</sup> *Id.* at 191.

<sup>33</sup> *Id.* at 192.

<sup>34</sup> *Id.*

“In light of these considerations,” the Court concluded that “Perich was a minister covered by the ministerial exception.”<sup>35</sup>

The Court then identified three ways that the lower court had gone astray. First, it failed to consider Perich’s title, which was relevant given what it signified: “that an employee has been ordained or commissioned as a minister,” and “that significant religious training and a recognized religious mission underlie the description of the employee’s position.”<sup>36</sup> Second, “the Sixth Circuit gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich.”<sup>37</sup> Finally, “the Sixth Circuit placed too much emphasis” on Perich’s “performance of secular duties” and the fact that “her religious duties consumed only 45 minutes of each workday.”<sup>38</sup> Noting and rejecting the EEOC’s “extreme position” that the ministerial exception should cover only those who “perform exclusively religious functions,” the Court explained that even the “heads of congregations themselves often have a mix of duties” both sacred and secular, and thus that ministerial status cannot “be resolved by a stopwatch.”<sup>39</sup> The Court emphasized that the proper touchstone was “the nature of the religious functions performed,” along with the three “other considerations” it had identified.<sup>40</sup>

The Court also rejected Perich’s and the EEOC’s arguments that they should at least be permitted to probe whether the religious reasons for her firing were “pretextual.” That approach, the Court explained, “misses the point”: the ministerial exception does not “safeguard a church’s decision to fire a minister only when it is made for a religious reason,” but rather “ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church’s alone.”<sup>41</sup>

In conclusion, the Court acknowledged society’s important interest in employment nondiscrimination, but found that the “First Amendment has struck the balance” in favor of religious autonomy: “church[es] must be free to choose those who will . . . preach their beliefs, teach their faith, and carry out their mission.”<sup>42</sup> The Court left to another day how the First Amendment required weighing claims that sounded in contract or tort instead of nondiscrimination statutes.<sup>43</sup>

### B. The Two Concurring Opinions

Justice Clarence Thomas filed a concurring opinion on his own behalf, and Justice Samuel Alito filed one joined by Justice Elena Kagan. Both concurring opinions focused on the question of how to define ministerial status.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 193.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 193-94.

<sup>40</sup> *Id.* at 194.

<sup>41</sup> *Id.* at 194-95 (internal citation omitted).

<sup>42</sup> *Id.* at 196.

<sup>43</sup> *Id.*

Justice Thomas argued that the standard should be one that “defer[s] to a religious organization’s good-faith understanding of who qualifies as its minister.”<sup>44</sup> He reasoned that “a religious organization’s right to choose its 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.”<sup>45</sup>

Justices Alito and Kagan warned against overreading the Court’s four considerations, explaining that “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 that is presented in cases like this one.”<sup>46</sup> They explained that the Court’s unanimous decision was consistent with a preexisting “functional consensus” among the lower courts that the focus of ministerial analysis should be “on the function performed by persons who work for religious bodies.”<sup>47</sup> The Justices recounted how, in the four decades of ministerial exception caselaw, the overwhelming majority of circuits and state supreme courts “ha[d] concluded that the focus should be on the function of the position” in “evaluating whether a particular employee is subject to the ministerial exception.”<sup>48</sup> They accordingly reasoned that the ministerial exception “should apply to any employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”<sup>49</sup> They warned that failing to adopt this approach and overemphasizing ministerial titles or ordination would necessarily leave members of non-Protestant faith groups—such as “Catholics, Jews, Muslims, Hindus, or Buddhists,” who do not use always such titles or have different ways of commissioning religious leaders—unprotected by the First Amendment.<sup>50</sup>

### III. APPLYING *HOSANNA-TABOR* IN THE LOWER COURTS

Courts applying *Hosanna-Tabor* have asked four main questions: (1) what is a “ministry,” (2) who is a “minister,” (3) what counts as impermissible interference, and (4) how does the ministerial exception operate procedurally?

#### A. What Is a “Ministry”?

In *Hosanna-Tabor*, there was no question that the petitioners—a Lutheran church and a Lutheran elementary school—were “ministries” for purposes of the ministerial exception. But several cases have since raised that question, and courts have answered it in two ways.

Some courts have looked at the religious nature of the party asserting the ministerial exception as a whole. For instance, the

<sup>44</sup> *Id.* (Thomas, J., concurring).

<sup>45</sup> *Id.* at 197.

<sup>46</sup> *Id.* at 198 (Alito, J., concurring).

<sup>47</sup> *Id.* at 198, 204.

<sup>48</sup> *Petruska v. Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006) (collecting cases from the D.C., Fourth, Fifth, and Seventh Circuits) (internal quotations omitted).

<sup>49</sup> *Hosanna-Tabor*, 565 U.S. at 199.

<sup>50</sup> *Id.* at 198.

first time the issue arose after *Hosanna-Tabor* was when the Sixth Circuit faced the question of whether a national parachurch organization that serves on college campuses, InterVarsity Christian Fellowship, was a “ministry.” In *Conlon v. InterVarsity Christian Fellowship/USA*, the court rejected the idea that the doctrine applies only to houses of worship such as churches, synagogues, and mosques.<sup>51</sup> Instead, relying on the Fourth Circuit’s 2004 decision in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, the court concluded that a group is a religious organization for purposes of the ministerial exception if its “mission is marked by clear or obvious religious characteristics.”<sup>52</sup> Under this rule, InterVarsity was a “ministry” because its avowed public purpose was “to advance the understanding and practice of Christianity in colleges and universities.”<sup>53</sup>

The Seventh Circuit’s *Grussgott v. Milwaukee Jewish Day School, Inc.* decision likewise adopted *Hebrew Home* in 2018, agreeing that the “key inquiry” was whether the institution had a “religious character.”<sup>54</sup> Further, the court found that a religious institution does not lose its religious identity either by failing to participate in an “ecclesiastical hierarchy” or by having a nondiscrimination policy that allows members of other faiths to receive services or employment from the institution. The Seventh Circuit concluded that imposing such limitations would both interfere in internal religious affairs and discriminate against religious groups that have either less hierarchical structures or more ecumenical ministries.

Courts have also used the *Hebrew Home* test to find that an organization is not eligible to assert the ministerial exception. The Sixth Circuit’s 2018 decision in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* found that a funeral home lacked the requisite religious character to invoke the ministerial exception because, among other things, it had “virtually no religious characteristics,” did not seek to “establish or advance” its religious beliefs, and did not “avow any religious purpose” in its articles of incorporation.<sup>55</sup>

The second approach still asks *Hebrew Home*’s “religious character” question, but it doesn’t look at the employer as a whole. Rather, it looks more narrowly at the nature of the employer at the point of its employment relationship with the plaintiff minister. Thus, in *Penn v. New York Methodist Hospital* and *Scharon v. St. Luke’s Episcopal Presbyterian Hospital*,<sup>56</sup> the Second and Eighth Circuits, respectively, addressed employers with religious heritages that had arguably waned in influence over time. Indeed, in

*Scharon*, the employer hospital had become “primarily a secular institution.”<sup>57</sup> But in both cases, instead of considering whether that the employer *as a whole* qualified as a “ministry,” the courts examined the employer’s specific relationship with the suing employee—in both cases, a chaplain. In *Penn*, the court found that the hospital’s Department of Pastoral Care was “marked by clear or obvious religious characteristics,” and that this was enough to warrant application of the ministerial exception to the Department’s relationship with its chaplain.<sup>58</sup>

#### B. Who Is a “Minister”?

Since the Court’s opinion in *Hosanna-Tabor*, several federal courts of appeals and two state supreme courts have squarely addressed the definition of “minister.” Despite the Supreme Court’s repeated assurance that it was not creating a rigid test, the courts have sometimes struggled analytically to determine what to do with the Supreme Court’s four “considerations” for determining ministerial status—title, substance of title, use of title, and function of position. No courts believe all four considerations are necessary; several have found that showing one or two is sufficient where function is among the considerations shown. Only one court has held that a showing of religious function *must* be accompanied by a showing of another consideration. And all of the courts, save the one, have agreed that the “functional consensus” identified in Justice Alito’s concurrence is the touchstone for analyzing whether someone is a minister.<sup>59</sup>

The first post-*Hosanna-Tabor* federal appellate case to consider this question, the Fifth Circuit’s *Cannata v. Catholic Diocese of Austin*, leaned heavily on function to determine ministerial status.<sup>60</sup> There, the court addressed a music director’s argument that he was not a minister because “he merely played the piano at Mass and . . . his only responsibilities were keeping the books, running the sound system, and doing custodial work, none of which was religious in nature.”<sup>61</sup> But the Fifth Circuit found it had “enough” basis to apply the ministerial exception because “there [wa]s no genuine dispute that Cannata played an integral role in the celebration of Mass and that by playing the piano during services, Cannata furthered the mission of the church and helped convey its message to the congregants.”<sup>62</sup> In other words, “[b]ecause Cannata performed an important *function*

51 777 F.3d 829 (6th Cir. 2015).

52 *Id.* at 834 (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)).

53 *Id.* at 833-34. *See also* *Yin v. Columbia Int’l Univ.*, 335 F. Supp. 3d 803, 814-15 (D.S.C. 2018) (applying the *Hebrew Home* test and determining that a religious university was protected by ministerial exception because the college “trains Christians for global missions, full-time vocational Christian ministry in a variety of strategic professions, and marketplace ministry”).

54 882 F.3d 655, 658 (7th Cir. 2018).

55 884 F.3d 560, 582 (6th Cir. 2018).

56 *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416 (2d Cir. 2018); *Scharon v. St. Luke’s Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991).

57 *Scharon*, 929 F.2d at 362.

58 *Penn*, 884 F.3d at 425.

59 *See generally* Jessica L. Waters, *Testing Hosanna-Tabor: The Implications for Pregnancy Discrimination Claims and Employees’ Reproductive Rights*, 9 STAN. J.C.R. & C.L. 47, 67 (2013); Brian M. Murray, *A Tale of Two Inquiries: The Ministerial Exception After Hosanna-Tabor*, 68 SMU L. REV. 1123 (2015); William A. Galston, *Why the Ministerial Exception Is Consistent With Smith—And Why It Makes Sense*, 53 SAN DIEGO L. REV. 147 (2016).

60 700 F.3d 169, 171 (5th Cir. 2012).

61 *Id.* at 177.

62 *Id.* *See also* *Demkovich v. St. Andrew the Apostle Parish*, 2017 WL 4339817 at \*3 (N.D. Ill. 2017) (“By selecting music for mass, Demkovich helped to ‘convey[] the Church’s message’ through the important religious function of worship music.”).

during the service,” he was a minister.<sup>63</sup> By contrast, Cannata’s lack of formal religious training was “immaterial.”<sup>64</sup> Nor did it matter that he did not hold a formal religious role under church law, since courts “may not second-guess whom the Catholic Church may consider a lay liturgical minister under canon law.”<sup>65</sup>

About the same time that *Cannata* came down, the Massachusetts Supreme Judicial Court held that function alone suffices to prove ministerial status.<sup>66</sup> In that case, the court held that a teacher at a Jewish school was covered by the ministerial exception even though her role did not obviously meet any of the other three *Hosanna-Tabor* considerations: “she was not a rabbi, was not called a rabbi, . . . did not hold herself out as a rabbi,” and had not been proven to have received “religious training.”<sup>67</sup> The court found it dispositive that “she taught religious subjects at a school that functioned solely as a religious school” for children.<sup>68</sup> Two years later, the Kentucky Supreme Court held that, in considering the totality of the circumstances of an employee’s role serving within a religious organization, courts should focus on “actual acts or functions conducted by the employee.”<sup>69</sup>

Next, the Sixth Circuit’s 2015 *Conlon* decision concerned an employee who alleged that her termination from the position of “Spiritual Director” violated state and federal employment discrimination law. The court analyzed all four *Hosanna-Tabor* considerations to determine whether she was a “minister.” First, the court found that the job title of “Spiritual Director” conveyed a religious rather than a secular meaning and connoted a leadership role in the religious organization.<sup>70</sup> On both the substance-of-title and use-of-title considerations, the court found that Conlon did not have as much religious training or as significant a public religious role as the plaintiff in *Hosanna-Tabor*.<sup>71</sup> With respect to the function consideration, the Sixth Circuit found that the plaintiff performed important religious duties because she was required “to assist others to cultivate ‘intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines.’”<sup>72</sup> Weighing all four considerations, the court found that the ministerial exception applied. Because the case did not present the question, the court declined to decide if any of the considerations standing alone was sufficient to meet the

exception. But it held that where both “formal title and religious function . . . are present, the ministerial exception *clearly* applies.”<sup>73</sup>

Two years later, in *Fratello v. Archdiocese of New York*, the Second Circuit likewise walked through the four *Hosanna-Tabor* considerations to determine the ministerial status of a former principal of a Roman Catholic school.<sup>74</sup> The court began by acknowledging that “*Hosanna-Tabor* instructs only as to what we *might* take into account as relevant, including the four considerations on which it relied; it neither limits the inquiry to those considerations nor requires their application in every case.”<sup>75</sup> With that framing, the court proceeded to examine each of the considerations. First, it found that the plaintiff’s formal title of “lay principal” was not sufficiently religious to suggest that the plaintiff performed any religious functions or held a clergy-type role.<sup>76</sup> But the court rejected the plaintiff’s argument that this finding was dispositive, since “the substance of the employees’ responsibilities in their positions is far more important.”<sup>77</sup> On the substance-of-title consideration, the court found that the plaintiff’s lack of formal religious training or education was not determinative, but rather took a back seat to the fact that the role required her to “be a ‘practicing Catholic in union with Rome’” and “‘demonstrate proficiency’ in a number of religious areas” such as “encouraging spiritual growth” and “exercising spiritual leadership” sufficient to “provide ‘Catholic leadership’ to the School[.]”<sup>78</sup> Concerning use-of-title, the court found that the plaintiff knew “that she would be perceived as a religious leader,” and that she held herself out as such through her role in leading “school prayers,” “convey[ing] religious messages in speeches and writings,” “and express[ing] the importance of Catholic prayer and spirituality in newsletters to parents.”<sup>79</sup> Finally, the court turned to the fourth consideration—religious “functions performed”—and emphasized that performance of “important religious

63 700 F.3d at 180 (emphasis supplied).

64 *Id.* at 178.

65 *Id.* at 179-80. The Fifth Circuit cited both the majority and concurring opinions in *Hosanna-Tabor* as support for declining to “second-guess” the church’s decision on who is a lay minister under canon law. *Id.* at 179.

66 *Temple Emanuel of Newton v. Mass. Comm’n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012).

67 *Id.* at 486.

68 *Id.*

69 *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 613 (Ky. 2014).

70 *Conlon*, 777 F.3d at 834-35.

71 *Id.* at 835.

72 *Id.*

73 *Id.*

74 863 F.3d 190 (2d Cir. 2017).

75 *Id.* at 204-05 (emphasis in original).

76 *Id.* at 206-07.

77 *Id.* at 207.

78 *Id.* at 208.

79 *Id.* See also *Ginalski v. Diocese of Gary*, 2016 U.S. Dist. LEXIS 168014 at \*2 (N.D. Ind. 2016) (district court dismissed employment discrimination claims of terminated Catholic High School Principal finding the ministerial exception applicable). But see *Richardson v. Northwest Christian Univ.*, 242 F. Supp. 3d 1132, 1145-46 (D. Ore. 2017) (district court held that an assistant professor at a private, non-profit, Christian university was not subject to the ministerial exception where plaintiff had a secular job title, had not undergone religious training prior to assuming the position, had not held herself out as a minister, and, while she did perform some “important religious functions” . . . “she was not tasked with performing any religious instruction and she was charged with no religious duties such as taking students to chapel or leading them in prayer”); *Bohnert v. Roman Catholic Archbishop of San Francisco*, 136 F. Supp. 3d 1094, 1114 (N.D. Cal. 2015) (district court found that a biology teacher at a Catholic all-boys college preparatory school was not subject to the ministerial exception where plaintiff was not an ordained minister nor held out as one by the defendant, had no formal religious or theological studies, and where plaintiff did not “provide spiritual or religious guidance” to students).

functions” was the “most important consideration.”<sup>80</sup> Because, “as principal, Fratello ‘conveyed’ the School’s Roman Catholic ‘message and carried out its mission’” the court concluded that “[t]his fundamental consideration therefore weighs strongly” in favor of finding ministerial status, which it did.<sup>81</sup>

A year later, in early 2018, the Seventh Circuit in *Grussgott v. Milwaukee Jewish Day School* addressed the ministerial status of a teacher of Hebrew and Jewish studies at a Jewish day school.<sup>82</sup> After determining that the school was eligible to raise the ministerial exception, the court turned to the teacher’s ministerial status. Like the courts in *Conlon* and *Fratello*, the court walked through the four *Hosanna-Tabor* considerations.<sup>83</sup> It found that the formal title and use-of-title considerations “cut . . . against applying the ministerial exception,” in part because there was “no evidence that Grussgott ever held herself out to the community as an ambassador of the Jewish faith” or otherwise “understood that her role would be perceived as a religious leader.”<sup>84</sup> But the court found that both the substance-of-title and function considerations weighed in favor of applying the exception, since her role “entails the teaching of the Jewish religion to students” and since she in fact carried out those religious duties, teaching “about Jewish holidays, prayer, and the weekly Torah readings” and “practic[ing] the religion alongside her students by praying with them and performing certain rituals.”<sup>85</sup> While adopting a “totality-of-the-circumstances test,” the court ultimately relied on the Alito concurrence to conclude that “the importance of Grussgott’s role as a ‘teacher of [ ] faith’ to the next generation outweighed other considerations.”<sup>86</sup>

Later in 2018, in *Biel v. St. James School*, a split panel of the Ninth Circuit was the first to break with what Justices Alito and Kagan described as the “functional consensus” that function is the focus of ministerial status analysis.<sup>87</sup> In *Biel*, much like in

*Hosanna-Tabor*, the plaintiff was a teacher who taught fifth grade for a religious school and had duties that included teaching a religion class, praying with her students, taking her students to Mass, and embodying the faith to her students. But *Biel*’s two-judge majority found that the ministerial exception didn’t apply because it believed that the teacher had a less religious title, had received less religious training, and did not hold herself out as a religious leader to the same extent as the fourth grade teacher in *Hosanna-Tabor*. The panel majority then found that function “alone” cannot determine ministerial status, and questioned whether *Grussgott* was correctly decided.<sup>88</sup> The dissenting judge disagreed, saying that the plaintiff’s duties were “strikingly similar” to those at issue in *Hosanna-Tabor*, and that the case “is not distinguishable from *Grussgott*.”<sup>89</sup> A petition for en banc rehearing is pending in that case at the time of publication of this article.<sup>90</sup>

### C. What Interference Is Impermissible?

At its core, the ministerial exception protects a religious group’s right under the Free Exercise Clause “to shape its own faith and mission through its appointments,” and it enforces the Establishment Clause’s structural limitation on government “involvement” in “determin[ing] which individuals will minister to the faithful.”<sup>91</sup> But what kinds of legal claims violate those core protections?

Employment nondiscrimination claims clearly do.<sup>92</sup> And these types of claims are the vast majority of the claims currently brought by ministers against ministries.<sup>93</sup> Further, as *Hosanna-Tabor* explained, the ministerial exception applies to such claims

80 *Fratello*, 863 F.3d at 208-09. Some district courts in the Second Circuit have taken the approach that “the more religious the employer institution is, the less religious the employee’s functions must be to qualify.” *Stabler v. Congregation Emanu-El of N.Y.*, 2017 U.S. Dist. LEXIS 118964, at \*18 (S.D.N.Y. 2017) (quoting *Penn v. N.Y. Methodist Hosp.*, 158 F. Supp. 3d 177, 182 (S.D.N.Y. 2016)) (noting that “[t]he ministerial exception should be viewed as a sliding scale, where the nature of the employer and the duties of the employee are both considered in determining whether the exception applies”).

81 *Id.* at 209.

82 882 F.3d at 656.

83 *Id.* at 658-59. The Seventh Circuit noted that “other courts of appeals have explained that the same four considerations need not be present in every case involving the exception.” *Id.* at 658.

84 *Id.*

85 *Id.* at 660.

86 *Id.* at 661 (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)).

87 911 F.3d 603 (9th Cir. 2018); *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). See also *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) (identifying function as “general rule”); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996) (employee was minister where her “primary functions serve [the religious employer’s] spiritual and pastoral mission”); *Dayner v. Archdiocese of*

Hartford, 23 A.3d 1192, 1204 (Conn. 2011) (courts must “objectively examine an employee’s actual job function, not her title, in determining” ministerial status), *overruling on other grounds recognized in* *Trinity Christian Sch. v. Comm’n on Human Rights*, 189 A.3d 79, 85 (Conn. 2018) (affirming as “settled law” *Dayner*’s ruling that immunity from suit required “the availability of an immediate interlocutory appeal”); *Coulee Catholic Sch. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868, 881 n.16 (Wis. 2009) (“The focus . . . should be on the function of the position, not the title or a categorization of job duties.”); *Pardue v. Ctr. City Consortium Sch. of Archdiocese of Wash., Inc.*, 875 A.2d 669, 675 (D.C. 2005) (inquiry focuses on “function of the position” and “not on categorical notions of who is or is not a ‘minister’”); *Archdiocese of Wash. v. Moersen*, 925 A.2d 659, 663 (Md. 2007) (emphasizing “the function of the position”); *Alicea v. New Brunswick Theological Seminary*, 608 A.2d 218, 222 (N.J. 1992) (protecting decisions “regarding employees who perform ministerial functions”). One year before *Biel*, the Ninth Circuit decided *Puri v. Khalsa*, which addressed the four considerations from *Hosanna-Tabor*. 844 F.3d 1152. But *Puri* declined to “resolve the question of whether the ministerial exception ever applies to the type of positions at issue here,” and instead remanded the case for fact-finding since ministerial status was not sufficiently established based on the pleadings alone. *Id.* at 1159.

88 *Biel*, 911 F.3d at 609.

89 *Id.* at 617-18 (Fisher, J., dissenting).

90 *Biel v. St. James School*, No. 17-55180 (9th Cir.). On February 26, 2019, the panel ordered the plaintiff to file a response to St. James’s petition for rehearing.

91 *Hosanna-Tabor*, 565 U.S. at 188-89.

92 *Id.* at 194.

93 See, e.g., Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J. L. & PUB. POL’Y 839, 861 (2012).

regardless of whether the claim is for reinstatement or for damages such as frontpay, backpay, or attorney's fees, because all "such relief would operate as a penalty on the Church for terminating an unwanted minister" and thus is "no less prohibited by the First Amendment."<sup>94</sup>

What about claims sounding in contract or tort? *Hosanna-Tabor* expressly did not address such claims, not least because those claims were not presented in the case.<sup>95</sup> But courts before 2012 had long held that the ministerial exception applies to a variety of claims, including condition-of-employment claims (such as wage-and-hour claims and hostile work environment claims), contract disputes, sexual harassments suits, and a number of tort claims such as tortious interference with business relationships, intentional infliction of emotional distress, invasion of privacy, and defamation.<sup>96</sup> As the First Circuit explained thirty years ago, the most important consideration is not a claim's basis in contract, tort, or nondiscrimination law, but rather its "substance and effect" on the church's freedom to select and control its leadership.<sup>97</sup> "Howsoever a suit may be labeled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated."<sup>98</sup>

None of the leading post-*Hosanna-Tabor* cases have squarely addressed the application of the ministerial exception to a tort claim.<sup>99</sup> But the first and only federal appellate court to consider the issue on the merits of a contract claim agreed with the First Circuit. In *Lee v. Sixth Mount Zion Missionary Baptist Church*, the Third Circuit found that the exception applied to bar a claim that a church lacked sufficient cause to terminate its senior pastor.<sup>100</sup> The court recognized that, in theory, some contract claims might

not implicate ecclesiastical matters or require interfering with the internal governance of the church.<sup>101</sup> But, in practice, as the court explained, every court that had reached the merits had "applied the ministerial exception [to bar] a breach of contract claim alleging wrongful termination of a religious leader by a religious institution."<sup>102</sup> Because the plaintiff's claim required second-guessing the basis for the church's decision to terminate him, the Third Circuit found that it was barred under the ministerial exception's rule against entanglement.<sup>103</sup>

Professor Douglas Laycock, who successfully argued *Hosanna-Tabor* and filed an amicus brief in support of the church in *Sixth Mount Zion*, appears to basically agree with the Third Circuit's approach. He believes that a "contract claim for unpaid salary or retirement benefits" can "surely" survive the ministerial exception.<sup>104</sup> But a minister's breach of contract claim that disputes adequacy of cause is "squarely within the rationale of *Hosanna-Tabor*" and must be rejected:

A minister discharged for cause, suing in contract on the theory that the church lacked adequate cause to discharge him . . . would be directly challenging the church's right to evaluate . . . its own ministers, and he would be asking the court to substitute its evaluation of his job performance for the church's evaluation.<sup>105</sup>

Professor Laycock's view, then, essentially tracks pre-*Hosanna-Tabor* case law: whether sounding in tort, contract, nondiscrimination law, or otherwise, the fundamental issue is whether a claim requires governmental entanglement with a church's sincere religious judgment about its relationship with its minister. If the answer is yes, then the claim will be more likely to be barred.

#### *D. How Does the Ministerial Exception Operate at a Practical Level?*

The ministerial exception's rule against state entanglement in internal church affairs is further safeguarded in a number of procedural ways. These safeguards provide a type of buffer around typical state powers employed during litigation, such as discovery requests and subpoenas, to prevent them from creating church-state conflict by being employed to probe the mind of the church. Recognizing that the "very process of inquiry" can "impinge on rights guaranteed by the Religion Clauses,"<sup>106</sup> courts have long enforced safeguards rooted in the First Amendment to, for instance, forbid intrusive inquiries into "confidential

94 565 U.S. at 194.

95 *Id.* at 196.

96 *Kaufmann v. Sheehan*, 707 F.2d 355, 355 (8th Cir. 1983) (defamation); *Scharon*, 929 F.2d at 363 (sex and age discrimination under Title VII and ADEA); *Hebrew Home*, 363 F.3d at 310 (FLSA overtime wages); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1290 (9th Cir. 2010) (Washington Minimum Wage Act overtime wages); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (sexual harassment); *Ogle v. Church of God*, 153 F. App'x 371, 372–73 (6th Cir. 2005) (breach of implied contract, tortious interference with business relationships, invasion of privacy, conspiracy, intentional infliction of emotional distress, defamation, and loss of consortium). *But see* *Demkovich v. St. Andrew The Apostle Parrish, Calumet City*, 2018 WL 4699767 (N.D. Ill. 2018) (granting dismissal of employment discrimination claims based on a minister's sex, sexual orientation, and marital status, but denying as to a hostile-environment-based-on-disability claim).

97 *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1576–78 (1st Cir. 1989) (applying ministerial exception to reject contract and tort claims).

98 *Id.*

99 *Puri v. Khalsa* addressed the ministerial exception in the context of tort claims, but it resolved the case on other grounds before reaching whether the tort context altered the analysis. 844 F.3d at 1160.

100 903 F.3d 113. *But see* *Sumner v. Simpson Univ.*, 238 Cal. Rptr. 3d 207, 220 (Cal. App. 3d 2018) (finding that the ministerial exception did not apply to contract claim by minister against ministry, reasoning that resolution "will not require the court to wade into doctrinal waters because review of the breach of contract claim does not require a review of Sumner's religious qualification or performance as a religious leader").

101 *Id.*

102 903 F.3d at 122.

103 The court explained that this non-entanglement principle was derived from the Establishment Clause component of the ministerial exception. But its ruling also suggested that, while previous Third Circuit precedent had indicated that a religious employer can contractually waive its Free Exercise rights under the ministerial exception, it was not clear that this ruling survived *Hosanna-Tabor*. *See Sixth Mount Zion*, 903 F.3d at 120–122 nn. 5 & 7.

104 Laycock, *supra* note 94, at 861.

105 *Id.*

106 *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979).



communications among church officials.”<sup>107</sup> It was thus “well established” at the time of *Hosanna-Tabor* that state power should be sparingly employed to “troll[] through a person’s or institution’s religious beliefs.”<sup>108</sup> So how do those protections play out after *Hosanna-Tabor*?

### 1. Discovery

Post-*Hosanna-Tabor*, courts have consistently found that the ministerial exception is a threshold question that should be resolved before allowing discovery into the merits of claims that would necessarily fail should the defense succeed. Courts explain that this is crucial because unnecessary merits discovery creates “the very type of intrusion that the ministerial exception seeks to avoid,”<sup>109</sup> thus “making the discovery . . . process itself a first amendment violation.”<sup>110</sup> For those same reasons, courts have quashed subpoenas where they implicated or violated church autonomy rights.<sup>111</sup>

Notably, this does not mean that courts deny *all* discovery. While plaintiffs can plead themselves out of a case,<sup>112</sup> courts will allow discovery where there are factual disputes related to the viability of the ministerial exception defense, with other merits discovery delayed until after that threshold issue is resolved.<sup>113</sup> Further, courts may also allow discovery into other claims that fall outside the reach of the ministerial exception.<sup>114</sup> In these respects, courts are largely following the general procedural approach for

discovery related to jurisdictional challenges under Federal Rule of Civil Procedure 12(b)(1).

### 2. Waiver

Courts have also faced several variations on the question of whether a party can waive the ministerial exception. The first case to squarely face the question following *Hosanna-Tabor* was the Sixth Circuit’s *Conlon* decision. There, the plaintiff argued that the defendant ministry had waived the ministerial exception by posting an equal opportunity employment policy expressly stating that the ministry would not discriminate on any bases other than religion. Thus, the plaintiff reasoned, the ministry waived any ministerial exception defense to her sex and marital status discrimination claims. The Sixth Circuit acknowledged that its precedent from 2007, *Hollins v. Methodist Healthcare, Inc.*, had indicated that waiver was possible where it was sufficiently express and unequivocal. But the Sixth Circuit found that *Hosanna-Tabor* abrogated *Hollins*, replacing it with a rule that the ministerial exception operated as “a structural limitation imposed on the government by the Religion Clauses, a limitation that can never be waived.”<sup>115</sup> The court explained that *Hosanna-Tabor* did “not allow for a situation in which a church could explicitly waive this protection” because the “protection is not only a personal one; it is a structural one that categorically prohibits federal and state governments from becoming involved in religious leadership disputes.” In short, a church cannot waive the government’s interest in remaining separate from the church. *Conlon* noted that the Seventh Circuit had reached the same conclusion in *Tomic v. Catholic Diocese of Peoria*, ruling that even if the parties should invite government involvement, a “federal court [should] not allow itself to get dragged into religious controversy.”<sup>116</sup> Three years later, in 2018, the Seventh Circuit’s *Grussgott* decision reaffirmed *Tomic*, finding that a religious employer’s equal opportunity policy cannot waive the ministerial exception.<sup>117</sup>

Waiver came up in a different way in the Third Circuit’s *Sixth Mount Zion* decision. There, the district court raised the ministerial exception sua sponte after the defendant church failed to raise it in response to the senior pastor’s wrongful termination claim. On appeal, the Third Circuit affirmed the district court’s decision to do so, citing *Conlon* to support the conclusion that the church had not waived the ministerial exception “because the exception is rooted in constitutional limits on judicial authority.”<sup>118</sup>

In another 2018 case, *EEOC v. R.G. & G.R. Harris Funeral Homes*, the Sixth Circuit again reaffirmed that the

107 *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 401-02 (1st Cir. 1985) (en banc) (Breyer, J., concurring).

108 *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.).

109 *Sterlinski v. Catholic Bishop of Chi.*, 2017 WL 1550186, at \*5 (N.D. Ill. May 1, 2017). See also *Fratello*, 863 F.3d 190 (noting that the district court had restricted discovery).

110 *Daymer*, 23 A.3d at 1200 (citing *McClure*, 460 F.2d at 560 (“investigation and review” of the church’s relationship with its ministers would “cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern”).

111 See *Whole Woman’s Health v. Smith*, 896 F.3d 362, 368 (5th Cir. 2018), cert. denied sub. nom. *Whole Woman’s Health v. Texas Catholic Conference of Bishops*, 2019 WL 659805 (2019) (quashing subpoena under Fed. R. Civ. P. 45 in light of burden on church autonomy rights); accord *McRaney v. North Am. Mission Bd. of the S. Baptist Convention, Inc.*, No. 17-cv-80, 2018 WL 5839678 (N.D. Miss. Nov. 7, 2018) (quashing subpoena under the ministerial exception and ecclesiastical abstention doctrines).

112 *Demkovich*, 2017 WL 4339817, at \*7 (granting motion to dismiss); *Moreno v. Episcopal Diocese of Long Island*, 2016 WL 8711448 (E.D.N.Y. 2016) (granting a Rule 12(c) motion for judgment on the pleadings, analyzed as a motion to dismiss); *Penn v. N.Y. Methodist Hosp.*, No. 11-CV-9137 NSR, 2013 WL 5477600, at \*6 (S.D.N.Y. Sept. 30, 2013).

113 *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671 (N.D. Ill. 2012) (allowing “limited discovery to determine whether the ministerial exception applies”).

114 See Dkt. 35, *Garrick v. Moody Bible Institute*, No. 18-cv-573 (N.D. Ill. July 3, 2018) (granting motion to reconsider order permitting discovery into merits of claims that would be foreclosed if ministerial exception defense was upheld, but permitting discovery into a claim that the court believed would survive the defense).

115 *Conlon*, 777 F.3d at 836.

116 442 F.3d 1036, 1042 (7th Cir. 2006).

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

118 *Sixth Mount Zion*, 903 F.3d at 118 n.4 & 121 (the doctrine is a “structural” limitation imposed on the government that safeguards courts from being “impermissibly entangle[d] . . . in religious governance and doctrine”). See also *Bethea v. Nation of Islam*, 248 F. App’x 331, 333 (3d Cir. 2007) (affirming district court’s sua sponte raising of defense). But see *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) (finding that defendant had waived the ministerial exception defense by failing to raise it on appeal, but also noting that “[n]ot only did [defendant] fail to argue in its brief that the ministerial

ministerial exception operates as a structural limitation on court involvement in religious matters, regardless of whether either party raises it.<sup>119</sup> There, as in *Sixth Mount Zion*, neither party argued that the ministerial exception was applicable to an employment discrimination claim before the court. But amici did raise it. Treating the exception almost as a jurisdictional issue which a court has independent responsibility to consider, the Sixth Circuit fully evaluated whether the ministerial exception applied and thus would prevent it from reaching the merits of the parties' claims and defenses.<sup>120</sup>

### 3. Interlocutory Appeal

Prior to *Hosanna-Tabor*, state appellate courts regularly permitted ministerial exception arguments to be raised on interlocutory appeal.<sup>121</sup> The courts repeatedly emphasized that part of the ministerial exception right is protection against unnecessary litigation over and discovery into internal church affairs, and that interlocutory appeal was therefore necessary to vindicate that part of the right. For instance, the Connecticut Supreme Court warned that "the very act of litigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice system with matters of religious policy, making the discovery and pre-trial process itself a first amendment violation."<sup>122</sup> By way of explanation, courts regularly compared church autonomy defenses to qualified immunity, a threshold legal issue that must be decided as a matter of law at the outset of a case and subject to appellate review when denied.<sup>123</sup>

In the wake of *Hosanna-Tabor*, courts have continued to reach the same result. For instance, the Kentucky Supreme Court has repeatedly permitted interlocutory appeals of ministerial exception defenses. In 2014's *Kirby v. Lexington Theological Seminary*, the court explained that "the determination of whether an employee of a religious institution is a ministerial employee is a question of law . . . to be handled as a threshold matter," and interlocutory appeal is required both to ensure that the defense is "resolved expeditiously at the beginning of litigation" and

to remove "the possibility of constitutional injury" that could otherwise be caused by discovery and trial.<sup>124</sup>

Academics writing on the meaning and application of *Hosanna-Tabor* agree that denial of a ministerial exception defense "is effectively final and should ordinarily be permitted to be tested on interlocutory appeal."<sup>125</sup> They also agree that a ministerial exception defense "closely resembles qualified immunity" for purposes of the doctrine that permits such immunity claims to receive interlocutory appeal.<sup>126</sup>

Since *Hosanna-Tabor*, federal appellate courts haven't yet directly addressed the question in the context of a ministerial exception interlocutory appeal. But they have relied on *Hosanna-Tabor* and its church autonomy principles to permit related interlocutory appeals. The Seventh Circuit's 2013 decision in *McCarthy v. Fuller* accepted an interlocutory appeal of a district court ruling that required the jury to decide whether the plaintiff was a member of a Roman Catholic religious order.<sup>127</sup> The court explained that the First Amendment's rule against judicial interference in internal religious affairs was "closely akin" to a type of "official immunity," since it conferred "immunity from the travails of a trial and not just from an adverse judgment."<sup>128</sup> The court further explained that the "harm of such a governmental intrusion into religious affairs would be irreparable, just as in the other types of case[s] in which the collateral order doctrine allows interlocutory appeals."<sup>129</sup>

And in 2018, the Fifth Circuit granted interlocutory appeal of a district court order requiring Texas' Catholic bishops to turn over internal church communications to abortion providers.<sup>130</sup> There, the court held that it had jurisdiction to hear the appeal because "the consequence of forced discovery" on rights that "go to the heart of the constitutional protection of religious belief and practice" would be "effectively unreviewable" without an interlocutory appeal.<sup>131</sup> The court relied on *Hosanna-Tabor* to note that "religious organizations" had an interest in "maintain[ing] their internal organizational autonomy [] from ordinary

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exception applies, its brief actually indicates that [defendant] did not consider [plaintiff], who taught at the school, to be a minister").

119 884 F.3d 560.

120 *Id.* at 581-583.

121 *See, e.g., Dayner*, 23 A.3d at 1198-1200; *Harris v. Matthews*, 643 S.E.2d 566, 568-69 (N.C. 2007); *United Methodist Church, Baltimore Annual Conf. v. White*, 571 A.2d 790, 791-93 (D.C. 1990).

122 *Dayner*, 23 A.3d at 1199-1200; *White*, 571 A.2d at 792-93 ("The First Amendment's Establishment Clause and Free Exercise Clause grant churches an immunity from civil discovery and trial under certain circumstances.").

123 *Dayner*, 23 A.3d at 1198-1200; *Heard v. Johnson*, 810 A.2d 871, 876-77 (D.C. 2002) (the ministerial exception is a "claim of immunity from suit under the First Amendment" that is "effectively lost if a case is erroneously permitted to go to trial"). *See also Petruska*, 462 F.3d at 302-03 (making comparison to qualified immunity); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002) (same).

124 426 S.W.3d at 604, 608-09. *See also Edwards*, 2018 WL 4628449, at \*3 (permitting interlocutory appeal of ministerial exception defense).

125 Mark E. Chopko, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233, 294 (2012) (denial of the ministerial exception defense "is effectively final and should ordinarily be permitted to be tested on interlocutory appeal").

126 *See* Peter Smith and Robert Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847, 1881 (2018) (the ministerial exception "closely resembles qualified immunity for purposes of the collateral-order doctrine," which permits interlocutory appeals). The collateral order doctrine permits interlocutory appeal of prejudgment orders that conclusively determine the appealed issue, are "collateral to the merits of an action, are "too important" to be denied immediate review, and would be effectively unreviewable on appeal from a final judgment. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *accord Mohawk Indus. v. Carpenter*, 558 U.S. 100, 103 (2009).

127 714 F.3d 971, 974-76 (7th Cir. 2013) (Posner, J.).

128 *Id.*

129 *Id.* at 976.

130 *Whole Woman's Health*, 896 F.3d at 368.

131 *Id.* at 367-68.

discovery.”<sup>132</sup> The abortion providers sought en banc review and then certiorari to overturn the court’s exercise of interlocutory jurisdiction, but to no avail.<sup>133</sup>

#### IV. CONCLUSION

Courts can’t second-guess churches’ judgments of who should be their ministers. As Judge Robert Sack noted for the Second Circuit, courts are “[a]rmed only with the law as written and the tools of judicial reasoning,” leaving them “ill-equipped” to gainsay that, “for instance, a stammering Moses was chosen to lead the people, and a scrawny David to slay a giant.”<sup>134</sup> *Hosanna-Tabor’s* unanimous vindication of the founders’ dual protection for internal religious autonomy and church-state non-entanglement avoids this problem. Courts are generally taking the Supreme Court’s cue, robustly applying *Hosanna-Tabor’s* reasoning to refine the law’s definitions of “ministry” and “minister,” as well as to prevent interference with church affairs through contract, tort, and procedural means.

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132 *Id.* at 374.

133 *Id.*, cert. denied sub. nom. *Whole Woman’s Health*, 2019 WL 659805 (2019).

134 *Fratello*, 863 F.3d at 203.

