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## At the Intersection of Religious Organization Missions and Employment Laws: The Case of Minister Employment Suits

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## At the Intersection of Religious Organization Missions and Employment Laws: The Case of Minister Employment Suits

### Cover Page Footnote

Professor of Law, Texas Tech University School of Law; B.B.A., summa cum laude, University of Oklahoma, 1997; J.D., with highest honors, University of Oklahoma College of Law, 2000. Thanks to Elizabeth Caulfield for her helpful research assistance on this article and the participants at the July 30, 2015 Southeastern Association of Law Schools Conference panel discussion on whistleblower topics for providing comments and feedback related to the ideas that form the substance of this article.

# AT THE INTERSECTION OF RELIGIOUS ORGANIZATION MISSIONS AND EMPLOYMENT LAWS: THE CASE OF MINISTER EMPLOYMENT SUITS

*Jarod S. Gonzalez*<sup>+</sup>

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Religious organizations aim to accomplish the unique goals and missions tied to their faiths.<sup>1</sup> Accomplishing these goals requires the work of organizational leaders and members. In many cases, a religious organization hires and pays individuals to work for the organization.<sup>2</sup> Both federal and state labor and employer laws often apply to those hiring relationships. As nonprofit organizations, religious organizations also rely on volunteers to provide services to the organizations.<sup>3</sup> The employment

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1. See Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233, 233–34 (2012).

2. See *id.*

3. See *Ockletree v. Franciscan Health Sys.*, 317 P.3d 1009, 1024 (Wash. 2014) (Stephens, J., dissenting) (explaining that many non-profits have to compete with for-profits for employees, which forces non-profits to rely on volunteers for much of their work). Religious organizations “receive the lion’s share of private contributions and more volunteer labor than any other nonprofit segment.” *Id.* at 1025 (Stephens, J., dissenting) (citing Evelyn

and volunteer selections made by a religious organization play a fundamental role in whether the organization will achieve its goals and further its mission. Protecting the internal operations of religious organizations, such as employee selection, from inappropriate governmental intrusion is an important societal value.<sup>4</sup> This societal value reaches its zenith with respect to a religious organization's selection of its ministers, clergy, or spiritual leaders.<sup>5</sup> A religious organization has broad First Amendment protection under the Free Exercise Clause to select its ministerial leaders without governmental intrusion and interference, so that the group may chart its own course and develop its faith.<sup>6</sup>

Federal and state governments are secular institutions.<sup>7</sup> These institutions have an important societal role in regulating employment relationships in the for-profit and non-profit sectors with respect to a variety of matters. These matters include, but are not limited to, employment security, freedom from discrimination, wage and hour protections, workplace safety and health, employee protections for reporting civil or criminal violations, and contract enforcement.<sup>8</sup> As compared to the founding era of the United States, the modern state pervasively regulates employment relationships, and the degree of regulation continues to increase.<sup>9</sup> One area in which

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Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 470 n.50 (1996)).

4. See *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 709–10 (1976); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929); *Watson v. Jones*, 80 U.S. 679, 727 (1871).

5. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167–68 (4th Cir. 1985); *Coulee Catholic Sch. v. Labor & Indust. Review Comm'n*, 768 N.W.2d 868, 880 (Wis. 2009).

6. The First Amendment to the U.S. Constitution provides, in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. In *Hosanna-Tabor*, the U.S. Supreme Court recognized a ministerial exception derived from the First Amendment and barred a minister's employment discrimination suit against the church because such suits interfere with “the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.” 132 S. Ct. at 706.

7. See U.S. CONST. amend. I.

8. See generally, e.g., *Montana Wrongful Discharge from Employment Act of 1987*, MONT. CODE ANN. §§ 39-2-901–915 (West 2015); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012); *Age Discrimination in Employment Act of 1967*, 29 U.S.C. §§ 621–634 (2012); *Fair Labor Standards Act*, 29 U.S.C. §§ 201–219 (2012); *Occupational Safety and Health Act of 1970*, 29 U.S.C. §§ 651–678 (2012); *Sarbanes-Oxley Act of 2002*, 18 U.S.C. § 1514A (2012).

9. *Hosanna-Tabor*, 132 S. Ct. at 704 (noting the absence of government employment regulation at the time of adoption of the First Amendment). See also Sid L. Moller, *Birth of Contract: Arbitration in the Non-Union Workplace*, 50 S.C. L. REV. 183, 194 (1998) (noting that “the non-union employment relationship is now . . . heavily regulated”); Michael R.

increasing regulation exists is whistleblower laws.<sup>10</sup> Federal and state legislatures and the judiciary have recognized the value of providing employment protection for employees who report civil and criminal violations to their own organizations or to outside sources, such as law enforcement agencies.<sup>11</sup> Protecting employee whistleblowers encourages reporting and serves the interest of the employee, the public, and third parties who may be harmed by the alleged wrongdoing.<sup>12</sup>

Clashes inevitably arise when employment laws of general applicability, like whistleblower laws, are applied to religious organizations because their application may substantially interfere with a religious organization's employee selection decisions and could negatively impact an organization's faith-based goals and mission.<sup>13</sup> Religious organizations advocate for First Amendment and statutory protections for their employee selection procedures in the form of accommodations, exemptions, and exceptions from employment laws of general applicability.<sup>14</sup> Via the U.S. Constitution

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Blum, *The Trend for Increased Regulation of Employers Under the Current Administration*, in *COMPLYING WITH EMPLOYMENT REGULATIONS* (Aspatore 2010), 2010 WL 3253662, at \*1 (noting a "significant increase in labor and employment regulation of employers since January 2009").

10. RICHARD CARLSON & SCOTT A. MOSS, *EMPLOYMENT LAW* 751–52 (3d ed. 2013).

11. *Id.* at 751–52 (explaining how the public's interest in protecting employee whistleblowers has "grown over time" with federal statutes that provide anti-retaliation protection for employment and certain non-employment laws, as well as court decisions recognizing specific "public policy-based exceptions to the employment at will doctrine").

12. *Id.* at 750–51.

13. Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1610–13 (2004) (expounding upon the conflict between government regulation of employment in religious organizations and church autonomy).

14. See, e.g., WASH. REV. CODE § 49.60.040(11) (2010) (explicitly excluding religious non-profit organizations from its definition of "employer" and therefore exempting such organizations from certain workplace discrimination regulations). In *Ockletree v. Franciscan Health System*, the Washington Supreme Court held that the Washington Law Against Discrimination statutory provision violated neither the privileges and immunities clause nor the establishment clause of the Washington Constitution. 317 P.3d 1009, 1016–17, 1019–20 (Wash. 2014). See also Lauren Markoe, *Supreme Court To Examine 'Ministerial Exception' Case*, HUFFINGTON POST (Sept. 29, 2011, 1:02 PM), [http://www.huffingtonpost.com/2011/09/29/supreme-court-ministerial-exemption\\_n\\_987348.html](http://www.huffingtonpost.com/2011/09/29/supreme-court-ministerial-exemption_n_987348.html) (noting that according to Ira C. Lupu, a professor at The George Washington University School of Law, "[a]dvocates for the ministerial exemption argue that religious institutions, in their hiring and firing, should be regulated as little as possible" while those opposing this viewpoint "are . . . concerned that a particular group is cast outside the various protections of civil rights law."); Molly A. Gerratt, Note, *Closing a Loophole: Headley v. Church of Scientology International as an Argument for Placing Limits on the Ministerial Exception from Clergy Disputes*, 85 S. CAL. L. REV. 141, 160 (2011) ("Church autonomy advocates argue that the scope of the ministerial exception is expanded when it is backed by a strong right to church autonomy.").

and statutes, courts have recognized some protection for religious organizations' employee selection procedures.<sup>15</sup>

This Article attempts to understand the broader issue of employment law exemptions of general applicability for religious organizations by evaluating specific employment suits brought by ministers. The societal value of shielding religious organizations from governmental interference in employee selection procedures is at its height with respect to a congregation's decisions regarding its selection of ministers.<sup>16</sup> However, society also has an interest in encouraging citizen-employees to report civil and criminal violations, protecting employees from discrimination, and enforcing contracts.<sup>17</sup> Do these employment laws protect ministers? The question is only partially answered by the U.S. Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*,<sup>18</sup> which recognizes that there is a ministerial exception protected by the First Amendment in the context of employment discrimination suits.<sup>19</sup> This Article will use the *Hosanna-Tabor* decision as a starting point for evaluating the employment rights of ministers against the backdrop of church autonomy in ministerial selection.

Part I of the Article explains the ministerial exception and ecclesiastical abstention concepts and describes the policies underlying the *Hosanna-Tabor* decision. Part II of the Article examines relevant cases that have arisen both before and after the *Hosanna-Tabor* decision in order to understand how suits brought by ministers asserting employment law rights are being decided. Part III of the Article details a categorical approach to resolving minister suits.<sup>20</sup> Based on the discussion below, there should be a strong presumption that minister whistleblower suits are generally barred on First Amendment grounds.

#### I. MINISTERIAL SELECTION AND THE FIRST AMENDMENT

A religious organization's right to select its clergy, ministers, and spiritual leaders free from governmental interference is one of the most important rights protected by the First Amendment. Courts utilize three

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15. See *supra* note 6 and accompanying text. Title VII of the Civil Rights Act exempts religious organizations from its prohibition against religious discrimination with respect to employment of individuals. 42 U.S.C. § 2000e-1(a) (2012) (stating that "[Title VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities").

16. See *supra* text accompanying notes 4–6.

17. See *supra* text accompanying note 8.

18. 132 S. Ct. 694 (2012).

19. *Id.* at 705–06, 709–10.

20. See *infra* Part III.

concepts when determining whether a minister suit alleging employment law violations is permitted: the ministerial exception; the ecclesiastical abstention doctrine; and the “neutral principles of law” approach.<sup>21</sup>

The ministerial exception is a judicially created principle that bars federal and state statutory employment discrimination suits by ministers against the religious organizations that employ them.<sup>22</sup> The Fifth Circuit Court of Appeals first created the exception in 1972.<sup>23</sup> The federal appellate circuit courts recognized and developed the exception for forty years.<sup>24</sup> In 2012, the U.S. Supreme Court recognized the exception and concluded that it is an “affirmative defense to an otherwise cognizable claim” and “not a jurisdictional bar.”<sup>25</sup> While the exception is labeled as *ministerial* for naming purposes, it is not limited to ordained clergy.<sup>26</sup> It applies to any employee of a religious organization who conveys the group’s spiritual

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21. See generally *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (discussing ecclesiastical abstention). See also *Jones v. Wolf*, 443 U.S. 595 (1979) (discussing “neutral principles of law”); *Hosanna-Tabor*, 132 S. Ct. at 694 (discussing the ministerial exception).

22. SUSAN GROVER, ET AL., *EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK* 323 (2d ed. 2014). See also *Chopko & Parker supra* note 1, at 234.

23. See *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972). The Fifth Circuit stated:

We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment. . . . We therefore hold that Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister.

*Id.*

24. See *Rweyemamu v. Cote*, 520 F.3d 198, 204–09 (2d Cir. 2008); *Schleicher v. The Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–27 (6th Cir. 2007); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–07 (3d Cir. 2006); *Werft v. Desert Sw. Annual Conference*, 377 F.3d 1099, 1100–04 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F.3d 648, 655–57 (10th Cir. 2002); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800–01 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301–04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 345–50 (5th Cir. 1999); *EEOC v. Catholic Univ.*, 83 F.3d 455, 460–63 (D.C. Cir. 1996); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989).

25. *Hosanna-Tabor*, 132 S. Ct. at 706 (“We agree [with the federal court of appeals] that there is such a ministerial exception.”); *id.* at 709 n.4 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010)) (holding “that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar” because the issue is whether the plaintiff is entitled to relief and not whether the court “has power to hear the case”).

26. See *id.* at 713–14.

message and carries out its spiritual mission.<sup>27</sup> The exception clearly applies to pastors, priests, and rabbis, but may also be available to other workers, such as “lay employees, seminary professors, hospital workers, press secretaries, [and] musicians.”<sup>28</sup>

The exception derives from the First Amendment’s Free Exercise and Establishment Clauses and is grounded on the principle of church autonomy.<sup>29</sup> Religious organizations have a First Amendment right to organize themselves, define their missions, and choose their workers without undue governmental interference.<sup>30</sup> The First Amendment precludes government interference in this endeavor.<sup>31</sup> The rationale for the exception is that minister employment discrimination suits unduly interfere with a church’s leadership decisions.<sup>32</sup> Ministerial employment decisions are made solely by the religious body, without the government’s influence, because it is through these decisions that a religious body shapes its faith and accomplishes its goals.<sup>33</sup> The *Hosanna-Tabor* Court stated:

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.<sup>34</sup>

The exception does not exist merely to prevent minister employment discrimination suits that involve determining whether the religious

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27. See *id.* at 708, 713–14. The Court held that the fact that an employee has been ordained or commissioned is relevant to whether the employee qualifies as a *minister* for purposes of the exception, but the lack of a commission or ordination is not dispositive. *Id.* at 708. In part, the Court based its ministerial status determination on a Lutheran schoolteacher because her job duties “reflected a role in conveying the Church’s message and carrying out its mission.” *Id.*

28. See *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 605 (Ky. 2014) (footnotes omitted).

29. See *Hosanna-Tabor*, 132 S. Ct. at 706.

30. *Id.*

31. *Id.*

32. *Id.*

33. See *id.*

34. *Id.*



organization based its employment decision on a religious reason.<sup>35</sup> Cue the *Hosanna-Tabor* Court again in response to the Equal Employment Opportunity Commission's (EEOC) argument that the defendant-religious organization did not have a religious reason for terminating the Lutheran schoolteacher's employment and therefore the ministerial exception did not apply:

The EEOC and Perich [the Lutheran school teacher] suggest that Hosanna-Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual. The suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone.<sup>36</sup>

The ecclesiastical abstention doctrine is related to the ministerial exception, but is broader.<sup>37</sup> This doctrine also derives from the First Amendment.<sup>38</sup> It is not strictly focused on personnel decisions regarding ministers.<sup>39</sup> Instead, the doctrine requires secular courts to avoid resolving disputes that relate to church doctrine.<sup>40</sup> Federal and state courts have interpreted the First Amendment as requiring secular courts to avoid interference or entanglement with ecclesiastical disputes.<sup>41</sup> A line of U.S. Supreme Court and state supreme court cases elucidate this principle.<sup>42</sup> Secular courts simply have no power, role, or competency under our constitutional system to weigh in on ecclesiastical disputes that concern church doctrine, faith, and practices.<sup>43</sup> In essence, secular courts must avoid resolution of religious controversies, doctrine, and beliefs in order to

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35. *Id.* at 709.

36. *Id.* (internal citations omitted).

37. See *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 724–25 (1976); Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment After Hosanna-Tabor*, 11 STAN. J. C.R. & C. L. 89, 92 (2015) (noting that the ecclesiastical abstention doctrine is “broader” than the ministerial exception).

38. See, e.g., *Jennison v. Prasifka*, 391 S.W.3d 660, 665 (Tex. App. 2013) (quoting *Milivojevic*, 426 U.S. at 713–14) (“The ecclesiastical abstention doctrine stands for the proposition that the First Amendment prohibits civil courts from exercising jurisdiction over matters concerning ‘theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them.’”).

39. See *infra* note 40 and accompanying text.

40. *Milivojevic*, 426 U.S. at 724–25. See also *supra* note 37.

41. See *Milivojevic*, 426 U.S. at 724–25; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Watson v. Jones*, 80 U.S. 679, 727 (1871); *Marsh v. Johnson*, 82 S.W.2d 345, 346 (Ky. 1935); *Nance v. Busby*, 18 S.W. 874, 879 (Tenn. 1892).

42. See *supra* note 41 and accompanying text.

43. See *supra* note 41 and accompanying text.

prevent the “chilling effect” such resolution would have on church practices as a result of such governmental intrusion.<sup>44</sup> Notably, a strand within the doctrine (which may be considered an exception to the doctrine or merely a corollary) indicates that secular courts have the power to hear a suit involving a church or minister if the suit can be resolved through “neutral principles of law” and without entanglement in church administration, beliefs, and doctrine.<sup>45</sup> The ecclesiastical abstention doctrine is relevant to minister employment suits to the extent that such suits involve church doctrine, faith, and practices.<sup>46</sup> Some courts have concluded that the “neutral principles” approach could resolve certain types of employment law claims brought by ministers—breach of contract claims, for example—without running afoul of the First Amendment.<sup>47</sup>

## II. *HOSANNA-TABOR* AND CASE LAW DEVELOPMENT

In *Hosanna-Tabor*, the EEOC sued a Lutheran church, alleging that it had unlawfully fired Cheryl Perich, a called Lutheran schoolteacher, in retaliation for threatening to file a lawsuit under the Americans with Disabilities Act (ADA).<sup>48</sup> The Supreme Court recognized a ministerial exception to the application of employment discrimination statutes grounded in both the First Amendment and the church autonomy principle with respect to internal church governance.<sup>49</sup> The Court also developed a

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44. Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 619 (Ky. 2014).

45. See Jones v. Wolf, 443 U.S. 595, 602–07 (1979). The Court stated:

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established [legal] concepts. . . . It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.

*Id.* See also Gen. Council on Fin. & Admin., United Methodist Church v. Cal. Super. Ct., San Diego, 439 U.S. 1369, 1373 (1978); N.Y. Annual Conference of United Methodist Church v. Fisher, 438 A.2d 62, 68 (Conn. 1980); McKelvey v. Pierce, 800 A.2d 840, 856 (N.J. 2002); Lacy v. Bassett, 132 S.W.3d 119, 123 (Tex. App. 2004).

46. See *supra* note 45 and accompanying text.

47. See Petruska v. Gannon Univ., 462 F.3d 294, 310–12 (3d Cir. 2006) (stating that a chaplain’s breach of employment contract claim against a private Catholic college survived a motion to dismiss because review of the claim “at the outset” would not “unconstitutionally entangle the court in religion”); Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1360 (D.C. Cir. 1990) (holding that a minister’s breach of oral contract claim against a church survived a motion to dismiss because neutral principles of law could decide the dispute without entanglement). See also Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985) (opining that churches are not “above the law” and “may be held liable for . . . their valid contracts”).

48. 132 S. Ct. 694, 699–701 (2012). Perich also was a party to the suit and alleged an ADA retaliation claim and a disability retaliation claim under the Michigan Persons with Disabilities Civil Rights Act. *Id.* at 701.

49. *Id.* at 706.

functional totality-of-the-circumstances test for determining whether an individual is covered by the ministerial exception.<sup>50</sup>

Perich qualified as a minister under the test for three main reasons.<sup>51</sup> First, the church held her out as a minister by extending her a calling.<sup>52</sup> Second, the church provided her with a title as a commissioned minister because she had undergone formal religious training and a commissioning process.<sup>53</sup> Third, Perich's job duties included religious instruction, as well as leading students in prayer, devotional exercises, and chapel service.<sup>54</sup>

The *Hosanna-Tabor* decision correctly recognized the ministerial exception and did well in explaining and emphasizing the fundamental policy reason for the exception: the church autonomy principle.<sup>55</sup> The Court also made reasonably clear that the exception seemingly bars minister federal and state statutory employment discrimination claims and minister federal and state statutory anti-retaliation claims alleging retaliation by the employer for asserting rights under federal and state employment discrimination statutes, respectively.<sup>56</sup> While the Court characterized the case as an "employment discrimination suit brought on behalf of a minister,"<sup>57</sup> the suit was more specifically an employment anti-retaliation

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50. *Id.* at 707–09. The Court noted that "[i]n light of . . . the formal title given to Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception." *Id.* at 708.

51. *See infra* notes 52–54 and accompanying text.

52. *Hosanna-Tabor*, 132 S. Ct. at 707.

53. *Id.*

54. *Id.* at 708.

55. *Id.* at 706, 709. *See also* Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 562 n.12 (2013) ("*Hosanna-Tabor* naturally sparked significant and thoughtful debate on the contours of the church autonomy doctrine.>").

56. The *Hosanna-Tabor* Court's decision seemingly barred both the federal and state disability retaliation claims. *See Hosanna-Tabor*, 132 S. Ct. at 709 n.3. The Court noted that the plaintiff did not dispute that if the ministerial exception barred her federal ADA retaliation claim it also barred her Michigan state retaliation claim. *Id.* ("Perich does not dispute that if the ministerial exception bars her retaliation claim under the ADA, it also bars her retaliation claim under Michigan law."). There appears to be at least tacit approval by the Court that the state law claim is barred. *See id.* Federal law would require the dismissal of the state statutory anti-retaliation claim due to the ministerial exception because the First Amendment Establishment and Free Exercise Clauses apply to the states via the Fourteenth Amendment by incorporation. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Additionally, the federal right would override a state statute that violated the First Amendment right under the Supremacy Clause of the Constitution. U.S. CONST. art. VI, cl. 2. *See also Conlon v. Interservice Christian Fellowship/USA*, 777 F.3d 829, 836–37 (6th Cir. 2015) (noting that the First Amendment ministerial exception is a defense against state statutory anti-discrimination claims because the First Amendment applies to the states through the Fourteenth Amendment by incorporation, and the federal right bars any state statute that, as applied, violates the First Amendment).

57. *Hosanna-Tabor*, 132 S. Ct. at 710.

claim to enforce a protected right built into an employment anti-discrimination statute.<sup>58</sup>

The decision left two key legal questions open. First, the Court's eloquent explanation justifying the exception would appear to rightfully open the door to a religious group's argument that it should have more freedom than the law provides to select its non-minister employees.<sup>59</sup> Alternatively, the rationale for the exception indicates that courts should be generally inclined to accept at face value whomever a religious organization sincerely says is a "minister" for that particular religious group's purposes.<sup>60</sup> A church should be entitled to express its own values through its hiring decisions so that it can accomplish its mission in whatever way it desires.<sup>61</sup> The concurrences of Justices Thomas, Alito, and Kagan are instructive on this point because they suggest considerable deference to a religious organization's judgment about which employees are "ministers."<sup>62</sup> As

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58. The EEOC sued the Church alleging ADA retaliation. *Id.* at 701. Perich sued, alleging ADA and Michigan law retaliation claims. *Id.* Both sought Perich's reinstatement to her former position (or front pay in lieu thereof), along with back pay, compensatory and punitive damages, attorney's fees, and other injunctive relief. *Id.*

59. *Id.* at 706–07; *see also* Chopko & Parker, *supra* note 1, at 235, 272–73 (noting that "[h]ow ministry is defined and which entities are religious (enough) to assert constitutional rights must still be resolved," while remarking that "the Court [in *Hosanna-Tabor*] decided that a 'special rule' was necessary to protect religious freedom principles, refusing to accept 'the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.'") (quoting *Hosanna-Tabor*, 132 S. Ct. at 706).

60. *See generally* *Hosanna-Tabor*, 132 S. Ct. at 710. The Court stated:

The EEOC and Perich foresee a parade of horrors that will follow our recognition of a ministerial exception. . . . [S]uch an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury in a criminal trial. . . . [and] confer on religious employers "unfettered discretion" to violate employment laws. . . . *Hosanna-Tabor* responds that the ministerial exception would not in any way bar criminal prosecutions . . . [or] government enforcement of general laws restricting eligibility for employment. . . . [T]he ministerial exception has been around in the lower courts for 40 years . . . and has not given rise to the dire consequences predicted by the EEOC and Perich.

*Id.*

61. *Id.* ("The church must be free to choose those who will guide it on its way.")

62. *See id.* at 710–11 (Thomas, J., concurring). Justice Thomas wrote:

[T]he Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister. . . . The question whether an employee is a minister is itself religious in nature, and the answer will vary widely. Judicial attempts to fashion a civil definition of "minister" through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the "mainstream" or unpalatable to some. Moreover, uncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding "ministers" to the prevailing secular understanding.

Justice Thomas notes, religious organizations in the United States vary widely as to leadership structure and doctrine concerning whom in a religious group has responsibility for spreading its spiritual mission.<sup>63</sup> Whether an individual is or is not a “minister” for purposes of the exception is essentially a religious question that is best determined by the religious group and not secular civil courts.<sup>64</sup>

The second legal question left open by the *Hosanna-Tabor* Court is: what is the proper test or approach under the First Amendment for resolving minister suits against religious organizations based on alleged employment law violations that do not involve federal or state anti-discrimination and anti-retaliation statutes? The Court stated:

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.<sup>65</sup>

There are a variety of possible minister employment suits beyond employment discrimination and retaliation claims.<sup>66</sup> For example, a minister could sue his or her church for breach of contract, negligence-based claims, pension claims, or whistleblower claims arising out of the employment relationship.<sup>67</sup> While *Hosanna-Tabor* was perhaps not the appropriate case to address the broader minister employment suit question,

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*Id.* Justices Alito and Kagan concurred:

[T]here is no principled basis for proscribing a pretext inquiry in such a case while permitting it in a case like the one now before us. The Roman Catholic Church’s insistence on clerical celibacy may be much better known than the Lutheran Church’s doctrine of internal dispute resolution, but popular familiarity with a religious doctrine cannot be the determinative factor. What matters in the present case is that *Hosanna-Tabor* believes that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment. This conclusion rests not on respondent’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.

*Id.* at 716 (Alito and Kagan, JJ., concurring).

63. *Id.* at 710 (Thomas, J., concurring).

64. *See id.* at 710–11.

65. *Id.* at 710.

66. *Id.* (noting that minister employment claims can be addressed in criminal suits, breach of contract claims, or tortious conduct claims, for example).

67. *See generally id.* (discussing some of the claims that could arise between a minister and his or her religious organization).

other cases have provided that opportunity.<sup>68</sup> It is important to look to pre and post-*Hosanna-Tabor* case law to see how the doctrine is developing with respect to the issue and to draw conclusions about how courts should be evaluating such claims.<sup>69</sup>

#### A. Breach of Contract Claims

Both pre and post-*Hosanna-Tabor* courts have distinguished minister employment discrimination and retaliation suits from minister breach of contract suits under the First Amendment based on the voluntary principle.<sup>70</sup> In *Minker v. Baltimore Annual Conference of United Methodist Church* (pre-*Hosanna-Tabor*),<sup>71</sup> a Methodist minister sued the United Methodist Church for breach of contract after he was denied a pastorship resulting in lost wages.<sup>72</sup> The minister asserted two types of breach of contract claims.<sup>73</sup> First, the minister alleged that the Methodist Book of Discipline contractually required minister appointments to be made without regard to age, and, therefore, the church breached this age-based contractual provision when it denied him his preferred pastorship.<sup>74</sup> The appellate court determined that the First Amendment barred the Book of Discipline contract claim because the interpretation of the appointment and anti-discrimination provisions of the Book of Discipline would involve highly speculative judgments that were spiritual and ecclesiastical in nature.<sup>75</sup> Second, the minister asserted a breach of oral contract claim on the ground that the church's district superintendent orally promised him a "move[]" to a congregation more suited to his training and skills, and more appropriate in level of income, at the earliest appropriate time.<sup>76</sup> The appellate court ruled that the oral breach of contract claim survived the motion to dismiss stage.<sup>77</sup> The court reasoned that a church may burden its activities voluntarily through contracts, and that such contracts are enforceable in civil courts so long as interpreting the contract would not involve matters of ecclesiastical

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68. See *id.*; *infra* Part II.A.

69. See *infra* Part II.A.

70. See, e.g., *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1357, 1361 (D.C. Cir. 1990) (holding that the religious institution has the authority to evaluate the "gifts and graces" of a minister despite a claim of employment discrimination, but it must not conflict with "promises made and contracts formed"); *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 882 (Wis. 2012) (finding that the court could not review whether the church improperly terminated a ministerial employee despite a possible breach of contract since the First Amendment protects church governance from state interference).

71. 894 F.2d 1354 (D.C. Cir. 1990).

72. *Id.* at 1355–56.

73. See *id.*

74. *Id.*

75. *Id.* at 1358–59.

76. *Id.* at 1355.

77. *Id.* at 1361.

policy.<sup>78</sup> It was unclear whether the oral breach of contract claim would involve a religious inquiry. The court opined that the breach of contract issue could be adduced through neutral principles of law to the extent the dispute focused on whether the church district superintendent promised the minister another congregation, whether the minister provided consideration for the promise, and whether other congregations were available but not offered to the minister.<sup>79</sup> But the court also warned that the suit would violate the Establishment Clause if the dispute turned into an inquiry concerning the church's reasons for asserting that the minister was not suited for a particular pastorship because such an inquiry would constitute an excessive entanglement in the church's affairs.<sup>80</sup>

In *Petruska v. Gannon University* (pre-*Hosanna-Tabor*),<sup>81</sup> a university chaplain who qualified as a minister for purposes of the ministerial exception to Title VII sued the university, alleging breach of contract with respect to the restructuring of her job duties.<sup>82</sup> Like the *Minker* court, the *Petruska* court started its analysis of the breach of contract claim by pointing out that enforcement of minister employment contracts does not inherently violate the First Amendment because “application of state contract law does not involve government-imposed limits on [a church's] right to select its ministers.”<sup>83</sup> The Third Circuit stated that enforcing a contractual employment promise between a minister and his or her religious organization would not violate the organization's Free Exercise rights because the contractual promise is voluntary in nature.<sup>84</sup> As for Establishment Clause concerns, the court concluded that the resolution of the chaplain's breach of contract claim did not involve “excessive entanglement” or “ecclesiastical inquiry” at the motion to dismiss stage.<sup>85</sup> As the case progressed, if the university's responses to the plaintiff's breach of contract allegations raised an ecclesiastical inquiry, the district court could correctly dismiss the claim on summary judgment.<sup>86</sup>

In *Kirby v. Lexington Theological Seminary* (post-*Hosanna-Tabor*),<sup>87</sup> a tenured Christian social ethics professor at a Christian seminary sued the seminary for breach of contract under Kentucky law after the seminary

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78. *Id.*

79. *Id.* at 1360.

80. *Id.* at 1359–61. As the court noted, “the contract alleged by *Minker* threatens to touch the core of the rights protected by the free exercise clause.” *Id.* at 1360.

81. 462 F.3d 294 (3d Cir. 2006).

82. *Id.* at 301–02.

83. *Id.* at 310.

84. *Id.*

85. *Id.* at 312.

86. *Id.*

87. 426 S.W.3d 597 (Ky. 2014).

terminated his employment.<sup>88</sup> The Faculty Handbook, which governed the employment relationship between the professor and the seminary, provided that “[t]he only grounds for dismissal of a tenured faculty member are moral delinquency, unambiguous failure to perform the responsibilities outlined in this Handbook, or conduct detrimental to the Seminary.”<sup>89</sup> The Kentucky Supreme Court determined that the seminary is a religious institution and the professor was a minister for purposes of the ministerial exception to Title VII.<sup>90</sup> The court concluded that the professor’s breach of contract claim was permitted under the First Amendment because enforcement of the contractual arrangement between the seminary and the professor did not cause governmental interference with the seminary’s selection of its ministers, and the contract did not concern religious matters that would prohibit the suit under the ecclesiastical abstention doctrine.<sup>91</sup>

As in *Minker* and *Petruska*, the *Kirby* court emphasized that enforcement of contractual restrictions on a religious institution’s right or ability to select its ministers does not arise out of governmental involvement, but instead arises from a voluntary agreement between the religious organization and the minister.<sup>92</sup> Here, the Seminary voluntarily agreed through a tenure system to fire tenured professors, including tenured professors who are ministers, “only under specified conditions.”<sup>93</sup> The Seminary’s decision to fire the tenured “minister” professor plaintiff was “completely free of any government involvement or restriction.”<sup>94</sup> Taking it one step further, the court opined that enforcing minister employment contracts according to their terms actually furthers church autonomy because “religious institutions are free to set forth policies that align with their respective mission.”<sup>95</sup>

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88. *Id.* at 601.

89. *Id.* at 603.

90. *Id.* at 609–12. The Seminary was religiously affiliated with the Christian Church (Disciples of Christ). *Id.* at 609. The Seminary had a covenant relationship with the church and received its principal funding from the church. *Id.* The professor’s “extensive involvement in the Seminary’s mission, religious ceremonies, and the subject matter of [the professor’s] teaching” qualified him as a ministerial employee for purposes of the Title VII exception. The Seminary issued him a call to serve in his professorial capacity. *Id.* at 611. The professor’s teaching focused on Christian socio-ethical issues. *Id.* As part of his employment, the professor participated and preached during various religious events connected to the Seminary. *Id.* at 612.

91. *Id.* at 615.

92. *Id.*

93. *Id.* at 617. *See also id.* at 616 (“[T]he Seminary explicitly stated in writing that it would only terminate a tenured professor on three grounds: (1) ‘moral delinquency,’ (2) ‘unambiguous failure to perform the responsibilities outlined in [the Faculty] Handbook’ and (3) ‘conduct detrimental to the Seminary.’”).

94. *Id.* at 617.

95. *Id.* at 616.



The *Kirby* court also confidently proclaimed that the tenured professor's breach of contract claim could be decided using neutral principles of law without wading into "doctrinal [religious] waters."<sup>96</sup> The court described the professor's tenure rights under the Faculty Handbook as unambiguous and concluded that considering the contract issue would not lead to any entanglement with "church doctrine or polity."<sup>97</sup> The court honed in on the heart of the matter as follows:

Under the ecclesiastical abstention doctrine, the question at the heart of whether [the minister-professor's] contract claim should be allowed is "whether [the minister-professor's] breach of contract claim can be decided without wading into doctrinal waters." When we consider the elements of breach of contract, as well as the particular contract at issue, we find no reason why a secular court is not able adequately to enforce the documents governing [the minister-professor's] former relationship with the Seminary.<sup>98</sup>

The court articulated that its green light to move forward with the breach of contract claim heeded the cautionary warning signals from *Hosanna-Tabor*.<sup>99</sup> If the professor eventually proved the elements of the contract claim, he would receive "compensatory damages, not specific performance or reinstatement," as reinstatement would "entail a secular court deciding who speaks for the church" and is constitutionally prohibited.<sup>100</sup> The penalty prohibition point made in the *Hosanna-Tabor* employment discrimination context was viewed as inapposite when applied to a damages award for breach of contract.<sup>101</sup> A damages award would not penalize the church, as no penalty is suffered where a secular court enforces a contractual employment agreement negotiated and agreed to in good faith between the minister and the religious organization.<sup>102</sup>

The Kentucky Supreme Court appeared certain in *Kirby* that the minister-professor's tenure-based employment rights could be interpreted without regard to religious doctrine or policy.<sup>103</sup> But interpreting a minister's employment agreement against the backdrop of explicit or implicit religious-based beliefs, ideas, and principles followed by a religious

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96. *Id.* at 620.

97. *Id.* at 619–20.

98. *Id.* at 620 (footnote omitted).

99. *Id.* at 615 (finding that the contract claim could proceed because enforcement of the contract between Kirby and the Seminary did not raise concerns of government interference in minister selection and the contract did not raise any ecclesiastical concerns that would bar the suit under the ecclesiastical abstention doctrine).

100. *Id.* at 620.

101. *Id.*

102. *Id.*

103. *Id.*

organization would seem to be a difficult and dangerous task under the Establishment Clause. In *DeBruin v. St. Patrick Congregation (post-Hosanna-Tabor)*,<sup>104</sup> the Wisconsin Supreme Court considered a minister's breach of employment contract claim and concluded that resolving the claim would violate the First Amendment.<sup>105</sup> The decision was splintered; the plurality dismissed the claim on First Amendment grounds, the concurrence avoided the constitutional question through contracts interpretation, and the dissent would have permitted the breach of contract claim to proceed.<sup>106</sup>

In *DeBruin*, the minister, a Director of Faith Formation, entered into a one-year employment agreement with a local Catholic church in the Archdiocese of Milwaukee.<sup>107</sup> It was undisputed that the individual was a ministerial employee for purposes of the ministerial exception to Title VII.<sup>108</sup> The contract stated: "The PARISH agrees that the DIRECTOR OF FAITH FORMATION shall not be discharged during the term of this contract, without good and sufficient cause, which shall be determined by the PARISH."<sup>109</sup> The church terminated the minister before the one-year term expired.<sup>110</sup> The minister sued for breach of the employment contract, alleging that there was not "good and sufficient cause" for the discharge, and sought money damages for the contractual violation.<sup>111</sup> The church moved to dismiss the suit under the First Amendment and a related Wisconsin constitutional provision.<sup>112</sup> The state circuit court dismissed the claim, and the state court of appeals certified the case to the Wisconsin Supreme Court on appeal.<sup>113</sup>

A plurality concluded that the "good and sufficient cause" language in the contract could not be interpreted and applied to the facts of this case by a secular court without infringing upon the church's First Amendment right to freely exercise its religious preferences through its ministerial selection.<sup>114</sup> The majority reasoned that the resolution of the contractual claim would involve an inquiry into the church's reasons for firing the minister and that the mere inquiry itself would "involve consideration of ecclesiastical decision-making" that is prohibited by the First Amendment.<sup>115</sup> Furthermore, resolving the contractual claim would violate

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104. 816 N.W.2d 878 (Wis. 2012).

105. *Id.* at 890.

106. *Id.*; *id.* at 894 (Crooks, J., concurring); *id.* at 913 (Bradley, J., dissenting).

107. *Id.* at 883 (majority).

108. *Id.* at 883–84. *See also id.* at 883 n.5.

109. *Id.* at 883.

110. *Id.*

111. *Id.*

112. *Id.* at 883–84.

113. *Id.* at 882, 884.

114. *See id.* at 887–90.

115. *Id.* at 889. *See also id.* at 887–90.

the First Amendment because the “Amendment gives [the church] the absolute right to terminate [the minister] for any reason, or for no reason, as it freely exercises its religious views. It is the decision itself, i.e., who shall be the voice of [the church], that affects the faith and mission of the church.”<sup>116</sup> The majority accepted the penalty prohibition from *Hosanna-Tabor* as apposite: if the State required the church to pay a damages award on the breach of contract claim it would unconstitutionally penalize the church for terminating an “unwanted ministerial employee.”<sup>117</sup>

Two concurring justices concluded that the “good and sufficient cause” clause was “illusory” under Wisconsin contract law.<sup>118</sup> By assigning to the church the right to determine whether “good and sufficient cause” exists, the contract effectively nullified the “without cause” protection and rendered the minister subject to employment-at-will.<sup>119</sup> Through this viewpoint, these justices avoided the First Amendment question.<sup>120</sup>

The dissenting justice conceptualized the First Amendment issues concerning the minister’s breach of contract claim in a similar way to the *Minker*, *Petruska*, and *Kirby* courts.<sup>121</sup> The dissent started with the proposition that the enforcement of a minister’s employment contract with his or her religious organization does not involve a “mandate from the state” and is voluntary.<sup>122</sup> Therefore, enforcement of such a contract does not constitute a Free Exercise Clause violation.<sup>123</sup> In fact, the dissent articulated the notion that church autonomy under the Free Exercise Clause is furthered by enforcing such contracts, commenting that the lack of enforcement of such agreements may prohibit religious organizations from recruiting the best candidates for their positions because candidates would not be able to rely on the employer’s security promises.<sup>124</sup> They stated:

If the ministerial exception . . . were extended to bar contract claims, then termination clauses would not be worth the paper they were printed on because no civil authority could hold a religious organization to the terms of any such contracts it had negotiated with a ministerial employee. Candidates for ministerial positions might be less inclined to enter into these

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116. *Id.* at 888.

117. *Id.* at 889–90.

118. *Id.* at 891–94 (Crooks, J., concurring) (discussing further the contractual promise in light of state contract law). *See also id.* at 898–99 (Prosser, J., concurring) (stating that “the protection that [the minister] relies on does not exist” and that “[f]rom [the Church’s] perspective, it did not breach the contract; it exercised its rights under the contract”).

119. *Id.* at 891–95 (Crooks, J., concurring), 898–99 (Prosser, J., concurring).

120. *Id.*

121. *Id.* at 906 (Bradley, J., dissenting).

122. *Id.*

123. *Id.*

124. *Id.* at 907.

types of employment arrangements in the first instance. A church's ability to recruit the best and brightest candidates for ministerial positions could be undermined because the church would be unable to offer desirable candidates any contractual assurances regarding job security.<sup>125</sup>

The dissenters conceded that excessive entanglement in violation of the Establishment Clause could arise if a trial court actually evaluated the Church's reasons for terminating the minister; however, the record was not developed enough to understand the basis for the church's decision and whether it involved matters of "faith and ministry" that would entail excessive entanglement.<sup>126</sup> For these reasons, the dissenters would have denied the motion to dismiss and remanded to the lower court for further proceedings.<sup>127</sup>

### B. Whistleblower Claims

Minister whistleblower claims pose unique analytical issues under the First Amendment that are distinct from First Amendment analysis under minister statutory employment discrimination claims, minister statutory employment retaliation claims, minister breach of employment contract claims, and even minister employment-based tort suits.<sup>128</sup> For purposes of this Article, whistleblower claims are defined as both common law and statutory claims where an employee is engaging in protected conduct to uphold a *non*-employment public interest.

Whistleblower claims are not the same as anti-retaliation claims.<sup>129</sup> Whistleblower claims are distinct from anti-retaliation claims in two fundamental ways that impact a minister's whistleblower claim under the First Amendment. First, whistleblower claims are different from *employment*-based anti-retaliation claims brought under anti-retaliation laws like Title VII and the Age Discrimination in Employment Act of 1967 (ADEA)—laws that prohibit retaliatory employment actions against employees who report or oppose violations of such employment laws—in that whistleblower claims often impact the public interest in matters unrelated to employment, while anti-retaliation laws generally protect employment rights.<sup>130</sup> Second, the underlying policy reason for protecting

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125. *Id.*

126. *Id.* at 907–08.

127. *Id.* at 908.

128. *See infra* text accompanying notes 129–36, 140–45.

129. *See infra* notes 130–31 and accompanying text.

130. CARLSON & MOSS, *supra* note 10, at 751–52. *See also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2012) (prohibiting retaliatory disciplinary actions by employers); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (2012) (prohibiting retaliatory employment action against employees who oppose unlawful practices under the ADEA).

employee whistleblowers is that their reporting protects a policy interest that either impacts the public at large or more specifically affects a third party.<sup>131</sup>

The public policy interest underlying anti-discrimination and anti-retaliation laws is arguably different than the interest supporting whistleblower laws.<sup>132</sup> Although anti-retaliation laws may be used to protect employees who complain about employer actions against other employees, third parties, or employees who are punished by their employers for having a close relationship with an individual who engages in protected conduct,<sup>133</sup> it is more often the case that an anti-retaliation plaintiff is suing an employer for taking an adverse employment action against the plaintiff because the plaintiff complained about the violation of his own statutory rights.<sup>134</sup> For example, a Title VII retaliation plaintiff might sue his employer for withdrawing an employment offer because he accused his supervisor of discriminating against him based on his national origin.<sup>135</sup> Employment anti-discrimination statutes and employment anti-retaliation statutes focus on protecting the individual employee, while whistleblower laws often protect a broader societal interest.<sup>136</sup>

*Hosanna-Tabor* can be interpreted as barring employment-based anti-retaliation claims in which the minister either opposed a practice made unlawful by the relevant employment law or engaged in protected conduct under that employment law.<sup>137</sup> In fact, as explained in Part II, the minister's claim in *Hosanna-Tabor* was actually an employment-based anti-retaliation claim and not a straight discrimination claim based on the minister's protected characteristic, which in itself supports this point.<sup>138</sup> Recall that in *Hosanna-Tabor* the minister sued the church for unlawfully retaliating against her by asserting rights under the ADA.<sup>139</sup>

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131. See Gerard Sinzdak, Comment, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1635 (2008).

132. See *infra* notes 133–36 and accompanying text.

133. See *Thompson v. N. Am. Stainless*, 131 S. Ct. 863, 867 (2011). See also Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 933–34 (2007).

134. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2522–23 (2013). In *Nassar*, the plaintiff asserted a Title VII retaliation claim alleging that his employer retaliated against him because he complained to his employer about his supervisor's national origin-based harassment. *Id.*

135. See, e.g., *id.* at 2523–24 (involving a Title VII retaliation claim on the basis of national origin).

136. Sinzdak, *supra* note 131, at 1635.

137. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012).

138. See *supra* text accompanying notes 55–58.

139. See *supra* notes 48–49 and accompanying text.

Minister whistleblower claims are also conceptually different from minister breach of employment contract claims for First Amendment purposes. Whistleblower claims stem from mandatory state regulations that could influence a church's choice of leaders, whereas breaches of contract claims arguably do not flow from any regulatory state mandate.<sup>140</sup> Breach of contract claims involve voluntary, freely negotiated agreements between the church and the minister with less risk of the state influencing a church's selection of its leaders.<sup>141</sup> The *Kirby*, *Petruska*, and *Minker* opinions and the *DeBruin* dissent all note and expound upon the voluntary aspect of minister employment contracts.<sup>142</sup> From the perspective of mandated state regulation, minister whistleblower claims are more like the barred minister employment discrimination claims than minister breach of contract claims.<sup>143</sup>

The minister whistleblower claim distinctions raise the question of how courts should treat minister whistleblower claims under the First Amendment. Computer-assisted research reveals various appellate court decisions regarding whether minister whistleblower suits are barred under the First Amendment.<sup>144</sup> The cases arise both before and after *Hosanna-*

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140. See, e.g., *Weishuhn v. Catholic Diocese of Lansing*, 787 N.W.2d 513, 521 (Mich. Ct. App. 2010) (noting that many clergy are subject to mandatory reporting requirements); *supra* note 70 and accompanying text.

141. See *supra* Part II.A (discussing the way in which courts have used the voluntary principal to distinguish retaliation cases from breach of contract cases).

142. *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 615 (Ky. 2014) (“Contractual transactions, and the resulting obligations, are assumed voluntarily.”); *Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006) (“On its face, application of state contract law does not involve government-imposed limits on Gannon’s right to select its ministers: Unlike the duties under Title VII and state tort law, contractual obligations are entirely voluntary.”); *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990) (“A church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court.”); *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 906 (Wis. 2012) (Bradley, J., dissenting). The dissent in *DeBruin* noted:

St. Patrick voluntarily selected its minister, freely negotiated the terms of employment including the circumstances under which the minister could be fired, and willingly agreed that both parties would be bound by those terms. Allowing DeBruin’s contract claims to survive a motion to dismiss would merely recognize that St. Patrick, “like any other person or organization,” is bound by its contracts.

*Id.* (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985)).

143. See *supra* notes 129–42 and accompanying text (discussing the different types of claims and showing how there are more similarities between whistleblower and employment discrimination claims than there are with contract claims).

144. Through a LexisNexis search of the Supreme Court’s *Hosanna-Tabor* decision, every state and federal appellate court decision that cited the U.S. Supreme Court’s *Hosanna-Tabor* opinion can be found and reviewed.

*Tabor*, but there is not a significant amount of authority. *Hosanna-Tabor* lends itself to different interpretations as to how to resolve these claims.<sup>145</sup>

A straightforward way to analyze minister whistleblower suits under the First Amendment is to say that employment discrimination and retaliation statutes are the same as whistleblower statutes because they both concern statutory regulation from the state. A pre-*Hosanna-Tabor* line of cases is instructive.

In *Weishuhn v. Catholic Diocese of Lansing*,<sup>146</sup> a Michigan appellate court ruled that the ministerial exception barred a Catholic school religious instructor's Michigan Whistleblower Protection Act claim.<sup>147</sup> The reasoning went straight to the employment law statutory analogy point. The appellate court noted that the ministerial exception "generally takes precedence over statutorily based claims."<sup>148</sup> The court explained that both employment discrimination claims and whistleblower claims "have as a common purpose the prevention of discrimination in employment on the basis of statutorily recognized factors rooted in public policy."<sup>149</sup> Therefore, the court ruled, "the rationale for recognizing the existence of the ministerial exception to a claim under the [Michigan state anti-discrimination statute] seems to apply equally to a claim under the [Michigan Whistleblower Protection Act]."<sup>150</sup> The court recognized that some might find it unjust that ministers can be terminated for reporting illegal activities that the law requires them to report, but concluded that to rule otherwise would violate the First Amendment.<sup>151</sup>

In *Archdiocese of Miami, Inc. v. Miñagorri*,<sup>152</sup> a Florida appellate court ruled that the ministerial exception barred a Catholic school principal's Florida Private Sector Whistleblower Act claim.<sup>153</sup> The principal reported to the Archdiocese that her supervisor "grabbed her by the arm and verbally threatened her."<sup>154</sup> Citing other cases in which courts had determined that the ministerial exception barred anti-discrimination claims, breach of contract claims, and tort claims, the court concluded that there was "no

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145. See generally *id.* See also *infra* notes 146–94 and accompanying text (discussing different courts' approaches to whistleblower claims).

146. 787 N.W.2d 513 (Mich. Ct. App. 2010).

147. *Id.* at 519.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 521 ("We recognize that it seems unjust that employees of religious institutions can be fired without recourse for reporting illegal activities, particularly given that members of the clergy, as well as teachers, are mandated reporters. However, to conclude otherwise would result in pervasive violations of First Amendment protections.").

152. 954 So.2d 640 (Fla. Dist. Ct. App. 2007).

153. *Id.* at 642–44.

154. *Id.* at 641.

reason why the ministerial exception should not be applied to the instant whistleblower claim.<sup>155</sup>

Beyond the statutory analogy, there is an argument for a deeper look into the validity of a minister whistleblower suit if one believes that whistleblower statutes affect the public interest and third parties in a way that employment discrimination and employment retaliation statutes do not.<sup>156</sup> During the Supreme Court oral argument in *Hosanna-Tabor*, Justice Sotomayor raised a challenging hypothetical concerning a minister-teacher who reports sexual abuse of a child to the government and is fired because of that report.<sup>157</sup> She queried how that situation would be resolved under the First Amendment and asked for a framework for resolving the case.<sup>158</sup> In other words, would the minister whistleblower receive employment protection for the report because the governmental interest in protecting children from sexual abuse outweighs the church's broad right to hire and fire its ministers free from governmental intrusion? In response to the question, *Hosanna-Tabor*'s counsel opined that such a whistleblower suit would still present a question as to the reason for the discharge, and the First Amendment should be interpreted to prevent the government from interfering with a religious organization's personnel decision in such a case.<sup>159</sup> However, counsel also stated upon further questioning that the law might create an exception for circumstances when the governmental concern is protecting children.<sup>160</sup> Counsel articulated the following theoretical framework for such a minister whistleblower suit:

[F]irst you have to identify the government's interest in regulation. If the government's interest is in protecting ministers from discrimination, we are squarely within the heart of the ministerial exception. If the government's interest is something quite different from that, like protecting the children, then you can assess whether that government interest is sufficiently compelling to justify interfering with the relationship between the church and its ministers. But the government's interest is at its nadir when the claim is: We want to protect these ministers as such. We want

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155. *Id.* at 643.

156. *See* Transcript of Oral Argument at 6–7, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

157. *Id.* at 4–5.

158. *Id.* at 5–6.

159. *Id.*

160. *Id.* at 6. *Hosanna-Tabor*'s counsel stated:

I understand that concern, and that was my second point, that if you want to carve out an exception for cases like child abuse where the government's interest is in protecting the child, not an interest in protecting the minister, when you get such a case, we think you could carve out that exception.

*Id.*



to tell the churches what criteria they should apply for . . . selecting and removing ministers.<sup>161</sup>

Justice Sotomayor’s minister whistleblower suit scenario based on termination for reporting child abuse came to life in a real case decided by an Indiana appellate court after the *Hosanna-Tabor* decision.<sup>162</sup> In *Ballaban v. Bloomington Jewish Community*,<sup>163</sup> a Jewish rabbi claimed the Jewish religious organization unlawfully terminated his employment because he reported alleged child abuse committed by a teacher in violation of an Indiana state child abuse reporting statute.<sup>164</sup> The statute made it a criminal offense to fail to report child abuse.<sup>165</sup> The Indiana appellate court raised the issue of whether the ministerial exception barred the rabbi’s whistleblower claim—framed as an unlawful employment termination claim for refusing to commit the criminal offense of failing to report child abuse—but then avoided deciding the matter.<sup>166</sup> The appellate court affirmed the trial court’s granting of summary judgment to the employer because the record demonstrated that the rabbi was fired for reasons unrelated to his report of the alleged child abuse.<sup>167</sup> A concurrence suggested that the ministerial exception would not bar the minister’s claim for unlawful termination because of a report of child abuse, and more broadly stated that the ministerial exception does not permit a church to fire a minister for refusing to commit a criminal act.<sup>168</sup>

The difficult case of a minister whistleblower suit alleging wrongful employment termination for reporting child abuse has the potential to create bad law if it were to create an unlimited exception to the ministerial exception.<sup>169</sup> Reasonable people should agree that the government has a strong societal interest in using civil laws (such as mandatory reporting statutes) to stop child abuse. Thus, a rule that precludes ministers from

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161. *Id.* at 6–7.

162. *Ballaban v. Bloomington Jewish Community*, 982 N.E.2d 329, 331–32 (Ind. Ct. App. 2013).

163. 982 N.E.2d 329 (Ind. Ct. App. 2013).

164. *Id.* at 331–33.

165. IND. CODE ANN. § 31-33-5-1 (West 2015) (requiring that an individual with reason to believe a child is abused make a report); *id.* § 31-33-5-2(a) (requiring that an individual notify the individual in charge of the entity where the alleged abuse is taking place); *id.* § 31-33-6-1 (noting those who may be immune from civil and criminal liability for child abuse accusations); *id.* § 31-33-6-2 (stating that immunity is not attached to those who act in bad faith or maliciously); *id.* § 31-33-6-3 (assuming that an individual making a child abuse report has acted in good faith).

166. *Ballaban*, 982 N.E.2d at 339.

167. *Id.*

168. *Id.* at 341–43 (Vaidik, J., concurring).

169. See generally Transcript of Oral Argument at 4–6, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553) (discussing the possibility of a “carve out” to the ministerial exception in situations such as child abuse reporting).

employment protection for making such reports may seem contrary to the behavior society would want to encourage. Nonetheless, other minister whistleblower suits would undoubtedly present societal interests that are less persuasive and deserving of protection, as not all interests furthered by whistleblower protection laws are equally meritorious.<sup>170</sup> Moreover, governments have other mechanisms beyond whistleblower protection laws for addressing the underlying public interest at stake in such cases.<sup>171</sup> In minister whistleblower cases other than the report of child abuse hypothetical, the balance would seem to tilt in favor of church autonomy in ministerial selection over a nebulous societal interest underlying the applicable whistleblower protection law.<sup>172</sup> Consider the following post-*Hosanna-Tabor* minister “whistleblower” case and how the appellate court analyzed it.<sup>173</sup>

In *Erdman v. Chapel Hill Presbyterian Church*,<sup>174</sup> the Washington Supreme Court faced a balancing act between a church’s autonomy to select its ministers without government interference and furtherance of an alleged institutional interest raised by a church employee whistleblower.<sup>175</sup> The case concerned the decision of the Chapel Hill Presbyterian Church in Gig Harbor, Washington (a part of the hierarchically structured U.S. Presbyterian Church) to dismiss a church executive after she made a variety of complaints against the Church’s Senior Pastor that were reviewed in accordance with the Church’s internal dispute resolution procedures and determined by the Church to be unfounded.<sup>176</sup> The Church’s Session Committee considered the executive’s grievances and determined that the plaintiff’s actions indicated that she “failed to follow the scriptural teaching concerning our relationships within the body of Christ.”<sup>177</sup> After the internal grievance procedure pursuant to the Presbyterian Church (U.S.A.)’s Book of Order ran its course, the church evidently decided to terminate the executive from her employment, and she subsequently sued the church in a civil court for negligent retention and supervision of the Senior Pastor.<sup>178</sup> The genesis of the dispute arose from the executive’s persistent complaints to the Senior Pastor and the Church that the Senior Pastor was allegedly jeopardizing the church’s tax-exempt status by receiving compensation

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170. See generally Nathan A. Adams IV, *Distinguishing Chicken Little from Bona Fide Whistleblowers*, 83 FLA. B.J. 100, 100–01 (2009) (distinguishing whistleblower claims that are genuine from those that are not).

171. See *supra* text accompanying notes 66–67.

172. See *supra* text accompanying notes 159–61; *infra* text accompanying notes 174–94.

173. See *infra* text accompanying notes 174–94.

174. 286 P.3d 357 (Wash. 2012).

175. See *id.* at 369.

176. *Id.* at 360–62.

177. *Id.* at 361–62.

178. *Id.*

from a tour company for publicizing international tours at religious sites within the Church.<sup>179</sup> The Senior Pastor and church investigated the matter and determined the concerns were without merit.<sup>180</sup> However, the rift in the working relationship between the two apparently was not healed and the executive claimed that the Senior Pastor physically intimidated her, verbally abused her, and harassed her after her complaints.<sup>181</sup> While the case was brought as a negligence suit, it can also be considered a whistleblower suit because the plaintiff alleged she was shedding light on an improper action by a church agent that affected an interest beyond her own—presumably the church’s interest in maintaining tax-exempt status—and that she deserved employment protection for that behavior.<sup>182</sup> In another sense, the alleged harassment implicates the executive’s own personal interest in bodily integrity.<sup>183</sup>

The *Erdman* court barred the executive’s negligent retention and negligent supervision claim from proceeding on First Amendment grounds.<sup>184</sup> From a doctrinal perspective, the majority and dissenting opinions are illuminating for a variety of reasons. The majority declined to decide whether the executive was a minister of the church for purposes of the ministerial exception because of the view that the record was not sufficiently developed to decide the matter under *Hosanna-Tabor*.<sup>185</sup> Not surprisingly, however, the policies underlying the basis for the ministerial exception and ecclesiastical abstention doctrines dominate the majority’s opinion.<sup>186</sup> The majority reasoned that consideration of the executive’s claims would unconstitutionally interfere with a church’s selection of its ministers, specifically retention and supervision of the Senior Pastor.<sup>187</sup> Both the Free Exercise and Establishment Clauses would be violated if the claims were decided by a civil court because a court’s insertion into the dispute would infringe the church’s right to select and supervise its clergy free from governmental interference and would entangle the state in determining the church’s religious beliefs and doctrines.<sup>188</sup> The church’s decision arising from the internal dispute resolution procedure demonstrated that the church considered scripture and church doctrine in arriving at a

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179. *Id.* at 360.

180. *Id.* at 362.

181. *Id.* at 361–62.

182. *See id.* at 360.

183. *See generally id.* at 363; *see also id.* at 372 (Fairhurst, J., concurring) (detailing allegations of physical harassment).

184. *Id.* at 363 (majority).

185. *Id.* at 362–63.

186. *See id.* at 369–70.

187. *See id.* at 368.

188. *See id.* at 365–66.

result.<sup>189</sup> The majority articulated that the “neutral principles of law” approach had no place in the case.<sup>190</sup> Finally, the majority agreed that the church’s decision should receive deference as a final decision of a “hierarchical religious organization.”<sup>191</sup>

The dissent argued that bringing the ministerial exception into the case was problematic given that there was no finding that the plaintiff-executive actually qualified as a minister.<sup>192</sup> By viewing the Senior Pastor and the church as alleged tortfeasors and the plaintiff as a non-minister, the dissent would have applied a neutral principles of law approach to the case.<sup>193</sup> However, because the church’s hierarchical body issued a decision in the matter, the dissent would have abstained and deferred to that decision.<sup>194</sup>

### C. Tort Claims

As the *Erdman* decision demonstrates, minister tort-based employment claims against congregations may bear a striking resemblance to statutory whistleblower claims. They are conceptually similar in that both involve mandated state regulation. Both types of claims may substantially interfere with church autonomy over its selection of ministers and improperly entangle the government in religious faith, beliefs, and doctrines.<sup>195</sup> Courts disagree whether “neutral principles of law” could properly resolve minister tort suits against religious institutions.<sup>196</sup>

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189. *See id.* at 368–69.

190. *Id.* at 368. The court stated:

[T]here is no room for the “neutral principles of law” approach in the case of civil tort claims brought against a church involving its authority to hire and control its ministers. Whether the situation involves religious reasons or interpretation of religious scripture or doctrine is not determinative of the First Amendment protections to the church. . . . A civil court is not entitled to interfere with or intervene in a church’s selection and supervision of its ministers . . . .

*Id.*

191. *Id.* at 369–70.

192. *Id.* at 372–73 (Chambers, J., dissenting in part).

193. *See id.* at 375–76.

194. *Id.*

195. *See, e.g.,* *Bilbrey v. Myers*, 91 So. 3d 887, 891 (Fla. Dist. Ct. App. 2012) (stating how some courts refuse to adjudicate most tort claims against religious institutions because the conduct leading to the claims is often entangled with church doctrine and administration); *Petruska v. Gannon Univ.*, 462 F.3d 294, 309 (3d Cir. 2006) (finding that a minister’s civil conspiracy, negligent supervision, and retention claims against a religious institution were barred on First Amendment grounds).

196. *Compare* *Erdman v. Chapel Hill Presbyterian Church*, 286 P.3d 357, 368 (Wash. 2012) (“[T]here is no room for the ‘neutral principles of law’ approach in the case of civil tort claims brought against a church involving its authority to hire and control its ministers.”), with *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171, 1177 (Md. 2011) (noting that “[n]umerous courts have recognized that tort claims based on harassment are not barred by the First Amendment,” and stating that such claims would not be barred insofar as they “do not implicate any employment decisions or religious beliefs”). *See also* *Weishuhn v.*

### III. A CATEGORICAL APPROACH TO MINISTER EMPLOYMENT LAWSUITS

Minister employment suits against churches should be placed into five categories with different analyses: (1) category one contains employment discrimination/employment retaliation claims; (2) category two contains breach of employment contract claims; (3) category three contains whistleblower claims; (4) category four contains tort claims; and (5) category five contains miscellaneous claims.

#### A. *Category One: Employment Discrimination and Retaliation Claims*

Category one is the *Hosanna-Tabor* category. For purposes of this categorization, *Hosanna-Tabor* is interpreted as barring federal and state employment anti-discrimination and anti-retaliation claims where a minister is suing the religious organization based on employment termination or adverse employment action. If a minister employment suit falls in this category, it is barred for the reasons expressed by the U.S. Supreme Court in the *Hosanna-Tabor* decision.

#### B. *Category Two: Breach of Employment Contract Claims*

Minister breach of employment contract claims should be decided on a case-by-case basis. A *per se* rule that would prohibit secular courts from hearing all minister breach of employment contract claims is too broad. Contract claims are fundamentally different from other statutory and common law employment law claims because such claims are freely negotiated between the minister and the church without a state mandate.<sup>197</sup> Churches could actually benefit if some contractual provisions between minister and church were enforceable in secular courts.<sup>198</sup> Some limited governmental intervention in interpreting contractual rights under the neutral principles of law that both parties voluntarily agreed to seems a prudent approach that would not substantially interfere with a religious organization's autonomy to select its ministers.<sup>199</sup> The problem with minister breach of employment contract cases is that many of them cannot be decided without the government evaluating the religious organization's beliefs and doctrine, and, therefore, presumably would still be barred on

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Catholic Diocese of Lansing, 787 N.W.2d 513, 522 (Mich. Ct. App. 2010) (noting that some minister "independent" tort-based employment actions against a church that do not concern the minister's termination are not foreclosed by the ministerial exception).

197. See *Petruska*, 462 F.3d at 310.

198. See *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 907 (Wis. 2012) (Bradley, J., dissenting) ("[I]f courts routinely dismissed this variety of contract claim, they might create an unnecessary roadblock hampering a church's free exercise ability to select its ministers. . . . Candidates for ministerial positions might be less inclined to enter into these types of employment arrangements in the first instance.").

199. See generally *Chopko & Parker*, *supra* note 1, at 300–01 (discussing some of the dangers of *not* permitting a ministerial exception).

ecclesiastical abstention grounds.<sup>200</sup> Take the *DeBruin* and *Kirby* cases as examples. *DeBruin* was correctly decided; *Kirby* was not.

In *DeBruin*, the minister and the church bargained for a one-year term employment agreement with protection for dismissal except for “good and sufficient cause, which shall be determined by the PARISH.”<sup>201</sup> The language gives one hundred percent of the legal judgment as to the basis for the dismissal to the church and, in reality, does nothing to take the minister out of at-will employment.<sup>202</sup> A plurality of the court made such a finding, although under different conceptions of the case.<sup>203</sup> But consider if the contract had just limited discharge to “good and sufficient cause.” From the church’s perspective, it will decide “good and sufficient cause” as to the minister’s job performance in the context of its own religious beliefs, traditions, and values.<sup>204</sup> Realistically, a secular civil court might have no way to apply neutral principles of secular law to second-guess the court’s judgment about a minister’s discharge that would not involve the state sticking its nose in an area of the church’s purview in which it has no business.<sup>205</sup> From an employment security perspective, it would be quite difficult to contractually overcome the presumption of at-will employment for a minister unless there was a *specific waiver* by the church of its First Amendment rights and *specific* agreement for a court to interpret the plain language under neutral secular principles.<sup>206</sup> These waivers pose questions because the First Amendment implicates structural interests in the relationship between church and state that go beyond the personal interests of the parties.

In *Kirby*, the appellate court stated that a secular court can apply neutral principles of law to consider whether a minister was legally fired under a

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200. See, e.g., *DeBruin*, 816 N.W.2d at 885 (“[T]he First Amendment grants religious institutions ‘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.’”) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 712 (2012)).

201. *Id.* at 883.

202. See *id.* at 892 (Crooks, J., concurring).

203. See *supra* notes 114–20 and accompanying text.

204. See *DeBruin*, 816 N.W.2d at 894 (Crooks, J., concurring).

205. See *id.* at 899 (Prosser, J., concurring). Justice Prosser wrote:

To prevail, *DeBruin* would have to persuade a court to enter into an internal parish conflict and second guess the parish’s decision. It would have to deny St. Patrick the power to make a decision that it explicitly reserved to itself. This cannot be squared with any reasonable view of religious liberty.

*Id.*

206. See generally *Alicea v. New Brunswick Theological Seminary*, 608 A.2d 218, 224 (N.J. 1992) (holding that “[a]lthough . . . a religious organization and adherent may, in their employment contract, affect the right to act or refrain from acting in conformance with religious strictures,” the court could not enforce provisions in a religious organization’s employment manual that “are both vague and clearly optional”).

supposedly unambiguous tenure agreement.<sup>207</sup> Recall that the tenure contract provided that “[t]he only grounds for dismissal of a tenured faculty member are moral delinquency, unambiguous failure to perform the responsibilities outlined in this Handbook, or conduct detrimental to the Seminary.”<sup>208</sup> The religious organization will apply language such as “moral delinquency” and “conduct detrimental to the Seminary” to its minister according to its religious beliefs, values, and faith tradition, which it should have the First Amendment right to do.<sup>209</sup> However, a secular court would likely improperly look to how similar language is interpreted by courts in the context of non-religious cases where professors were fired by universities for improper conduct.<sup>210</sup> The comparisons are inapt.

There are likely minister breach of employment contract claims that could be resolved without violating the First Amendment. For example, consider a breach of contract wage dispute claim where the minister argues that he or she had a contract for a certain wage and was not paid for his or her services according to the contractual terms.<sup>211</sup> This scenario is unlikely to involve or implicate religious doctrines, beliefs, administration, and values.

A final point regarding minister breach of employment contract claims: there can be no doubt that if a court is able to rule on such a claim, the remedy would have to be limited to damages as opposed to specific performance or reinstatement.<sup>212</sup> The First Amendment prohibits a secular civil court from telling a religious institution that it must reinstate a minister whose contractual employment rights were violated.<sup>213</sup>

### C. Category Three: Whistleblower Claims

Minister whistleblower claims are the type of employment law claims that, if permitted, pose the greatest danger to a religious institution’s autonomy over its selection of ministers. The societal interests that underlie whistleblower laws are varied and difficult to categorize in terms of importance and value. A rule that permits ministers to sue for whistleblower law violations would impinge on religious liberty in a significant way that

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207. See *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 618, 620 (Ky. 2014).

208. *Id.* at 603.

209. *Id.* at 616.

210. *See id.*

211. *See supra* note 72 and accompanying text.

212. *See Kirby*, 426 S.W.3d at 620.

213. *See id.* The court stated:

[W]e emphasize that [the minister] is seeking compensatory damages, not specific performance or reinstatement [for the alleged breach of the minister’s employment contract]. We think there is little doubt that reinstatement is an unavailable remedy in all actions because that *would* entail a secular court deciding who speaks for the church. That we cannot do.

*Id.*

would harm religious institutions and society.<sup>214</sup> Yet a rule that disallows all minister whistleblower claims may stretch too far in discouraging ministers from reporting harms suffered by third parties.

The appropriate response to this conundrum is to err on the side of protecting religious organizations' free exercise rights to select their religious leaders free from governmental intrusion.<sup>215</sup> A whistleblower law should only apply to a minister when the basis for the whistleblower law is in furtherance of a governmental interest that is so convincing that it would override the religious institution's usual dominant interest in plenary freedom to select its ministers.<sup>216</sup> Therefore, the First Amendment requires a strong presumption that the ministerial exception precludes federal and state statutory and common law whistleblower claims brought by ministers, which would bar the vast majority of minister whistleblower claims.<sup>217</sup> For most whistleblower laws, the underlying governmental interest being furthered is not sufficiently compelling to justify the intrusion on a religious institution's First Amendment right to select its ministers, and there are ways other than whistleblower laws that the government can further the interests that underly these laws.<sup>218</sup>

The strong presumption that the ministerial exception bars minister whistleblower claims<sup>219</sup> may be overcome by clear and convincing proof that the underlying whistleblower law exists to encourage or mandate the whistleblower to report criminal acts involving physical harm to third parties, to protect the whistleblower for refusing to commit criminal acts that would cause physical harm to third parties, or to encourage or mandate the whistleblower to report civil violations involving physical harm to third parties.<sup>220</sup> Under this standard, minister whistleblower suits based on employment termination for reporting child abuse would be permitted. A claim like that in *Erdman*, where a minister asserted that he or she was fired

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214. See generally *supra* notes 12–13 and accompanying text (discussing conflicts between accomplishing the goals of whistleblower laws and protecting the ministerial decisions of religious organizations).

215. See Berg, *supra* note 13, at 1613. Berg notes:

The ministerial exemption should rest fundamentally on the right of a church to choose its leaders and those who speak for it . . . . We keep courts out of such questions not just for the sake of doing so, but ultimately for the sake of substantive religious autonomy: when judges make theological determinations, they may distort and unjustifiably override a church's organization and self-understanding.

*Id.*

216. See *supra* note 161 and accompanying text.

217. See *supra* notes 146–55 and accompanying text.

218. See *supra* text accompanying notes 170–72.

219. See, e.g., *Weishuhn v. Catholic Diocese of Lansing*, 787 N.W.2d 513, 521 (Mich. Ct. App. 2010) (warning that First Amendment violations could result if the ministerial exception is not applied to whistleblower claims).

220. See *supra* note 168 and accompanying text.



merely for reporting an alleged civil violation involving church administration, would not be protected.<sup>221</sup>

Minister whistleblower claims based on reports of alleged civil violations of health and safety laws, financial and accounting practices, tax laws, and laws related to governmental administration would be barred under the First Amendment. Once again, the fundamental value is to protect religious institutions from governmental interference in ministerial selections so the institutions can shape their own faith and accomplish their own mission. Rarely should a minister whistleblower claim be permitted. If permitted, the minister should only be able to sue for damages and not reinstatement of his or her position.

#### *D. Category Four: Tort Claims*

A minister plaintiff can presumably dress up minister employment-based tort claims in a variety of ways. Such claims would be based on law imposing some sort of statutory or common-law duty on religious organizations with respect to how they make ministerial selection decisions. In general, the First Amendment should bar such claims for the same reasons that employment discrimination, retaliation claims, and whistleblower claims are barred.<sup>222</sup> However, minister employment-based claims where the minister is claiming the religious organization had a duty to protect the minister from physical harm suffered by organizational agents in the workplace could perhaps still be permitted without running afoul of the First Amendment.<sup>223</sup> This type of permitted claim would be consistent with suits brought by third-parties against religious organizations alleging that such organization had knowledge that their clergy were sexually abusing children, but did not take appropriate steps to end such abuse and protect third parties.<sup>224</sup> The legal responsibilities to protect employees and other individuals in the organization from physical harm are no different for religious organizations than others. Imposing such responsibilities on religious organizations is consistent with First Amendment principles.

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221. See *Erdman v. Chapel Hill Presbyterian Church*, 286 P.3d 357, 360, 372 (Wash. 2012).

222. See *supra* note 195 and accompanying text.

223. See, e.g., *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 960, 964, 969 (9th Cir. 2004) (holding that the ministerial exception did not bar a hostile work environment sexual harassment suit); *Bollard v. Cal. Province of Soc'y of Jesus*, 196 F.3d 940, 947, 950 (9th Cir. 1999) (holding that a priest's sexual harassment claim was not barred by the First Amendment).

224. See, e.g., *Malicki v. Doe*, 814 So. 2d 347, 360–61 (Fla. 2002) (holding that the First Amendment did not bar negligent hiring and supervision claims against a church based on clergy sexual abuse of a child).

### *E. Category Five: Miscellaneous Claims*

There are a variety of potential minister employment-based claims that should resist categorization. The law should evaluate whether they should be permitted under the First Amendment on a case-specific basis utilizing the various principles outlined in this Article.<sup>225</sup> For example, pension claims and wage payment claims would not seem to raise Free Exercise or Establishment Clause concerns because the issues litigated in those cases would presumably not affect how a religious institution selects its ministers and would not influence or impact a religious institution's religious doctrine, faith, or beliefs.

## IV. CONCLUSION

The founding generation was prescient in understanding the importance of constitutional protection for religious freedom and expression. It is self-evident that a religious institution's ability to select its leaders free from governmental interference is a core First Amendment right. The founding generation could not have foreseen how the modern state would pervasively regulate the employment relationship. Moreover, they could not have anticipated how such secular laws could impact religious organizations' decisions involving selection of religious leaders if such laws were allowed to apply to ministerial employment decisions. The pervasiveness of modern state regulation of the employment relationship is a given. The question is how to navigate the relationship between church and state at the intersection of religious organization missions, employment laws, and ministerial selection. Judicial interpretations of the First Amendment in minister employment suits should err on the side of providing as much room as possible for religious organizations to select their leaders free from governmental interference. Such breathing room will help religious institutions shape their faith and accomplish their mission. On many occasions, the cost of such breathing room is that secular employment laws may fall by the way side. The gain of religious freedom is generally worth that cost, but not always. The key is finding the right balance.

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225. See, e.g., *Verlee v. Astrue*, No 1:12-CV-45, 2013 WL 1760931, at \*8 (N.D. Ind. Feb. 4, 2013) (holding that awarding Social Security Administration disability benefits to a minister did not interfere with the church's right to select its ministers); *Tubra v. Cooke*, 225 P.3d 862, 872-73 (Or. Ct. App. 2010) (holding that a pastor's defamation suit against church officials was not barred by the First Amendment).