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Omnipotent Doctrine of Law: The Ministerial Exception After Our Lady of Guadalupe School v. Morrissey-Berru

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Omnipotent Doctrine of Law: The Ministerial Exception After *Our Lady of Guadalupe School v. Morrissey-Berru*

Madeleine Breaux[*]

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INTRODUCTION

Imagine finally achieving your goal of becoming an elementary school teacher at a Catholic school. After earning a bachelor's degree in liberal arts, pursuing more schooling to receive a teaching credential, and eventually working your way up the chain of command from tutor to long-term substitute teacher, you become a full-time teacher.[1] You receive praiseworthy commentary from your supervisory principal, noting your excellent promotion of a safe and caring space in which students can learn, your keen ability to cater to the different needs of different students, and your empathic methods of instilling and encouraging growth in students.[2] The lone negative comment expresses that a couple of students were off-task during the principal's classroom observation.[3] Six months later, you are diagnosed with breast cancer and must undergo grueling chemotherapy and progressive cancer treatment.[4] You break the news to your husband and young children, and then you must inform your boss that you will need time off to undergo treatment.

Within weeks of telling the administration of your diagnosis, the school terminates your contract, citing, in particular, "it was not fair . . . to have two teachers for the children during the school year."[5] Confused, scared, and angry, you file an employment discrimination suit, alleging disability discrimination under the Americans with Disabilities Act.[6] Before the suit reaches the trial stage, however, the school moves for summary judgment, citing the ministerial exception.[7] The court grants the motion, completely precluding a trial on the merits.[8] With no right to bring the action in court, you are now powerless to challenge the grounds of your termination. This is the story of Kristin Biel, the plaintiff in *Biel v. St.*

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1. Biel v. St. James Sch., 911 F.3d 603, 605 (9th Cir. 2018).
2. *Id.* at 606.
3. *Id.*
4. *Id.* at 605.
5. *Id.*
6. *Id.* at 606; *see* 42 U.S.C. § 12112(a).
7. *Biel*, 911 F.3d at 606. The ministerial exception is a judicially created operation of law that bars employees of religious organizations from bringing employment discrimination suits to court. *See* McClure v. Salvation Army, 460 F.2d 553, 555 (5th Cir. 1972).
8. *Biel*, 911 F.3d at 606.

James School.[9] Though she passed away a year before the Supreme Court granted certiorari on her case, her suit provides a modern-day example of the form and function of the ministerial exception.[10]

The ministerial exception is a judicially created legal doctrine that religious organizations can invoke to escape liability in employment discrimination cases filed by their ministers.[11] First created by the courts in 1972, the exception bars employees who are ministers of religious organizations from bringing employment discrimination suits against their employers.[12] Thus, the application of the ministerial exception to a specific case depends on whether the claimant is a minister of the religious organization.[13] Since the inception of the exception, courts have grappled with tailoring the scope of who qualifies as a minister.[14] Now, after the Supreme Court's recent 7–2 decision in *Our Lady of Guadalupe School v. Morrissey-Berru*, the ministerial exception essentially serves as a *carte blanche*, as the Court expanded the scope of "minister" to include any employee whose job serves a religious function within the institution.[15] This expansion allows religious employers to escape liability in employment discrimination suits filed by their teachers and any other employee whose role serves a religious function—impacting nearly every

9. *Id.* at 605. Biel's case was joined with Agnes Morrissey-Berru's employment discrimination case that was also out of the Ninth Circuit. *Id.*

10. Adam Liptak, *Job Bias Laws Do Not Protect Teachers in Catholic Schools*, *Supreme Court Rules*, THE N.Y. TIMES (July 8, 2010), https://www.nytimes.com/2020/07/08/us/job-bias-catholic-schools-supreme-court.html?searchResultPosition=2 [https://perma.cc/7BH7-D96K]. Biel's husband acted as substituted plaintiff after her passing. *Biel*, 911 F.3d 603.

11. Petruska v. Gannon Univ., 462 F.3d 294, 299 (3d Cir. 2006).

12. *McClure*, 460 F.2d at 560. The Fifth Circuit was the first court to hold that a ministerial exception existed and, in effect, barred ministers of religious organizations from bringing employment discrimination suits against their religious employers. *Id.*

13. *See* Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829 (6th Cir. 2015); Cannata v. Cath. Diocese of Austin, 700 F.3d 169 (5th Cir. 2012); E.E.O.C. v. Roman Cath. Diocese of Raleigh, N.C., 213 F.3d 795 (4th Cir. 2000); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007); Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. 2004).

14. *See* cases cited *supra* note 13.

15. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting. "Carte blanche" means "full discretionary power; unlimited authority." *Carte Blanche*, BLACK'S LAW DICTIONARY (11th ed. 2019).

American who is employed by a religious institution, organization, or school.[16]

As demonstrated by Kristin Biel's story, the ministerial exception's effects are potent. When applied, the ministerial exception completely bars plaintiffs from litigating their claims and prevents any inquiry into the allegedly discriminatory reasons behind religious organizations' employment decisions.[17] Courts frequently cite the First Amendment's Free Exercise and Establishment Clauses as the constitutional bases for the ministerial exception.[18] The Free Exercise Clause "protects the [religious employer's] act of a decision rather than a motivation behind it,"[19] and the Establishment Clause limits the degree that the government can interfere in church matters.[20]

Within the past decade, the Supreme Court granted certiorari on two ministerial exception cases.[21] In its holdings in *Hosanna-Tabor Evangelical School v. E.E.O.C.* and *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court expanded the powers bestowed to religious institutions through the ministerial exception, resulting in an unprecedented potency within the employment field.[22] This expansion contravenes the broad protections for workers and narrow protective exceptions for religious institutions that Congress guaranteed in Title VII of the Civil Rights Act of 1964 (Title VII). Title VII generally protects workers from employment discrimination based on "race, color, religion, sex, or national origin."[23] However, Title VII contains a creed exception that allows religious employers to discriminate based on religion in order to employ individuals who are also of that faith.[24] Additionally, Title VII carves out a curriculum exception for religious educational institutions.[25]

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16. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072.

17. *Roman Cath. Diocese*, 213 F.3d at 801 (quoting Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)).

18. *See* McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); *Roman Cath. Diocese*, 213 F.3d at 795; Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012).

19. *See Roman Cath. Diocese*, 213 F.3d at 801 (quoting *Rayburn*, 772 F.2d at 1169).

20. *See* U.S. CONST. amend. I; *see also* Lemon v. Kurtzman, 403 U.S. 602 (1971).

21. *See Hosanna-Tabor*, 565 U.S. at 181; *see also Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049 (majority opinion).

22. *See Hosanna-Tabor*, 565 U.S. at 181; *see also Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

23. 42 U.S.C. § 2000e-2(a)(1).

24. *Id.* § 2000e-1(a).

25. *See id.* § 2000e-2(e)(2). The curriculum exception explicitly states:

Because of the Court's recognition of a very broad ministerial exception to the employment discrimination law's protections and exceptions carefully laid out by Congress, the Supreme Court in *Our Lady of Guadalupe School* committed judicial overreach.[26]

With the Court's broadened definition of "minister" in *Our Lady of Guadalupe School*, the ministerial exception will undoubtedly serve as an impermeable barrier between litigants seeking justice for discrimination claims and their chance for remedy.[27] The decision essentially strips over 100,000 secular teachers at religious private schools of their right to be free from employment discrimination, and in the case that discrimination does occur, they also lose the right to a remedy.[28] Additionally, the Court's focus on the function of the employee in determining who is a minister for the purposes of the ministerial exception exposes even more employees of religious organizations to unchecked discrimination.[29] The decision contravenes the protections for workers and exceptions for religious employers that Congress laid out in Title VII. To resolve this issue, the Supreme Court needs to revisit the issue of who is considered a minister by granting certiorari in a ministerial exception case and ruling to retract its sweeping definition of "minister."

Part I of this Comment will provide a brief background of Title VII and the ministerial exception from its inception to the present. Part II will analyze the majority, concurring, and dissenting opinions in *Our Lady of Guadalupe School v. Morrissey-Berru* and will show how many lives are

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> (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Id.

26. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

27. *Id.*

28. Liptak, *supra* note 10.

29. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2081. For example, Justice Sotomayor notes, "the rights of countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions" are now subject to discrimination based on any animus on the part of the employer. *Id.*

affected by the Supreme Court's newly espoused definition of "minister." This Part will explain that the Supreme Court has effectively confiscated rights to trial and remedy from an entire demographic once protected by Title VII and other federal employment discrimination laws, changing the landscape of employment discrimination law and promulgating a culture of permissible and unchecked bias in the workplace culture of religious institutions. Part III will examine, in the context of the ministerial exception, the competing interests of the United States' system of separation of church and state laid out in the First Amendment and Title VII. This Part will illustrate American society's desire for the branches of government to protect its citizens from discrimination and will examine the current state of judicial and legislative power within the American system of checks and balances regarding Constitutional interpretation and enforcement. Part IV will assert that the Supreme Court committed judicial overreach in its expansion of the ministerial exception and will propose that if the Court grants certiorari on another ministerial exception case, the Court should adopt a refined *Hosanna-Tabor* factor analysis.[30]

I. TRACING THE MINISTERIAL EXCEPTION

The United States Fifth Circuit Court of Appeals first created the ministerial exception in 1972.[31] Following the Fifth Circuit's precedent, every circuit court adopted the exception, with varying tests for determining who constitutes a minister, into its own jurisprudence.[32] This

30. *See generally* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012). A rather significant obstacle stands in the way of this proposed solution. Due to the current composition of the Supreme Court, it is unlikely that the Court will grant certiorari on another ministerial exception case or narrow an exception that favors religious freedom over anti-discrimination rights any time in the near future.

31. McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

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

lack of a streamlined definition for "minister" led the Supreme Court to grant certiorari on a ministerial exception case in 2012, forty years after the exception's initial creation.[33]

A. The Inception of the Exception

Though its roots lie in the First Amendment, the ministerial exception is a judicially created doctrine of law, first recognized by the Fifth Circuit in the case of *McClure v. Salvation Army*.[34] The plaintiff in *McClure*, Billie McClure, completed a two-year training period to become a minister in the Salvation Army.[35] The Salvation Army proclaims to be "an evangelical part of the universal Christian Church."[36] When the Salvation Army fired her, McClure brought an employment discrimination suit and alleged Title VII violations, particularly that she was fired due to her complaints filed with the Equal Employment Opportunity Commission.[37] Additionally, she alleged that she received lesser compensation and benefits than similarly situated male ministers.[38] In response, the Salvation Army filed a motion to dismiss for lack of jurisdiction, claiming that because it qualifies as a religious organization under § 702 of Title VII, any claims of employment discrimination in the relationship between a church and its ministers are exempt from the discrimination laws.[39]

At the time, § 702 stated, "This subchapter shall not apply . . . to a religious corporation, association, education 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."[40] The Salvation Army argued that applying Title VII standards for employment discrimination cases between a religious institution and its officers would constitute an

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

34. *McClure*, 460 F.2d at 560.

35. *Id.* at 555.

36. *Our Mission Statement*, THE SALVATION ARMY, https://www.salvationarmyusa.org/usn/about/ [https://perma.cc/JQ8T-J6N6] (last visited Oct. 6, 2020). Further, the Salvation Army's "message is based on the Bible. Its ministry is motivated by the love of God. Its mission is to preach the gospel of Jesus Christ and to meet human needs in His name *without discrimination*." *Id.* (emphasis added).

37. *About the E.E.O.C.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/about-eeoc-2 [https://perma.cc/MX8M-KV95] (last visited Oct. 6, 2020).

38. *McClure*, 460 F.2d at 555.

39. *Id.* at 553, 555; 42 U.S.C. § 2000e-1(a) (2018).

40. Section 702 of Title VII, 42 U.S.C. § 2000e-1(a) (now Section 703).

intrusion into the First Amendment's Free Exercise and Establishment Clauses.[41] In response, McClure argued that the legislative history and statutory language demonstrate that Congress intended a narrow interpretation of the exception granted to religious organizations in § 702.[42] Therefore, Congress intended § 702 to merely allow religious institutions to select employees of a certain faith to carry out the private institution's work, not discriminate against hired employees or fire them for any discriminatory reason.[43]

To make its decision, the Fifth Circuit considered the metaphorical wall between church and state created by Supreme Court jurisprudence and the Constitution.[44] The *McClure* court ultimately determined that, though it may be difficult to decide which issues can breach the wall of separation, the general rule is that this wall should remain "high and impregnable."[45] The court emphasized that the burden to prove a necessity to encroach, even in the slightest, upon the rights guaranteed in the Free Exercise Clause and breach the "impregnable" wall is extraordinarily high.[46] In order to infringe upon the First Amendment, a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate" must be shown, and "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[47]

The Fifth Circuit held that Congress did not intend for Title VII to regulate or interfere in any way with the employment relationship between a church and its ministers, who serve as its lifeblood.[48] Thus, the Fifth Circuit was the first to adjudge explicitly that the government should not be allowed to interfere in the employment decisions a religious employer makes regarding its "ministers."[49] The Fourth Circuit court in *Rayburn v. General Conference of Seventh Day Adventists* later formally named this exception "the ministerial exception."[50] Throughout the years, each of the federal circuit courts recognized the legal validity of the ministerial

41. *McClure*, 460 F.2d at 556.
42. *Id.* at 558.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 406 (1963)).
48. *Id.* at 560.
49. *Id.*
50. Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985).

exception,[51] and the Supreme Court ultimately recognized the exception in 2012.[52]

B. The Ministerial Exception Merits Supreme Recognition

The Supreme Court first recognized the ministerial exception in *Hosanna-Tabor Evangelical School v. E.E.O.C.*[53] In *Hosanna-Tabor*, the Court examined whether the Free Exercise and Establishment Clauses of the First Amendment bar employment discrimination suits when the plaintiff is a titled minister of a religious organization.[54] Hosanna-Tabor, a Lutheran school, classified its teachers as either "lay"[55] or "called."[56] To become a "called teacher," the teacher must meet specific academic-training criteria outlined by the school.[57] If the criteria are met, a congregation "calls" the teacher, who then receives the formal title of "Minister of Religion, Commissioned."[58]

Cheryl Perich, the plaintiff, taught at Hosanna-Tabor in various capacities during her tenure.[59] Hosanna-Tabor initially hired Perich as a lay teacher, but after she successfully performed the requisite academic training, Hosanna-Tabor bestowed upon Perich the esteemed title of "Minister of Religion, Commissioned."[60] Among her duties as a "called teacher," Perich taught courses in secular subjects, including math, language arts, social studies, science, gym, art, and music.[61] She also taught one course in religion four times weekly, brought her students to a chapel service each week, and led prayers and devotion with her students daily.[62]

In 2004, Perich was diagnosed with narcolepsy and therefore took a leave of absence for disability at the beginning of that school year.[63] When she asked the school administration to return to her job with a doctor's

51. *See* cases cited *supra* note 32.
52. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012).
53. *Id.*
54. *Id.* at 176.
55. "Lay" means someone not holding a place in the clergy or not holding an ecclesiastical position. *See Lay*, MERRIAM-WEBSTER (2020).
56. *Hosanna-Tabor*, 565 U.S. at 176.
57. *Id.*
58. *Id.*
59. *Id.* at 177.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

note clearing her for work, the principal informed Perich that she had been replaced and offered her "peaceful release."[64] Though Perich showed up to work on the first day she was medically cleared to do so, the congregation fired her, essentially for not quietly resigning.[65] After Perich filed a charge with the EEOC, the EEOC brought a discrimination claim against Hosanna-Tabor.[66] Hosanna-Tabor moved for summary judgment, claiming that the ministerial exception applied in this suit due to the employment relationship between a religious institution and its minister.[67] The district court ruled in Hosanna-Tabor's favor, but the Sixth Circuit reversed, stating that the duties of a "called teacher" were essentially the same as a lay teacher, thereby disqualifying Perich from being considered a minister under the ministerial exception.[68] Hosanna-Tabor appealed, and the Supreme Court granted certiorari.[69]

The Court first analyzed the history that served as the backdrop for the creation of the First Amendment to emphasize the importance and sacredness of religious freedom.[70] The Court then applied the religion clauses of the First Amendment to the issue, espousing that "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[71] The Court found that because employment decisions within a religious organization serve an essential role in the promulgation of faith, the judicially-created ministerial exception was a constitutionally valid doctrine.[72]

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64. *Id.* "The congregation voted to offer Perich a 'peaceful release' from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher." *Id*. at 178.

65. *Id.* at 179. Perich would not leave the premises without garnering written documentation that she had shown up for work. Afterwards, the principal called her and warned her of the likely imminent termination. In response, Perich mentioned she intended to sue. The school board chairman called Perich's actions "regrettable" and scolded her for "insubordination and disruptive behavior." *Id*.

66. *Id.*

67. *Id.*

68. *Id.*

69. *See id.* at 181.

70. *Id.* at 182; *see* Geary v. Visitation of Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993); Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); E.E.O.C. v. Miss. Coll., 626 F.2d 477, 479, 485 (5th Cir. 1980); E.E.O.C. v. Fremont Christian Sch., 781 F.2d 1362, 1369–70 (9th Cir. 1986).

71. *Hosanna-Tabor*, 565 U.S. at 183.

72. *Id.* at 190.

Further, the Court refused to formulate a rigid test to determine whether the ministerial exception applied in the *Hosanna-Tabor* case.[73] Instead, it utilized a totality-of-the-circumstances approach to resolve whether Perich's role was that of a minister.[74] The Court analyzed four factors—"the formal title given 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"—and determined Perich was a minister under the ministerial exception.[75] The Court assigned error to the Sixth Circuit in three areas: the Court of Appeals (1) failed to acknowledge the import of Perich's formal title, (2) gave too much emphasis to the fact that lay and called teachers performed essentially the same duties, and (3) gave too much consideration to Perich's secular duties.[76] The Court also noted that the ministerial exception does not only serve to bar employment discrimination cases when the plaintiff is fired for a religious reason; the exception also "ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,' . . . is the church's alone."[77] The Court conceded that its decision was largely made in deference to the First Amendment, and that to maintain autonomy, the church must govern its own internal matters.[78]

After the *Hosanna-Tabor* decision, legal scholars pondered how the ministerial exception would evolve and whether the Court would eventually provide a rigid test to determine who constituted a minister.[79] Nearly a decade later, the Supreme Court revisited the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*.[80]

II. MORE POTENCY, MORE PROBLEMS: THE MINISTERIAL EXCEPTION AFTER *OUR LADY OF GUADALUPE SCHOOL V. MORRISSEY-BERRU*

In July of 2020, the Supreme Court modified the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*.[81] In its 7–2

73. *Id.*
74. *Id.*
75. *Id.* at 191.
76. *Id.*
77. *Id.* at 194–195 (citing Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952)).
78. *Id.* at 196.
79. *See, e.g.*, Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 974 (2012).
80. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
81. *See id.*

decision, the Court expanded its interpretation of who is considered a minister for the purposes of the ministerial exception to include any employee who serves any religious purpose.[82] Under the new definition of "minister," hundreds of thousands of secular teachers at private religious schools lose the protections guaranteed to them by federal employment discrimination laws.[83] The ministerial exception produces extraordinary effects through the power it grants to religious employers—the ability to discriminate based on any animus without any repercussion or check.[84]

A. The Divine Mystery of Minister Debunked: Our Lady of Guadalupe School v. Morrissey-Berru

The Supreme Court granted certiorari and consolidated two Ninth Circuit cases in *Our Lady of Guadalupe School v. Morrissey-Berru*.[85] One of the plaintiffs, Agnes Morrissey-Berru, taught fifth and sixth graders all subjects, including religion, at Our Lady of Guadalupe School (OLG), a Catholic school in the diocese of Los Angeles.[86] Morrissey-Berru obtained a bachelor's degree in English and earned a California teaching credential, and during her employment at OLG, she attended mandatory prayer services and continuing religious-education classes.[87] OLG's mission was rooted in the Catholic faith, and per the handbook, the school required teachers to exemplify the faith and values of Catholicism to students.[88] OLG's religious mission played an integral role in the school's hiring and firing decisions, all of which a parochial priest oversaw.[89] Morrissey-Berru's duties included bringing her students to confession, participating in weekly masses, teaching religion out of a textbook, and beginning and ending the school day in prayer.[90] The school prioritized ensuring that teachers incorporated Catholic values in all of their classroom activities and subjects, and therefore, performance reviews by OLG faculty focused on this criterion.[91]

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82. *See id.* at 2069.
83. *See id.* at 2072 (Sotomayor, J., dissenting).
84. E.E.O.C. v. Roman Cath. Diocese of Raleigh, N.C., 213 F.3d 795, 802 (4th Cir. 2000) (quoting Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)).
85. *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2060 (majority opinion).
86. *Id.* at 2056.
87. *Id*.
88. *Id.* at 2057.
89. *Id.*
90. *Id*.
91. *Id*.

In 2014, OLG demoted Morrissey-Berru from full-time instructor to part-time, and then in 2015, OLG declined to renew her annual contract.[92] Subsequently, Morrissey-Berru filed an age-discrimination claim against the school with the EEOC, alleging that the school fired her in order to hire a younger teacher in her place.[93] Though the school cited a secular reason for Morrissey-Berru's termination—inadequate classroom performance—OLG also raised the ministerial exception in its attempt to dismiss the proceeding.[94] In using the *Hosanna-Tabor* totality-of-the-circumstances test, the Ninth Circuit found that Morrissey-Berru's lack of formal ministerial title, lack of extensive religious education, and lack of a public portrayal as a minister weighed more heavily than her religious duties as a teacher.[95] Therefore, she did not qualify as a minister under the ministerial exception.[96] OLG appealed the Ninth Circuit's decision, and the Supreme Court granted certiorari.[97]

The other plaintiff in *Our Lady of Guadalupe School* was Kristin Biel.[98] Biel started employment at St. James Catholic School (St. James) as a long-term substitute first-grade teacher; subsequently, St. James hired her as a full-time lay fifth-grade teacher.[99] Biel received her bachelor's degree in liberal studies, earned a teaching credential, and partook in a religious conference during her employment at St. James.[100] While at St. James, Biel taught all subjects to her students, including religion.[101] Her other duties included attending mass and praying daily with her students, preparing students for the sacraments and mass, and teaching religion out of a textbook selected by the principal.[102] St. James's handbook for teachers resembled OLG's, requiring that teachers embody Catholic faith and principles, incorporate Catholicism into all subject matters, and guide students in their own spiritual growth, particularly by preparing them for the sacraments.[103] Moreover, St. James used the same standards and

92. *Id.* at 2057–58.
93. *Id.* at 2058. Morrissey-Berru filed specifically under the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. § 621). *Id.*
94. *Id.*
95. *Id*.
96. *Id.*
97. *See id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id*.
103. *Id.* at 2059.

criteria as OLG in its teacher observation reports, which were performed by the principal.[104]

After her first year of teaching fifth grade full-time, St. James declined to renew Biel's contract.[105] Biel alleged that St. James fired her because a few months prior to her termination she disclosed to the principal her breast cancer diagnosis, which would require her to take time off for treatment.[106] She filed a charge with the EEOC and then brought suit against St. James, alleging discrimination based on disability.[107] St. James alleged that Biel's termination was due to poor performance and the burden her absence would place on her students.[108] Soon after Biel filed suit, St. James invoked the ministerial exception.[109] The district court granted summary judgment in favor of St. James based on the ministerial exception.[110] However, on appeal the Ninth Circuit reversed, citing the totality-of-the-circumstances analysis used by the Supreme Court in *Hosanna-Tabor*.[111] The Ninth Circuit found that "Biel lacked Perich's [the claimant in *Hosanna-Tabor*] 'credentials, training, [and] ministerial background,'" and therefore, she did not qualify as a minister for purposes of the ministerial exception.[112] St. James appealed the decision of the Ninth Circuit, and the Supreme Court granted certiorari.[113]

1. Majority: 2020 Model of Minister

The Supreme Court's majority opinion, authored by Justice Alito, begins by explaining that the First Amendment's Free Exercise and Establishment Clauses grant the power to decide matters "of faith and doctrine" solely to religious organizations.[114] Further, the Court explained that this Constitutional authority grants religious institutions true autonomy to make their own decisions about internal governance without the intrusion of the courts so that their missions of faith remain untouched

104. *Id*.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id*.
111. *Id.*
112. *Id.* (citing Biel v. St. James Sch., 911 F.3d 603, 608 (9th Cir. 2018)).
113. *Biel*, 911 F.3d 603; Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 Fed. App'x. 460 (9th Cir. 2019).
114. *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2060 (2020) (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch., 565 U.S. 171, 186 (2012)).

by the government.[115] After re-affirming its recognition of the ministerial exception as an exemption that bars litigants, if considered ministers, from adjudicating their employment discrimination claims against their religious employers in a court, the Supreme Court turned to the issue of who is considered a minister under the ministerial exception.[116]

In the beginning of its analysis, the majority explored the Court's prior decision in *Hosanna-Tabor*, including the four factors the Court weighed in deciding it.[117] First, the Court analyzed the first two factors—the formal title of minister and substance of that title—and explained that these factors are not universally applicable.[118] Various faiths use different terminology to distinguish those in its hierarchy, and the use of this factor would allow secular courts to decide which titles of the faith are more important than others—a role that should be reserved for the religious organization.[119] Further, any inquiry into the religious significance and substance behind the title would constitute an intrusion into church autonomy.[120]

Next, the Court noted the consideration used in *Hosanna-Tabor* of the educational experience and background of the employee.[121] The Court contemplated that this factor could create misleading results, as the religious credentials differ between an elementary school teacher and a professor, yet their function in furthering the church's mission may very well be the same.[122] Therefore, under the majority's reasoning these factors are not determinative of whether the ministerial exception is applicable.[123] Essentially, the Court reiterated its reasoning that the *Hosanna-Tabor* factors merely constituted a flexible, totality-of-the-circumstances analysis rather than a rigid test.[124] The Court emphasized that it created the *Hosanna-Tabor* factors for the purpose of analyzing the relevant circumstances related to that particular plaintiff, Cheryl Perich, in that particular case.[125]

115. *Id*.
116. *Id.*
117. *Id.* at 2063.
118. *Id*.
119. *Id.* at 2064.
120. *Id.*
121. *Id.*
122. *Id.*
123. *See id.*
124. *Id.* at 2062.
125. *Id.*

The Court did, however, emphasize the importance of one of the *Hosanna-Tabor* considerations—an employee's duties.[126] The Court asserted that, rather than taking into account the factors from *Hosanna-Tabor*, the true takeaway of the decision should have been that any private religious school teacher's job is essential to the continuance of any and all faiths, and therefore, the exception should apply to those who teach in religious schools.[127] The Court claimed that central to the holding in *Hosanna-Tabor* was the fact that educators in religious schools serve to inculcate faith-filled values into their students and further the mission of the church.[128] In summary, the Court determined that although the factors used to decide *Hosanna-Tabor* were relevant to that specific case, those factors may not be relevant or significant in other cases regarding the ministerial exception.[129] The majority concluded that the Ninth Circuit erred by interpreting the ministerial exception much too narrowly when rigidly applying the *Hosanna-Tabor* factors to Morrissey-Berru's and Biel's cases.[130]

2. Concurrence: Complete Deferential Approach

In his concurrence, Justice Thomas proposed that the First Amendment's Free Exercise and Establishment Clauses demand that secular courts give complete deference to a religious employer's good faith claims that a certain employee is ministerial.[131] In support, he argued that the secular courts do not possess the requisite knowledge and understanding of the traditions, doctrine, and dogma of each faith.[132] Therefore, he continued, the initial step in determining whether or not an employee qualifies as a minister is an ecclesiastical question in itself and not an issue for the secular courts to decide.[133]

To further his argument, Justice Thomas noted that the organization and structure of various faiths differ greatly.[134] In addition to hierarchical differences, he asserted that religious beliefs, functions, and roles also

126. *Id.* at 2064.
127. *Id.*
128. *Id.*
129. *Id.* at 2063.
130. *Id.* at 2068.
131. *Id.* at 2069–70. (Thomas, J., concurring) (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012) (Thomas, J., concurring)).
132. *Id.* at 2070.
133. *Id.*
134. *Id.*

differ among faiths, and these differences would create difficulty for a secular court to objectively decide who is a minister in a particular faith.[135] Ultimately, Justice Thomas argued that the determination of ministerial status is an ecclesiastical question because it is a question that involves religious doctrine.[136] He added that the First Amendment "commands civil courts to decide [legal] disputes without resolving underlying controversies over religious doctrine."[137] In summary, Justice Thomas emphasized that intrusion by the courts into the issue of who constitutes a minister would create an entanglement between church and state, which is precisely what the First Amendment aims to prevent.[138]

3. Dissent: Exponential Potential for Abuse

Writing in dissent, Justice Sotomayor argued that employment discrimination protections should be generally applicable, while exceptions, such as the ministerial exception, should be narrowly applicable in scope.[139] She asserted that the United States' "pluralistic society requires religious entities to abide by generally applicable laws."[140] In support of her argument, Justice Sotomayor demonstrated that secular impositions on religious institutions do exist and include paying Social Security taxes, abiding by child-labor laws, and abiding by minimum-wage laws.[141] She added that Congress implemented protective measures into legislation to preserve the autonomy of religion within the nation.[142] For reference, she provided the example of the Americans with Disabilities Act, which contains an exemption that allows a religious organization to give preference to a candidate for employment whose faith aligns with that of the organization.[143]

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135. *Id.*
136. *Id.*
137. *Id.* (citing Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969)).
138. *Id*.
139. *Id.* at 2071 (Sotomayor, J., dissenting).
140. *Id.* at 2072.
141. *Id.*; *see* United States v. Lee, 455 U.S. 252, 256–61 (1982); Prince v. Massachusetts, 321 U.S. 158, 166–70 (1944); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303–06 (1985); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 603–05 (1983). Entities that discriminate based on race are denied nonprofit status. Bowen v. Roy, 476 U.S. 693, 699–701 (1986).
142. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072.
143. *Id.*

Additionally, Justice Sotomayor argued that the way in which the Court interpreted the ministerial exception in *Our Lady of Guadalupe School* increases the exception's potency, fortifying a legacy of condoning animus in employment relations between a religious organization and its employees.[144] The exception grants an employer the ability to "discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their 'ministers,' even when the discrimination is wholly unrelated to the employer's religious beliefs or practices."[145] Justice Sotomayor argued that because of the exception's potency and the potential for absurd results, the Court should have followed the traditional totality-of-the-circumstances approach that the Court endorsed in *Hosanna-Tabor* and that many federal courts used to determine who is a minister.[146] Looking to the exception's foundation, Justice Sotomayor noted that although courts have recognized that the ministerial exception serves to protect a religious organization's ability to select its own leaders without government intrusion, common employment law regulations still cover most employees.[147] Justice Sotomayor expressed that, after the majority's broad interpretation, the exception penetrates the protective shield over lower-level employees hired by religious organizations and institutions.[148]

Justice Sotomayor reasoned that interwoven into case law from the Third, Fourth, Fifth, and Ninth circuits regarding the ministerial exception is a common thread: an understanding that if a teacher at a private school, even if teaching the faith, identifies as a member of the laity,[149] he would not be considered a minister.[150] She also revisited the decisions of the lower-level courts in which they looked to the quality of leadership the

144. *Id.*

145. *Id.* (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 194–95 (2012)).

146. *Id.*; *see also* Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 n.3 (8th Cir. 1991).

147. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072; *see also* Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985); Hankins v. Lyght, 441 F.3d 96, 117–18 n.13 (2d Cir. 2006).

148. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2073.

149. "Laity" means "the people of a religious faith as distinguished from its clergy." *Laity*, MERRIAM-WEBSTER (2020).

150. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2073; *see also* Geary v. Visitation of Blessed Virgin Mary Par. Sch., 7 F.3d 324 (3d Cir. 1993); Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); E.E.O.C. v. Miss. Coll., 626 F.2d 477, 479, 485 (5th Cir. 1980); E.E.O.C. v. Fremont Christian Sch., 781 F.2d 1362, 1369–70 (9th Cir. 1986).

employee possessed to determine whether someone was a minister for the purposes of the ministerial exception.[151]

Additionally, Justice Sotomayor endorsed *Hosanna-Tabor*'s "context specific" analysis for determining ministerial status.[152] In *Hosanna-Tabor*, the Supreme Court articulated that the ministerial "exception applies to someone with a leadership role 'distinct from that of most of [organizations'] members,' someone in whom '[t]he members of a religious group put their faith,' or someone who 'personif[ies] the organization's 'beliefs' and 'guide[s] it on its way.'"[153] Justice Sotomayor critiqued the *Our Lady of Guadalupe School* majority's broad interpretation of who constitutes a minister, comparing it to a "mechanical . . . trigger" and a "rubber stamp" for discrimination based on animus to persist and perhaps expand in the employment field.[154] In summary, Justice Sotomayor endorsed the Ninth Circuit's approach to defining ministerial status through the *Hosanna-Tabor* factors, asserting that the majority's failure to use this totality-of-the-circumstances test defied reason.[155]

Lastly, Justice Sotomayor warned that the expansion of the scope of the ministerial exception will inevitably lead to severe consequences.[156] She also insinuated that the majority's decision was influenced, in part, by the public opinion that the Court partakes in religious discrimination.[157] She alleged that in an attempt to rectify this public opinion, the majority chose to take an extreme and sweeping stance, "permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs."[158] She concluded that the ministerial exception, as it stands in its expanded interpretation, allows religious employers the power to discriminate against whomever they consider their ministers based not only on religious beliefs but also based on animus, far too powerful of an ability for any institution.[159]

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151. *See Geary*, 7 F.3d 324; *Dole*, 899 F.2d 1389 (4th Cir. 1990); *Miss. Coll.*, 626 F.2d at 479, 485; *Fremont Christian Sch.*, 781 F.2d at 1369–70.

152. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2076.

153. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188, 191, 196 (2012).

154. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2076.

155. *Id.* at 2082.

156. *Id.*

157. *Id.*; *see generally* Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246, 2257 (2020).

158. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2082.

159. *See id.*

B. Effects of the Expansion

In 1972, the Fifth Circuit created the ministerial exception as a means of safeguarding the ability of churches to elect their own leaders without governmental interference, thereby maintaining church autonomy.[160] Forty years later, in 2012, the Supreme Court affirmatively recognized the ministerial exception and addressed the issue of who is considered a minister under the exception, but the Court failed to formulate an official set of factors to determine an employee's ministerial status.[161] The 2020 Supreme Court decision in *Our Lady of Guadalupe School* fully departed from the narrow confines of the Fifth Circuit's original creation of the ministerial exception, which was designated for church leaders. The Court broadened the exception's applicability, relying entirely on a religious employee's function and ruling that all religious school teachers are ministers for the purposes of the ministerial exception.[162] Under this sweeping holding, even lay teachers at religious institutions, schools, and organizations are barred from bringing employment discrimination suits to court due to the ministerial exception.[163]

From the moment the Court decided *Our Lady of Guadalupe School*, more than 100,000 secular teachers at private schools effectively lost their right to bring an employment discrimination suit to court.[164] Now, religious employers may freely discriminate for any reason against these teachers, who have no right to suit and no remedy for their employers' mistreatment.[165] Additionally, the far-reaching effects of this decision carry the possibility of impacting more secular employees of religious organizations who perform any sort of religious function, even if teaching or preaching the faith is not their primary role.[166] To name a few, this decision could affect "coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel," and many more hired by religious employers.[167] Not only was the Court's decision in *Our*

160. McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972).

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

162. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049, 2064 (majority opinion). Over time, the exception has been continually broadened by courts. *See supra* discussion Parts I–II.

163. *See id.*

164. Liptak, *supra* note 10.

165. *Id.*

166. *Id.*

167. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting).

Lady of Guadalupe School far-reaching, but the decision could be viewed as one of judicial overreach.

The Constitution vests specific power in the legislative and judicial branches in order to create a system of checks and balances.[168] Congress's designated role is to promulgate law,[169] and Congress previously passed Title VII, which provides both protections for workers as well as protections and exceptions for religious organizations and institutions to discriminate in certain employment circumstances.[170] Additionally, Congress passed other employment discrimination legislation in the Age Discrimination in Employment Act, the Civil Rights Act of 1991, and the Americans with Disabilities Act to further protect American employees from discrimination.[171] In *Our Lady of Guadalupe School*, the Supreme Court essentially created legislation that circumvents Title VII and the employment discrimination statutes.[172]

Historically, when the Supreme Court made rulings within the employment discrimination realm, Congress acted to essentially overturn the Court's rulings through legislation.[173] However, because *Our Lady of Guadalupe School* presents, fundamentally, a constitutional issue, Congress is constrained by the Court's interpretation, and potential remedies are limited due to separation of powers.[174]

III. CONGRESS VERSUS COURTS

The Constitution vests the power of interpretation of the law in the judicial branch.[175] In creating and maintaining the validity of the ministerial exception, the Supreme Court relied on the separation-of-

168. *See* U.S. CONST. art. I, § I; *see also* U.S. CONST. art. III, § I.

169. *Our Government: The Legislative Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/the-legislative-branch/ [https://perma.cc/V9JX-UBDU] (last visited May 29, 2021).

170. *See* 42 U.S.C. § 2000e-1.

171. 29 U.S.C. § 621; 42 U.S.C. §§ 1981, 12101.

172. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

173. For example, Congress passed the Lily Ledbetter Fair Pay Act in direct response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co*., effectively overturning the Court's ruling regarding timely notice in compensation employment discrimination cases. *See* Lily Ledbetter Fair Pay Act of 2009, Pub. L. No 111-2, 123 Stat. 5; Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007).

174. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997); *see also infra* Section III.D for discussion of *City of Boerne v. Flores*.

175. *See* U.S. CONST. art. III, § I.

church-and-state principles guaranteed in the First Amendment, particularly, the Establishment Clause.[176] In relying so heavily on the Establishment Clause, the Court neglected to consider Congress's role in promulgating employment discrimination law as well as special circumstances that circumvent the constraints of the First Amendment regarding the separation of church and state.[177]

A. Congress: Set the Standard with Title VII

Congress promulgated Title VII as part of the Civil Rights Act in 1964.[178] The Civil Rights Act was Congress's attempt to eradicate discrimination within the United States, and as the name insinuates, the Act passed in response to the Civil Rights Movement of the 1960s.[179] Title VII set the standard for employment discrimination law within American workplaces while also providing certain caveats that allow employers such as religious organizations a limited right to discriminate.[180]

1. Fight for Your Rights: The Civil Rights Act of 1964

The Civil Rights Act of 1964 prohibits employment discrimination based on "race, color, religion, sex, or national origin."[181] Congress drafted and passed this legislation during a very distinct era of American history. The Civil Rights Movement of the 1960s arose out of the African American community's thirst for justice and equality after experiencing centuries of oppression, discrimination, and continued segregation.[182] America saw an unprecedented amount of effective and targeted activism, including protests, boycotts, and marches as people fought for recognition of their most basic rights.[183]

In response, Congress passed one of the most prolific pieces of civil rights legislation in American history.[184] Among its initiatives, the Civil

176. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060 (majority opinion).
177. *See id.* at 2072 (Sotomayor, J., dissenting).
178. 42 U.S.C § 2000e-2(a)(1) (2018).
179. *See generally* 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 1:4 (2020).
180. *See* 42 U.S.C § 2000e-2(a)(1).
181. *Id*.
182. *Civil Rights Movement*, ADL, https://www.adl.org/education/resources/backgrounders/civil-rights-movement#about-the-movement [https://perma.cc/X9F4-UMYG] (last visited January 27, 2021).
183. *Id.*
184. *Id.*

Rights Act of 1964 integrated schools and public facilities, prohibited discrimination in public places, and prohibited employment discrimination under Title VII.[185] From its inception, the Act's purpose was to serve the compelling interest of providing equal opportunity and equal treatment of both individuals and groups that faced repeated oppression.[186] At the time the Civil Rights Act of 1964 was drafted, Congress expressed the goal to eliminate discrimination as its "highest priority."[187] The Civil Rights Act's creation and implementation served as an attempt to remedy a "legacy of mistreatment" of minority groups in America and resulted largely from social activism.[188]

2. Title VII of the Civil Rights Act of 1964

Title VII protects workers from employment discrimination based on "race, color, religion, sex, or national origin."[189] Congress included exceptions within Title VII for religious employers to discriminate in certain circumstances.[190] Originally, the House version of the Act included a proposed § 703, which is strikingly similar to the scope and function of the modern-day ministerial exception.[191] That version would have granted religious employers the unchecked power to discriminate for any reason against their employees.[192] Congress purposefully did not pass § 703 in its broad proposed form, but rather Congress confined it to an exception for religious employers to discriminate based on religion only.[193] This exception is known as the creed exception, which allows religious

185. *Id.*

186. *See generally* 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 1:4 (2020).

187. E.E.O.C. v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1280 (9th Cir. 1982) (quoting S. REP. NO. 88-872, pt. 1, at 11, 24 (1964)).

188. *See generally* 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 1:4 (2020).

189. 42 U.S.C. § 2000e-2(a)(1).

190. *See* 42 U.S.C. §§ 2000e-1 to 2000e-2.

191. *Pac. Press Publ'g Ass'n*, 676 F.2d at 1276 (quoting H.R. REP. NO. 88-914, at 10 (1963), reprinted in EEOC, Legislative History of Title VII and XI of Civil Rights Act of 1964 at 2010 (1968) ("1964 Legis. Hist.") 1964 U.S.C.C.A.N. 2355).

192. *Id.*

193. 42 U.S.C. § 2000e-1(a) ("This subchapter 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.").

employers to discriminate based on religion in order to employ individuals who are of the employer's faith.[194]

Additionally, Title VII carves out a curriculum exception for religious educational institutions to hire candidates who are members of the faith of the organization.[195] Title VII also contains a bona-fide-occupational-qualification exception.[196] In claiming this exception, an employer may discriminate if it can show a reasonable necessity for the discriminatory employment preference.[197] The bona-fide-occupational-qualification exception may be invoked by any employer, including a religious employer.[198] The creed exception, curriculum exception, and bona fide occupational qualification exception serve as narrow but effective exceptions that religious organizations may invoke in order to discriminate for the purposes of ensuring that they fulfill their religious missions.

Traditionally, Title VII would have protected those who are now affected by the ministerial exception under *Our Lady of Guadalupe School*.[199] In defense of an employee's employment discrimination claims, the religious employer could have utilized any of the three exceptions that Title VII carved out to "justify" its discrimination. In those situations, however, a court would rule on the validity of this justification and thus provide a check on the discriminatory power of the employer.[200] Instead, in broadening the definition of "minister," the Supreme Court expanded the scope and unchecked discriminatory power of the omnipotent ministerial exception.[201]

B. Court: Disregarded the Standard and Depended on the First Amendment

When the circuit courts and Supreme Court faced ministerial exception cases, they failed to give credence to the standards that Congress

194. *Id.*

195. *See id.* § 2000e-2(e)(2).

196. *See id.* § 2000e-1(e)(1).

197. *Bona Fide Occupational Qualification (BFOQ)*, WESTLAW GLOSSARY, https://content.next.westlaw.com/Glossary/PracticalLaw/I0f9fe64eef0811e28578f7ccc38dcbee?transitionType=Default&contextData=(sc.Default)&firstPage=true [https://perma.cc/TV6U-HSPF] (last visited January 27, 2021).

198. *See* 42 U.S.C. § 2000e-1(e)(1).

199. *Id.* § 2000e-2(a)(1).

200. *See id.* §§ 2000e-1(a), 2000e-2(e)(2), 2000e-1(e)(1).

201. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2080 (2020) (Sotomayor, J., dissenting).

set regarding employment discrimination law in Title VII.[202] Rather, courts used the First Amendment's Free Exercise and Establishment Clauses to justify broadening the demographic affected by religious institutions' unchecked discriminatory power in the ministerial exception.[203] Particularly, in ministerial exception cases, courts quite often allude to the "impregnable" wall separating church and state in America.[204]

1. The Wall: Constitutionally Compelled

The Constitution vests in the judicial branch the power to interpret the law.[205] In *Our Lady of Guadalupe School*, the Supreme Court relied on the First Amendment in its reasoning for expanding the definition of "minister."[206] The First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[207] The two clauses in the First Amendment are commonly referred to as the Establishment Clause and Free Exercise Clause.[208] The Establishment Clause precludes "excessive government entanglement with religion," and the Free Exercise Clause "protects not only the individual's 'right to believe and profess whatever religious doctrine one desires' . . . but also a religious institution's right to decide matters of faith, doctrine, and church governance."[209] Both clauses are relevant to the reasoning behind the ministerial exception, but the Court particularly focused on the implications surrounding the Establishment Clause.[210]

The Establishment Clause's purpose is to prohibit the government from establishing a religion; its historical basis is prohibition of a state-sponsored church.[211] The Supreme Court devised a three-factor analysis in *Lemon v. Kurtzman* to determine what constitutes an establishment of

202. *See* 42 U.S.C. § 2000e-2(e)(2).
203. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060–61.
204. *See* McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).
205. *See* U.S. CONST. art. III, § I.
206. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060, 2069.
207. U.S. CONST. amend. I.
208. *See generally id.*
209. Petruska v. Gannon Univ., 462 F.3d 294, 306, 311 (3d Cir. 2006); U.S. CONST. amend. I.
210. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060.
211. *First Amendment and Religion*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion [https://perma.cc/UFQ9-G3HK] (last visited February 24, 2021).

religion within the confines of the Establishment Clause.[212] The three factors outlined in *Lemon* are (1) if the primary purpose of the assistance is secular in nature, (2) if the effect is not one to advance or endorse religion, and (3) if there is no excessive entanglement between church and state.[213] The ministerial exception raises concern in regard to *Lemon*'s excessive-entanglement factor, as the secular government's interference in the relationship between a religious employer and employee could be construed as entangling matters of church and state.[214] Courts analogize the degree of separation needed between the two entities and warranted by the First Amendment to an "impregnable" wall.[215] Though the Constitution guarantees the separation of church and state in America, the Court failed to duly acknowledge that the metaphorical wall that separates the two competing interests is, in fact, not impenetrable.[216]

2. Illusion of Impregnability

Courts compared the separation needed to safeguard against the threat of entanglement between church and state to a "high and impregnable" wall.[217] However, years of jurisprudence show that though this wall stands in principle, it is far from impenetrable.[218] Secular courts have repeatedly enforced mandatory regulations on religious institutions and organizations, such as the requirements to pay Social Security taxes, follow minimum-wage laws, and abide by child-labor laws.[219] Therefore,

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212. Lemon v. Kurtzman, 403 U.S. 602 (1971). This factor analysis is colloquially referred to as the *Lemon* test. *Id.* Though it remains precedent, *Lemon*'s applicability has recently been severely questioned by the Supreme Court, creating some ambiguity in the law. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (in which the Court expressed disdain for the "shortcomings" of, but did not explicitly overrule, the *Lemon* test; in written reasons, six justices between two opinions called for *Lemon*'s demise).

213. *Id.* at 612–13.

214. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069 (majority opinion).

215. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).

216. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2080 (Sotomayor, J., dissenting).

217. *McClure*, 460 F.2d at 558.

218. *See* United States v. Lee, 455 U.S. 252, 256–61 (1982); Prince v. Massachusestts, 321 U.S. 158, 166–70 (1944); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303–06 (1985); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 603–05 (1983). Entities that discriminate based on race are denied nonprofit status. Bowen v. Roy, 476 U.S. 693, 699–701 (1986).

219. *See Lee*, 455 U.S. at 256–61; *Prince*, 321 U.S. at 166–70; *Tony & Susan Alamo Found.*, 471 U.S. at 303–06.

though the interest of continuing and guarding the principle of separation of church and state is well-grounded, courts can and have intruded when there is a compelling governmental interest at stake and the issue reaches a level of paramount interest.[220] Congress expressed, with great import, the government's interest in eradicating discrimination and bias through its promulgation of the Civil Rights Act of 1964.[221] Arguably, America's current social climate features a resurgence of many aspects of the Civil Rights Movement of the 1950s and 1960s.[222] This resurgence of activism in America indicates that there is a compelling interest in modern society for more protections against discrimination rather than less.[223]

C. America's Current Social Climate

The year 2020 ushered in a new wave of social justice activism lead by citizens around the nation and particularly on social-media platforms.[224] Arguably, this era of activism parallels the social climate that served as the backdrop of the Civil Rights Act of 1964.[225] Recently, *Politico* interviewed Clayborne Carson, a professor of American history at Stanford University and the director of the Martin Luther King Jr. Research and Education Institute, who participated in the Civil Rights Movement protests in the 1960s.[226] Carson observed that today's protests are larger in size compared to those that occurred in the 1960s.[227] He attributed this increase to the involvement of America's younger generations joining together to actively

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220. *See Our Lady of Guadalupe Sch*., 140 S. Ct. 2049; *McClure*, 460 F.2d at 558 (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

221. E.E.O.C. v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1280 (9th Cir. 1982) (citing S. REP. NO. 88-872, pt. 1, at 11, 24 (1964)). Congress, through enacting Title VII, considered prohibiting discrimination as a "highest priority." *Id.*

222. *See* Kalhan Rosenblatt, *A summer of digital protest: How 2020 became the summer of activism both online and offline*, NBC (Sept. 26, 2020), https://www.nbcnews.com/news/us-news/summer-digital-protest-how-2020-became-summer-activism-both-online-n1241001 [https://perma.cc/9YRN-EXR7]; *see also* Valerie Strauss, *This is my generation's civil rights movement*, THE WASHINGTON POST (June 6, 2020), https://washingtonpost.com/education/2020/06/06/this-is-my-generations-civil-rights-movement/ [https://perma.cc/J58H-6N9K].

223. *See* Rosenblatt, *supra* note 222; *see also* Strauss, *supra* note 222.

224. *See* Rosenblatt, *supra* note 222.

225. *See* Ruairi Arrieta-Kenna, *Why a Civil Rights Veteran Thinks the Protests are More Like 1963 than 1968*, POLITICO (Sept. 3, 2020), https://www.politico.com/news/magazine/2020/09/03/civil-rights-historian-clayborne-carson-protests-interview-408029 [https://perma.cc/2L2B-HPMH].

226. *See id.*

227. *See id.*

stop discrimination and social injustice in our society.[228] He emphasized that if the nation implements or fails to rectify unjust social policies and laws, "people are right to reject [those policies]. That's not a democracy."[229] The perpetuation of discrimination and the broadening of the power held by religious employers to discriminate constitutes an unjust social policy. The resounding voice of Americans who fight for social justice and equality echoes that sentiment as they urge for more protections for those against whom discrimination persists in American society.[230] Lastly, Carson asserted that though protests may directly arise from police brutality or a specific incident, there is a larger goal to be realized that supersedes these underlying issues—the true destination of the movement will provide a more sweeping change in American policy and society and is still yet to be realized.[231]

Carson's words emphasized that the Civil Rights Movement, though timelined in history books as occurring in the 1950s and 1960s, continues into present day society.[232] In this revived era of social and political activism, Americans urge for more protections against discrimination.[233] Certainly, the goal of protecting citizens from discrimination constitutes a compelling interest, as Congress itself articulated that eliminating discrimination was its "highest priority" when drafting and promulgating the Civil Rights Act of 1964.[234] This priority remains prevalent as evidenced by the subsequent federal employment discrimination laws Congress enacted, such as the Age Discrimination in Employment Act of 1967 and Americans with Disabilities Act of 1990.[235] Since today's social justice activism is more widespread than it was in the mid-1900s,[236] the government's interest in eradicating discrimination is arguably more prevalent and compelling than it was when Congress passed the Civil Rights Act of 1964.

The decision in *Our Lady of Guadalupe School* contravenes the momentum and ideology that many Americans hold, as demonstrated by the recent surge of social activism, and fails to consider this compelling-

228. *See id.*
229. *Id.*
230. *See id*.
231. *See id.*
232. *See id.*
233. *See id.*
234. E.E.O.C. v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1280 (9th Cir. 1982) (citing S. REP. NO. 88-872, pt. 1, at 11, 24 (1964)).
235. 29 U.S.C. § 621; 42 U.S.C. § 12101.
236. *See* Arrieta-Kenna, *supra* note 225.

interest argument.[237] The Court's expansion of the definition of "minister" for the purposes of the ministerial exception diminished the rights of American citizens who teach in private schools and other employees who perform any religious function.[238] *Our Lady of Guadalupe School* serves as just one piece of the puzzle in a greater power struggle between religious and individual freedom.

In the summer of 2020, the Supreme Court decided two more cases that feature the battle between religious and individual freedom. In June of 2020, the Court announced its landmark decision in *Bostock v. Clayton County*.[239] The Court consolidated three cases that centered on the issue of whether Title VII protects gay and transgender people from discrimination in the workplace.[240] In a 6–3 decision, the Court found that gay and transgender people are protected under Title VII's ban on sex discrimination.[241] The majority noted that the holding may cause employers to worry about violating their religious beliefs and that these "worries about how Title VII may intersect with religious liberties are nothing new."[242] To combat this fear, the majority cited Congress's statutory exception for religious organizations under § 2000e-1(a), the Religious Freedom Restoration Act of 1993, and the ministerial exception as doctrines that religious employers can utilize to preserve their religious liberty.[243] However, the majority conceded that issues about the interplay between religious liberty and Title VII will continually need to be addressed in future cases.[244] Regardless of that imminent future issue, the Court held that Title VII's ban on employment discrimination based on sex also provides protection from termination based on an employee being gay or transgender.[245]

In July of 2020, the Supreme Court decided *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.[246] The case's central issue

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237. *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (Sotomayor, J., dissenting); *see* Arrieta-Kenna, *supra* note 225; *see also* Strauss, *supra* note 222.

238. *See Our Lady of Guadalupe Sch*., 140 S. Ct. at 2082 (Sotomayor, J., dissenting).

239. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

240. *See id.*

241. *See id.*

242. *Id.* at 1754.

243. *Id.*

244. *Id.*

245. *See id.*

246. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020). This was a 7–2 decision. *Id.*

was whether government departments rightly granted an exemption from the contraceptive mandate[247] in the Patient Protection and Affordable Care Act of 2010 to employers with religious objections.[248] The Court decided that the plain language of the statute, which neither provided an explicit list of services nor specifications on departmental creation of exceptions, allows for governmental departments to create both standards of care and moral exemptions.[249] Conversely, the dissent argued that a broadening of the exemptions is both unauthorized and inconsistent with Congress's intent to grant employees equal access to healthcare, including access to contraceptives.[250] Regardless, the Court ruled that the agencies could promulgate regulations that permit private employers with religious objections to deny women contraceptive coverage under the Affordable Care Act.[251]

The Supreme Court's review of these cases, including *Our Lady of Guadalupe School*, demonstrates the Court's continued interest in and priority of determining the boundaries of separation of church and state.[252] While struggles with boundaries between individual freedom and religious separation occur within the courtroom, outside of the courtroom an American resurgence in grassroots social and political activism has gained traction in 2020.[253] America's goal to eradicate discrimination should remain unchanged.[254] The present era overwhelmingly demonstrates a surge of political and social activism that is larger in number and scope than the Civil Rights Movement.[255] Eradicating discrimination when it undoubtedly occurs constitutes a compelling interest that warrants intrusion into the religious sphere.[256]

Congress provided teachers and other employees of religious institutions the right to be free from employment discrimination when it passed Title VII of the Civil Rights Act of 1964 and other federal

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247. After Congress passed the Patient Protection and Affordable Care Act of 2010, the government required certain employers to provide contraceptive coverage for their employees. *Id.*

248. *Id*.

249. *Id.* at 2386.

250. *Id.* at 2041 (Ginsburg, J., dissenting).

251. *Id.* at 2386 (majority opinion).

252. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Bostock v. Clayton Cnty., 140 S. Ct 1731 (2020); *Little Sisters of the Poor*, 140 S. Ct. 2367.

253. *See* Arrieta-Kenna, *supra* note 225.

254. *See id.*

255. *See id.*

256. *See id.* at 2082.

employment discrimination laws.[257] The Supreme Court committed judicial overreach in *Our Lady of Guadalupe School* by usurping the rights that Title VII provided to these employees. Additionally, Title VII already provided caveats for religious employers to discriminate in certain circumstances before the Court's overbroad expansion of the ministerial exception.[258]

D. The Bottom Line: Who Can Act?

Though the intent of Congress in promulgating Title VII is rather clear, the primary issue in *Our Lady of Guadalupe School* revolves around the First Amendment as interpreted by the Court, which does not factor in Congress's intentions or statutory interpretations of Title VII.[259] *City of Boerne v. Flores* rather famously illustrates what powers the Supreme Court permits Congress to exercise when a constitutional issue arises.[260]

The Court in *City of Boerne* considered whether Congress's Religious Freedom Restoration Act (RFRA) was a proper exercise of its Fourteenth Amendment authority.[261] Section 5 of the Fourteenth Amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[262] The Court espoused that Congress merely had a remedial rather than substantive power under the Fourteenth Amendment.[263] In its reasoning, the Court alluded to *Marbury v. Madison* when it stated, "When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is."[264] In sum, even though Section 5 of the Fourteenth Amendment explicitly gives Congress the authority to "enforce" the Fourteenth Amendment, the Supreme Court ruled that only the Court can "interpret" the Constitution.[265] Further, Congress's enforcement power is limited to enforcing only the Court's interpretations, not its own.[266]

257. *See* 42 U.S.C. §§ 2000e-1, 1981, 12101; 29 U.S.C. § 621.
258. *See* 42 U.S.C. § 2000e-1.
259. *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
260. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).
261. *Id.* at 2162.
262. U.S. CONST. amend. XIV, § 5.
263. *City of Boerne*, 117 S. Ct. at 2167.
264. *Id.* at 2172; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
265. *See City of Boerne*, 117 S. Ct. at 2172.
266. *See id.*

Critics of *City of Boerne* found fault with the Court's decision for inaccurate interpretations of the historical record and criticized the Court for interpreting Congress's authority so narrowly while expanding its own power.[267] Regardless of criticism, the Court further restricted Congress's Fourteenth Amendment power in *City of Boerne*'s progeny, such as *Board of Trustees of the University of Alabama v. Garrett*.[268] Scholars coined the ideological trend and vision seemingly embodied in the Court's decisions the "juricentric Constitution."[269] This ideology "imagines the judiciary as the exclusive guardian of the Constitution."[270] Under the juricentric Constitution ideology, the executive and legislative branches are empowered only to enforce the Supreme Court's constitutional interpretations.[271]

Though *Our Lady of Guadalupe School* hinges on the First Amendment, not the Fourteenth, it can be argued *a fortiori*[272] that the Court is once again expanding and reaffirming its own power as the "exclusive guardian of the Constitution." Nonetheless, with the current composition of the Court making a successful challenge to *City of Boerne* and its progeny unlikely, the Supreme Court is the only body able to act with regard to the ministerial exception due to its First Amendment implications.[273]

Therefore, the Supreme Court should act to restore protections against discrimination to teachers and other employees. The power of religious employers or any entity to freely discriminate is an omnipotent power that the Court should bestow sparingly. The Court should rectify its overbroad interpretation of the ministerial exception by granting certiorari to another ministerial exception case. In doing so, the Court should narrowly tailor the definition of "minister." To accomplish this goal, the Court should revisit and revise the factors the Court devised in *Hosanna-Tabor*.

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267. *See* Rachel Toker, *Tying the Hands of Congress*—City of Boerne v. Flores*, 117 S. Ct. 2157 (1997)*, 33 HARV. C.R.-C.L. L. REV. 273 (1998); *see also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997).

268. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003).

269. *Id.*

270. *Id.*

271. *Id.*

272. "A fortiori" means "[b]y even greater force of logic; even more so it follows." *A Fortiori*, BLACK'S LAW DICTIONARY (11th ed. 2019).

273. See *supra* discussion Sections I.A–B & II.A, in which the origins and evolution of the ministerial exception are discussed.

IV. *HOSANNA-TABOR* FACTORS: REVISITED AND REVISED

As Justice Sotomayor remarked in her dissent in *Our Lady of Guadalupe School*, the *Hosanna-Tabor* factors merited consideration in the Court's determination of who is considered a minister.[274] The majority declined to consider all of the *Hosanna-Tabor* factors due to First Amendment concerns, particularly the threat of excessive entanglement.[275] However, as the Court has stated and shown, the wall separating church and state and safeguarding against entanglement between the two entities may be pierced if a compelling interest to do so is demonstrated.[276]

Ultimately, the Court missed the mark in both *Hosanna-Tabor* and *Our Lady of Guadalupe School* by overvaluing and undervaluing certain relevant factors. As previously discussed, in *Our Lady of Guadalupe School*, the majority solely focused on the employee's religious functions within the religious organization, thereby undervaluing other relevant factors.[277] This function factor was just one of the four relevant factors the Court originally espoused in *Hosanna-Tabor*.[278] In *Hosanna-Tabor*, however, the Court overvalued the employee's formal title and the employee's own belief of her role, which are both subjective in nature.

Accordingly, the Court should revisit and revise the original *Hosanna-Tabor* factors. The Court in *Hosanna-Tabor* articulated four factors to determine whether the plaintiff was a minister: (1) her formal title, (2) the substance of that title, (3) her subjective belief of her role and her use of title, and (4) her religious functions within the religious organization.[279] The revised test would include an objective leadership analysis, religious function analysis, and subjective belief of the employee's faith. This revision would allow courts to conduct case-by-case inquiries to ensure the sensibility and justice of the determination of which employees of religious organizations are ministers for the purpose of the ministerial exception. This case-by-case factual inquiry would somewhat differ from the original *Hosanna-Tabor* factors, as it includes a leadership nexus as well as a consideration of the employee's own subjective beliefs regarding his or her faith and belief systems.

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274. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2076 (2020) (Sotomayor, J., dissenting).

275. *See id.* at 2069 (majority opinion).

276. *See supra* discussion Section III.B.2.

277. *See supra* discussion Section II.A.1.

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

279. *Id.* at 192.

A. Trinity of Factors

First, the Court should implement a variation on the formal-title factor from *Hosanna-Tabor* to determine who is considered a minister for the purposes of the ministerial exception. This factor, in its original form, is flawed because titles vary across faiths due to differing hierarchical structures.[280] For example, imams, pastors, and rabbis all fulfill rather lofty leadership positions within their respective faith communities, but each faith designates a different title to those in its sanctified leadership positions.[281] To resolve this possible issue, the factor should be revised to involve an objective analysis. This objective analysis would help avoid extraneous, unnecessary prying into doctrine. This can be done by looking at the organization's chain of command rather than doctrinal practices and belief systems. For example, the Court should examine the number of superiors to whom the employee reports. The fewer superiors above the employee, the more likely the formal-title factor is applicable and the more likely the employee qualifies as a minister. Conversely, the fewer subordinates below the employee, the more likely she is not a leader within the faith. Ultimately, the courts would have discretion to make a good faith determination of this factor, and the factor should include an objective analysis of the individual employee's level of leadership.

Second, the Court should still consider the employee's functions. The Court should derive this factor directly from the list of *Hosanna-Tabor* factors. Similar to the majority's conclusion in *Our Lady of Guadalupe School*, the employee's duties should play a significant role in the determination of ministerial status and should accordingly be kept as a factor in this revised list of considerations. However, it should not be the sole determining factor.[282]

Third, the Court should revisit the original factor from *Hosanna-Tabor* of whether the employee held herself out to be a minister.[283] This factor in *Hosanna-Tabor* is limited as it concerns a subjective belief of ministerial status. The Court should revise this factor to be more centrally focused on whether the person was a member of the faith of the organization. As Justice Ginsburg posited during oral argument for *Our Lady of Guadalupe School*, it is a bit anomalous and nonsensical that someone not of the faith could serve as a true minister of that faith, embody

280. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063 (2020) (majority opinion).

281. *See id.* at 2064.

282. See *infra* Section V.B for illustrations of this factor in action.

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

the values of that faith, and instill those values in his or her students when her beliefs do not align as such.[284]

Courts should weigh these factors utilizing a totality-of-the-circumstances approach. This test ensures a narrower ministerial exception than the current test as defined in *Our Lady of Guadalupe School*.[285] Though some factors might be deemed to encroach upon the religious sphere, the compelling interest of protecting American workers from unchecked discrimination justifies such an intrusion.[286]

B. Hypotheticals

The following hypotheticals demonstrate the proposed revised *Hosanna-Tabor* factors in action. The hypotheticals take place in Louisiana, a state in which 84% of adults identify as religious.[287] Louisiana's private school enrollment numbers rank 5% higher than that of the nation's average.[288] Therefore, because of the highly saturated Louisiana religious landscape, private schools in the state require a greater number of faculty and staff.[289] These statistics imply that the recent decision in *Our Lady of Guadalupe School* impacts a large demographic of Louisianans; therefore, Louisiana is a realistic backdrop for the following hypotheticals.

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284. Transcript of Oral Argument at 9, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (No. 19-267). Justice Ginsburg questioned, "How can a Jewish teacher be required to model Catholic faith, counter to his or her own beliefs - - how can a Jewish teacher be a Catholic minister?" *Id.*

285. *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2069.

286. *See* discussion *supra* Part III.

287. *Adults in Louisiana: Religious composition of adults in Louisiana*, PEW RSCH. CTR.: RELIGIOUS & PUB. LIFE, https://www.pewforum.org/religious-landscape-study/state/louisiana/ [https://perma.cc/3WR8-ZC28] (last visited Mar. 23, 2021).

288. *Louisiana K-12 Public Education: Governance, Demographics, and Enrollment*, TULANE UNIV.: COWEN INST. FOR PUB. EDUC. INITIATIVES, (Apr. 2009), http://www.thecoweninstitute.com.php56-17.dfw3-1.websitetestlink.com/uploads/5-LouisianaK-12Education_002-1505880743.pdf [https://perma.cc/NQW9-E4KN]. Louisiana's private school enrollment makes up 16% of total K-12 enrollment, which is higher than the nationwide average of 11%. *Id.*

289. *Id.*

1. Joseph

Joseph is hired by a Catholic school in Lafayette, Louisiana, to fill the position of religion curriculum coordinator. In this new position, Joseph develops, implements, and oversees annual religious training for employees as well as regulates how Catholicism is taught to the school's students in grades K-12. Additionally, Joseph chooses a "virtue of the year" for the school and confers with the diocese directly regarding matters of doctrine. Per the school's requirement that the religion curriculum coordinator be a confirmed member of the Catholic faith, Joseph disclosed his Catholic faith on his employment application and in his interview with administration. Is Joseph a minister who falls under and whose claim is barred by the ministerial exception?

This hypothetical is rather simple in analysis. First, a religion curriculum coordinator falls rather high on the leadership ladder of a school microcosm. People in this role are often directly overseen by a diocese or church parish, and then they in turn instruct and implement how the faith will be taught to the students in the school. Joseph would be directly overseen by the diocese, placing him high in the chain of command while also placing him in charge of a great number of people. Therefore, the leadership nexus would likely be met. Next, a religion curriculum coordinator's entire role is one of fortifying and implementing doctrinal teachings within the school. Lastly, Joseph is a member of the Catholic faith. This prong is satisfied without any further inquiry into the depth of his beliefs or whether or not he would be considered a practicing Catholic. Therefore, the ministerial exception would bar any employment discrimination suit in the event that the school fires Joseph.

Suppose Joseph was not a Catholic. Joseph holds a position of leadership as the curriculum coordinator, oversees a number of other employees, and is directly overseen by the diocese. In addition, his entire job function is related to the teaching of the faith. These two factors would outweigh the fact that Joseph does not consider himself to be a minister of the faith in the totality-of-the-circumstances analysis. Therefore, the courts should still consider Joseph a minister for the purposes of the ministerial exception.

2. Mary

Mary is a first-grade teacher at an Episcopal school in New Iberia, Louisiana. She teaches secular courses as well as daily teachings in the Episcopal faith. She brings the students to Episcopalian services and leads the students in prayer. Mary is not Episcopalian; rather, she is a non-

denominational Christian. In her role as a teacher, she holds a leadership position only in regard to her students and her teaching assistant. Otherwise, she is a subordinate to her principal, curriculum coordinator, and priest. Would Mary fall under the category of minister for the purposes of the ministerial exception?

First, Mary does serve as a leader in some respects, but she is near the bottom of the chain of command within her school microcosm. Therefore, the leadership nexus would likely not be met. Next, Mary does fulfill religious duties in the form of teaching the faith and bringing the children to service. However, she also fulfills secular duties. Next, she is a non-denominational Christian and does not identify as Episcopalian. This would fail the third prong. Given this set of facts and analyzing them using the refined *Hosanna-Tabor* factors, Mary would likely not constitute a minister for the purposes of this exception.

Now, suppose Mary is an eighth-grade Episcopalian religion teacher within the school instead. Mary's role as an eighth-grade religion teacher is solely to teach the Episcopalian faith to her students. She develops lesson plans under the guidance and subject to the approval of the religious curriculum coordinator. Suppose all the other facts about Mary remain unchanged. This set of facts proposes a more challenging analysis. From an objective standpoint, the leadership nexus prong is likely to remain the same as if Mary were a first-grade teacher. Secondly, Mary's sole function is to teach the Episcopalian faith to her students and inculcate its values. Thirdly, Mary is not of the Episcopalian faith; therefore, the internal faith prong is not satisfied. Because Mary's only duty is religious, she would likely fall under the ministerial exception because her entire purpose revolves around teaching the faith.

3. Martha

Martha is a pre-K teacher's assistant at a Baptist school in Baton Rouge, Louisiana. Martha identifies as a Baptist believer. The school follows all curriculum requirements from the state, but it also incorporates its own religion course requirements. Martha's job includes assisting the primary teacher, helping to implement classroom procedures, and escorting the students to and from elective courses. She also sometimes teaches the religion portion of the day as well as helps to teach other general skills to students. Would Martha fall under the ministerial exception?

First, since Martha is an assistant, she falls in rank below a teacher and far below administration. The first prong of the revised *Hosanna-Tabor* factor analysis, the leadership nexus, would not be met. Next, Martha

identifies as a Baptist and is an employee of a Baptist school. Therefore, the internal-faith factor would be met. Lastly, Martha primarily assists the teacher in performing and implementing classroom procedures, and though she might occasionally teach the religion portion of the class, her secular duties far outweigh the religious. Therefore, the function prong would likely not be met. Overall, Martha would likely not be considered a minister for the purposes of the ministerial exception.

CONCLUSION

In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court expanded the definition of "minister" for the purposes of the ministerial exception.[290] Under its current interpretation, the ministerial exception bars teachers and any employees who carry out a religious function at a private, religious school from bringing an employment discrimination suit against their employer.[291] The result strips hundreds of thousands of lay private-school teachers of their right to not be discriminated against by their employer.[292] In particular, the result of Kristin Biel's case seems unconscionable but serves as an accurate portrayal of exactly how much discriminatory power the Supreme Court vested in religious employers.

Through the Supreme Court's unquestionable broadening of the scope of "minister," the Court divested American workers of the protections that Congress bestowed on them in Title VII of the Civil Rights Act of 1964.[293] Congress specifically developed Title VII and other federal employment discrimination laws to include protections for employees against discrimination as well as protections and exceptions for religious employers to discriminate based on religion or any reasonably necessary job qualification.[294] The Court contravened these narrow but potent exceptions through its expansion of the ministerial exception, committing judicial overreach.

Though the Court relied on the First Amendment for its reasoning, compelling interests allow intrusion of the not so "high and impregnable" wall separating church and state.[295] Congress, at the time it promulgated the Civil Rights Act of 1964, espoused that eliminating discrimination was

290. *See Our Lady of Guadalupe Sch*., 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

291. *See id.*

292. Liptak, *supra* note 10.

293. *See* 42 U.S.C. § 2000e-1.

294. *See id*. §§ 2000e-1(a), 2000e-2(e)(2).

295. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).

its greatest priority.[296] This priority arose from one of the great social and political activism eras of America.[297] Today, America experiences a resurgence of activism as Americans gather to fight for social justice and equality against persisting and pernicious discrimination.[298] Therefore, a compelling interest exists, warranting respectful intrusion into most of the employment decisions of religious employers in the interest of preventing and eradicating discrimination. Thus, the ministerial exception should be interpreted narrowly.

Because the Supreme Court has the exclusive right to interpret the Constitution, only the Court has the power to rectify its error.[299] The Supreme Court should grant certiorari on another ministerial exception case and narrowly tailor the definition of "minister." To determine who constitutes a minister for the purposes of the exception, the Court should revisit and revise the *Hosanna-Tabor* factors. The trinity of factors the Court should espouse are an objective-leadership nexus, function factor, and internal-faith factor. Secular courts would consider these factors and have the discretion to determine ministerial status. This would limit the scope of impact that the omnipotent ministerial exception carries and create more reasonable results for potential litigants like Kristin Biel.

Under the revised factor analysis, Biel would not qualify as a minister for the purposes of the ministerial exception. First, her position as an elementary school teacher at a private school places her near the bottom of the chain of command with many superiors and without inferiors.[300] This would fail the first prong of the totality-of-the-circumstances test. Next, she served a religious function in that she taught her students religion out of a textbook and brought them to mass.[301] However, she also served a secular function in that she taught secular subjects to her students as well.[302] Biel spent most hours of the day in the classroom teaching her students secular subjects. This circumstance would likely fail the function prong. Lastly, Biel was a Catholic, [303] so the internal-faith prong would be satisfied.

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296. E.E.O.C. v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1280 (9th Cir. 1982) (citing S. REP. NO. 88-872, pt. 1, at 11, 24 (1964)).

297. *See* Arrieta-Kenna, *supra* note 225.

298. *See* Rosenblatt, *supra* note 222; *see also* Strauss, *supra* note 222.

299. *See* U.S. CONST. art. III, § I; City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997) (for the proposition that when the Court is interpreting the Constitution, it is acting within its proper authority).

300. Biel v. St. James Sch., 911 F.3d 603, 605 (9th Cir. 2018).

301. *Id.*

302. *Id.*

303. *Id.*

Considering all the factors together, Biel would not be considered a minister for the purposes of the ministerial exception, and therefore, she would be able to bring her claim of employment discrimination against St. James School. As demonstrated, the refined factor test would provide employees of religious organizations the Title VII protections Congress intended for them to have while still providing religious employers the right to invoke the omnipotent ministerial exception in cases where it is warranted.