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The Ministerial Exception of the First Amendment: Employment Discrimination and Religious Organizations

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Summary

Congress has enacted a number of federal laws banning discrimination in employment decisions, including hiring and firing of employees. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment if the discrimination is based on race, color, religion, national origin, or sex. The Americans with Disabilities Act (ADA) prohibits discrimination based on disability. The Age Discrimination in Employment Act prohibits discrimination in employment based on age. Exceptions in these laws for religious organizations have reflected long-standing recognition of the autonomy of religious organizations in certain employment decisions.

While these statutory provisions protect religious organizations in selected contexts, religious organizations also have constitutional protection, known as the ministerial exception. The ministerial exception protects the employment relationship between a religious entity and its ministerial employees. Courts have long held that the First Amendment of the U.S. Constitution bars the government from interfering with internal governance of religious organizations, including decisions regarding employment of ministers or ministerial employees. This exception has generally been framed relatively narrowly to avoid undermining the public policy goals of nondiscrimination legislation. Thus, only religious institutions may claim the ministerial exception and may only do so if the employee functions as a minister or ministerial employee. The boundaries of the exception are not yet settled though. In 2012, the U.S. Supreme Court recognized the ministerial exception as a necessary outgrowth of its jurisprudence on non-interference in the internal governance of religious organizations (*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*). However, the Court did not define the scope of the exception and declined to identify a standard for determining whether an employee could be labeled as ministerial.

This report analyzes the history and constitutional bases for the ministerial exception and examines selected statutory provisions reflecting its protections under federal employment laws. The report examines the distinction between the constitutional and statutory protections for religious organizations and addresses critical questions involved in judicial consideration of the ministerial exception. It analyzes which employees may qualify as ministerial, the extent to which courts may defer to religious entities claiming the exception, and whether the exception may apply to any claim brought against a religious entity.

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Introduction

A number of federal laws prohibit discrimination in employment decisions, including hiring and firing of employees. Generally, these laws also include statutory exceptions for the employment of ministers within religious institutions and organizations. This protection arises most often in the context of employment legislation, but it has also been recognized in other contexts.[1] The exceptions in these laws for religious organizations reflect a constitutional protection commonly known as the ministerial exception. This exception has been used to ensure that enforcement of nondiscrimination legislation does not violate the constitutional rights of religious entities to exercise freely their religious practices and to avoid government interference in internal matters. In 2012, the U.S. Supreme Court recognized the ministerial exception as a protection grounded in the Free Exercise and Establishment Clauses of the First Amendment in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[2] However, the Court did not define the scope of the exception, and a number of questions still remain unanswered in how it may be applied in future cases.

This report analyzes the constitutional bases of the ministerial exception and examines selected statutory provisions reflecting its protections under federal employment laws. The report addresses critical questions involved in the application of the ministerial exception, including which employees qualify as ministers, the extent to which courts may defer to religious entities claiming the exception, and whether the exception may apply to any claim brought against a religious entity.

Selected Statutory Exceptions for Employment Discrimination

A number of federal laws prohibit discrimination in employment, each protecting separate classes of individuals. Congress has included explicit statutory recognition of the hiring rights of religious organizations in these laws. Two prominent examples of legislation that include religious exemptions for prohibitions on discrimination are Title VII of the Civil Rights Act of 1964[3] and the Americans with Disabilities Act (ADA).[4] However, other nondiscrimination statutes, like the Age Discrimination in Employment Act[5] and the Equal Pay Act,[6] may also affect religious organizations' rights under the First Amendment.[7] These exemptions are sometimes

[1] *See* 8 U.S.C. §1324(1)(C). Section 1324 generally imposes criminal penalties for inducing the entry and harboring aliens in the United States. However, an exemption from some penalties is provided for religious organizations to encourage "an alien who is present in the United States to perform the vocation of a minister or missionary … as a volunteer who is not compensated as an employee, notwithstanding [certain basic living expenses], provided the minister or missionary has been a member of the denomination for at least one year." *Id*.

[2] Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S.Ct. 694, 703 (2012).

[3] 42 U.S.C. §§2000e et seq.

[4] 42 U.S.C. §§12101 et seq.

[5] 29 U.S.C. §§621 et seq.

[6] 29 U.S.C. §206(d).

[7] *See* EEOC Compliance Manual, Section 12, Directives Transmittal No. 915.003 (July 22, 2008).

referred to as ministerial exceptions, but they differ from the constitutional ministerial exception as discussed in this report.

Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex.[8] It is the most well-known statutory protection for religious discrimination and often is used as a model for other nondiscrimination legislation. Title VII generally prohibits employers from treating employees of one religion differently from employees of another religion.[9] However, Title VII includes several exceptions that allow certain employers to consider religion in employment decisions, such as hiring, termination, etc.[10]

Specifically, Title VII's prohibition against religious discrimination does not apply to "a religious corporation, association, educational institution, or society with respect to the employment [i.e., hiring and retention] 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."[11] A separate, but similar, exemption applies specifically to religious educational institutions, allowing such institutions "to hire and employ employees of a particular religion if [the institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular [organization], or if the curriculum of [the institution] is directed toward the propagation of a particular religion."[12] Exemptions for religious organizations in the context of Title VII are not absolute. Once an organization qualifies as an entity eligible for a Title VII exemption, it is permitted to discriminate on the basis of religion in its employment decisions, but it may not discriminate on any other basis forbidden by Title VII.[13]

Americans with Disabilities Act (ADA)

The ADA provides broad nondiscrimination protection in a variety of contexts, including employment, public services, public accommodations and services operated by private entities, transportation, and telecommunications for individuals with disabilities.[14] It bars discrimination

[8] 42 U.S.C. §2000e et seq. For a comprehensive legal analysis of religion issues under Title VII, see CRS Report RS22745, *Religious Discrimination in Employment Under Title VII of the Civil Rights Act of 1964*.

[9] 42 U.S.C. §§2000e-2, 2000e-3.

[10] Religious organizations receiving public funds under grant programs are generally subject to so-called charitable choice provisions, which recognize First Amendment protections to maintain religious identity and practice. When enacting such provisions, Congress recognized the continuing applicability of Title VII's religious exemption to such organization, regardless of the organization's receipt of public funds. *See, e.g.*, 42 U.S.C. §604a(f). Although selectivity in employment has been one of the most controversial aspects of charitable choice, there is little case law settling the issue. In a leading case, a federal district court indicated that selectivity by religious organizations receiving government assistance may be constitutionally permissible. *See* Lown v. Salvation Army, 393 F. Supp. 2d 223 (S.D. N.Y. 2005). For a complete legal analysis of these issues, see CRS Report R41099, *Faith-Based Funding: Legal Issues Associated with Religious Organizations That Receive Public Funds*.

[11] 42 U.S.C. §2000e-1(a). *See also* LeBoon v. Lancaster Jewish Community Center Association, 503 F.3d 217, 226-27 (3rd Cir. 2007) (discussing factors courts have considered relevant to deciding whether an organization qualifies as a religious organization under Title VII).

[12] 42 U.S.C. §2000e-2(e)(2).

[13] Employment decisions covered by Title VII include hiring, discharge, compensation, and other terms, conditions, or privileges of employment. *See* 42 U.S.C. §2000e-2(a)(1).

[14] 42 U.S.C. §§12101 et seq. For a complete legal analysis of the ADA, see CRS Report 98-921, *The Americans with*
(continued...)

against qualified individuals because of the individual's disability in a range of employment decisions including application procedures, hiring, promotion, discharge, compensation, and other terms and conditions of employment.[15]

The ADA includes exemptions for religious organizations. Accordingly, the ADA's prohibition on nondiscrimination based on disability does not bar "a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[16] Furthermore, the ADA permits religious organizations to "require that all applicants and employees conform to the religious tenets of such organization."[17]

The Ministerial Exception to Employment Discrimination Laws

Before Congress enacted statutory exemptions for religious organizations' hiring decisions, the U.S. Supreme Court recognized that the "freedom to select the clergy" has constitutional protection under the First Amendment.[18] Statutory nondiscrimination provisions, for example, Title VII's prohibition on discrimination in employment on the basis of sex, would appear to interfere with this constitutional freedom though. The so-called "ministerial exception" reconciles statutory nondiscrimination provisions with constitutional freedom of religion protections by allowing religious organizations to select clergy without regard to such statutory restrictions. In 2012, the Court explicitly recognized the ministerial exception as a constitutional protection grounded under both the Establishment Clause and the Free Exercise Clause: "The 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 [ministers]."[19]

Underlying Constitutional Principles

Judicial Avoidance of Disputes of Matters of Religious Significance

The Supreme Court's justification of the ministerial exception relies upon its historical understanding that it must avoid intervening in the internal matters of church operation. The Court has long recognized that churches and other religious institutions have a right under the First Amendment to address their internal matters independently and without interference from government institutions.[20] Furthermore, such action by courts would entangle the legal system in

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Disabilities Act (ADA): Statutory Language and Recent Issues.

[15] 42 U.S.C. §12112(a).

[16] 42 U.S.C.§12113(d)(1).

[17] 42 U.S.C.§12113(d)(2).

[18] Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

[19] *Hosanna-Tabor*, 132 S.Ct. at 703.

[20] *See, e.g.*, Watson v. Jones, 80 U.S. 679 (1872).

an inquiry of religious authority and doctrine, suggesting the type of probing interference contemplated by the entanglement prong of the *Lemon* test.[21] Accordingly, the Court has barred interference in religious practices through decisions prohibiting the government from deciding disputes concerning religious authority or policies.[22]

In 1872, the Court recognized that matters of religious doctrine should be determined within the authority of the particular church and should be separate from any secular legal interpretation:

> The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. … All who united themselves to such a body [the general church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.[23]

Thus, the Court established the principle that determinations of church doctrine and practice were to be free of government control well before it had even developed other aspects of its First Amendment jurisprudence.

In 1952, noting its historic recognition of a prohibition on government interference in matters of religion, the Court reiterated its earlier understanding of "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[24] The Court accordingly granted federal constitutional protection for the independent choice of churches for self-governance "as a part of the free exercise of religion against state interference" when it held that a legislature was constitutionally barred from determining the proper religious authority of the Russian Orthodox Church.[25]

On a number of occasions, the Court has reiterated the First Amendment limitations on the government's authority to decide matters of church internal disputes and practices. Just as it invalidated the legislature from doing so, it has also limited courts from overstepping their constitutional authority in making civil determinations of the propriety of church actions.[26] The Court has held that "because of the religious nature of [disputes related to control of church property, doctrine, and practice], civil courts should decide them according to the principles that

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[21] The tripartite *Lemon* test has traditionally been used by the Court to determine whether a governmental action comports with the Establishment Clause. It requires that a challenged law (1) have a secular purpose; (2) have a neutral primary effect; and (3) not foster excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[22] *See, e.g.*, *Kedroff*, 344 U.S. 94; Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

[23] *Watson*, 80 U.S. at 729, quoted in Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 446 (1969). *See also* Gonzalez v. Archbishop, 280 U.S. 1 (1929) ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.").

[24] *Kedroff*, 344 U.S. at 116.

[25] *Id.*

[26] *See, e.g.,* Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (courts may not transfer control of church from general body of the Russian Orthodox Church).

do not interfere with the free exercise of religion in accordance with church polity and doctrine."[27]

Recognizing that the authors of the First Amendment understood that "establishment of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity," the Court has interpreted the Establishment Clause to prohibit laws from fostering an "excessive entanglement" between government and religion.[28] The Court has explained the bar on entanglement as an inquiry of whether the disputed government action would "establish or interfere with religious beliefs and practices or have the effect of doing so" or would create "the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice."[29]

Courts have generally addressed matters involving religious doctrine quite carefully. Litigation of employment discrimination claims in which religious organizations assert their freedom to hire clergy according to religious doctrine almost inevitably raises concerns that a legal decision on the merits of the case may lead to judicial interference with church decisions.

Judicial Avoidance of Defining Religion and Religious Tenets

In addition to avoiding making determinations on the validity of internal church policies and practices, the Court has refused to define religious practices or what may constitute religion, holding that courts may not judge the truth or falsity of religious beliefs.[30] It has explained that the First Amendment ensures the freedom to believe, even if those beliefs cannot be proven.[31]

While courts must avoid determining the validity of religious beliefs, they must at times identify whether an individual's beliefs would qualify as religious for certain purposes, that is, religious exemptions for statutory requirements. To do so, the Court has stated a test for whether a belief qualifies as religious: "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.... "[32] In other words, the court will look at whether an individual's beliefs "are sincerely held and whether they are, in his own scheme of things, religious."[33] As a result, courts generally examine whether an individual applies a particular belief consistently in his or her own practices.[34]

The beliefs of an individual seeking protection under the First Amendment are not required to conform with the beliefs of other members of his or her religious group.[35] Furthermore, the

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[27] Jones v. Wolf, 443 U.S. 595, 616 (1979). *See also* Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); *Presbyterian Church*, 393 U.S. 440.

[28] Walz v. Tax Commission of New York, 397 U.S. 664, 668, 674 (1970).

[29] *Id.* at 669-70.

[30] United States v. Ballard, 322 U.S. 78 (1944).

[31] *Id*. at 86-87.

[32] United States v. Seeger, 380 U.S. 163, 176 (1965).

[33] *Id.* at 185. *See also* Welsh v. United States, 398 U.S. 333 (1970).

[34] *See id*. For example, when deciding whether an individual may claim a religious objection to photo identification requirements due to a religious belief that photographs are prohibited by biblical teachings, courts have considered whether the individual displays photographs, videos, or artwork at home. *See, e.g*., Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

[35] *See* Thomas v. Review Board, 450 U.S. 707 (1981) ("The guarantee of free exercise is not limited to beliefs which (continued...)

individual is not even required to be a member of a religious group at all.[36] The Court has been deferential to the individual's claim that a belief "is an essential part of a religious faith."[37] It has recognized that beliefs are a matter of personal decision, which may vary greatly among different individuals or groups, but it has not allowed total deference to the individual's claim, however.[38] Though the Court gives significant weight to an individual's characterization of his or her beliefs, that characterization is not dispositive in the analysis. The Court has explained that an individual's understanding of what might qualify as a religious view may not be reliable and courts may assess the nature of the belief independent of the individual's characterization.[39]

Attempts to define religion for certain statutory purposes have reflected courts' aversion to state explicitly the parameters of religious belief or practice. Often times, statutory definitions related to religion use the word to define itself. For instance, under Title VII, religion is defined to include "all aspects of religious observance and practice, as well as belief.... "[40] Religious practices and observances are then defined "to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[41] Under the tax code, individuals may claim an exemption based on religion if they can demonstrate themselves to be "a member of a recognized religious sect or division thereof and [ ] an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed" to benefits that would otherwise be received.[42] These definitions do not provide absolute clarity on what qualifies as "religion" or "religious."

Origins of the Ministerial Exception

In a 1972 case recognizing a constitutional ministerial exception to employment discrimination laws, the U.S. Court of Appeals for the Fifth Circuit held the employment relationship between a church and its minister was beyond the reach of governmental regulation.[43] In *McClure v. Salvation Army*, a woman who had been commissioned as a minister in the Salvation Army alleged that the organization discriminated against her based on her sex. The court recognized that the organization's action was constitutionally protected under the ministerial exception.[44] It explained:

(...continued)

are shared by all the members of a religious sect.").

[36] *Id*.

[37] *Seeger,* 380 U.S. at 184.

[38] *Id*.

[39] *See Welsh*, 398 U.S. at 341 ("[V]ery few registrants are fully aware of the broad scope of the word 'religious' as used in [the statute], and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption.").

[40] 42 U.S.C. §2000e(j).

[41] 29 C.F.R. §1605.1.

[42] 26 U.S.C. §1402(g)(1).

[43] McClure v. Salvation Army, 460 F.2d 553 (1972).

[44] The court noted that the employer could not avoid liability under Title VII's religious exemption for discrimination in employment. Title VII would protect the employer only against claims of religious discrimination but did not permit the religious organization to show preference on the basis of sex or other factors. *Id*. at 558. Title VII's exemption and the distinctions between the constitutional exception and statutory exemption are discussed later in this report.

> The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection.[45]

If the government regulated the relationship between a church and its minister, it would be forced to review practices and decisions of a religious organization and unlawfully "intrude upon matters of church administration and government."[46] To avoid the risk of such unconstitutional interference, the court recognized a ministerial exception to insulate decisions regarding those employment relationships from governmental review.

Each of the federal circuit courts to consider the ministerial exception recognized its application to some extent, but the courts have differed on the scope of its application.[47] Federal courts are generally in agreement that the ministerial exception bars lawsuits by clergy and religious leaders—regardless of the particular religious sect or denomination to which they minister—seeking redress for employment discrimination by their religious organization.[48] The circuits differ, however, in how to apply the ministerial exception to other employees who may serve religious functions in the organization.

Until 2012, when the Supreme Court considered the issue, the most commonly applied test applied by circuit courts in ministerial exception cases was the primary duties test (sometimes called the primary functions test).[49] Under this test, ministerial employees are not identified by their job titles or ordination status, but rather by the function of their position. To apply the exception, a court must "determine whether a position is important to the spiritual and pastoral mission of the church."[50] Courts applying the primary duties test have adopted the following standard as a general rule: "If the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy."[51]

Several courts agreed that the ministerial exception may apply with regard to any employees who "perform particular spiritual functions."[52] Some courts looked at other factors, in addition to the

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[45] *Id*. at 558-59.

[46] *Id*. at 560.

[47] *See, e.g.,* Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Rweyemamu v. Cote, 520 F.3d 198 (2nd Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 303-04 (3rd Cir. 2006); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000) (hereinafter Roman Catholic Diocese); Combs v. Central Texas Annual Conf. of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Hollins v. Methodist Healthcare, 474 F.3d 223, 226 (6th Cir. 2007); Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. 2003); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Bryce v. Episcopal Church, 289 F.3d 648 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); EEOC v. Catholic Univ. Of America, 83 F.3d 455 (D.C. Cir. 1996) (hereinafter Catholic Univ. of America).

[48] *See Hosanna-Tabor*, 132 S.Ct. at 705-06.

[49] *See Petruska*, 462 F.3d at 307; Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164, 1168-69 (4th Cir. 1985); *Hollins*, 474 F.3d at 226; *Catholic Univ. of America*, 83 F.3d at 463.

[50] *Rayburn*, 772 F.2d at 1169.

[51] *See id.* (internal quotations and citations omitted). *See also Petruska*, 462 F.3d at 307, quoting *Rayburn*, 772 F.2d 1164; *Hollins*, 474 F.3d at 226, quoting *Rayburn*, 772 F.2d 1164.

[52] *See Petruska*, 462 F.3d at 307; *Catholic Univ. of America*, 83 F.3d at 463.

employee's primary functions, such as the nature of the claim asserted.[53] Other courts decided ministerial exception cases on a case-by-case basis without applying a particular standard.[54]

U.S. Supreme Court Recognition of the Ministerial Exception: *Hosanna-Tabor Evangelical Church and School v. EEOC*

In 2012, the Supreme Court issued its decision in *Hosanna-Tabor Evangelical Church and School v. EEOC*,[55] a case which gave the Court an opportunity to recognize and clarify the application of the ministerial exception. In this case, a teacher with both religious and secular duties at a religiously affiliated school sought protection under the ADA after being terminated following her disability leave. The teacher claimed that her termination was improperly based on her disability and barred by the ADA. The school claimed that its decision was based on internal religious policies regarding its spiritual leaders, which included some teachers. The case required the Court to determine whether a teacher at a religious school qualified as a minister for purposes of the ministerial exception.

In *Hosanna-Tabor*, Cheryl Perich, a "called" teacher at the school, had taken a disability leave of absence, but attempted to return to her position later in the school year. The school informed Perich that her position had been filled by a lay teacher for the remainder of the school year and offered her "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."[56] When Perich refused to resign, she was informed that she would likely be fired, and in response she notified the school that she intended to file a claim under the ADA. Hosanna-Tabor rescinded Perich's "call" and terminated her teaching position, citing "insubordination and disruptive behavior" and her threat of legal action against the institution.[57]

The Court's decision noted the significance of the specific position held by the teacher. Hosanna-Tabor Evangelical Lutheran Church and School hires two types of teachers: called teachers and lay teachers.[58] Called teachers are deemed to have been called by God to teach and must meet certain qualifications, which include post-secondary theological study, endorsement by local church authority, and completion of an oral examination. Upon meeting these qualifications, called teachers receive the title of "Minister of Religion, Commissioned" and serve an open-ended term at the school.[59] Lay teachers are not required to meet such qualifications and may not be trained by the church or even share the same affiliation. Lay teachers serve under one-year renewable contracts.[60]

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[53] *See Rweyemamu*, 520 F.3d at 208 ("While we agree that courts should consider the 'function' of an employee, rather than his title or the fact of his ordination, we still find this approach too rigid as it fails to consider the nature of the dispute." (internal citations omitted)).

[54] *See, e.g.*, Bryce, 289 F.3d 648; Gellington, 203 F.3d 1299.

[55] 132 S.Ct. 694.

[56] *Id*. at 700.

[57] *Id*.

[58] *Id.* at 699.

[59] *Id*.

[60] *Id*. at 699-700.

The Court held that Perich qualified as a minister for purposes of the ministerial exception and therefore could not enforce the protections that would be available to other employees under the ADA. Notably, the Court's opinion in *Hosanna-Tabor* was unanimous, a rare occurrence for the current Court in First Amendment cases. However, agreement among the Justices is not particularly surprising given the narrow scope of the Court's opinion, which only recognized the widely accepted constitutional exception. It agreed with the circuit courts that the First Amendment provides protection for a religious organization's decisions regarding employment of its ministers.[61] It also agreed "that the ministerial exception is not limited to the head of a religious congregation."[62] However, the Court stopped short of defining what a minister is for purposes of the exception—the more contentious issue associated with the ministerial exception—stating its "[reluctance] … to adopt a rigid formula for deciding when an employee qualifies as a minister."[63]

Instead, the Court treated the case as one of first impression limited only to the challenge in question, alluding that later legal challenges would allow it to consider the parameters of the exception.[64] The Court explained that Hosanna-Tabor designated the employee as a minister, which required a number of religiously significant qualifications to be met. The employee regarded herself as a minister based on her position and accepted privileges available only to ministerial employees.[65] Furthermore, the duties of the position "reflected a role in conveying the Church's message and carrying out its mission" and indicated that the employee "performed an important role in transmitting the Lutheran faith to the next generation."[66] Accordingly, the Court held that the employee would qualify as a ministerial employee and Hosanna-Tabor's decision was not subject to the ADA.

Distinctions Between Statutory Religious Exemptions and the Constitutional Ministerial Exception

The statutory exemptions for religious organizations provided by Congress differ from the constitutional ministerial exception, though both are rooted in the same principles of non-interference in the internal decisions of church authority and operations. The constitutional exception protects religious organizations from liability for decisions regarding only ministerial employees, but may be applied to decisions made on any basis. The statutory exemptions generally exempt religious employers from liability for decisions regarding other employees, but are limited to decisions made on the basis of religion.

To invoke the constitutional ministerial exception, an employer must be a religious organization and the employee must be a minister or ministerial employee. However, the religious employer

[61] *Id*. at 705-06.

[62] *Id*. at 707.

[63] *Id*.

[64] *See id*.

[65] *Id*. at 707-08.

[66] *Id*. at 708.

does not need a religious basis for its decision. Rather, courts have indicated that the inquiry should focus on the action itself, rather than the motives: "The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause 'protects the act of a decision rather than a motivation behind it.'"[67]

Under the constitutional exception, courts have upheld the termination of a college chaplain who claimed her termination was a result of gender discrimination;[68] a hospital chaplain who claimed her termination was a result of discrimination based on a disability;[69] and a priest who claimed his termination resulted from race discrimination.[70] Various circuit courts determined in each of these examples that the employee qualified as a ministerial employee and that the religious employer's decision was accordingly beyond the review of the court.

Congress has extended the recognition of noninterference in employment decisions through statutory exemptions, but has limited the exemptions to avoid undermining the purpose of the legislation. Statutory exemptions apply only to religious employers making decisions based on religion. One federal court has explained that the statutory exemption is significantly distinct from the constitutional protections to such religious organizations because the "statutory exemption applies to one particular reason for employment decision—that based on religious preference."[71] A number of federal circuit courts have noted that the statutory exemption allows religious organizations to make employment decisions based on religious preferences, but does not permit those decisions to be based on other preferences, like race, sex, or national origin.[72]

The statutory exemptions also differ from the constitutional exception because the statutory exceptions exempt employers from liability for decisions regarding any employee, rather than being limited to ministers and ministerial employees. For example, the religious exemption under Title VII has been held to allow a religious organization to terminate the employment of an employee with no religious duties.[73] In 1987, the Supreme Court upheld the Title VII exemption when a religious employer discharged a building engineer because the employee failed to qualify for membership in the church that operated the facility for which he worked.[74] The Court explained that the exemption was neutral and its purpose to limit governmental interference in religious matters was permissible.[75]

Effect of *Hosanna-Tabor* on Future Cases

In light of the split among the circuit courts over the standard for determining the scope of the ministerial exception, it seemed likely in *Hosanna-Tabor* that the U.S. Supreme Court would

[67] *Roman Catholic Diocese*, 213 F.3d at 802 (quoting *Rayburn*, 772 F.2d at 1169).

[68] *Petruska*, 462 F.3d 294.

[69] *Hollins*, 474 F.3d 223.

[70] *Rweyemamu*, 520 F.3d 198.

[71] *Rayburn*, 772 F.2d at 1166-67.

[72] *See, e.g., id.*; EEOC v. Pacific Press Publishing Association, 676 F.2d 1272, 1276-77 (9th Cir. 1982).

[73] *See* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

[74] *Id*.

[75] *Id*. at 339.

clarify the analysis of how courts should define minister in future employment discrimination lawsuits involving religious organizations. Often, the Court accepts cases for review because a different standard is applied across the various circuits, which, if left unreviewed, means that the application of law is determined by the geography of the court in which the claim is filed rather than by a uniform national standard. The Court did not resolve the split among the circuits, however. Instead, it only announced its recognition of the ministerial exception as a constitutional protection for religious entities and explained that it could be applied to more than just the nominal head of the congregation. Many questions still remain regarding the scope of the ministerial exception: Who qualifies as a ministerial employee? Which legal claims might the ministerial exception apply to? What options does Congress have to affect the outcome of such cases? Although the Court did not provide the definitive clarification of the ministerial exception that many were expecting, its decision nonetheless indicates its preferred direction of the constitutional analysis for future cases.

U.S. Supreme Court Rejection of Primary Duties Test

In *Hosanna-Tabor*, as discussed earlier, the Court declined to announce a uniform standard for applying the ministerial exception, noting its reluctance "to adopt a rigid formula for deciding when an employee qualifies as a minister," and decided only the facts of the case before it.[76] The Court relied upon four general considerations in its decision: (1) the formal title given to the employee by the religious institution; (2) the substantive actions reflected by the title (i.e., the qualifications required to be granted such a title); (3) the employee's understanding and use of the title; and (4) the important religious functions performed by employees holding the title.[77]

Rejecting the primary duties test, the Court explained that the factors relied upon by the U.S. Court of Appeals for the Sixth Circuit may be relevant to the applicability of the ministerial exception, but they should not be treated as dispositive. For example, the Court disagreed with the Sixth Circuit that the title of commissioned minister was irrelevant. Rather, the Court stated that "although such a title, by itself, does not automatically ensure coverage, [it] is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's position."[78] Likewise, according to the Court, the comparison of duties between similar positions and the proportion of religious duties versus secular duties may be relevant, but are not conclusive in the determination of ministerial employees:

> [T]hough relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions—particularly when, as here, they did so only because commissioned ministers were unavailable. ...
>
> The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.[79]

The Court's decision not to announce a formal standard for determining ministerial employees means that future decisions in lower courts may still be decided based on different standards.

[76] *Hosanna-Tabor*, 132 S.Ct. at 707.

[77] *Id*. at 707-08.

[78] *Id*.

[79] *Id*. at 708-09.

However, the Court's rejection of the application of the primary duties test provides a strong indication that at least courts in judicial circuits in which the test had prevailed will now be guided by factors considered significant to the Court in *Hosanna-Tabor*.

Deference to Religious Institutions to Define Ministers

The Court's decision indicated a significant amount of deference to religious authorities when identifying ministerial employees, relying on the school's understanding of its relationship with its called teachers. The Court noted that "although teachers at the school generally performed the same duties regardless of whether they were lay or called, lay teachers were hired only when called teachers were unavailable."[80] Citing a long history of avoidance of determining matters of religion, the Court relied on historical precedent "[confirming] that it is impermissible for the government to contradict a church's determination of who can act as its ministers."[81]

The Court also deferred to the school's reason for termination, explaining that the exception applies regardless of whether the reason for termination is based on religion.[82] During the lawsuit, Hosanna-Tabor maintained that "Perich was a minister, and she had been fired for a religious reason—namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."[83] The Court emphasized that the purpose of the ministerial exception is to ensure that employment decisions of ministers and ministerial employees remains within the sole authority of the religious institution.[84] Accordingly, the Court's opinion suggests that religious employers may make decisions regarding employment of ministers or ministerial employees for any reason it deems necessary to adherence to its beliefs, regardless of whether the stated reason is pretextual.[85]

Although the Court's decision was unanimous, Justice Thomas's concurring opinion, joined by Justice Alito, provides further support of the Court's deference to religious institutions when defining ministerial employees. Justice Thomas stated that the institution's "right to choose its ministers would be hollow … if secular courts could second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets."[86] The opinion also warned against the adoption of a strict definition in the future. If courts attempt to create a definitive standard for what positions qualify as ministerial, some religious groups, particularly those "whose beliefs, practices and membership are outside of the 'Mainstream' or unpalatable to some," would be disadvantaged because traditional definitions may not be easily applied to them.[87] A definitive standard may raise constitutional concerns if a religious group feels pressed "to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding."[88]

[80] *Id*. at 700.
[81] *Id*. at 704.
[82] *Id*. at 709.
[83] *Id*. at 701.
[84] *Id.* at 709.
[85] *Id*.
[86] *Id*. at 710 (Thomas, J., concurring).
[87] *Id*. at 711.
[88] *Id*.

The Court's opinions reflect the long-standing aversion to interpreting what religious tenets require. Just as the Court has recognized that it may not judge the veracity of beliefs or what constitutes religion, it has now indicated that it may be similarly improper for courts to decide who is a minister within a particular religion. It seems possible that, even with further litigation of the scope of the ministerial exception, the Court will defer to a religious institution's understanding of which employees function as ministers. Such deference would allow courts to avoid interpreting the religious doctrine of the institution and defining what constitutes spiritual leadership within the institution.

Range of Legal Claims Affected

Although it reflects long-standing and widely accepted principles of noninterference in the internal governance of religious institutions, the ministerial exception nonetheless raises concerns regarding the degree to which such institutions may operate without legal recourse to those with whom they may interact.[89] In other words, if courts are prohibited from reviewing a church's decisions regarding its employees to avoid unconstitutional interference with religious operations, might they also be prohibited from hearing other challenges involving the church's decisions? The Court limited its decision in *Hosanna-Tabor*, holding only that the ministerial exception bars employment discrimination suits brought on behalf of a minister challenging a religious institution's decisions to terminate his or her employment.[90] The Court expressly stated that it was expressing "no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortuous conduct by their religious employers," leaving such decisions to be determined in later cases.[91] Thus, under *Hosanna-Tabor*, the ministerial exception applies, at a minimum, to employment discrimination lawsuits alleging improper termination of a minister by a religious institution, regardless of whether the reason given was based on religion or another factor. Lower court decisions have indicated some uncertainty in the applicability of the ministerial exception to other types of cases.

As one federal court has stated, religious organizations "are not—and should not be—above the law" and "may be held liable for their torts and upon their valid contracts."[92] This court also emphasized that such organizations remain subject to Title VII in cases that do not involve the organization's religious functions.[93] Thus, according to some interpretations, even if the ministerial exception bars certain claims, other claims in the same case may proceed. For example, a university chaplain filed claims against her employer after the university decided to restructure her department and removed her from her position.[94] The lawsuit asserted a variety of claims, including employment discrimination, breach of contract, and state tort claims (e.g., negligent supervision and retention). The U.S. Court of Appeals for the Third Circuit held that the

[89] Although the Court has adhered to a doctrine of avoidance of internal church matters, it has not adopted a policy of non-regulation of religious activity. It has held that religious doctrine cannot exempt an individual from laws of general applicability. *See* Employment Division v. Smith, 494 U.S. 872 (1990). The Court has clarified that the government may regulate "outward physical acts" of religious beliefs, but may not interfere "with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 132 S.Ct. at 707.

[90] *Id*. at 710.

[91] *Id*.

[92] *Rayburn*, 772 F.2d at 1171.

[93] *Id*.

[94] *Petruska*, 462 F.3d 294.

ministerial exception barred any decision on the employment discrimination claims.[95] The court also explained that the First Amendment protected the university's right to determine its internal structure and therefore the court could not consider the tort claim of negligent supervision and retention which resulted from the university's decision to restructure.[96] However, because some of the chaplain's claims did not implicate the university's "freedom to select its ministers," judicial resolution of other claims, such as breach of contract, was not barred by the ministerial exception.[97]

In another example of a court applying the ministerial exception to cases challenging actions other than termination, the U.S. Court of Appeals for the Ninth Circuit applied the ministerial exception to a challenge filed by a seminarian over the sufficiency of the wages he received from his employing church.[98] The court noted that the individual was challenging wages received in his capacity as a seminarian in which he was assisting with the administration of religious services, not for employment or duties outside the scope of seminary training. The court determined that the challenge was of a ministerial nature, and therefore it could not interfere with the church's decision.[99]

Some federal courts have indicated that the nature of the dispute is a critical factor in determining whether the ministerial exception applies. According to the U.S. Court of Appeals for the Second Circuit, the ministerial exception is not an absolute bar to legal challenges, indicating that a court must consider the nature of the dispute before it, in addition to the employee's position, when deciding whether or not to apply the exception.[100] The U.S. Court of Appeals for the Ninth Circuit has stated that a court may consider a case if it is limited in a manner that allows for controlled discovery and avoids "wide-ranging intrusion into sensitive religious matters."[101]

Sexual harassment claims have been of particular concern in the debate over the applicability of the ministerial exception. Like any other claim, whether a court decides the merits of such cases likely depends on whether the accused institution claims religious justification for its actions. For example, the U.S. Court of Appeals for the Ninth Circuit permitted an ordained minister to pursue a sexual harassment claim against her church.[102] The court explained that the ministerial exception applied only to the church's ministerial employment decisions, and that the sexual harassment claim was "narrower and thus viable" because it did not implicate a protected employment decision.[103] The court noted that "the Church could invoke First Amendment protection … if it claimed doctrinal reasons for tolerating or failing to stop the sexual harassment."[104] Because the church did not defend its actions based on religious doctrine, the

[95] *Id*. at 305-07.

[96] *Id*. at 309.

[97] *Id*. at 310.

[98] Alcazar v. Corporation of the Catholic Bishop of Seattle, 627 F.3d 1288 (9th Cir. 2010).

[99] *Id*.

[100] *Rweyemamu*, 520 F.3d at 207-08.

[101] Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 950 (9th Cir. 1999). *See also Petruska*, 462 F.3d at 311 (advising against court involvement in claims that may entangle the courts in religious matters).

[102] *Elvig*, 375 F.3d 951.

[103] *Id*. at 953.

[104] *Id*. at 963.

court explained that the issues for judicial resolution were limited to "a restricted, secular inquiry" and were appropriate for the court to consider.[105]

Potential Considerations for Congress

The Court's decision in *Hosanna-Tabor* did not address the scope of the statutory exception of the ADA.[106] Rather, it was grounded in the constitutional protections afforded to religious organizations under the First Amendment. In other words, regardless of the explicit statutory protection for religious organizations like Hosanna-Tabor in the ADA, the school still was able to exercise its constitutional right to terminate Perich's employment without affording her the legislative protections of the ADA. Accordingly, the legislative options for Congress in response to the Court's decision in Hosanna-Tabor are extremely limited.

Congress may seek to include a preferred standard of review in its religious exceptions to nondiscrimination legislation, but such clarification must comport with the requirements of the constitutional exception. The most probable method for clarification of the proper standard for the constitutional exception is further litigation, as the Court alluded in its decision.

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[105] *Id*. *See also* Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991) (court may consider sexual harassment claim "unrelated to pastoral qualifications or issues of church doctrine").

[106] The ADA's exception exempts religious entities from its general prohibition on discrimination based on disability, to allow religious entities to give "preference in employment to individuals of a particular religion" and "require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. §12113(d).