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The Expansive Scope of the Ministerial Exception After *Our Lady of Guadalupe School v. Morrissey-Berru*

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THE EXPANSIVE SCOPE OF THE MINISTERIAL EXCEPTION AFTER *OUR LADY OF GUADALUPE SCHOOL v. MORRISSEY-BERRU*

Abstract: On July 8th, 2020, the United States Supreme Court held in *Our Lady of Guadalupe School v. Morrissey-Berru* that two parochial school teachers, Kristen Biel and Agnes-Morrissey-Berru, were ministers for purposes of the First Amendment's ministerial exception. This meant that the First Amendment barred their respective employment discrimination actions notwithstanding the merit of their claims. When the Court first recognized the ministerial exception in 2012, in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, it determined that an employee qualified as a minister through a multi-factor, totality of the circumstances analysis. Yet, in reaching its conclusion in *Our Lady of Guadalupe School*, the Court focused predominantly on one factor—whether the employees performed religious functions. This Comment argues that the Court's sole focus on religious function has significantly expanded the scope of the ministerial exception, such that more employees of more religious institutions are likely to qualify as ministers and thus lose their federal antidiscrimination employment protections. Given the policy interests at stake, courts applying the ministerial exception after *Our Lady of Guadalupe School* should recognize that a broad reading invites exploitation and interpret the opinion in its narrowest form.

INTRODUCTION

Religious institutions generally must comply with federal employment antidiscrimination statutes, and employees of religious institutions may bring claims for relief against their employers under such statutes.[1] Yet, depending

[1] *See* 3 N. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 53.12(2)(a) (explaining that federal statutes prohibit religious institution employers from discriminating against their employees on the basis of sex, race, and national origin). Title VII provides religious employers with a statutory exemption from otherwise prohibited religious discrimination to allow for the expression of religious preference, but it does not permit discrimination for other protected classes, such as sex, race, or national origin. *See id.* (noting the statutory prohibitions against sex, race, and national origin discrimination still apply to religious employers); *see also* 42 U.S.C. § 2000e–1 (rendering the subchapter inapplicable to religious employers who seek to make employment decisions on the basis of religion); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting) (noting that religious institutions must comply with "generally applicable laws" (citing Emp't Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879–82 (1990))). *See generally* 42 U.S.C. § 2000e–2 (establishing unlawful employment practices under Title VII, which include "to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin").

on the role of the employee, a religious institution may be entitled to assert an affirmative defense to such a claim, known as the ministerial exception.[2] The ministerial exception forecloses courts from applying employment antidiscrimination statutes to disputes between religious institutions and their ministers.[3] Thus, if an employee bringing suit qualifies as a minister for purposes of the ministerial exception, the First Amendment bars the employee's discrimination claim against the religious institution, even if the claim is otherwise viable.[4] As such, the predominant inquiry in ministerial exception cases is often whether an employee qualifies as a minister and fits within the ambit of the exception.[5]

In July 2020, in *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court held that two Catholic school elementary teachers were ministers for purposes of the ministerial exception.[6] The Court's decision reversed the

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[2] George L. Blum, Annotation, *Application of First Amendment's "Ministerial Exception" or "Ecclesiastical Exception" to Federal Civil Rights Claims*, 41 A.L.R. Fed. 2d 445, I § 3 (2009) (explaining that, for certain employees, religious institutions may escape liability for discrimination). An affirmative defense bars the plaintiff's claim if the judge or jury recognizes the defense. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 (3d ed. 2020). Notably, the ministerial exception does not exclusively apply to clergy or religious leadership; "lay employees" can also qualify as ministers for purposes of the exception. *See* Blum, *supra*, at I. § 2 (noting that the ministerial exception applies to "lay employees" when they perform functions that resemble those of a minister); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 190 (2012) (declining to restrict the ministerial exception to the "head of a religious congregation").

[3] Blum, *supra* note 2, at I § 3. The ministerial exception is a judge-made doctrine that is constitutionally rooted in the Establishment and Free Exercise Clauses of the First Amendment, commonly referred to as "the Religion Clauses." *Id.* at I §§ 2–3; *see also* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."). The Establishment Clause prohibits "excessive government entanglement" with religion, or in other words, requires separation between church and state. Blum, *supra* note 2, at I § 3. The Free Exercise Clause guarantees individuals and religious institutions autonomy in how they practice faith. *Id*. Thus, the ministerial exception derives from a dual notion. *See id*. (explaining the ministerial exception derives from Establishment Clause and Free Exercise Clause concerns). First, that applying secular standards, such as established antidiscrimination statutes, to a religious institution's choice of minister constitutes excessive government entanglement because it requires courts to concern themselves with internal religious operations and decisions. *Id*. Second, that government involvement in a religious institution's choice of minister fundamentally upends the institution's autonomy in carrying out its religious mission. *Id*.

[4] *See Hosanna-Tabor*, 565 U.S. at 195 n.4 (clarifying the way the exception operates).

[5] *See* Blum, *supra* note 2, at I § 2 (noting that the boundaries of the doctrine are still unclear).

[6] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055. *Our Lady of Guadalupe School* was a consolidated action of two similar Ninth Circuit cases. *See id*. at 2060 (noting the procedural history); Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 460–61 (9th Cir. 2019) (holding that the teacher was not a minister for purposes of the exception), *rev'd*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069; Biel v. St. James Sch., 911 F.3d 603, 605 (9th Cir. 2018) (same), *rev'd*, *Our Lady of Guadalupe Sch.*,140 S. Ct. at 2069. Kristen Biel was a fifth-grade teacher who brought a claim under the Americans with Disabilities Act when her employer did not renew her contract after she sought to take time off to undergo chemotherapy treatment. *Biel*, 911 F.3d at 605; *see also* Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (providing the statutory basis for Biel's claim). Morrissey-Berru brought a claim under the Age Discrimination Employment Act when the

United States Court of Appeals for the Ninth Circuit's decisions in *Biel v. St. James School* and *Morrissey-Berru v. Our Lady of Guadalupe School*.[7] The Ninth Circuit had held that in order to determine whether an employee is a minister for purposes of the ministerial exception, a court must perform a holistic analysis—analyzing not only the employee's religious functions, but also other factors such as the employee's religious title and training.[8] In *Our Lady of Guadalupe School*, the Supreme Court curtailed the Ninth Circuit's totality of the circumstances analysis, instead holding that what is most pertinent in determining whether an employee is a minister is the employee's religious function.[9]

This Comment argues that *Our Lady of Guadalupe School* problematically expanded the scope of the ministerial exception by making religious function the heart of the exception.[10] Part I introduces the ministerial exception and describes the factual and procedural history of *Our Lady of Guadalupe School*.[11] Part II discusses the specific reasoning set out in *Our Lady of Guadalupe School* and acknowledges Justice Sotomayor's dissenting arguments.[12] Finally, Part III explores the policy considerations that underlie why courts should narrowly construe the ministerial exception and suggests an interpretation of the opinion that might keep the exception more confined.[13]

I. The Foundation of *Our Lady of Guadalupe School v. Morrissey-Berru*

When the United States Supreme Court heard *Our Lady of Guadalupe School v. Morrissey-Berru* in 2020, it had not evaluated a ministerial exception dispute since 2012, when it heard *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.[14] Section A of this Part explores the Supreme Court's decision in *Hosanna-Tabor* where it

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school allegedly replaced her with a younger teacher. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2057–58; *see also* Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634 (providing the statutory basis for Morrissey-Berru's claim).

[7] *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2055, 2069; *see also Morrissey-Berru*, 769 F. App'x at 460–61 (holding plaintiff was not a minister for purposes of the exception); *Biel*, 911 F.3d at 605 (same).

[8] *See Biel*, 911 F.3d 609 (stating that under *Hosanna-Tabor*, one characteristic alone is not enough for the ministerial exception to apply); *see also Morrissey-Berru*, 769 F. App'x at 461 (same).

[9] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2056–61, 2066 (employing a more function-focused analysis to reach the opposite conclusion from the Ninth Circuit).

[10] *See infra* notes 102–140 and accompanying text (discussing the way in which function expands the exception and advocating for a narrower construal).

[11] *See infra* notes 14–67 and accompanying text.

[12] *See infra* notes 68–101 and accompanying text.

[13] *See infra* notes 102–140 and accompanying text.

[14] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (pointing to *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission* as its latest ministerial exception decision (citing 565 U.S. 171 (2012))).

first recognized the ministerial exception.[15] Sections B and C discuss the factual and procedural backgrounds of *Biel v. St. James School* and *Morrissey-Berru v. Our Lady of Guadalupe School*—the two 2018 and 2019 Ninth Circuit decisions that the Supreme Court consolidated in *Our Lady of Guadalupe School*.[16] Finally, Section D discusses the potential circuit split the Ninth Circuit's decisions created and the corresponding procedural history that brought the cases before the Supreme Court.[17]

A. The Supreme Court First Recognizes the Ministerial Exception

The Supreme Court first recognized the ministerial exception in 2012 in *Hosanna-Tabor*.[18] The plaintiff, Cheryl Perich, was a "called" teacher and employee of Hosanna-Tabor, a Lutheran elementary school.[19] Perich brought a discrimination action against the school under the Americans with Disabilities Act (ADA) when the school terminated her after she took disability leave.[20] The school moved for summary judgment and claimed that the ministerial exception barred Perich's suit because she qualified as a minister.[21] Writing for a unanimous Court, Chief Justice Roberts affirmed the existence of the ministerial exception.[22] Moreover, the Court held that the Establishment and Free Exercise Clauses of the First Amendment foreclose government involvement in a

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[15] *See infra* notes 18–34 and accompanying text.

[16] *See infra* notes 35–60 and accompanying text.

[17] *See infra* notes 61–67 and accompanying text.

[18] *Hosanna-Tabor*, 565 U.S. at 188–89. Although the Supreme Court had not yet considered the ministerial exception prior to 2012, lower courts had accepted and applied it as early as 1972. *Id.* at 196 (citing McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972)); *see also* Zoë Robinson, *What Is a "Religious Institution"?*, 55 B.C. L. REV. 181, 199 (2014) (noting ministerial exception cases were pervasive in the lower courts after Congress passed the Civil Rights Act of 1964). Furthermore, by 2012, the courts of appeals had also uniformly accepted and applied the ministerial exception. *Hosanna-Tabor*, 565 U.S. at 188.

[19] *Hosanna Tabor*, 565 U.S. at 177–78.

[20] *Id.* at 177–80 (citing Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2009)). Perich filed her claim with the Equal Employment Opportunity Commission, which in turn, brought suit against Hosanna-Tabor on her behalf. *Id.* at 179–80. Hosanna-Tabor employed both "called" teachers and "lay" teachers. *Id.* at 177. "Called," as a designation, indicated that the teacher had been summoned to her "vocation by God through a congregation," and could thus receive the formal title "Minister of Religion, Commissioned." *Id.* Teachers could become a "called" teacher if they met required academic standards, which they could accomplish by completing a certain training program at a Lutheran-affiliated university. *Id.* The school did not require "lay" teachers to receive such training, although they had the same responsibilities as "called" teachers. *Id.*

[21] *Id.* at 180. The District Court agreed that Perich was a minister for purposes of the exception and granted Hosanna-Tabor summary judgment. *Id.* at 180–81. The Sixth Circuit reversed and remanded, holding that, although the ministerial exception existed, it did not apply to Perich's employment. *Id.* at 181.

[22] *Id.* at 181.

religious institution's relationship with its employees that are ministers.[23] It reasoned that a religious institution's choice of minister has substantial religious implications, as ministers are responsible for communicating religious messages and guiding the members of the religious community in faith.[24] As such, the First Amendment bestows a freedom on a given religious institution to be free from secular government intervention into the selection of its ministers and to be free to curate its "faith and mission" through ministerial appointments.[25] Thus, the ministerial exception derives from the notion that courts cannot apply employment antidiscrimination statutes to minister employees because such statutes would effectively force a religious institution to hire or retain certain ministers based on secular guidelines and objectives.[26]

Ultimately, the Court determined that Perich qualified as a minister for purposes of the ministerial exception and dismissed her employment discrimination action against Hosanna-Tabor.[27] The Court declined to adopt a "rigid formula" when it determined that Perich qualified as a minister.[28] Instead, the Court applied a totality of the circumstances analysis and considered four factors specific to Perich's employment that, when taken together as a whole, indicated she was a minister.[29] First, the Court highlighted Perich's formal title of minister that the school gave her.[30] Second, the Court noted the substance of her title by emphasizing the significant amount of religious training that the school required Perich to complete before it commissioned her as a minister.[31] Third, the Court considered how Perich embraced the title and presented her-

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[23] *Id.* at 188. The Court reasoned that the founders drafted the Religion Clauses to create a distinct separation between church and state and to preserve religious autonomy in decisions concerning faith, religious doctrine, and church administration. *Id.* at 183–86. The Court noted that important historical context influenced the founders when drafting these clauses. *Id.* at 183. Many colonists had left England to escape the control of the Church of England and to be free to choose their own ministers and practice their faith. *Id.* Yet, to their dismay, the Crown continued to exercise control over the appointment of ministers in colonial churches. *See id.* As such, religious autonomy in the selection of ministers was a key consideration behind the Religion Clauses. *Id.*

[24] *See id.* at 188, 192 (suggesting a minister is one who embodies the religious institution's beliefs and plays a part in "conveying the Church's message and carrying out its mission").

[25] *See id.* at 188–89 (explaining the way the First Amendment protections manifest).

[26] *See id.* (describing the conflict of employment antidiscrimination statutes and First Amendment guarantees).

[27] *Id.* at 194.

[28] *Id.* at 190.

[29] *See id.* at 191–92 (noting multiple characteristics of Perich's employment that, when looked at holistically, suggested that she was a minister).

[30] *Id.* When Hosanna-Tabor offered her a position as a "called" teacher, it issued Perich a "diploma of vocation." *Id.* at 191. The Court reasoned that in giving Perich the title of "called" teacher, Hosanna-Tabor effectively presented her to the community in such a way that distinguished her from the average members of the congregation. *Id.*

[31] *Id.* at 191. The requirements, which took Perich six years to complete, included completing eight college-level theology courses, obtaining endorsement from her local Synod district, and having a congregation elect her by recognizing God's call to her to teach. *Id.*

self to the community as a minister.[32] Finally, the Court looked to Perich's job duties, which included teaching religion classes, leading her students in prayer, and occasionally leading chapel service.[33] The Court stipulated that these duties indicated Perich had a role in communicating the Church's message and "carrying out its mission"—a minister's central functions.[34]

B. Biel v. St. James School*: Factual Background and Procedural History*

In 2018, in *Biel v. St. James School*, the Ninth Circuit considered whether Kristen Biel, a fifth-grade teacher at St. James Catholic School in Los Angeles, was a minister for purposes of the ministerial exception.[35] Biel brought a claim against the school under the ADA when the school refused to renew her contract shortly after she requested time off to undergo treatment for breast cancer.[36] The school alleged that Biel was a minister, and that she consequently could not bring an employment discrimination action against it.[37] The United States District Court for the Central District of California agreed and granted the school's motion for summary judgment.[38]

On appeal, the Ninth Circuit analyzed Biel's background, training, title, role, and the extent to which the school presented her as a minister to the community.[39] Unlike Perich in *Hosanna-Tabor*, Biel had no formal title indicating she was a minister, nor did she complete any religious education to ob-

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[32] *Id.* at 192. For example, when filing her taxes, Perich claimed a unique housing allowance that only employees earning compensation for ministry work can claim. *Id.* The Court reasoned that this indicated she thought of herself as a minister and presented herself as such. *Id.*

[33] *Id.* Perich taught religion four days a week, led her students in prayer several times a day, took her students to chapel once a week, and led chapel service twice a year. *Id.*

[34] *Id.* Perich's position required that she "lead others toward Christian maturity" and perform her job "according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures." *Id.* In his concurrence, Justice Alito cautioned against placing too much significance on the formal title of the employee, given differences among religions, and instead emphasized the importance of the employee's function in determining whether the ministerial exception should apply. *Id.* at 198–99 (Alito, J., concurring) (arguing that "any employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith" should qualify as a minister). Such singular emphasis did not appear in the majority opinion. *See id.* at 191–92 (Roberts, C.J.) (stating that many factors led to the Court's conclusion that Perich was a minister). Justice Thomas also filed a separate concurrence and argued that, in determining whether an employee is a minister, courts should "defer to a religious organization's good faith understanding." *Id.* at 196–97 (Thomas, J., concurring).

[35] Biel v. St. James Sch., 911 F.3d 603, 605 (9th Cir. 2018), *rev'd*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020). Biel taught all academic subjects, including religion, as these subjects were part of the school's required curriculum. *Id.*

[36] *Id.*

[37] *Id.* at 606.

[38] Biel v. St. James Sch., No. 15-cv-04248, 2017 WL 5973293, at *3 (C.D. Cal. Jan. 24, 2017).

[39] *Biel*, 911 F.3d at 605–09 (stating and applying the factors that the Court considered in *Hosanna-Tabor* to Biel's employment); *see Hosanna-Tabor*, 565 U.S. at 191–92 (setting forth the factors that suggested Perich was a minister).

tain her position.[40] Furthermore, unlike Perich, nothing in the record indicated that Biel considered herself a minister or purported to be one.[41] The only similarity between Biel and Perich was that they both performed various religious duties, as Biel taught religion lessons four days a week and highlighted religious themes in her general lesson plans.[42]

Ultimately, the Ninth Circuit held that Kristen Biel was not a minister for purposes of the ministerial exception.[43] It reasoned that courts should not construe the ministerial exception to provide religious institutions with immunity from employment discrimination claims of employees who do not act as religious leaders.[44] As such, the court stated that religious institutions are not exempt from employment antidiscrimination statutes when a given employee has both religious and secular responsibilities but does not guide the faith community in the way a congregation leader would.[45] The Ninth Circuit noted that the Supreme Court's holistic analysis in *Hosanna-Tabor* identified four characteristics of Perich's employment that informed the Court's conclusion that she was a religious leader.[46] Yet, the Court only reached such a conclusion after

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[40] *Biel*, 911 F.3d at 608; *see Hosanna-Tabor*, 565 U.S. at 191 (analyzing the characteristics of Perich's employment). The school gave Biel the title of "Grade 5 Teacher," and she was a liberal studies major in college but completed no religious courses while obtaining her degree. *Biel*, 911 F.3d at 605, 608. The only religious training that Biel received was a half-day religious conference that covered ways to incorporate religious lessons into a curriculum in addition to various secular topics. *Id.* at 605.

[41] *Biel*, 911 F.3d at 608–09; *see Hosanna-Tabor*, 565 U.S. at 191–92 (noting that Perich claimed a tax credit exclusively reserved for ministers). Unlike Perich, whom the school could only terminate by a congregation supermajority vote, Biel was an at-will employee with a yearlong contract. *Id.* at 605, 608; *see Hosanna-Tabor*, 565 U.S. at 191 (describing Perich's termination process).

[42] *Biel*, 911 F.3d at 609; *see Hosanna-Tabor*, 565 U.S. at 192 (describing Perich's duties such as teaching religion classes, leading prayer, and occasionally leading chapel service). Biel taught her students religion four days a week from a book the school provided. *Biel*, 911 F.3d at 605. She prayed with her students, but she did not lead her students in prayer. *Id.* She attended a monthly school mass with her students, at which her predominant responsibility was to make sure they behaved. *Id.* Biel was Catholic, although St. James School did not require that its teaching candidates be Catholic to hire them. *Id.* Biel's employment contract and the St. James School faculty handbook did contain various religious mission statements, however, and the school did evaluate her in part by the way she incorporated those themes into her classroom. *Id.* at 605–06.

[43] *Biel*, 911 F.3d at 605.

[44] *Id.* at 611 (arguing that the ministerial exception does not provide "carte blanche to disregard antidiscrimination laws"). The policy behind the Establishment and Free Exercise Clauses, as noted in *Hosanna-Tabor*, centered on the founders' intent to prevent the government from choosing church leadership, as was the case under the British monarchy. *Id.* at 610. Although the applicability of the exception is not exclusive to "the head of a religious congregation," the focus is on religious leadership and thus the exception need not apply to all employees who serve a religious function. *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 188).

[45] *Id.* at 610–11.

[46] *Id.* at 607, 610.

considering all four characteristics.[47] Accordingly, the fact that Biel's employment only satisfied one of the four factors indicated that she did not serve as a religious leader in the way a congregation leader would.[48] Therefore, her employment did not fall within the realm of the exception.[49]

C. Morrissey-Berru v. Our Lady of Guadalupe School*: Factual Background and Procedural History*

In 2019, in *Morrissey-Berru v. Our Lady of Guadalupe School*, the Ninth Circuit once again considered whether the ministerial exception applied to a teacher at a Catholic elementary school.[50] Agnes Morrissey-Berru, a former fifth and sixth grade teacher at Our Lady of Guadalupe School, brought a claim under the Age Discrimination in Employment Act against the school.[51] The school claimed Morrissey-Berru qualified as a minister for purposes of the ministerial exception.[52] The United States District Court for the Central District of California agreed and accordingly granted the school summary judgment.[53] On appeal, the Ninth Circuit followed the approach taken in *Biel* and evaluated Morrissey-Berru's formal title, training, religious responsibilities, and public persona as compared to those of Perich in *Hosanna-Tabor*.[54] Morrissey-Berru did have several religious responsibilities, including praying with her students daily, teaching

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[47] *See id.* at 609 (noting that courts cannot interpret *Hosanna-Tabor* to mean that the ministerial exception applies solely on the basis of one shared characteristic because, if it did, the court's careful four-characteristic analysis would amount to mere dicta).

[48] *Id.* at 610 (noting that the only factor that Biel's employment satisfied was that she performed religious duties by providing religious instruction). *See supra* notes 39–42 and accompanying text for further discussion of the court's factor-based analysis.

[49] *Biel*, 911 F.3d at 611.

[50] Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 460–61 (9th Cir. 2019), *rev'd*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020).

[51] *Morrissey-Berru*, 769 F. App'x at 460; *see Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2056, 2058 (noting that the crux of Morissey-Berru's age discrimination claim was that the school demoted her and did not renew her contract in order to replace her with a younger teacher); *see also* Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a) (providing that it is illegal for an employer to make hiring and retention decisions based on an individual's age). Morrissey-Berru taught all subjects, including religion, as the school required of all teachers at the Catholic school. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2056.

[52] *Morrissey-Berru*, 769 F. App'x at 460–61.

[53] Morrissey-Berru v. Our Lady of Guadalupe Sch., No. 16-cv-09353, 2017 WL 6527336, at *2–3 (C.D. Cal. Sept. 27, 2017).

[54] *Morrissey-Berru*, 769 F. App'x at 461 (explicitly comparing Morrissey-Berru's employment to Perich's employment in *Hosanna-Tabor* (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 191–92 (2012))); *see Biel*, 911 F.3d at 605–09 (employing a similar comparison of Biel's employment to Perich's employment characteristics in *Hosanna-Tabor*).

religion classes, and planning monthly Mass.[55] Furthermore, her employment agreement required that she infuse Catholic lessons and values into her teaching plan.[56] Similar to Biel, however, Morrissey-Berru had a secular title, minimal religious training, and did not present herself to the public as a minister.[57] Therefore, explicitly relying on its decision in *Biel*, the Ninth Circuit held that Morrissey-Berru was also not a minister for purposes of the ministerial exception.[58] The court reiterated that serving a religious function is not dispositive under the framework set out in *Hosanna-Tabor*.[59] Even though Morrissey-Berru performed various religious functions, the other aspects of her employment, namely her title, training, and public persona, were not ministerial.[60]

D. The Road to the Supreme Court: Our Lady of Guadalupe School v. Morrissey-Berru *Procedural History*

After the Ninth Circuit issued its decision in *Biel* in 2018, St. James School petitioned the Ninth Circuit for a panel rehearing, which the panel denied in 2019.[61] Judge Nelson dissented in the rehearing denial and alleged that the court's narrow application of the ministerial exception constituted a sharp

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[55] *Morrissey-Berru*, 769 F. App'x at 461. Morrissey-Berru taught her students religion every day from a textbook and prepared them for participation in Mass and Catholic sacraments. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2057.

[56] *Morrissey-Berru*, 769 F. App'x at 461. Morrissey-Berru was not Catholic, but her employment agreement required that she teach in a way that promoted the Catholic faith and its mission. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2057, 2078 (indicating that Morrissey-Berru was not Catholic). The school also evaluated her in accordance with a faculty handbook that established the same religious expectations. *Id.* at 2057.

[57] *Morrissey-Berru*, 769 F. App'x at 461; *see Biel*, 911 F.3d at 608–09 (explaining why Biel was not a minister for the purposes of the exception). Morrissey-Berru's official employment title was "Teacher." *Id.* Her religious training only included one religious education course on the history of the Catholic Church. *Id.* She received a bachelor's degree for completing an English Language Arts major and secondary education minor. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2078.

[58] *Morrissey-Berru*, 769 F. App'x at 461 (citing *Biel*, 911 F.3d at 609).

[59] *Id.*; *see Hosanna-Tabor*, 565 U.S. at 194 (providing the framework for determining whether a teacher qualified as a minister).

[60] *Morrissey-Berru*, 769 F. App'x at 461.

[61] Biel v. St. James Sch., 926 F.3d 1238, 1239 (9th Cir. 2019) (denying en banc review). In 2018, the Ninth Circuit had decided Biel's case as a three-judge panel. Biel v. St. James Sch., 911 F.3d 603, 605 (9th Cir. 2018), *rev'd*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069. Judge D. Michael Fisher, the dissenting judge in the panel decision, requested a vote on en banc rehearing. *Id.* at 605; *Biel*, 926 F.3d at 1239. The Ninth Circuit denied the petition for rehearing en banc and denied St. James School's petition for panel rehearing. *Biel*, 926 F.3d at 1239. A petition for panel rehearing is a request that a party submits to a judicial panel to ask that it reevaluate a prior decision because it "overlooked or misapprehended" facts or law. *Petition for Panel Rehearing*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* FED. R. APP. P. 40 (providing the procedural requirements for a petition for panel rehearing). A petition for rehearing en banc asks that the full appellate court review an earlier panel decision that is inconsistent with the court's precedent. *Petition for Rehearing En Banc*, BLACK'S LAW DICTIONARY, *supra*; *see* FED. R. APP. P. 35 (providing the procedure for a petition for rehearing en banc).

departure from the approaches of its fellow circuit courts.[62] Judge Nelson argued that the other circuit courts' application of the ministerial exception had determined that an employee's religious function was the key determinant in whether an employee qualified as a minister under *Hosanna-Tabor*.[63] He also noted that, although the four characteristics of Perich's employment informed the Court's conclusion in *Hosanna-Tabor*, it did not create a test for courts to use going forward.[64]

St. James School and Our Lady of Guadalupe School separately filed petitions for certiorari with the Supreme Court.[65] Both petitions cited Judge Nelson's dissent and argued that the Ninth Circuit's narrow approach had effectively created a circuit split regarding the effect of employee function on the application of the ministerial exception.[66] The Supreme Court granted certiorari and consolidated the two actions into *Our Lady of Guadalupe School v. Morrissey-Berru*.[67]

II. *OUR LADY OF GUADALUPE SCHOOL V. MORRISSEY-BERRU*

In July 2020, in *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court reversed both Ninth Circuit decisions, holding that Kristen Biel and Agnes Morrissey-Berru were ministers for purposes of the ministerial exception.[68] The Court held that under the existing framework, the ministerial

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[62] *Biel*, 926 F.3d at 1239 (Nelson, J., dissenting). Judges Bybee, Callahan, Bea, M. Smith, Ikuta, Bennett, Bade and Collins joined Judge Nelson's dissent. *Id.*

[63] *Id.* Several circuit courts gave the most weight to an employee's religious function and often held the ministerial exception applied even if all four of the factors identified in *Hosanna-Tabor* were not applicable. *See, e.g.*, Sterlinski v. Catholic Bishop of Chi., 934 F.3d 568, 569–70, 572 (7th Cir. 2019) (emphasizing the function of the employee as the most important consideration); Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 122 n.7 (3d Cir. 2018) (explaining that the ministerial exception applies if the employee will perform "spiritual functions"); Fratello v. Archdiocese of N.Y., 863 F.3d 190, 205 (2d Cir. 2017) (accepting guidance from Justice Alito's concurrence in *Hosanna-Tabor* that focused on the importance of the employee's function); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 199 (2012) (Alito, J., concurring) (noting that the employee's function is the most important factor in the ministerial exception analysis).

[64] *Biel*, 926 F.3d at 1242 (Nelson, J., dissenting); *see Hosanna-Tabor*, 565 U.S. at 190 (holding that Perich was a minister for purposes of the ministerial exception).

[65] Petition for Writ of Certiorari, Biel v. St. James Sch., 911 F.3d 603 (9th Cir. 2018) (No. 19-348), 2019 WL 4528125 (U.S. Sept. 16, 2019) [hereinafter St. James School Petition]; Petition for Writ of Certiorari, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 769 F. App'x 460 (9th Cir. 2019) (No. 19-267), 2019 WL 4131225 (U.S. Aug. 28, 2019) [hereinafter Our Lady of Guadalupe School Petition]. A petition for a writ of certiorari is a request that the United States Supreme Court agree to review a lower court decision. *See Certiorari*, BLACK'S LAW DICTIONARY, *supra* note 61 (defining certiorari).

[66] *See* St. James School Petition, *supra* note 65, at 12–24 (highlighting Judge Nelson's dissent); Our Lady of Guadalupe School Petition, *supra* note 65, at 14–26 (same).

[67] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2049 (2020).

[68] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020); *see also* Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 460–61 (9th Cir. 2019), *rev'd*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069 (holding that Morrissey-Berru was not a minister); Biel v.

exception encompassed employees who performed important religious duties, even when such employees did not have ministerial titles or extensive religious training backgrounds.[69] Section A of this Part recounts the policies that the Court identified as grounding the ministerial exception and the way they influenced the Court to conclude that employee function is the most essential consideration of the analysis.[70] Section B discusses the Court's application of the ministerial exception to Biel and Morrissey-Berru and how the Court held that the Ninth Circuit erred in its application.[71] Section C analyzes Justice Sotomayor's dissenting opinion that explored how the Court's opinion may have strayed from its 2012 approach in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.[72]

A. An Employee's Function Is the Most Important Factor in the Ministerial Exception Analysis

Ultimately, in *Our Lady of Guadalupe School*, the Court concluded that "what an employee does" is the most important consideration in determining whether an employee qualifies as a minister for purposes of the exception.[73] It reached that conclusion by extrapolating from the policy considerations underlying the ministerial exception.[74] As the Court acknowledged in *Hosanna-Tabor*, the founders designed the Establishment and Free Exercise clauses, at least in part, to protect religious institutions from government intrusion into "matters of faith and doctrine."[75] As such, the First Amendment provides a given religious institution with autonomy to decide which individuals will play essential roles in carrying out its central mission.[76] This raises the question as to *why* a religious institution must be able to choose, retain, or terminate such

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St. James Sch., 911 F.3d 603, 605 (9th Cir. 2018), *rev'd*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069 (holding that Biel was not a minister). Because the teachers fell within the scope of the ministerial exception, courts could not hear employment discrimination actions brought against their employers. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055. Kristen Biel passed away before the case reached the Supreme Court, so her husband, Daryl Biel, litigated the case on her behalf. *Id.* at 2058 n.6.

[69] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2052, 2066 (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 190–91 (2012)) (analyzing, with respect to Biel and Morrissey-Berru, the four characteristics of ministerial function that the Court laid out in *Hosanna-Tabor*). Chief Justice Roberts and Justices Thomas, Breyer, Alito, Kagan, Gorsuch, and Kavanaugh joined the opinion. *Id.* at 2052.

[70] *See infra* notes 73–85 and accompanying text.

[71] *See infra* notes 86–93 accompanying text.

[72] *See infra* notes 94–101 and accompanying text.

[73] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064 (emphasizing that employee function is the most significant indicator of ministerial role).

[74] *See id.* at 2060–61, 2064 (analyzing the existing justifications for the ministerial exception).

[75] *See id.* at 2060 (noting that state interference into such matters would violate religious institutions' free exercise of religion and constitute government establishment of religion).

[76] *See id.* (noting, however, that even though religious institutions require autonomy in leadership decisions, that does not mean such institutions are generally exempt from secular laws).

individuals without government involvement in order to maintain its independence in "matters of faith and doctrine."[77] The Court reasoned that without such autonomy, ministers could preach, educate, or advise in a manner that contradicted essential church doctrine and lead members of the faith astray.[78] As such, the policy behind the ministerial exception is to insulate a religion's message and mission by exempting employees who serve these functions from secular regulation.[79]

The Court held that what is most salient in determining whether the ministerial exception applies to a particular employee is whether the employee has a role in delivering the religious institution's message and fulfilling its mission.[80] In *Hosanna-Tabor*, the four characteristics of Perich's employment were relevant because they indicated the extent to which she communicated the Church's message and furthered its mission.[81] Yet, the Court reasoned that the four characteristics were not necessary to hold that Perich was a minister and, therefore, are not dispositive in other cases.[82] Furthermore, the Court reasoned that treating some of the characteristics of Perich's employment as necessary would be problematic.[83] Namely, placing too much emphasis on a formal title like "minister" or even on the amount of extensive religious training could create difficult line drawing problems and risk discrimination against faiths that do not have clear ministerial equivalents.[84] As such, the majority held that the most

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[77] *See id.* at 2060–61 (delving deeper into the importance of a religious institution's autonomy under the First Amendment).

[78] *Id.*

[79] *See id.* (connecting a religious institution's choice of minister to its broader implications).

[80] *See id.* at 2063 (holding that employee function is the most important consideration in determining whether an employee is a minister).

[81] *See id.* at 2063–64 (noting that Perich's title of "minister" indicated that she had an important position built on trust, and that her extensive religious training indicated she understood Church doctrine and could communicate it effectively to her students); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 191 (2012) (analyzing Perich's title).

[82] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2063 (reasoning that although there were four aspects of Perich's employment that indicated she was a minister, that did not suggest those characteristics must be present in future cases or would even be significant in deciding a different factual scenario).

[83] *See id*. at 2063–64 (indicating the drawbacks of requiring all four factors be present).

[84] *Id.* An employee's title of "minister" would not alone warrant invoking the exception, because it does not guarantee religious function. *Id.* In the same way, an employee's lack of designation as "minister" does not alone preclude the application of the exception because it does not guarantee that the employee serves no religious function. *Id.* The term "minister" does not carry the same, if any, significance across all faiths. *Id.* at 2064. As such, if courts were to focus on formal title, it would have to decide which titles were sufficiently significant and would accordingly have to look to function anyway to make that determination. *Id.* Similarly, although training requirements for an employee might indicate a capacity to master and effectively communicate religious doctrine, an employee's lack of training does not necessarily translate to an inability to convey religious messages. *Id.* Teaching children religion, for example, may not require a sophisticated understanding of doctrine such that a teacher's lack of training would not necessarily indicate she was not a minister. *Id.*

reliable method for identifying whether an employee should fall under the ambit of the ministerial exception is examining the employee's function.[85]

B. The Supreme Court Holds the Ninth Circuit Erred in Finding the Ministerial Exception Did Not Apply to Biel *and* Morrissey-Berru

The Court applied its understanding of the ministerial exception to Kristen Biel and Agnes Morrissey-Berru's cases.[86] It meticulously analyzed the facts of each case to ultimately reach the determination that both teachers carried out essential religious responsibilities.[87] The Court noted that both schools had strong religious missions and the objectives to educate and train their students in the faith were ubiquitous.[88] The terms of both teachers' employment agreements required they help fulfill those missions.[89] Furthermore, Biel and Morrissey-Berru took active measures to not only teach their students religious doctrine through their religion courses, but also to provide guidance on how to practice their faith.[90] Although they did not have the same formal title or extensive religious training as Perich did in *Hosanna-Tabor*, their responsibilities were largely the same as Perich's.[91] Further, the Court stated that the Ninth Cir-

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[85] *Id.* at 2064. The Court reasoned that teaching often brings an employee within the ambit of the ministerial exception because religious education is one of the most prolific and important mechanisms for organized religions to communicate their doctrines and fulfill their missions. *Id.* at 2064–65. The crux of a religious school's mission is to educate its students in religious doctrine and train them to become fully participating members of the faith. *Id.* at 2064 (suggesting such reasoning was "implicit" in the majority's opinion in *Hosanna-Tabor* (citing *Hosanna-Tabor*, 565 U.S. at 198, 202 (Alito, J., concurring))). Teachers at religious schools play a direct role in communicating religious lessons and training students in faith. *Id.* at 2055, 2066. Accordingly, secular regulation of such teachers would infringe on the religious school's independence in "matters of faith and doctrine." *See id.* at 2055, 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186) (connecting a school's autonomy in choosing religious education instructors to the broader purposes underlying the ministerial exception). Thus, employees of religious institutions who provide religious instruction fall within the scope of the ministerial exception. *Id.* at 2064. The Court pointed to the specific importance of religious education in Catholicism, Protestantism, Judaism, Islam, the Church of Jesus Christ of Latter-day Saints, and Seventh-day Adventism to reflect the essential role it plays across faiths. *Id.* at 2065–66.

[86] *Id.* at 2066; *see also* Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 460–61 (9th Cir. 2019), *rev'd*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069 (holding that Morrissey-Berru was not a minister); Biel v. St. James Sch., 911 F.3d 603, 605 (9th Cir. 2018), *rev'd*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069 (holding that Biel was not a minister).

[87] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2056–2061, 2066 (providing a detailed analysis of the facts and holding that both teachers carried out religious functions).

[88] *Id.* at 2066.

[89] *See id.* (referencing Biel's and Morrissey-Berru's respective employment agreements and applicable faculty handbooks). The Court reasoned that this reflected the way in which the schools saw the teachers as crucial to the execution of their missions. *Id.*

[90] *See id.* (reiterating that both teachers led their students in prayer, prepared them for various religious ceremonies, and attended Mass with them).

[91] *See id.* (describing Perich's title, training, and responsibilities in relation to Biel's and Morrissey-Berru's (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 186, 190-91 (2012))).

cuit erred by giving too much consideration to title and formal training in its analysis of both cases.[92] As such, the Court held that the functions of both teachers indicated that they were ministers for purposes of the ministerial exception.[93]

C. Potential Departure from Hosanna-Tabor*: Justice Sotomayor's Dissent*

Justice Sotomayor filed a dissenting opinion, which argued that the Court effectively re-wrote *Hosanna-Tabor* in its application of the ministerial exception in *Our Lady of Guadalupe School*.[94] She emphasized that, because the ministerial exception effectively grants religious institutions the ability to discriminate against their employees without repercussions, courts must limit it to only apply to church leadership.[95] In *Hosanna-Tabor*, the Court identified the four characteristics of Perich's employment because they collectively suggested that she held an important leadership role in the Church.[96] Justice Sotomayor reasoned that, although an employee's religious function informs the extent to which an employee is a religious leader, serving a religious function does not automatically make an employee a religious leader.[97] She argued that the other three factors—title, religious training, and public presentation as a minister—were essential to the analysis in *Hosanna-Tabor*, yet the Court improperly minimized their significance here.[98] If the Court in *Hosanna-Tabor* did not find them to be important considerations, it would not have wasted its time discussing them.[99] Ultimately, she argued that the Court's conversion of the holistic, leadership-focused analysis in *Hosanna-Tabor* to a function-focused analysis made the ministerial exception

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[92] *Id.* at 2057. The Court even noted that Biel and Morrissey-Berru's titles of teacher or Catholic school teacher indicated they were their students' "primary teachers of religion." *Id.*

[93] *Id.*

[94] *Id.* at 2071, 2075 (Sotomayor, J., dissenting) (arguing that Justice Alito's majority opinion reframed his concurrence in *Hosanna-Tabor*, which only received two votes, to become the "touchstone" of *Hosanna-Tabor*); *see also Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring) (suggesting function is the most important consideration in the ministerial exception analysis).

[95] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072–73 (Sotomayor, J., dissenting) (noting the consensus among federal appellate courts prior to *Hosanna-Tabor* that religious leadership was the most important factor that led to multiple determinations that "lay faculty" did not qualify as ministers for purposes of the exception).

[96] *Id.* at 2073–74 (conceding that, although *Hosanna-Tabor* did provide that the exception does not exclusively apply to "the head of a religious congregation," its analysis served to identify whether Perich "personified" the faith and its mission (quoting *Hosanna-Tabor*, 565 U.S. at 188)).

[97] *Id.* at 2076.

[98] *Id.* at 2081; *see Hosanna-Tabor*, 565 U.S. at 191–92 (analyzing Perich's title, training, and presentation to the community as a minister).

[99] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2080–81 (Sotomayor, J., dissenting) (noting that the Court problematically did not even acknowledge the third factor—whether the religious institution held each employee out to the public as a minister).

overly broad.[100] Furthermore, the holding threatened the employment antidiscrimination rights of countless employees of religious institutions.[101]

III. *Our Lady of Guadalupe v. Morrissey-Berru* Problematically Expanded the Scope of the Ministerial Exception

The Supreme Court's decision in 2020, in *Our Lady of Guadalupe School v. Morrissey-Berru* problematically expanded the scope of the ministerial exception, such that more employees will now fall within the exception's ambit and lose their federal employment antidiscrimination protections.[102] The outcome poignantly illustrates the reasons why future courts should nevertheless try to limit the scope of the exception as much as possible.[103] Kristen Biel had breast cancer, and St. James School refused to renew her contract shortly after she asked for time off to seek chemotherapy treatment.[104] She passed away before her case reached the Supreme Court, which forced her husband, Daryl, to litigate on her behalf.[105] Because she served a religious function in her capacity as an elementary school teacher, Biel qualified as a minister under the ministerial exception.[106] As such, her case is closed—her widowed husband has no opportunity to seek a remedy under an employment antidiscrimination statute.[107] Effectively, it does not matter whether St. James School discriminated against her because of her disability.[108] So long as Biel's employment fell within the ambit of the exception, the school could have discriminated freely against her on any statutorily prohibited basis—even without religious justification—and experience no legal repercussion in employment antidiscrimination law.[109]

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[100] *Id.* at 2082.

[101] *Id.*

[102] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2082 (Sotomayor, J. dissenting) (noting that the majority's opinion broadens the ministerial exception in a way that will likely threaten the antidiscrimination protections of innumerable employees).

[103] *See id.* at 2071 (emphasizing the lamentable facts surrounding both teachers' terminations and the reality that the majority's opinion wholly protects their employers from potentially viable discrimination claims).

[104] Biel v. St. James Sch., 911 F.3d 603, 605 (9th Cir. 2018), *rev'd*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069 (explaining the circumstances surrounding the end of Biel's employment with St. James School).

[105] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2058 n.6.

[106] *Id.* at 2066.

[107] *See id.* at 2055 (stating that the First Amendment bars courts, under the ministerial exception, from hearing employment discrimination claims that employees who qualify as ministers bring).

[108] *See id.* at 2072 (Sotomayor, J. dissenting) (arguing that the exception shields the employer regardless of whether it discriminated against the employee).

[109] *See id.* (noting that the ministerial exception allows an employer to discriminate on the basis of statutorily protected grounds notwithstanding whether such discrimination is "wholly unrelated to the employer's religious beliefs or practices," such that the employer need not even provide a religious justification). *See generally* George L. Blum, Annotation, *Application of First Amendment's "Ministe-*

Section A of this Part argues that, from a policy standpoint, the ministerial exception should only apply in a narrow set of circumstances because it poses a threat to the efficacy of statutory employee antidiscrimination protections.[110] Section B proposes that, even though *Our Lady of Guadalupe School* certainly expanded the scope of the ministerial exception, the extent of the expansion will depend on whether courts interpret the opinion itself broadly or narrowly.[111] Finally, Section C argues that courts should apply the narrowest interpretation of *Our Lady of Guadalupe School* in future ministerial exception cases to protect against abuse deriving from religious deference.[112]

A. The Policy Argument for a Ministerial Exception That Is Narrow in Scope

As a matter of general policy, the ministerial exception should apply to as few employees as possible, because a broad application has the potential to undermine the statutory employment antidiscrimination protections of millions of American workers.[113] Employment discrimination on the basis of statutorily protected classes and identities continues to pervade American society.[114] Approximately two million workers in the United States are employees of religious organizations.[115] When the ministerial exception applies, it grants incredible deference to religious employers, and leaves employees with a stark lack of legal recourse.[116] Such religious organizations are well aware of the poten-

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rial Exception" or "Ecclesiastical Exception" to Federal Civil Rights Claims, 41 A.L.R. Fed. 2d 445, I § 2 (2009) (discussing the ways in which some courts' application of the First Amendment's ministerial exception has barred employees of religious institutions' claims of discrimination on the basis of statutorily protected classes other than religion, including, but not limited to, race, national origin, and sex).

[110] *See infra* notes 113–119 and accompanying text.

[111] *See infra* notes 120–135 and accompanying text.

[112] *See infra* notes 136–140 and accompanying text.

[113] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2082 (Sotomayor, J. dissenting) (arguing that a sweeping ministerial exception poses an untold threat to the antidiscrimination protections of employees).

[114] *See* Brief of National Women's Law Center et al. as Amici Curiae in Support of Respondents at 9–22, *Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049 (No. 19-267 & 19-348) [hereinafter Brief of National Women's Law Center] (describing in detail the extent to which "women, people of color, older workers, workers with disabilities, LGBTQ workers, immigrant workers, and those with multiple and intertwining identities" still experience employment discrimination).

[115] *See* Brief of The National Employment Lawyers Association et al. as Amici Curiae in Support of Respondents at 15, *Our Lady of Guadalupe Sch*., 140 S. Ct. 2049 (No. 19266 & 19–348) [hereinafter Brief of National Employment Lawyers Association] (providing the data regarding employment of religious organizations (citing *Occupational Employment Statistics, May 2016 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 8131-Religious Organizations*, U.S. BUREAU LABOR STATISTICS (Mar. 30, 2018), http://www.bls.gov/oes/2017/may/naics4_813100.htm [https://perma.cc/LJD4-4GGE])).

[116] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072–73 (Sotomayor, J., dissenting) (arguing that because the ministerial exception constitutes a significant break from antidiscrimination law,

tial immunity the ministerial exception affords to them and have attempted to bring more types of employees, employers, and claims within the exception's scope.[117] Some organizations have even gone so far as to explicitly provide religious employers with guidance for avoiding civil rights lawsuits by using the ministerial exception.[118] As such, to expand the scope of the ministerial exception is to deprive more workers of the antidiscrimination protections that Congress intended to provide to them.[119]

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courts have and should construe it narrowly). Justice Sotomayor noted that when the Supreme Court accepted the ministerial exception in 2012, in *Hosanna-Tabor*, it ratified the holdings of the federal appellate courts. *See id.* (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 188 (2012)); *see, e.g.*, Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 n.3 (8th Cir. 1991) (providing an example of one such decision that the Court recognized). The federal appellate courts were cognizant of the "potential for abuse" deriving from the ministerial exception, and therefore, evaluated whether an employee was a minister on a case-by-case basis, focusing primarily on religious leadership status. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072–73 (Sotomayor, J., dissenting) (citing *Scharon*, 929 F.2d at 363 n.3; Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985)). By making leadership the focus of the analysis, Justice Sotomayor reasoned that the federal appellate courts had cabined the exception in such a way that "generally applicable laws" would still protect the majority of employees of religious institutions. *Id.* at 2073.

[117] *See* Brief of National Women's Law Center, *supra* note 114, at 22–26 (detailing the ways in which religious employers have tried to expand the ministerial exception). Religious employers have asserted the exception against employees who were not church leaders or religious teachers. *Id.* at 23; *see, e.g.*, Richardson v. Nw. Christian Univ., 242 F. Supp. 3d 1132, 1143–46 (D. Or. 2017) (college professors with no ties to religious mission); Dias v. Archdiocese of Cincinnati, No. 11–CV–00251, 2013 WL 360355 at *1, *4 (S.D. Ohio Jan 30, 2013) (computer technicians); Davis v. Balt. Hebrew Congregation, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (facilities workers); Patsakis v. Greek Orthodox Archdiocese of Am., 399 F. Supp. 2d 689, 690, 693–95 (W.D. Pa. 2004) (other administrative or support staff); Smith v. Raleigh Dist. of N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 697–97, 703–07 (E.D.N.C. 1999) (secretaries and receptionists). Religious employers that are not churches or religious schools have also claimed the exception. Brief of National Women's Law Center, *supra* note 114, at 25–26; *see, e.g.*, Penn v. N.Y. Methodist Hosp., 884 F.3d 416, 423–26 (2d Cir. 2018) (hospital); Schleicher v. Salvation Army, 518 F.3d 472, 475–78 (7th Cir. 2008) (rehabilitation center); Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d at 299, 309–11 (4th Cir. 2004) (nursing home); Equal Emp. Opportunity Comm'n v. Pac. Press Pub. Ass'n, 676 F.2d 1272, 1277–78 (9th Cir. 1982) (publisher). Furthermore, religious employers have claimed that the First Amendment's exception bars any suit that a minister employee files against their employer—even those that do not pertain to hiring or firing. Brief of National Women's Law Center, *supra* note 114, at 24; *see, e.g.*, Demkovich v. St. Andrew the Apostle Parish, 343 F. Supp. 3d 772, 779 (N.D. Ill. 2018) (hostile work environment claim). *See generally* Vin Gurrieri, *Justices May Take New Shot at Balancing Religion and Bias*, LAW360 (Sept. 25, 2020), https://www.law360.com/articles/1311355/justices–may–take–new–shot–at–balancing–religion–and–bias [https://perma.cc/29VX-XRYR] (discussing whether the ministerial exception protects religious employers from hostile work environment claims).

[118] *See, e.g.*, Brief of National Women's Law Center, *supra* note 114, at 30–31 (citing ALLIANCE DEFENDING FREEDOM, THE LUTHERAN CHURCH—MISSOURI SYNOD, PROTECTING YOUR MINISTRY FROM SEXUAL ORIENTATION GENDER IDENTITY LAWSUITS (2016), https://bit.ly/2U3RhPB [https://perma.cc/A5X7-B3FY]) (referencing a specific guide designed to help congregations, schools, and ministries prepare for civil rights lawsuits by taking advantage of the exception).

[119] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072–73, 2082 (Sotomayor, J., dissenting) (noting that the ministerial exception is a judicially-created doctrine that provides exceptions for reli-

B. Our Lady of Guadalupe School *Expanded the Scope of the Ministerial Exception, Although the Extent Depends on Which Interpretation Future Courts Apply*

Nevertheless, the Supreme Court's opinion in *Our Lady of Guadalupe School* expanded the ministerial exception and eroded its limitations by hinging its applicability on whether an employee serves a religious function.[120] The extent to which the decision expands the scope of the ministerial exception, however, depends on which of two plausible interpretations of the Court's reasoning for defining religious function future courts apply.[121]

A narrower reading of the Court's opinion suggests that an employee only qualifies as a minister when she actually performs various religious duties that are consistent with communicating religious messages and guiding the faith

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gious employers that exceed those Congress provided by statute); s*ee also* Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621(b) (stating that the purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment"); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101(b) (stating that the purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" as well as "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities"); Lenzi v. Systemax, Inc., 944 F.3d 97, 100 (2d Cir. 2019) (stating that Title VII has a broad remedial purpose that "counsels against interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate" (quoting Washington County v. Gunther, 452 U.S. 161, 178 (1981))); *cf.* Bostock v. Clayton Cnty, Georgia, 170 S. Ct. 1731, 1753–54 (2020) (noting explicitly—while recognizing sexual orientation and gender identity as protected classes under Title VII for the first time—that the ministerial exception is a potential avenue for religious employers to evade compliance with Title VII prohibitions of employment discrimination on such bases).

[120] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2075–76, 2082 (Sotomayor, J., dissenting) (noting that the function-focused analysis is what expanded the exception). In *Hosanna-Tabor*, the Court's totality of the circumstances approach for determining whether an employee qualified as a minister worked to limit the scope of the ministerial exception to church leadership. *See id.* at 2073–74 (noting that the collective circumstances of Perich's employment showed that she was a leader in her church (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 190–92 (2012))). Without such a holistic analysis, more employees of more religious institutions are likely to fall within the ambit of the ministerial exception after *Our Lady of Guadalupe School*. *See id.* at 2082 (noting the expanded breadth of the exception due to the Court's new "religious function" approach).

[121] *See The Bigotry of Low Expectations*, STRICT SCRUTINY (Jul. 14, 2020), https://strictscrutinypodcast.com/podcast/low-expectations/ [https://perma.cc/27M7-EYBG] (suggesting that one can interpret the opinion broadly or narrowly and that in order for Justice Kagan and Justice Breyer to have signed on to the opinion without writing separately they must have thought that courts could interpret the scope narrowly). *But see* Noah Feldman, *Why Supreme Court Liberals Joined Conservatives on Religion*, BLOOMBERG (July 8, 2020), https://www.bloomberg.com/opinion/articles/2020-07-08/supreme-court-expands-religious-exemptions-with-liberals-help [https://perma.cc/RJY3-7ZTH] (arguing Justices Breyer and Kagan may have joined the majority to demonstrate their willingness to cross traditional ideological lines).

community.[122] In short, whether an employee performs a religious function depends on the nature of the employee's duties.[123] Under this interpretation, even if an employer set forth an umbrella mission statement that characterized all of the work done through the institution as furthering the religion's message and mission, employees would not fall within the ambit of the exception absent some explicit religious action taken.[124] Such a reading confines the exception in the sense that it would only apply to employees who carry out discernibly religious duties.[125]

Yet, courts might also interpret *Our Lady of Guadalupe School* more broadly to mean an employee's religious function is defined, not in terms of

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[122] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066 (holding that educating students in faith is an essential religious function). The Court reasoned that the policy underlying the ministerial exception was needed to insulate a given religious institution's message by refraining from applying secular standards to the employees who deliver that message. *Id.* at 2060–61.

[123] *See id.* (noting that religious education, for example, is essential to many faiths in the United States, and therefore, teaching religion is a crucial responsibility). As such, a teacher who teaches her students religion classes would qualify as a minister, but a teacher who teaches no religion classes and performs no other religious duties would not qualify. *See The Bigotry of Low Expectations*, *supra* note 121 (inferring that under this reading, a teacher who instructs on global religion but does not teach or instill the religious institution's faith, would not fall within the ambit of the exception and could accordingly bring an antidiscrimination action).

[124] *See The Bigotry of Low Expectations*, *supra* note 121 (explaining this possible interpretation).

[125] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2063 (noting that important ministerial functions include leading a religious group, guiding worship, or acting "as a messenger or teacher of the faith" (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring))). Nevertheless, this narrower interpretation still does not clearly define the limitations of the exception because it does not address how much religious function an employee must perform to qualify as a minister. *See* Transcript of Oral Argument at 18:18–21:24, *Our Lady of Guadalupe Sch.*, 140 S. Ct. 2049 (Nos. 19–267 & 19–348) (hinting at this problem); *see also* Amy Howe, *Argument Analysis: Justices Divided in Debate Over "Ministerial Exception,"* SCOTUSBLOG (May 11, 2020), https://www.scotusblog.com/2020/05/argument–analysis–argument–analysis–justices–divided–in–debate–over–ministerial–exception/ [https://perma.cc/TQ2R-8Z6Z] (noting that during oral argument, several justices appeared to be concerned about the challenges of line drawing regarding the amount of religious activity an employee must partake in to be considered a minister). Justice Kagan acknowledged this problem in oral argument when she posed Eric Rassbach, counsel representing the schools, with a series of hypotheticals where employees had varying degrees of religious responsibilities and asked whether each would qualify as a minister. *See* Transcript of Oral Argument, *supra*, at 18:18–21:24. Among the hypotheticals Justice Kagan posed were, 1) "a math teacher who is told to teach something about Judaism for ten minutes a week," 2) "a math teacher who was told to embody Jewish values and infuse instruction with Jewish values," 3) "a nurse at a Catholic hospital who prays with sick patients and is told otherwise to tend to their religious needs," 4) "an employee at a soup kitchen who distributes religious literature and leads grace before meals." *Id.* Rassbach replied that in each of these hypotheticals, with the exception of the third involving the nurse, the amount of religious activity performed by the employee would be "de minimis," such that he or she would not fall within the realm of the exception. *See id*. (responding to Justice Kagan's hypotheticals); *see also* Mark Joseph Stern, *The Supreme Court Considers Exempting Religious Employers from All Religious Discrimination Laws*, SLATE (May 11, 2020), https://slate.com/news-and-politics/2020/05/religious-employers-supreme-court-argument-discrimination.html [https://perma.cc/GY8K-DQSW] (highlighting the same exchange between Justice Kagan and Rassbach, as well as Justice Ginsburg's attempts to clarify the exception's limits).

the function itself, but rather, vis-à-vis the religious institution's mission.[126] In other words, an employee serves a religious function if she performs duties that are essential to carrying out the religious institution's mission.[127] To illustrate, the central mission of both St. James School and Our Lady of Guadalupe School was to educate young members of the faith.[128] As teachers, Biel and Morrissey-Berru each played a direct and central role in education generally.[129] Thus, in order to maintain independence in carrying out its religious mission, each school required autonomy in selecting which individuals would play this important role.[130]

The broader, autonomy-focused interpretation has much more sweeping implications, namely because it defers to the religious institution with regard to how the mission is defined.[131] The more generally defined the mission, the more likely it is to encompass employees who might not otherwise qualify as ministers.[132] Without entertaining a parade of horribles, one can imagine a variety of situations in which a religious institution that serves both religious and secular purposes expansively defines its religious mission, such that the majority of its employees perform functions essential to that mission.[133] This reading

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[126] *See* Brief of National Women's Law Center, *supra* note 114, at 28–29 (arguing that the function test significantly expands which employees will qualify as ministers, because, for example, a school could design its mission statement such that all staff perform essential religious functions); *see also The Bigotry of Low Expectations*, *supra* note 121 (arguing that it is plausible that courts will interpret the opinion will more broadly, such that religious institutions can craftily define their mission statements to encompass more employees).

[127] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066 (noting the pertinence of a religious institution's description of the religious importance of an employee's responsibilities); *see also The Bigotry of Low Expectations*, *supra* note 121 (arguing that if Justices Kagan and Breyer only signed on to the opinion because they thought it could be narrowly limited to functions related to raising future members of the faith, that it was naïve, because sweeping religious missions are easy to craft).

[128] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. 2066 (noting that "educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught").

[129] *See id.* (noting that Biel's and Morrissey-Berru's employment agreements and handbooks specified that they were to help carry out the mission of teaching and guiding students in the faith, and as teachers, they were given the most direct responsibility of that mission).

[130] *See id.* at 2060 (explaining the need for autonomy in hiring and retaining employees who perform essential religious responsibilities derives from religious institutions' broader protection from government interference into church administration decisions).

[131] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2076 (Sotomayor, J. dissenting) (arguing that placing a heightened importance on functionality is especially problematic because it relies on the notion that religious institutions are best situated to explain the importance of a function, effectively allowing employers to decide when discrimination will be actionable, which invites manipulation); *see also* Feldman, *supra* note 121 (arguing that by making the autonomy of religious institutions a central basis for the ministerial exception, the Court re-wrote the exception to make it much more far-reaching in practice).

[132] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting) (linking the scope of the exception to the number of employees who will fall within its ambit).

[133] *See id.* (noting the various different professions in which those who work for religious institutions may lose their protections, including "coaches, camp counselors, nurses, social-service workers, in-house lawyers, media relations personnel"); *see also* Feldman, *supra* note 121 (arguing that under

of the Court's decision incentivizes religious institutions to define their mission statements broadly enough to create a link between employee function and the institution's core religious mission.[134] By defining their missions in such a way, religious institutions will be able to freely discriminate against their employees without fear of recourse, as many of their employees will effectively fall within the scope of ministerial exception.[135]

C. Future Courts Applying the Ministerial Exception After Our Lady of Guadalupe School *Should Interpret the Court's Opinion Narrowly as a Way to Confine the Exception's Scope*

Going forward, it is imperative that courts apply *Our Lady of Guadalupe School* in accordance with its narrower interpretation by which religious function is defined in terms of whether the function itself has religious importance.[136] Although *Our Lady of Guadalupe's* emphasis on function expand-

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the prior *Hosanna-Tabor* ministerial exception framework, professors of secular subjects at Catholic universities would not be exempt from federal unionization laws but, under the new *Our Lady of Guadalupe School* framework, they likely would be); *The Bigotry of Low Expectations*, *supra* note 121 (posing a hypothetical where a Catholic charity drafts a mission statement that states that it performs its work in accordance with the tenets of the Catholic faith and each employee acts as an example of the faith). *See generally* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 590–91 (1990) (explaining that the well-known "parade of horribles" is a phrase used in legal writing to describe a critic's depiction of the undesirable consequences of a given principle using specific examples).

[134] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2082 (Sotomayor, J. dissenting) (noting the Court's "laissez-faire analysis" green lights employment discrimination on the basis of an otherwise protected class); Brief of National Employment Lawyers Association, *supra* note 115, at 19 (arguing that the function test could subject a significant amount of employees of religious institutions to the ministerial exception because an employer could easily argue that all functions are religious); *see also* Mark Joseph Stern, *The Supreme Court Just Gave Religious Employers a License to Discriminate Against Workers*, SLATE (July 8, 2020), https://slate.com/news-and-politics/2020/07/supreme-court-ministerial-exception-religious-employers.html [https://perma.cc/Z3JW-3HMK] (arguing that every capable attorney representing religious institutions will now advise such institutions to give every employee some nominal religious duties as a way to defend against discrimination suits).

[135] *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2076 (Sotomayor, J. dissenting) (arguing that the Court's decision welcomes the "potential for abuse" that federal circuit courts had cautioned against (citing Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 n.3 (8th Cir. 1991))); *see also supra* note 116 and accompanying text for further discussion of the federal circuit courts' prior concerns regarding abuse of the ministerial exception.

[136] *See supra* notes 122–125 and accompanying text (discussing the way the narrower interpretation operationalizes). *But see* Nelson Tebbe & Micah Schwartzman, *Re-upping Appeasement: Religious Freedom and Judicial Politics in the 2019 Term* 17 (Va. Pub. L. & Legal Theory Res. Paper No. 2020-68, Cornell Legal Stud. Res. Paper No. 20-40, 2020), http://ssrn.com/abstract=3694589 [https://perma.cc/VLR8-V227] (arguing that there is very little in the Court's opinion in *Our Lady of Guadalupe* that will prevent the conservative Roberts Court from expanding the exception further). Justice Alito's concurrence in *Hosanna-Tabor* might actually provide a helpful starting point in determining which functions are of such religious importance that they bring employees who perform them within the scope of the exception. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 199 (2012) (Alito, J., concurring) (stating that the exception

ed the exception, courts still can—and should—confine the ministerial exception by only applying it to employees who have discernibly essential religious functions.[137] For example, religious instruction may concededly be so crucial to a religious institution's communication of its message that religious teachers rightfully fall within the ambit of the exception.[138] This principle does not require, however, that employees who play no significant part in delivering religious messages or leading the faith community should also fall within the ambit of the exception.[139] Rather than blindly deferring to a religious institution with regard to whether an employee serves a salient religious function, courts should be skeptical of tactical attempts to qualify employees as ministers when they play no serious role in communicating religious messages or guiding the faith community.[140]

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should include "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith").

[137] *See supra* notes 116–119 and accompanying text (detailing the policy implications of an expanded exception). The Court was aptly able to identify teaching as a ministerial function by painstakingly emphasizing the importance of religious instruction to all organized religions in the United States, in part by citing to religious cannons and secondary sources. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064–66 (describing the practices of various religions). Presumably, it could perform the same exercise in determining whether a receptionist performs sufficiently important religious duties to qualify as a minister. *See* Stern, *supra* note 134 (posing this specific scenario). In 2021, the Supreme Judicial Court of Massachusetts applied *Our Lady of Guadalupe* narrowly and held that a social work professor at a religious university was not a minister for purposes of the exception because her specific functions were not religious. *See* DeWeese-Boyd v. Gordon Coll., SJC-12988, 2021 Mass. LEXIS 147, at *3 (Mar. 5, 2021) (noting she did not provide religious instruction, guide her students in prayer or usher them to religious proceedings, give sermons, or perform any other religious responsibility). The court acknowledged that the professor did have a general duty to incorporate her faith into the way she taught and studied social work. *Id.* at *3–4. The university argued that this general duty was enough to qualify the professor as a minister under *Our Lady of Guadalupe*. *Id.* at *36–37. The court, however, rejected the university's argument. *Id.* at *36–38. It noted that although one could interpret some language in *Our Lady of Guadalupe* expansively, interpreting it in this way would drastically increase the scope of the exception and impermissibly destroy antidiscrimination protection statutes. *Id.* This Comment endorses the Supreme Judicial Court's analysis and holding in *Deweese-Boyd* as a model for future courts to use in ministerial exception cases. *See supra* notes 136–137 and accompanying text; *infra* notes 138–140 and accompanying text (arguing for a narrow interpretation of *Our Lady of Guadalupe*).

[138] *See* Feldman, *supra* note 121 (suggesting Justices Breyer and Kagan's votes were justified, because it was reasonable to include teachers who taught religion and worshipped with their students within the scope of the ministerial exception); *see also Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064–66 (discussing the importance of religious instruction).

[139] *See The Bigotry of Low Expectations*, *supra* note 121 (arguing that courts might interpret *Our Lady of Guadalupe Sch.* so that employees who do not teach religion do not fall within the exception); *see also Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2063 (noting that the exception insulates those who deliver religious messages and act as religious leaders); *supra* notes 122–125 and accompanying text (discussing the way the narrower interpretation operationalizes).

[140] *See* Brief of National Women's Law Center, *supra* note 114, at 30–31 (showing how religious institutions are conscious of how they may use the exception to their advantage); *see also supra* notes 118–119 for further discussion of religious efforts to pull more employees within the ambit of the

Conclusion

When the ministerial exception applies to an employee of a religious institution, the implications are significant. The employee effectively loses much of the employment antidiscrimination safeguards that Congress intended to provide. Although religious institutions have a First Amendment interest in maintaining autonomy in selecting their religious leaders and those who take on important religious roles, courts should not enable them to exploit that autonomy. As such, courts should construe the ministerial exception narrowly to protect the interests of as many employees of religious institutions as possible. In *Our Lady of Guadalupe v. Morrissey-Berru*, in 2020, the Supreme Court's function analysis broadened the exception beyond its historic parameters. Yet, there is still an opportunity for future courts applying the ministerial exception to read the Court's opinion narrowly. If "what an employee does" is really what is most salient in determining whether an employee is a minster, then courts should define that function in terms of whether the function itself is of general religious importance.

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exception. *See generally Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2063 (noting the importance of individuals preaching, advising, and instructing to a given faith).