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If You're a Minister and You Know It, Clap Your Hands: Contract Nondiscrimination Clauses as a Voluntary Waiver of the Ministerial Exception

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INTRODUCTION

Looking back, I’m not sure if I ever had any employment protections or whether I was, legally, a minister. Yes, I was a “secular studies” teacher, but I also led lower-school *tefillah* after lunch two days a week. I was expected to plan and lead lessons every month for our character development (*tikkun middot*) curriculum, which included values like “Torah,” “faith,” “joy,” and “gratitude.” On Fridays, I had to sit at a table with students and celebrate an early Shabbat—we’d light candles, cover our eyes, sing prayers, and pass around a loaf of challah. I folded Jewish and Israeli history into our curriculum, painstakingly pulling passages from the Torah and prophets to lay side-by-side with excerpts from Gilgamesh, or Assyrian relief sculptures, or the Qur’an, or whatever else we were studying.

I was a gentile teacher of secular history, but I was also expected to be invested in the building of Jewish community and Jewish citizens—and I was. Under the test expanded and articulated by the Supreme Court in 2020,¹ I would have been a close case. I don’t know what my school would have argued. I don’t know how a court would have ruled. And I’m someone with an expensive legal education who is supposed to know my professional status under the law.

So how was Agnes Morrissey-Berru, an elementary teacher at Our Lady of Guadalupe School in Hermosa Beach, California, expected to know?

Lay readers of a contract tend to believe the text to be enforceable and binding, even when it is not.² They believe contract language. Imagine Morrissey-Berru’s confusion, then, when the plain text of her contract turned out to be a lie.

Morrissey-Berru’s contract listed the circumstances under which she could be fired: She was subject to a six-month probationary period and, later, could be fired immediately for cause or with thirty-days’ notice

1. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
2. Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 STAN. L. REV. 503, 503 (2020).

without cause.³ That is not language that would lead a person to believe that they have no legally cognizable employment claims at all. Moreover, her contract directed her to the faculty handbook,⁴ and that handbook promised, “Employment decisions will not be made on the basis of race, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, pregnancy, veteran status or political affiliation.”⁵ The handbook included a standard reference to the fact that religious institutions are exempt from the Title VII provision barring discrimination on the basis of religion,⁶ but it did not mention or suggest that the school believed it could discriminate against her for *nonreligious* reasons and on the basis of the other listed characteristics.⁷

When Morrissey-Berru filed suit against the school for age-based discrimination, however, the school argued just that. It said that courts were forbidden from enforcing antidiscrimination law to interfere in the school’s relationship with its teachers, and the Supreme Court agreed.⁸ In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court reaffirmed and broadened the constitutional right of religious employers to hire and fire ministers without state intervention. Whatever Ms. Morrissey-Berru believed about her employment protections based on what she read in her contract and

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3. App.: Exs. 1–14 in Supp. of Mot. for Summ. J. at 70, *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, No. 2:16-cv-09353 (C.D. Cal. Dec 19, 2016), ECF No. 34.
 4. *Id.* at 69–70 (“You shall be familiar with, and comply with, the School’s personnel policies and procedures as they may be adopted or amended from time-to-time, including policies in the faculty handbook. You should refer to such documents for information relating to your employment, duties, and benefits . . . You acknowledge that a copy of the faculty handbook has been made available to you.”)
 5. *Id.* at 55.
 6. *Id.* (“Schools [of the Diocese of Los Angeles] may make employment decisions based on religious preferences and other religious needs in accordance with applicable law.”)
 7. In fact, the purpose of the ministerial exception is to protect discrimination made on nonreligious grounds. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194 (2012) (“The purpose of the [ministerial] exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason.”)
 8. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). *Morrissey-Berru’s* case was combined with that of Kristen Biel, a teacher at St. James School in nearby Torrance, also in the Archdiocese of Los Angeles.

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handbook, the Court found that she was a minister in a religious enterprise. She therefore had no protections.

The ministerial exception to employment-discrimination law is rooted in the First Amendment rights of religious organizations to be free from state interference in matters of faith, doctrine, and church governance. This Note begins from the presumption that the exemption is good law and plays a necessary role in First Amendment jurisprudence. It does not seek to overturn the exemption, either directly or through bad-faith efforts to narrow the exemption beyond all recognition. Rather, this Note confronts a market failure—and a failure of fairness. Many employees affected by the exception have no way of knowing that their employer views them as a minister and that this view, if vindicated in court, will limit their legal rights. Thus, the goal of this Note is to identify a legal mechanism that can ensure disclosure and clarity in any written employment agreements exchanged at the time of contract formation.

That mechanism is the waiver of constitutional rights. This Note argues that where religious establishments have employee handbooks that (1) would otherwise qualify as binding contracts;⁹ (2) clearly state that employees are protected against certain forms of employment discrimination; and (3) do not clearly state that certain employees are excepted from these protections, such handbook provisions should be construed by courts as waivers of the right to be excepted from antidiscrimination law.

This approach would fully respect religious establishments' constitutional rights, would align with Supreme Court precedent, and would not require the judiciary to render decisions on any matter of religious doctrine. It would also, however, protect the interests of employees who may have reasonably relied on representations of nondiscrimination made when they accepted employment. Part I of this Note summarizes the current state of ministerial exception law. Part II summarizes the law of waiver of constitutional rights. Part III argues that the doctrine of waiver of constitutional rights should apply to the ministerial exception, and that handbook provisions of the kind described above satisfy the requirements of waiver.

9. The question of whether and when an employee handbook is incorporated into an employment contract is beyond the scope of this Note. For a good overview of employee handbook cases and the importance of holding employers to the promises made in handbooks, see Rachel Leiser Levy, *Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule*, 72 U. CHI. L. REV. 695 (2005).

PART I: THE MINISTERIAL EXCEPTION

A. *Origins of and justification for the exception*

The ministerial exception was first applied by the Fifth Circuit in 1972.¹⁰ In *McClure v. Salvation Army*, a Salvation Army officer alleged that she had been compensated less than her male colleagues and had been fired in illegal retaliation for reporting that allegation to the EEOC.¹¹ Despite finding that the text of Title VII's sex-discrimination provisions applied to religious institutional employers and employees, the court found it was unconstitutional to apply Title VII in a way that would "regulate the employment relationship between church and minister."¹² In 1985, the Fourth Circuit named this principle "the ministerial exception,"¹³ and all twelve geographic circuits had recognized the exception by 2008.¹⁴ In 2012,

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

11. *Id.*

12. *Id.* at 560–61.

13. *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985). The name of this exception is not entirely accurate, as the term "minister" suggests a member of the Protestant clergy while the exception applies far more broadly. *Id.* at 1168 ("The 'ministerial exception' to Title VII... does not depend upon ordination but upon the function of the position..."); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 198 (2012) (Alito, J., concurring) ("The term 'minister' is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions. Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one.")

14. *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198, 204–10 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–07 (3d Cir. 2006); *Rayburn*, 772 F.2d at 1168; *Combs v. Cent. Tex. Ann. Conf. of the United Methodist Church*, 173 F.3d 343, 347–50 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–27 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360,

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the Supreme Court took up the issue for the first time and unanimously affirmed in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC* that “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”¹⁵

The Court’s invocation of *both* Religion Clauses is important. The theoretical roots of the ministerial exception are as complicated and contested as its boundaries, with *Hosanna-Tabor* itself tracing the origin of the exception back to the Magna Carta.¹⁶ In concrete constitutional law terms, the Court has argued that the exception logically arises from the First Amendment’s discussion of religion as a whole.¹⁷ Legislative attempts to apply employment law in a way that controls the ministerial relationship violates religious organizations’ free exercise rights, while any attempt by courts to adjudicate disputes between ministers and religious organizations are, inherently, an attempt to pick sides in a religious dispute and therefore tread on establishment lines.¹⁸ But things get more complicated when we take each of these propositions in turn.

The ministerial exception goes well beyond the typical free exercise right because it applies uniformly, without balancing individual and state interests. And the exception is stronger than the closest analogues in Establishment Clause doctrine because it applies to irreligious questions within the competence of secular courts, and because it is a First Amendment right rather than a doctrine about jurisdiction, abstention, or sovereignty.

1. A free exercise line of its own

The claim that religious organizations have a right to be exempted or excepted from employment law with respect to their ministers does not fit cleanly within free exercise jurisprudence. Current precedent under

362–63 (8th Cir. 1991); *Werft v. Desert Sw. Annual Conf. of the United Methodist Church*, 377 F.3d 1099, 1100–04 (9th Cir. 2004); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655–57 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301–04 (11th Cir. 2000); *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 460–63 (D.C. Cir. 1996).

15. 565 U.S. at 181.

16. *Id.* at 181–82.

17. *Id.* 181.

18. *Id.* at 188–89.

*Employment Division v. Smith*¹⁹ frowns on providing religious exceptions to neutral and generally applicable laws.²⁰ Even if the Court were implying that antidiscrimination law is insufficiently neutral²¹ or overtly targeted²² in the context of ministerial employees, and even if the Court were to do away with *Smith* and its suspicion of religious exceptions,²³ ministerial employers would still not have an absolute free exercise right to be exempt from employment law. Strict scrutiny would still need to be applied before dismissing a ministerial employee's suit.²⁴ Under no reading of the Free Exercise Clause is the government *categorically* forbidden from regulating religious people or religious organizations in a way that interferes with the free exercise of their religion. The state is forbidden only from making such regulations in a discriminatory way, and, at best, may be required to provide a very good reason for its regulation.

The ministerial exception is, well, the only exception to this. The prohibition is absolute. In ministerial exception cases, no state interest, no matter how strong,²⁵ and no matter how narrowly targeted, can override the religious employer's right to control its ministers. If a ministerial employee alleges that they were fired due to racial animus, while the employer argues that it has a free exercise right to fire its ministers for any reason it chooses,²⁶ that should at least be a hard question under existing law. But the ministerial exception requires no strict-scrutiny analysis before

19. 494 U.S. 872 (1990).

20. See, e.g., Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 992 (2013).

21. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

22. See, e.g., Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

23. Cf. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring) (reflecting on whether strict scrutiny or some other, less stringent test should replace *Smith* as the primary free exercise doctrine should the Court choose to overrule it).

24. Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 433 (2013) ("It is hard to justify [the ministerial exception's] dramatically differential treatment within the current doctrinal confines of the Free Exercise Clause . . .").

25. Laws targeting discrimination have historically been understood to protect one of the state's strongest interests. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

26. See, e.g., *Orr v. Christian Bros. High Sch.*, No. 21-15109, 2021 U.S. App. LEXIS 34810 (9th Cir. Nov. 23, 2021).

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declaring that the state has no right to place any burdens at all on the ministerial relationship.

The Court makes a passing reference to this theoretical problem in *Hosanna-Tabor*. It makes a distinction between “internal church decision[s]” and “outward physical acts,” arguing that the ministerial exception cases address the former while the *Smith* line governs the latter.²⁷ The logic of this distinction has been extensively criticized by free exercise scholars,²⁸ but even if true, it places the ministerial exception in a new free exercise line of its own, unapplied as of yet to any other religious exercise. The Court has not elaborated on other “internal church decisions” that might be wholly immune from government regulation.

In short, while the Free Exercise Clause is cited in defense of the ministerial exception and forms part of the Court’s rationale, the exception does not emerge clearly from those precedents. It needs further constitutional justification.

2. Not an Establishment Clause jurisdictional bar

Meanwhile, the Establishment Clause argument for the exception is similarly novel within its line. A series of disputes over church property established the doctrine of ecclesiastical abstention.²⁹ Secular courts cannot intervene in disputes between religious factions over the use of a piece of

27. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

28. *See, e.g.*, Carl H. Esbeck, *A Religious Organization’s Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 *ENGAGE* 168 (2012); Michael C. Dorf, *Ministers and Peyote*, *DORF ON LAW* (Jan. 12, 2012), <http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html> [<https://perma.cc/7Z95-5XYL>] (responding to the Supreme Court’s attempt in *Hosanna-Tabor* to distinguish *Employment Division v. Smith* by querying, “With due respect: huh???”); Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 *MINN. L. REV.* 1891, 1900 (2013) (asking whether “termination of an employee [is] not also an outward physical act”).

29. *Watson v. Jones*, 80 U.S. 679 (1871) (ruling on a dispute between pro-slavery and anti-slavery factions over the Walnut Street Presbyterian Church in Louisville, Ky.); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952) (ruling on a dispute between rival archbishops, one appointed in Moscow and one elected in the United States, over control of a Russian Orthodox cathedral); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (ruling on a dispute over diocesan reorganization and defrocking of a bishop).

property if the dispute turns in any way on a religious question; they can only affirm the resolution of the highest ecclesiastical authority.³⁰ If, though, a court can use neutral principles of law and a secular reading of the documents to reach a resolution—accepting internal church understanding of any doctrinal content in the documents—then the court is entitled to rule.³¹ This limitation arising under the Establishment Clause is *jurisdictional*,³² and it speaks to the power and competence of civil courts. The secular government simply has no capacity to overturn the decisions of religious authorities regarding doctrinal matters and lacks the expertise to answer religious questions.³³ To claim otherwise would be to establish the civil courts as religious authorities with the power to name favored and less favored readings of religious law. Over time, these precedents have grown to stand for a larger doctrine of “church autonomy,” which functions as a jurisdictional bar that “protects religious organizations ‘from secular control or manipulation.’”³⁴

However, once again, the ministerial exception differs from this traditional doctrine in two ways. First, if the ministerial exception operated as a mere extension of the logic of the church property cases, it would bar secular courts from asserting power over ministerial employment decisions because of the religious entanglement problems that would inherently arise. But the implication of that argument is that the court could intervene in cases without a religious element, where neutral principles of law could solve the employment dispute.

For example, Hosanna-Tabor Evangelical Lutheran Church asserted that it terminated Cheryl Perich, a commissioned teacher-minister, because she violated a religious principle in favor of dialogue and internal dispute

30. *Hosanna-Tabor*, 565 U.S. at 185–87; Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL’Y 840, 852–53 (2012).

31. *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

32. *Watson*, 80 U.S. at 733 (describing these as “matter[s] over which the civil courts exercise no jurisdiction”).

33. Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 58–59 (2002).

34. *Seattle’s Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1096 (2022) (Alito, J. concurring in denial of certiorari) (citing *Kedroff*, 344 U.S. at 116). Douglas Laycock has argued that church autonomy is properly understood through free exercise rather than Establishment Clause doctrine. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1381–84 (1981).

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resolution when she retained legal counsel and threatened to turn to the EEOC.³⁵ The church argued that intervention by the secular courts would require a constitutionally impermissible decision that this religious principle was “pretextual.” This argument reflected the primary understanding at the time that ministerial exception arguments should mirror ecclesiastical-abstention arguments.

But the Court’s decision in *Hosanna-Tabor* removed and distinguished the ministerial exception from the church autonomy line of cases, stating unequivocally that a religious organization need not assert a religious reason for its employment decision.³⁶ There is no neutral principles of law exception to the ministerial exception.³⁷

By the time the Court reached the combined cases in *Our Lady of Guadalupe*, religious organizations no longer asserted any religious justification for ministerial employment decisions, because there was no longer any question that entanglement would be part of the analysis. The school at which Kristin Biel taught produced evidence that she had been failing for some time to implement important school policies regarding tests, homework, and classroom management,³⁸ while Biel’s estate argued that she was fired because she needed time off to undergo chemotherapy.³⁹ That dispute looks very similar to many others that courts hear and resolve every year with no attention to religious content. Surely, critics argue, the Catechism of the Catholic Church is not implicated by a review of the school’s documentation about Biel’s meetings with the principal to discuss these issues. Ministerial exception defenders respond that, because the dispute ultimately requires answering whether a person who failed to follow the homework policy remains qualified to teach and model religious doctrine to fifth-grade students, it requires religious entanglement.⁴⁰ By this

35. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194 (2012). The secular name for that behavior is retaliation.

36. *Id.* at 194–95.

37. *Jones v. Wolf*, 443 U.S. 595, 597 (1979).

38. Mot. for Summ. J. Ex. A ¶ 11, *Biel v. St. James School*, No. 2:15-cv-04248 (C.D. Cal. June 5, 2015), ECF No. 67.

39. Complaint at 3, *Biel v. St. James School*, No. 2:15-cv-04248 (C.D. Cal. Jun 05, 2015), ECF No. 1.

40. When some argue that tort and contract claims are not barred under the ministerial exception, as discussed in *infra* Section I.B.3, they are drawing on this reasoning. If the ministerial exception only applies to all nondiscrimination claims because all such claims touch on religious

logic, the selection or rejection of a minister is *always* a religious question, and the Court's refusal to intervene is a straightforward application of existing doctrine.⁴¹

That may be so. But still, the test in the ministerial exception does not ask that question. Religious organizations are not asked to explicate the religious question at issue or to assert their faith-based belief that obedience to the homework policy is key to one's ability to minister the faith. The threshold question for applying the ministerial exception is factual—*does this person perform important religious functions on behalf of a religious organization?*—not jurisdictional—*does answering this question necessarily entangle the court in a religious issue beyond its power?* Moreover, if ministerial employment is always inherently a religious question within the meaning of the Establishment Clause, no new doctrine would have been needed to resolve these cases. Courts could have simply evaluated for religious entanglement and dismissed accordingly. In order for the ministerial exception to be justified, it must do additional work. Thus, this is a real distinction between the ministerial exception and ecclesiastical abstention doctrine: the ministerial exception applies to bar relief even when no religiously entangling question places the dispute outside of secular jurisdiction.

The second distinction is related to the first. The ministerial exception is not a jurisdictional bar but a right to assert an affirmative defense because it applies to cases that otherwise fall within secular courts' jurisdiction. In a footnote in *Hosanna-Tabor*, the Court specified that the ministerial exception has nothing to do with courts' "power to hear a case"; it is about whether a plaintiff is actually entitled to relief for their "otherwise cognizable claim."⁴² Consistent with this framing of the nature of the ministerial exception, the court reversed and remanded the combined cases in *Our Lady of Guadalupe*. It did not dismiss them for want of subject-matter jurisdiction.⁴³

questions, then it ought not apply where a contract or tort question can be disentangled from any religious question.

41. Laycock, *supra* note 30, at 850–51; Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck & Richard W. Garnett, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. UNIV. L. REV. COLLOQUY 175, 187 (2011).
42. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012) (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010)).
43. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020).

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This caused a scholarly crisis.⁴⁴ Most scholars had understood the ministerial exception to derive from limits on secular courts' jurisdiction that emerge from the Establishment Clause.⁴⁵ The Court affirmed that the ministerial exception existed, but it simultaneously disrupted the theoretical basis that justified the exception. If the ministerial exception was not a jurisdictional bar, then it could not follow directly from a theory of church autonomy or ecclesiastical abstention.

Some scholars have tried to avoid the challenge posed by footnote four's jurisdictional finding by framing it as a formality. These scholars argue that the footnote was merely part of the Court's extended effort to limit the definition of subject-matter jurisdiction.⁴⁶ Or they argue that civil procedure

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44. See, e.g., Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233, 291 (2012); Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and the Constitutional Structure*, in CATO SUPREME COURT REVIEW 326–30 (Ilya Shapiro ed. 2012); Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1898–1901 (2013); Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 425–29 (2013); Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 304–05 (2012).
45. Some scholars taking this view understand the church property cases as a subset of a robust church autonomy doctrine. See, e.g., Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL'Y 165, 177 (2009); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 3–4 (1998); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 288 (2008); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 156, 161–62 (2011); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 87 (2009); Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 48–49 (2008); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1167 (2011). Other scholars, critical of religious exceptionalism in constitutional law, reject the idea that “religious institutions are presumptively autonomous,” but even these scholars see the ministerial exception as being, like the church property cases, about the Establishment Clause and subject-matter jurisdiction. Lupu & Tuttle, *supra* note 33, at 78–79.
46. Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1190 (2014).

dictated the result because application of the ministerial exception may require factual investigation that will preclude case dismissal at the first instance, when issues of subject-matter jurisdiction are best decided.⁴⁷ Disputes continue to play out in the lower courts⁴⁸ and in scholarship⁴⁹ about whether cases invoking the ministerial exception should be dismissed at the motion to dismiss stage or are better resolved by summary judgment, whether the existence of the exception can be the subject of an interlocutory appeal, and whether the exception should provide immunity from investigation by state equal employment offices. All are questions that relate to whether the exception is characterized as a matter of subject-matter jurisdiction or an affirmative defense.

But these explanations fail to reckon fully with the nature of the ministerial exception itself. The best argument for the ministerial exception being a right rather than an immunity is not that the Court used some magic words about jurisdiction and defenses in a footnote. Because of the strength and scope of the ministerial exception, and because the exception applies in cases beyond those invoking religious questions, it cannot be jurisdictional.

Ministerial exception cases do not concern inherently religious issues beyond the power or competence of secular courts; rather, they deal with matters of secular employment and discrimination law. Courts can hear those questions. Courts have jurisdiction over those questions. Every ministerial exception case begins as an employment case within the jurisdiction of the court, implicating the state's interest in a nondiscriminatory market and an individual's statutory rights under (usually) Title VII, the ADA, or the ADEA. However, when a minister is involved, religious employers have a right to defend themselves from legal sanction. When the religious organization introduces new information about the nature of the employment relationship, it invokes a right; it does not effect a change in jurisdiction. The fact-intensiveness of the ministerial

47. Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1866-67 (2018).

48. *Tucker v. Faith Bible Chapel Int'l*, 53 F.4th 620 (10th Cir. 2022) (*en banc*), petition for cert. filed (Feb. 2023), No. 22-741; *Ference v. Roman Catholic Diocese of Greensburg*, No. 22-797, 2023 U.S. Dist. LEXIS 8416 (W.D. Pa. Jan. 18, 2023); *Seattle Pacific University v. Ferguson*, No. 22-5540 (W.D. Wash. June 27, 2022).

49. See, e.g., Lund, *supra* note 46, at 1191; Lael Daniel Weinberger, *Is Church Autonomy Jurisdictional?*, 54 LOY. U. CHI. L.J. (forthcoming 2023) (manuscript at 22-26) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4168276) [<https://perma.cc/Z9DC-AJEZ>].

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exception test—which determines whether the religious organization’s rights will triumph over the other rights and interests that typically animate an employment dispute—is a feature of the doctrine, not a bug. The ministerial exception is a religious right, and a strong one at that, but not a structural limitation on the power of the courts.

Thus, the ministerial exception is not a clean development of the Establishment Clause’s right to church autonomy, either. It is its own, separate, religious rights doctrine.

3. An implied right

While the exception is clearly rooted in the Religion Clauses, it is justified less by an argument from precedent and existing legal tests than from common sense and history. If religious freedom means anything at all, it means that the government cannot tell a church, temple, or mosque who its religious leaders must be. If the government can dictate who leads a community or assembly in worship, it can control that worship in an essential way. Similarly, if the government can assess civil liability for a community decision to fire a religious leader, the government can coerce a religious community to worship under someone they would prefer not to continue worshipping under. Allowing religious organizations to be liable to their ministers under employment law would punish communities for choosing the “wrong” ministers. This cannot be consistent with the First Amendment. A state that can neither hinder free exercise nor establish favored forms of religious practice also cannot regulate the selection of religious leaders.

Only the positionality of the exception as a *right* makes this Note’s argument possible. And only this positionality of the exception as stronger than the other Religion Clause rights makes this Note’s argument necessary. While the exception affects a deeply important, internal community decision, it also intervenes in a major way in the national economy and allows religious employers to undercut the strongest state and employee interests. As an argument from common sense and history, there should be room for similarly commonsense arguments about its scope and limits.

B. Application and Open Questions

The last two years have seen an extraordinary number of ministerial exception cases as courts struggle to resolve the ambiguities and questions left open by the Supreme Court’s most recent intervention. Circuits have divided, sometimes from within, on the questions of which organizations

can have ministers, who those ministers are, and how far the exception goes beyond barring discrimination claims.

1. What is a religious organization?

In order for an organization to have ministers, it must be a religious organization. The first question in any ministerial exception inquiry is whether the given employer qualifies as religious. It is clear from the two ministerial exception cases decided by the Supreme Court that schools directly affiliated with a church are religious institutions.⁵⁰ The Court further specified that the exception should “not [be] limited to the head of a religious congregation.”⁵¹ Beyond those obvious and uncontested principles, lower courts have adopted a somewhat teleological test: a religious “entity’s mission is marked by clear or obvious religious characteristics.”⁵² When in doubt, courts faced with this question draw on doctrine from another, parallel set of cases—the Title VII religious organization exemption to religious discrimination. If an organization qualifies as “religious enough” to qualify for that exemption, it is likely religious enough to qualify for the ministerial exception.⁵³

The result is a doctrine that is deeply fact specific. Judge Posner once used a concurrence to question whether the Jesuit-affiliated Loyola University Chicago was really religious enough to qualify as a religious employer.⁵⁴ The case involved a Jewish faculty member who was denied tenure on the basis that the philosophy department maintained a preference for hiring Jesuits, and it was decided on bona fide occupational qualification grounds rather than the religious exception.⁵⁵ But, Judge

50. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 171 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2053 (2020).

51. *Hosanna-Tabor*, 565 U.S. at 190.

52. *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 425 (2d Cir. 2018); *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 834 (6th Cir. 2015); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church*, No. 07-14124, 2008 U.S. Dist. LEXIS 106726 at *6 (E.D. Mich. Dec. 3, 2008); *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 310 (4th Cir. 2004).

53. James A. Davids, *Religious Colleges’ Employment Rights Under the “Ministerial Exception” and When Disciplining an Employee for Sexually Related Conduct*, 21 TEX. REV. L. & POL. 423, 436 (2017).

54. *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 357 (7th Cir. 1986).

55. *Id.* at 351–52.

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Posner pointed out, the school was not owned by the Jesuits, the school received only 0.033% of its income from the Jesuits, the Jesuits maintained only minority control of the board of trustees, there was no seminary on campus, and, while students were required to take courses in theology, they were not required to take courses in Catholic theology.⁵⁶ In a similar case, the Ninth Circuit found that a boarding school in Hawaii was not religious enough to maintain a requirement that all teachers “be persons of the Protestant religion.”⁵⁷ The school was founded through a charitable trust which required that restriction, but the school had no affiliation with any church or denomination.⁵⁸ Most teachers did not teach religious content and were not asked how they integrated their faith with their teaching duties.⁵⁹ The school had a chapel and implemented daily prayer, but the religion curriculum “consist[ed] of minimal, largely comparative religious studies.”⁶⁰ Additionally, a court determined that a children’s home in Virginia with an all-Methodist board that contained an infrequently used chapel, no religious symbols or artwork, and a chaplaincy curriculum that “involve[d] various perspectives and concepts” was not a religious organization.⁶¹

While courts today feel the need to distinguish new cases from these precedents,⁶² it is questionable whether any of these cases would come out the same in the post-*Hosanna-Tabor* world. In some sense, these days, the inquiry can run backwards: if only religious institutions can have ministers, and if the court is convinced that a plaintiff is performing ministerial

56. *Id.* at 357.

57. *EEOC v. Kamehameha Sch./Bishop Est.*, 990 F.2d 458, 459 (9th Cir. 1993).

58. *Id.* at 461.

59. *Id.* at 462.

60. *Id.* at 462–63.

61. *Fike v. United Methodist Children’s Home of Va., Inc.*, 547 F. Supp. 286, 290 (E.D. Va. 1982).

62. *Ginsburg v. Concordia Univ.*, No. 4:10CV3064, 2011 U.S. Dist. LEXIS 1098, at *12-13 (D. Neb. Jan. 5, 2011) (distinguishing *Fike* in finding a Lutheran university was entitled to fire a Catholic softball coach); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 227 (3d Cir. 2007) (pointing out that *Kamehameha’s* consideration of the school’s non-proselytizing nature should not be relied on where an organization purports to belong to an inherently non-proselytizing religion). *See also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1781 & n.55 (2020) (Alito, J., dissenting) (questioning the “narrow protection” of the Title VII religious-organization exemption “as interpreted by some lower courts,” including *Kamehameha*).

functions, then there must be a religious organization present. Where there's smoke, there's fire. Courts effectuate this outcome by focusing on smaller divisions within a more secular whole.

For example, the Second Circuit acknowledged that New York Methodist Hospital “took steps to distance itself from its religious heritage”; the United Methodist Church no longer had power over the hospital’s business decisions or amendments to its articles of incorporation; the hospital’s “Methodist identity does not infuse its performance of its secular duties”; and the retention of a few religious aspects was far from dispositive because “many secular hospitals have chaplains and accredited clinical pastoral education programs.”⁶³ Regardless, the Second Circuit found that the hospital’s interfaith chaplains were ministers by narrowing its inquiry to the specific hospital department housing the chaplains. Because the plaintiff “d[id] not and c[ould] not dispute that he performed religious services for NYMH’s Department of Pastoral Care,” he had “thus[] served *that department’s* religious purpose” and was a minister.⁶⁴ Likewise, cases involving purported discrimination by campus chapters of the InterVarsity Christian Fellowship have zoomed in on the club as the relevant organization, not the public university within which the organization is housed.⁶⁵ Because these student organizations are religious in nature, public universities cannot apply nondiscrimination policies to their leadership.

While it is formally the case that the first step in a ministerial exception inquiry requires evaluating the religious nature of the employer, it is rare that a court denies the ministerial exception solely on the grounds that the employer is not a religious entity. When someone’s role is functionally ministerial, their employer is functionally religious. All the work of the exception is done in the second half of the test.

63. Penn v. N.Y. Methodist Hosp., 884 F.3d 416, 425 (2d Cir. 2018).

64. *Id.* at 426 (emphasis added).

65. InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ., 534 F. Supp. 3d. 785 (E.D. Mich. 2021). *InterVarsity* is not strictly a ministerial exception case—no employee sued the organization. Rather, the university refused to authorize InterVarsity as a “registered student organization” because it would not apply the university’s sexual orientation and gender identity nondiscrimination policy to its student leaders. InterVarsity sued the university under 42 U.S.C. § 1983, and in ruling in favor of InterVarsity, the Court’s logic relied heavily on the fact that InterVarsity’s choice of student leaders would be protected by the ministerial exception. *See id.* at 810.

2. Who is a minister?

The Court in *Hosanna-Tabor* was unable to come to a consensus definition of “minister.”⁶⁶ Lower courts struggled with the lack of a clear test, leading the Court to consider the dimensions of the exception again in 2020 in *Our Lady of Guadalupe*. In that case, the Court adopted the “functional approach” encouraged by Justice Alito’s concurrence to *Hosanna-Tabor*.⁶⁷ Using that approach, the Court determined that a primary classroom teacher—whose duties included teaching a religion curriculum from a workbook and leading occasional classroom prayer or accompanying students to Mass—qualified as a minister. The function and “core . . . mission” of religious schools is to “[e]ducat[e] and form[] students in the . . . faith,” and teachers who model and teach the faith are central to that function.⁶⁸

Even after the Supreme Court’s clarification of the exception’s parameters in *Our Lady of Guadalupe*, there remains much uncertainty about who else is a minister and, even within the teacher context, how much “religious content” or “modeling of the faith” is enough to make someone a minister. Part of this uncertainty arises from a tension inherent to the ministerial exception and reflected in the Court’s internal dialogue throughout both *Hosanna-Tabor* and *Our Lady of Guadalupe*: how to craft a

66. “We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

67. *Compare id.* at 198–99 (Alito, J., concurring) (“Instead, courts should focus on the function performed by persons who work for religious bodies. The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith.”), *with* *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020) (“What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school. . . . One of the concurrences made the same point . . .”).

68. *Our Lady of Guadalupe*, 140 S. Ct. at 2066. *See also* *Hosanna-Tabor*, 565 U.S. at 192 (noting that the respondent’s work is central “in conveying the Church’s message and carrying out its mission”).

rule that does not favor certain religions or forms of religious expression over others, and how much the Court should consider a religion's own understanding of itself. Justice Alito has been at the forefront of pushing the first question, while Justice Thomas has pushed the Court on the second.

Justice Alito authored a concurrence in *Hosanna-Tabor* to make an explicit equity point about the Court's reluctance to constrain the exception to formal clergy—some faiths have no formal clergy.⁶⁹ Some do not even grant formal titles. When writing the majority opinion in *Our Lady of Guadalupe*, Justice Alito recoiled from the plaintiffs' suggestion that it was illogical, perhaps even offensive, for a court to tell someone that they are legally a minister of a faith they do not practice or profess.⁷⁰ Beyond the religious-question problems with allowing a court to decide whether a member of a Reform synagogue is the "same religion" as their Chabad-affiliated employer, such a "co-religionist" requirement would discriminate against minority faiths who cannot find enough qualified teacher-ministers within their smaller communities.⁷¹ Meanwhile, Justice Thomas authored concurrences in both cases pushing the Court to defer to any sincere, good-faith assertion by a religious organization that an employee is a minister.⁷² To do otherwise is to impose an outside, secular perspective on what the "central functions" of a given faith are, and to question the religion's own hierarchy of importance.⁷³ This, too, is an equity argument: the faiths most likely to be misunderstood are those whose members do not sit on the bench.⁷⁴

But in some ways, these two instincts toward equity and accepting faiths on their own terms operate at cross-purposes. Some faiths may maintain a strong boundary between sacred and profane, preferring to maintain math education as a purely secular enterprise, while others may have a more expansive understanding of religious conduct and content, imbuing math education with holy purpose. Does it build inequality into the law to grant the latter faith more expansive legal rights than the former, or would that simply respect religions' self-definitions and self-understanding? Could the structure of the law influence religious doctrine

69. *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

70. *Our Lady of Guadalupe*, 140 S. Ct. at 2068.

71. *Id.* at 2068–69.

72. *Hosanna-Tabor*, 565 U.S. at 196–98 (Thomas, J., concurring); *Our Lady of Guadalupe*, 140 S. Ct. at 2069–71 (Thomas, J., concurring).

73. *Our Lady of Guadalupe*, 140 S. Ct. at 2070 (Thomas, J., concurring).

74. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

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by encouraging religious organizations to define more and more conduct as sacred?⁷⁵ Are there practical concerns, like the aforementioned lack of qualified coreligionist teachers, that might push a community to have fewer ministerial roles than they might otherwise choose? Does any of that matter?

A long-running New Jersey case is illustrative. Seven years ago, Victoria Crisitello was an art teacher and former preschool aide at St. Theresa School in Kenilworth when she became pregnant.⁷⁶ Because she was unmarried, and because the school had a morality code embedded in her contract, she was fired.⁷⁷ The state district court granted summary judgment to the school, but the appellate court overturned the order and remanded the case for trial.⁷⁸ The school again prevailed, and Crisitello again appealed.⁷⁹ While the appeal was pending, the Supreme Court issued its decision in *Our Lady of Guadalupe*.⁸⁰ The school raised the ministerial exception, and before the state appellate court could turn to the issue of the morality code (which it found unenforceable on other grounds) it first had to determine whether Crisitello was a minister under the newly expanded definition.⁸¹

Unlike Morrissey-Berru and Biel, Crisitello *only* taught art.⁸² She did not teach religion or participate in the prayer life of the school.⁸³ But it is apparent that, from the school's perspective, this was not the dispositive factor in determining whether a person was a minister. The school's handbook and other documents expressed a thick vision of education that was drenched in faith down to the smallest details. Teachers were expected to implement St. John Bosco's pedagogy and play the role of "Christian Witness" by "express[ing] a value-centered approach to living and learning in their private and professional lives"; students could only graduate if their

75. *Cf. id.* (“[U]ncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding ‘ministers’ to the prevailing secular understanding.”).

76. *Crisitello v. St. Theresa Sch.*, 242 A.3d 292, 294 (N.J. Super. Ct. App. Div. 2020), *cert. granted*, 250 A.3d 1129 (N.J. Sup. Ct. 2021).

77. *Id.*

78. *Id.* at 296.

79. *Id.* at 298.

80. *Id.* at 298–99.

81. *Id.* at 299, 301–03.

82. *Id.* at 296.

83. *Id.*

“attitudes, beliefs, and values” were in line with “the teachings of Christ and the Roman Catholic Church”; and moral education was as important as education in any subject matter.⁸⁴ The appellate court ruled against the school,⁸⁵ and the case is now proceeding to the New Jersey Supreme Court. *St. Theresa’s* is arguing that, because the school’s theology paints even teachers of nonreligious subjects as ministerial, the court should vitiate that understanding.⁸⁶ Otherwise, the court stands to implement a “minimalist view of the importance of Christian witness” that is at odds with Catholic theology.⁸⁷

The dilemma facing the state supreme court is an interesting one. The only guidance *Our Lady of Guadalupe* offers is that the court should pay attention to “important religious functions.”⁸⁸ Perhaps the court will return to Justice Alito’s initial, nonprecedential description of the functional analysis as applying to anyone who “serves as a messenger or teacher of . . . faith.”⁸⁹ Is teaching art part of teaching faith, such that the ministerial exception would be applied to any religious school’s art program? Or is there something unique about Catholic theology that makes its art teacher a minister, while a case involving a Seventh-Day Adventist school might reach a different result?

A religious organization’s understanding of a given person as a minister is not sufficient, but it is necessary. No court can define anyone as an exempt minister whom the religious organization itself does not describe that way; that would pose an Establishment Clause issue of its own. There must be some subjective analysis in the functional approach. The question is whether it is also possible to have an objective test of “religious functions” that defines what it means to be a “teacher of . . . faith” or whether Justice Thomas is right, and the effort is a fool’s errand.

The difficulty of these questions is even better expressed outside the K-12 context, where the Court has yet to rule. In two cases since *Our Lady of Guadalupe* was handed down, courts have struggled to determine what

84. Petition for Certif. of Defendant-Petitioner at 4–5, *Crisitello v. St. Theresa Sch.*, No. 085213 (N.J., Dec. 21, 2020).

85. *Crisitello*, 242 A.3d at 303.

86. Petition for Cert., *supra* note 84, at 4–5.

87. *Id.* at 12.

88. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2074 (2020) (Sotomayor, J., dissenting) (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 192 (2012)).

89. *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring).

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should prevail—an organization’s expansive understanding of how its employees’ work is tied to the will of God, or an outsider’s more quotidian, commonsense definition of “religious functions.”

Seattle’s Union Gospel Mission provides services to unhoused people in the name of the Gospel and with evangelical purpose. All employees are expected to minister, in every sense of the word, to their clients, and they are required to sign a statement of faith.⁹⁰ Matthew Woods, a law student who identifies as Christian and comfortably signed the statement of faith, began volunteering for the organization’s legal clinic and sought to apply for a staff attorney position after graduation, at which point his same-sex relationship was disclosed and he was told he was not eligible for the job.⁹¹ The Gospel Mission exists because the organization believes in a religious duty to serve the homeless, and Woods agreed that the work carried religious significance. Is that enough to make him a minister? The Washington Supreme Court did not decide the question, returning it to the lower court for factual review,⁹² though the concurrence questioned whether legal ethics rules could ever permit a lawyer to be a minister.⁹³

In Massachusetts, however, the state supreme court recently drew a clear line to prevent the ministerial *exception* from ballooning into the *rule*: professors of subjects other than religion are not ministers.⁹⁴ The case addressed claims by a social work professor at a Christian college.⁹⁵ The college described itself in similar terms to St. Theresa’s, requiring faculty to “integrate [] Christian faith into [their] teaching, scholarship and advising,” and explicitly stating that “there are no nonsacred disciplines.”⁹⁶ But the

90. Woods v. Seattle’s Union Gospel Mission, 481 P.3d 1060, 1063 (Wash. 2021) (en banc), *cert. denied*, 142 S. Ct. 1094 (2022).

91. *Id.*

92. *Id.* at 1070.

93. *Id.* at 1073 (Yu, J., concurring) (“[I]t is simply not possible to simultaneously act as both an attorney and a minister while complying with the RPCs . . . [T]he likelihood of concurrent conflicts of interest would be enormous if an attorney attempted to act as a minister and a lawyer . . .”).

94. DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000, 1002 (Mass. 2021), *cert. denied*, 142 S. Ct. 952 (2022).

95. For a similar decision from a federal court, addressing the ministerial status of an art professor at a religious university, see Palmer v. Liberty Univ., No. 6:20-cv-31, 2021 U.S. Dist. LEXIS 248963 (W.D. Va. Dec. 1, 2021), *appeal docketed*, No. 21-2390 (4th Cir. argued Jan. 26, 2023).

96. Gordon Coll., 163 N.E.3d at 1004, 1013–14.

professor was not held out as a minister, was not required to undergo religious training, and did not plan or participate in campus chapel services.⁹⁷ *Hosanna-Tabor* was only meant to apply to “individuals who play certain key roles” in a faith community; it cannot apply to everyone who integrates their faith in their everyday life.⁹⁸ The court concluded that there must be a legal difference between “a Christian teacher and scholar,” and a minister.⁹⁹

In both cases, the Supreme Court denied certiorari, likely for procedural reasons that would have complicated review,¹⁰⁰ but Justice Alito wrote concurrences questioning state court decisions holding that lawyers or professors fall outside the ministerial exception.¹⁰¹ If lower courts continue to limit application in this way, we may see the Court intervene to expand the scope of the ministerial exception yet again.

The definition of a minister under the ministerial exception is perhaps murkier now than it was before the Court took up *Our Lady of Guadalupe* in the hope of clarifying its scope. The Court followed an impulse toward equity when it decided that the exception could not be constrained to formal clergy. But now the equity impulse is pushing back, with the threat that all employees at every religious organization with an integrated view of faith and mission—every religious organization—will be unprotected by civil rights laws. And those employees won’t even know it.

3. Which causes of action are subject to the exemption?

Both *Hosanna-Tabor* and *Our Lady of Guadalupe* addressed ministerial employees who brought suit for employment discrimination under Title VII, the ADA, or the ADEA. The Court “express[ed] no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”¹⁰²

97. *Id.* at 1002.

98. *Id.* at 1017 (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020)).

99. *Id.* at 1018.

100. *Seattle’s Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1096–97 (2022) (Alito, J., concurring in denial of cert.); *Gordon Coll.*, 142 S. Ct. at 955 (Alito, J., concurring in denial of cert.).

101. *Seattle’s Union Gospel Mission*, 142 S. Ct. at 1096 (Alito, J., concurring in denial of cert.); *Gordon Coll.*, 142 S. Ct. at 954 (Alito, J., concurring in denial of cert.).

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

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Lower courts have not had the luxury of punting these questions. They have been left on their own to determine which other adverse employment actions are similarly unreviewable under the exception. This process requires developing a coherent theoretical basis for the ministerial exception and applying that logic forward. Given the complicated and contested explanations for why the exception exists at all, it should not be surprising that this question has given lower courts the most trouble and has resulted in the most disparate treatment across jurisdictions.

If, for example, a decision on the hiring or firing of a minister is *always inherently* entangled in a religious question, then even breach of contract claims should be barred if the “contract” is an employment agreement. If, on the other hand, secular courts can use neutral principles of law to review ministerial employment decisions for “fraud, collusion, or arbitrariness,”¹⁰³ holding religious organizations to the simple terms of their employment contracts should be permitted; the ministerial exception is only concerned with the imposition of external employment standards by the state. The split among circuits and states on this question is quite extreme.¹⁰⁴ It bears

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103. *Compare* *Hutchison v. Thomas*, 789 F.2d 392, 395 (6th Cir. 1986) (“Assuming, without deciding, that review [of ministerial employment decisions] is allowed for fraud or collusion, it is still only allowed . . . [when it is] of the most serious nature . . .”), *with* *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 471 (8th Cir. 1993) (explaining that a “claim that the Synod violated its own bylaws by removing [the plaintiff’s] name from its list of eligible ministers falls squarely into the category of claims that are not justiciable by secular courts”).
104. *Compare* *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 617 (Ky. 2014) (“[T]he Seminary’s decision to fire a tenured professor, whether a minister or not, is completely free of any government involvement or restriction. In the absence of government interference, the ministerial exception cannot act as a bar to an otherwise legitimate suit.”), *and* *Petruska v. Gannon Univ.*, 462 F.3d 294, 312 (3d Cir. 2006) (“Petruska’s breach of contract claim ‘do[es] not inevitably or even necessarily lead to government inquiry into [Gannon’s] religious mission or doctrines.’” (alteration in original) (quoting *Geary v. Visitation of the Blessed Virgin Mary Par. Sch.*, 7 F.3d 324, 329 (3d Cir. 1993))), *and* *Sumner v. Simpson Univ.*, 238 Cal. Rptr. 3d 207, 220–21 (Cal. Ct. App. 2018) (“Reviewing Sumner’s contract cause of action will not require the court to wade into doctrinal waters because review of the breach of contract claim does not require a review of Sumner’s religious qualification or performance as a religious leader. Defendants have never claimed to have terminated Sumner for religious reasons, only because she was insubordinate.”), *with* *Middleton v. United Church of Christ Bd.*, 483 F.

noting that a breach of contract claim could provide some relief to ministers whose employment contracts contain nondiscrimination provisions or incorporate handbook promises not to discriminate. This is a distinct claim from waiver, though, and not this Note's central argument. The waiver argument should apply *even if* the ministerial exception ultimately applies to most or all breach of contract claims and *even when* the contract language in question is not sufficient to create an independent, legally binding contractual obligation that can be breached.¹⁰⁵

The claims with perhaps the most contested and variable outcomes under the ministerial exception are those based in harassment and hostile work environment because those claims rise from the very antidiscrimination laws at the center of the paradigm ministerial exception cases. On the one hand, few would go so far as to defend the perpetuation of

Supp. 3d 489, 498–99 (N.D. Ohio 2020) (“[T]he court concludes that the ministerial exception does apply to a minister’s common law [breach of contract and promissory estoppel] claims challenging tangible employment actions.”), *aff’d on other grounds*, No. 20-4141, 2021 U.S. App. LEXIS 34852 (6th Cir. Nov. 22, 2021), and *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 122 (3d Cir. 2018) (“Our sister circuit courts have repeatedly dismissed breach of contract claims asserted by terminated religious leaders against their religious institution employers based on the ministerial exception.”), and *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1208 (Conn. 2011) (“[C]ounts . . . alleging breach of implied contract and the implied covenant of good faith and fair dealing . . . are barred by the ministerial exception.”), *abrogated on other grounds by Hosanna-Tabor*, 565 U.S. at 171. See also Kevin J. Murphy, *Note: Administering the Ministerial Exception Post-Hosanna-Tabor: Why Contract Claims Should Not Be Barred*, 28 NOTRE DAME J. L. ETHICS & PUB. POL’Y 383 (2014).

105. See *infra* p. 330. It is extremely difficult to create an independent contractual obligation not to discriminate that will be recognized in federal court. See, e.g., *Gally v. Columbia Univ.*, 22 F. Supp. 2d 199, 208 (S.D.N.Y. 1998) (“[A] general statement of adherence by [the defendant] to existing anti-discrimination laws . . . does not create a separate and independent contractual obligation.”); *Peralta v. Cendant Corp.*, 123 F. Supp. 2d 65, 83 (D. Conn. 2000) (“The language of the anti-harassment policy that plaintiff urges as the basis of his implied contract claim does not indicate that defendant is undertaking any contractual obligations towards the plaintiff; rather, it obliges [the defendant] to comply with federal and state anti-discrimination laws . . .”). See also Ian Ayres and Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639 (2006) (outlining a complex procedure for businesses to enact a contractually binding promise not to discriminate against LGBTQ employees where such discrimination was not otherwise illegal).

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harassment and abuse in the name of religious freedom. On the other, many standard discrimination claims can be reframed as hostile work environment or harassment claims, leading to a fear that gamesmanship and clever pleading could be used to narrow the exception out of existence.¹⁰⁶ Circuits began splitting on this issue more than a decade ago, and the division has potentially deepened since *Our Lady of Guadalupe* was decided.¹⁰⁷ The Seventh Circuit divided en banc to shut down a minister's disability-based hostile work environment claim as barred by the ministerial exception, while the Sixth Circuit affirmed a district court decision allowing a minister's race-based hostile work environment claim to proceed.¹⁰⁸

106. See, e.g., *Middleton*, 483 F. Supp. 3d at 496 (“[W]ith a quick pivot, Middleton’s Response in Opposition clarifies that her first cause of action actually ‘is based on the hostile work environment to which Defendants subjected her because she is an African American female, separately and apart from the tangible employment actions they took against her.’”) (citations omitted); *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 973 (7th Cir. 2021) (en banc) (“Demkovich repackaged his allegations of discriminatory termination as hostile work environment claims.”). It should be noted, however, that it is simply not the case that every set of facts that would be a cognizable discrimination claim can also create a successful hostile work environment claim. While the *Middleton* court decided that the ministerial exception did not bar a hostile work environment claim, it also found that Middleton’s pleaded facts failed to state such a claim. 483 F. Supp. 3d at 501–04. And while the district court in *Demkovich* allowed the disability-based hostile work environment claim to proceed, it dismissed the hostile work environment claims rooted in sex, sexual orientation, and marital status discrimination because the church had purported religious reasons for engaging in the allegedly discriminatory and hostile conduct. 343 F. Supp. 3d 772 (N.D. Ill. 2018), *aff’d in part, rev’d in part and remanded*, 3 F.4th 968 (7th Cir. 2021).

107. Compare *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), with *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010). The Fifth and Eleventh Circuits have said that the exception applies to *all* Title VII claims, presumably including those brought under a hostile work environment or harassment theory. *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F. 3d 1299 (11th Cir. 2000); *McClure v. Salvation Army*, 460 F. 2d 553 (5th Cir. 1972).

108. *Demkovich*, 3 F.4th at 973.; *Middleton*, 2021 U.S. App. LEXIS 34852, at *6–10 (finding that the ministerial exception barred certain evidence, leading the hostile work environment claim to fail on the merits, but declining to decide that the ministerial exception barred the claim altogether).

There are concerning implications on both sides of the argument. Employers can acquire liability for harassment if they negligently hire, retain, or supervise an employee who harasses another.¹⁰⁹ When applied to a ministerial relationship, this would mean a congregation could be civilly liable for choosing the “wrong” minister—exactly the outcome that the ministerial exception is designed to prevent.¹¹⁰ Perhaps the congregation chose to make an “unreasonable” hire by secular standards, but one that reflected the community’s religious understanding of sin, redemption, and forgiveness. And how are secular courts to evaluate “negligent supervision” within religions with highly variable systems of hierarchy and autonomy without encountering a religious question?¹¹¹

Also concerning are the potential implications of a rule that places *all* harassment and abuse claims rooted in Title VII (or other antidiscrimination law) outside the review of secular courts.¹¹² Few would struggle to list prominent examples of sexual misconduct by and against ministerial employees.¹¹³ State courts have allowed cases alleging sexual

109. A commonly cited Washington state supreme court case found that “a religious organization must be able to choose and retain its spiritual leaders,” *Erdman v. Chapel Hill Presbyterian Church*, 286 P.3d 357, 363 (Wash. 2012) (en banc), and that “claims of negligent retention and supervision pose serious First Amendment concerns that often weigh against allowing a tort claim to proceed in a civil court.” *Id.* at 364.

110. Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1114-16 (2003). *See also* Malicki v. Doe, 814 So. 2d 347 (Fla. 2002).

111. In the Christian tradition, the relationship between local church autonomy and ecclesiastical authority is not just a practical question but a deeply religious one that has caused schisms and wars. Denominations often define themselves not only in terms of doctrinal statements but in terms of organizational structure. *See, e.g.*, RUSSELL E. RICHEY, DENOMINATIONALISM: ILLUSTRATED AND EXPLAINED (2013); DENOMINATION: ASSESSING AN ECCLESIOLOGICAL CATEGORY (Paul M. Collins & Barry A. Ensign-George, eds., 2011); Chopko, *supra* note 110, at 1116-19.

112. *See* Ira C. Lupu & Robert W. Tuttle, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment’s Religion Clauses*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 249 (2019); Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment After Hosanna-Tabor*, 11 STAN. J. CIV. RTS. & CIV. LIBERTIES 89 (2015).

113. *E.g.*, Laurie Goodstein & Sharon Otterman, *He Preyed on Men Who Wanted to Be Priests. Then He Became a Cardinal*, N.Y. TIMES (July 16, 2018),

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harassment of an associate pastor by a senior pastor¹¹⁴ and unwanted sexual advances toward a seminarian by supervising priests¹¹⁵ to proceed, notwithstanding the ministerial exception. And cases brought against religious organizations by non-ministers alleging sexual misconduct by ministers, because they must establish negligent hiring or supervision, run up against the ministerial exception precedents as well.¹¹⁶ If negligence is a religious question barred by the ecclesiastical abstention doctrine, it should logically be barred no matter what kind of plaintiff is asking it. The Ninth Circuit developed its permissive attitude toward ministerial hostile work environment claims in a case alleging endemic sexual harassment in a Jesuit seminary,¹¹⁷ and since then, more and more circuits have chosen expansive definitions of the exception that bar such suits,¹¹⁸ endangering precedents that have allowed clergy harassment to give rise to civil damages in secular courts. Precedents protecting religious organizations from whistleblower

<https://www.nytimes.com/2018/07/16/us/cardinal-mccarrick-abuse-priest.html> [<https://perma.cc/7VXY-VJAE>]; Tara Isabella Burton, *A Megachurch Pastor Resigns After Sexual Misconduct Allegations. The Larger Problem Remains*, Vox (Apr. 13, 2018), <https://www.vox.com/identities/2018/4/13/17234606/bill-hybels-willow-creek-resignation-megachurch-pastor-scandal> [<https://perma.cc/6YUG-FSU5>]; Olivia Tucker, *Abuse and Fear at the Yeshiva of New Haven*, YALE DAILY NEWS (Mar. 20, 2020), <http://features.yaledailynews.com/blog/2020/03/20/abuse-and-fear-at-the-yeshiva-of-new-haven> [<https://perma.cc/AT3W-VQNF>].

114. *Black v. Snyder*, 471 N.W.2d 715, 717–18 (Minn. Ct. App. 1991) (“The claim alleged that Snyder repeatedly made unwelcome sexual advances toward her including referring to the two of them as ‘lovers,’ physically contacting her in a sexual manner, and insisting on her companionship outside the work place, despite her objections.”).
115. *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002).
116. *Doe v. Corp. of Cath. Bishop of Yakima*, 957 F. Supp. 2d 1225, 1227, 1229 (E.D. Wash. 2013) (rejecting, in case alleging that a transitional deacon “repeatedly raped and sexually assaulted [minor] Plaintiff,” Defendant’s argument that the “negligent hiring and retention claims fail because such claims violate the Free Exercise clause by intruding into the church’s ecclesiastical practice of selecting its own leaders.”). *See also* *Roman Cath. Diocese of Jackson v. Morrison*, 905 So.2d 1213, 1256–61 (Miss. 2005) (collecting conflicting cases in appendices).
117. *Bollard v. California Province of the Soc’y of Jesus*, 196 F.3d 940 (9th Cir. 1999).
118. *See supra* notes 106 and 107.

liability—leaving those who report abuse or harassment without protection from retaliation—certainly do not help matters.¹¹⁹

And consider when harassment might begin to resemble a trafficking claim. Take, for example, a case brought by an Orthodox “nun”¹²⁰ alleging, among other things, that (1) while she was a student, the priest who was dean of students at her college “made” her marry the man who sexually assaulted her; (2) after “allow[ing]” her divorce in 2009, the priest helped her found a monastery in 2010, where she worked full-time without compensation until 2018; (3) throughout her time as a student and while she was living at the monastery, the priest sexually harassed her, including “unwanted kissing and full-body hugs”; and (4) after the nun complained to the bishop, she was informed that the archdiocese was “considering sending [her] to Greece.”¹²¹ The Southern District of New York granted summary judgment for the archdiocese on all claims, including dismissing her claim for sexual harassment.¹²² Commentators have noted that religious organizations’ combined immunity from wage laws¹²³ and sexual harassment creates a serious risk of human trafficking.¹²⁴ And while the sexual harassment of a vulnerable young nun who felt trapped in her monastery is not trafficking, formal claims of trafficking by religious groups

119. *Rehfield v. Diocese of Joliet*, No. 125656, 2021 IL 125656 (Ill. Feb. 4, 2021) (dismissing case where a Catholic school principal alleged that she was fired for reporting a parent’s threatening behavior to the police). For more cases and a defense of a policy barring whistleblower claims under the ministerial exception, see Rachel Casper, *When Harassment at Work is Harassment at Church: Hostile Work Environments and the Ministerial Exception*, 25 U. PA. J.L. & SOC. CHANGE 11 (2021); and Jarod S. Gonzalez, *At the Intersection of Religious Organization Missions and Employment Laws: The Case of Minister Employment Suits*, 65 CATH. U. L. REV. 303, 320–28 (2015).

120. The precise religious status of the plaintiffs was contested. *Brandenburg v. Greek Orthodox Archdiocese of N. Am.*, No. 20-CV-3809, 2021 WL 2206486, at *1 (S.D.N.Y. June 1, 2021) (“[A]lthough Plaintiffs were given the formal title of ‘nuns,’ they ‘were referred to and considered as laypeople by the Archdiocese.’”).

121. *Id.* at *1–*2.

122. *Id.* at *11.

123. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter FLSA 2021-2 (Jan. 8, 2021).

124. Juliana Moraes Liu, *Ministerial Exception: The Involuntary Servitude Loophole*, 19 FIRST AMEND. L. REV. 313 (2021).

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are not at all unheard of.¹²⁵ The Eastern District of New York allowed a Victims of Trafficking and Violence Prevention Act (TVPA) claim to go forward against an ashram that allegedly confiscated a priest's passport after sponsoring his immigration from India,¹²⁶ while the Central District of California dismissed a TVPA claim against a Scientologist religious order under the ministerial exception.¹²⁷

Finally, most courts—but not all—have been surprisingly amenable to allowing defamation claims arising from ministerial employment. Some ministerial defamation claims are inextricably bound up in religious doctrine.¹²⁸ However, many claims are not, and most courts have allowed those claims to proceed, even where the plaintiff is a former ministerial employee alleging that the defamatory speech occurred as part of an adverse employment action.¹²⁹

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125. *Id.* at 334 (“[T]he MudMan burger chain in Montana had been staffing its restaurants with ‘interns’ who worked sixty hours per week, while receiving as little as \$2 an hour compensation. These ‘interns’ had all been recruited from Potter’s Field, an evangelical Christian group run by MudMan’s owners. Similarly, the Holy Tabernacle Born Again Faith Inc. religious organization forced children at the McCollum Ranch to work over forty hours a week in fish markets, where they would engage in dangerous manual labor, with little to no pay. If religious organizations are granted protection against human trafficking claims, more of these types of arrangements are likely to emerge.”).
126. *Shukla v. Sharma*, No. 07-CV-2972, 2009 WL 3151109 (E.D.N.Y. Sept. 29, 2009).
127. *Headley v. Church of Scientology Int’l*, No. CV 09-3987, 2010 WL 3184389 (C.D. Cal. Aug. 5, 2010), *aff’d*, 687 F.3d 1173 (9th Cir. 2012).
128. *See, e.g.*, *In Re Diocese of Lubbock*, No. 20-0127, 2021 WL 2386135 (Tex. June 11, 2021) (dismissing defamation claim by deacon whose name was included on a public list of “Names of All Clergy with a Credible Allegation of Sexual Abuse of a Minor” because the case would ultimately require analysis of a Code of Canon Law definition of “minor” that included “vulnerable adults”).
129. *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346, 349 (5th Cir. 2020), *cert. denied*, 2021 WL 722954 (June 28, 2021); *Drevlow v. Lutheran Church*, 991 F.2d 468, 471–72 (8th Cir. 1993); *Brandenburg v. Greek Orthodox Archdiocese of N. Am.*, No. 20-CV-3809, 2021 WL 2206486, at *9 (S.D.N.Y. June 1, 2021); *Tubra v. Cooke*, 225 P.3d 862, 864 (Or. 2010); *Marshall v. Munro*, 845 P.2d 424, 425, 428 (Alaska 1993). *But see* *Hyman v. Rosenbaum Yeshiva of N.J.*, No. A-2650-20, 2023 N.J. Super. LEXIS 9, at *32–33 (Super. Ct. App. Div. Feb. 8, 2023) (dismissing a defamation claim on the sole basis of the ministerial exception without considering whether the statement had enough religious content for the ecclesiastical abstention

This attitude toward defamation affirms that not all aspects of the relationship between a religious community and its minister are above the law—notably, lying is still wrong. When a church takes an affirmative step to place itself outside the law by making public misrepresentations about a secular topic, the case ceases to be covered by the ministerial exception. Contractual misrepresentations about secular employment protections should be thought of in the same way.

PART II: WAIVER OF CONSTITUTIONAL RIGHTS

A. *The Ministerial Exception as a Waivable Right*

The ministerial exception is a waivable First Amendment right. Not all rights are waivable. Many statutory rights, for example, are nonwaivable, including the religious organization exemption to Title VII's ban on religious discrimination in employment.¹³⁰ But the ministerial exception can be waived simply by choosing not to plead it affirmatively.¹³¹ When rights as fundamental as due process and free speech are waivable, there is no reason to consider the ministerial exception to be different. And if citizens can

doctrine to create “an independent basis” for dismissal); *Sumner v. Simpson Univ.*, 238 Cal. Rptr. 3d 207, 223 (Cal. Ct. App. 2018) (“It is true that the reasons given for terminating Sumner were not strictly religious. Nevertheless, . . . [w]ere we to allow the acts taken in terminating Sumner to be framed as tortious acts, we would render the ministerial exception meaningless.”).

130. *E.g.*, *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (“Th[e] argument [that the religious organization exemption of Title VII can be waived] incorrectly views the exemptions for religious schools as a privilege or interest granted to those organizations. Instead, those exemptions reflect a decision by Congress that the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention. Once Congress stated that ‘[t]his title shall not apply’ to religiously motivated employment decisions by religious organizations, no act by Little or the Parish could expand the statute’s scope.”). Some states have made the same determination regarding their antidiscrimination statutes, deciding that the limitations on applying the law to religious organizations are jurisdictional, not a waivable right. *E.g.*, *Romeo v. Seton Hall Univ.*, 875 A.2d 1043 (N.J. Super. Ct. App. Div. 2005).

131. Helfand, *supra* note 28, at 1899.

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waive their right to sue under federal civil rights law,¹³² there is no reason to bar religious groups from waiving their right *not* to be sued under those laws.

The ministerial exception regulates two separate relationships: the one between a religious organization and the state, and the one between a religious organization and its ministers. Those who argue that the ministerial exception is nonwaivable or difficult to waive focus their attention on the former, but their argument misconstrues the legal quality of that relationship. The latter relationship, moreover, is rooted in consent, and contract and contractual waiver are appropriate methods for monitoring and evaluating that consent. Finally, there are strong policy reasons to advocate for the exception's waiver under traditional contractual waiver theories.

1. The exception is not like sovereign immunity

Some identify the ministerial exception as either nonwaivable or waivable only under stringent tests derived from sovereign immunity. These arguments rely on a persistent misdefinition of the ministerial exception as an adjudicative jurisdictional bar, based either on the claim that matters of subject-matter jurisdiction are nonwaivable, or on some ill-defined “structural limitation” theory thought to parallel an immunity doctrine like sovereign immunity or qualified immunity. These arguments fail because, as explained in Section I.A.2, the ministerial exception is not about the limited power of secular courts.

Two waiver cases in federal circuit courts were resolved on the first theory, directly debunked by *Hosanna-Tabor*, that the ministerial exception is jurisdictional and hence inherently nonwaivable. The Seventh Circuit's decision to this effect preceded *Hosanna-Tabor*.¹³³ But the Sixth Circuit resolved a case called *Conlon* on this logic in 2015 in a dispute centered on a Michigan chapter of InterVarsity Christian Fellowship that terminated an employee because she filed for divorce.¹³⁴ At the time she applied for the

132. *Newton v. Rumery*, 480 U.S. 386 (1987) (holding that waiver of right to bring Section 1983 claim in exchange for dismissal of criminal charges was not *per se* unconstitutional).

133. *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1037 (7th Cir. 2006), *abrogated by Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

134. *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 831, 834 (6th Cir. 2015).

job, IVCF's website stated that it did not consider sex and marital status in employment decisions, and the employee argued that this should constitute a waiver.¹³⁵ Instead, the Sixth Circuit explained that while it had previously held that the ministerial exception was waivable in theory, it read *Hosanna-Tabor* to close that possibility, and it cited the abrogated Seventh Circuit decision.¹³⁶

The Sixth Circuit focused on language in *Hosanna-Tabor* that emphasized the power that the exception gives to religious organizations—the exception “bar[s] the government from interfering,” “prohibits government involvement,” and makes it “impermissible for the government to contradict a church’s determination.”¹³⁷ But nothing about acknowledging a religious organization’s power to waive its right would undermine the strength of that right vis-à-vis the government. The concurrence seems to acknowledge this, clarifying that nothing about the decision should be read to foreclose the possibility that “a religious employer could enter into a judicially-enforceable employment contract with a ministerial employee not to fire that employee on certain grounds.”¹³⁸ It is hard to imagine how the court hoped to retain that possibility, though, given its holding that the exception “can never be waived.”¹³⁹ The Sixth Circuit finds a lot of meaning in the word “bar” while never reckoning with the clear holding in *Hosanna-Tabor* that, while the ministerial exception *barred* the particular employment discrimination claim in that case, the exception was “*not a jurisdictional bar*.”¹⁴⁰ The court’s analysis directly contradicts *Hosanna-Tabor* by making the ministerial exception all about what the government *cannot* do, rather than about what religious organizations *can* do.

More recently, Judge Bacharach on the Tenth Circuit wrote a strident dissent defending the second, “structural limitation” theory for the

135. *Conlon v. Intervarsity Christian Fellowship/USA*, 13 F. Supp. 3d 782, 785 (W.D. Mich. 2014).

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

137. *Id.* at 836 (quoting *Hosanna-Tabor*, 565 U.S. at 181, 185, 189).

138. *Id.* at 838.

139. *Id.* at 836.

140. *Hosanna-Tabor*, 565 U.S. at 195 n.4. Indeed, a state court in the Sixth Circuit held, shortly after *Hosanna-Tabor*, that *Hosanna-Tabor* clearly precluded any argument that courts lack jurisdiction over ministerial exception matters. *Petschonek v. Cath. Diocese of Memphis*, No. W2011-02216-COA-R9-CV, 2012 WL 1868212, at *6 (Tenn. Ct. App. May 23, 2012).

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exception's nonwaivability. He argued that the exception is an absolute bar against suits, not just a defense against liability.¹⁴¹ Much as I do,¹⁴² the majority draws attention to the fact-intensiveness of the ministerial exception test as a defense against its being construed in this way:

[T]here will be no judicial 'meddling' with religion if a fact-finder ultimately determines that Tucker is not a minister because religious employers are amenable to employment discrimination claims brought by non-ministerial employees. That is the factual question still to be determined in our case. The dissent's analysis starts with the incorrect (and contested) premise that Tucker should be deemed a minister.¹⁴³

And some scholarship has recently defended the possibility of the exception's waiver, but only insofar as a doctrine like sovereign immunity is waivable, which is a very high standard.¹⁴⁴ Like sovereign immunity, the ministerial exception is "not spelled out in the Constitution";¹⁴⁵ rather, it emerges from the "implicit ordering of relationships . . . necessary to make the Constitution a workable governing charter."¹⁴⁶ But the comparison to sovereign immunity is otherwise inapt. The ministerial exception is not about and cannot be about the relative powers of religious authorities and secular authorities in employment law. The ministerial exception is about religious organizations' *citizenship* and religious organizations' *rights*, but it

141. *Tucker*, 53 F.4th at 627 (Bacharach, J., dissenting). The narrow question before the Tenth Circuit was whether it should permit interlocutory appeals of ministerial exception decisions. Judge Bacharach argued that the exception should be compared to qualified immunity, which is not jurisdictional but may trigger the collateral-order doctrine, but he also argues that the ministerial exception should be nonwaivable, unlike qualified immunity.

142. *Supra* Section I.A.

143. *Tucker*, 53 F.4th at 624.

144. Weinberger, *supra* note 49, at 27–28; Michael J. West, Note, *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861, 1886 (2017). West was concerned with defending the rights of religious organizations that might want to form special contracts with core ministers to waive the exception. He understood that scenario as a rare and idiosyncratic need, and thus there was no issue with applying a heightened waiver standard.

145. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019).

146. *Id.* at 1492 (*citing* *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting)).

is not about religious organizations as rival sovereigns who exist outside the regulable economy. Secular authorities enjoy jurisdiction over employment law even when the employer is religious.

All three of these arguments—that the ministerial exception is nonwaivable because it is jurisdictional, that it is nonwaivable because it is a structural limitation or restraint, or that it is only as waivable as sovereign immunity—ignore footnote four and rely on other language in *Hosanna-Tabor* that has a simpler explanation. Certainly states do not have the “power to determine which individuals will minister to the faithful,”¹⁴⁷ so of course “the ministerial exception bars such a suit.”¹⁴⁸ But this need not mean that the exception bears on adjudicative jurisdiction or requires some unique, inventive legal-constitutional form other than that of a very strong, very important First Amendment right. All rights are about what the state cannot do, does not have the power to do, or is barred from doing. For theorists who are attached to forceful language about limits on the state’s ability to regulate religion, perhaps it is most helpful to think of these rights as issues of prescriptive or enforcement adjudication.¹⁴⁹

While the ministerial exception is indeed special, its specialness is contained in the already broad scope of the right and lack of balancing considerations. It is not especially *nonwaivable* or otherwise distinct from traditional constitutional rights. It is no more a special structural limitation than the Thirteenth Amendment is a structural limitation on the state’s power to enforce enslavement, or the First Amendment is a structural barrier to prior restraints on the press. These are all merits doctrines dealing with constitutional rights.

In its mediation of the relationship between the state and a religious organization, the ministerial exception creates a firewall of protection in the form of a right whose on/off switch is solely controlled by the religious organization. Any attempt to exercise state power within the boundaries of that right is invalid, barred, and beyond the state’s power, even though the state interest in a nondiscriminatory labor market is otherwise considered one of its strongest. But, like any other First Amendment right, the religious organization also retains the right to waive its rights.

147. *Hosanna-Tabor*, 565 U.S. at 189.

148. *Id.* at 196.

149. Wasserman, *supra* note 44, at 304.

2. The exception is rooted in implied consent

Furthermore, there is an additional relationship and set of rights at issue. In fact, the earliest articulations of “church autonomy” were focused not on the relationship between the state and religious organizations but on the relationship between religious organizations and their members.

Michael Helfand argues that the Court’s earliest justifications for leaving ecclesiastical courts to resolve church property disputes relied on a theory of consent.¹⁵⁰ People have a right to choose to be governed by alternate institutions or forms of governance, and becoming a minister in a church is a kind of implied consent to obey religious rules and the edicts of religious authorities.¹⁵¹ The reasoning is similar, in a sense, to rules that allow parties to contract out of the courts and into arbitration.¹⁵² But the implied consent framework and parallel to arbitration makes three things clear: (1) the parties can agree to waive their bargain and send the dispute to the secular courts at any time; (2) both parties must have initially consented; and (3) secular courts can review the process with an eye to “fraud, collusion, or arbitrariness.”¹⁵³ Even if the parties impliedly consented to be governed by alternate authorities, they did not consent to lawlessness, and the courts have the right to conduct a basic review to determine that the processes promised *ex ante* and those used *ex post* bear some relationship to each other.

Helfand’s framework helps explain why courts can hear ministerial exception cases when both parties waive their agreement to resolve disputes as coreligionists—the employee by bringing their complaint to a civil authority, and the employer by failing to raise the affirmative defense.¹⁵⁴ His theory also reframes what a court is doing when it asks

150. Helfand, *supra* note 28, at 1921–51. For another analysis of the historical role of consent in church autonomy doctrine, see Lael Daniel Weinberger, *The Limits of Church Autonomy*, 98 NOTRE DAME L. REV. (forthcoming 2023) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4092087).

151. *Id.*

152. *Id.* at 1931–33.

153. *Id.* at 1944 (quoting *Gonzalez v. Roman Cath. Archbishop of Manila*, 280 U.S. 1, 16 (1929)).

154. *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316, 1318 (11th Cir. 2012) (finding a religious organization had waived the ministerial exception through procedural default). In the Sixth Circuit, courts can raise the exception *sua sponte*, but other circuits have rejected this. *See, e.g.*, *EEOC v.*

whether an employee qualifies as a minister; the question is about whether the employee consented to ecclesiastical governance by acting in a ministerial role. And it helps explain the ministerial exception's historic foundations in light of the Court's characterization of it as an affirmative defense.¹⁵⁵

When the ministerial exception was thought to be jurisdictional, a matter of a hole in the state's power, it was possible (though never easy) to justify its nullification of employees' statutory rights without any corollary balancing test. But the exception is not jurisdictional, and those rights demand to be considered. Under Helfand's theory, there is no nullification because ministers consented to the waiver of their own rights.

But if the theoretical basis of the exception is consent, then contract clauses that help us understand what the parties consented to are extraordinarily important and ought to be read by courts with an eye to that question.

3. The exception demands a boundary

Finally, maintaining the waivability of the exception is crucial because it is the only limiting principle in the doctrine.

Unlike all other Religion Clause doctrines, the ministerial exception is absolute. It is not subject to strict scrutiny or any other test, and it has no neutral principles of law exception. The ministerial exception also recognizes ministers on a religion's own terms, allowing it to apply to any and all employees as dictated by the religious organization's theology. Far more employees are subject to having their suits dismissed in the aftermath of *Our Lady of Guadalupe* than before. Where *Hosanna-Tabor* dealt with a teacher who was set apart from other teachers as "called" and having

R.G., 884 F.3d 560, 581–82 (6th Cir. 2018). This is part of the Sixth Circuit's ongoing misunderstanding of the ministerial exception as a structural, jurisdictional doctrine rather than a rights doctrine. Note that the question of *sua sponte* consideration is distinct from waiver, which is distinct from forfeiture, though these differences are sometimes elided.

155. For critiques of Helfand's argument, see Smith & Tuttle, *supra* note 33, at 1865; Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1299-1301 (2017); and John Robinson, Note, *Neither "Ministerial" Nor an "Exception": The Ministerial Exception in Light of Hosanna-Tabor*, 37 HARV. J. L. & PUB. POL'Y 1151, 1156–58 (2014).

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specific religious training,¹⁵⁶ *Our Lady of Guadalupe* brought essentially all religious-school teachers into the ambit of the exception. While the Court framed its decision as a simple application of *Hosanna-Tabor* to new facts,¹⁵⁷ lower courts have treated it as a change in the law.¹⁵⁸ This new, broader scope to the ministerial exception adds urgency to the need to identify the doctrine's ceiling.

Supporters of a strong ministerial exception complain, often correctly, about the hyperbolic parades of horrors that are invoked against the exception's limitlessness.¹⁵⁹ But the fact that such issues are rare is hardly a substantive defense to the possibility of the ministerial exception shielding human trafficking by cults,¹⁶⁰ especially given the ongoing expansion of the doctrine.

Waiver looks to the employers' language at the time of contract only to verify that the minister consented to the ministerial relationship, or at least was not intentionally misled about their rights within that relationship. It would primarily protect employees who were not ministers at all, based on language used and representations made at the moment of contract formation, but whose employers have an incentive to claim otherwise when they later terminate them. Allowing waiver builds in the enforcement of limiting principles that are already built into the definition of the exception itself—consent, bad faith, and the religious organizations' subjective view of the employee's ministerial status—and thus nothing is lost, and the right is undiluted. In fact, arguably, by limiting the number of people who find themselves outside the ambit of civil rights law without their knowledge or permission, allowing waiver only strengthens the exception's public perception and longevity.

156. *Hosanna-Tabor*, 565 U.S. at 177–78.

157. *Our Lady of Guadalupe*, 140 S. Ct. at 2064.

158. In allowing a religious university to amend its pleading after the deadline in a case involving the termination of a volleyball coach, the U.S. District Court for the District of Kansas found that the university's late pleading was excusable because *Our Lady of Guadalupe* had changed the law and the university could not have known to assert the ministerial exception in this case before the deadline. *Destiny Clark v. Newman Univ., Inc.*, No. 19-1033-JWB, 2021 WL 2024891 (D. Kan. May 21, 2021).

159. *Hosanna-Tabor*, 565 U.S. at 195.

160. See discussion *supra* p. 308.

B. Contractual waiver of constitutional rights

The test for waiving the ministerial exception should be the same one used to evaluate contractual waivers of First Amendment rights and other constitutional rights.

“The classic definition of waiver” is the “intentional relinquishment or abandonment of a known right or privilege.”¹⁶¹ Part of having a right is having the right to trade it away for another benefit. Our entire criminal justice system is based upon such exchanges: defendants waive their rights against self-incrimination, to a trial by jury, and to certain exculpatory evidence held by the state, all in exchange for a lower sentence.¹⁶² Policing, too, relies on consensual searches (the voluntary waiver of Fourth Amendment rights) and police interviews (the voluntary waiver of Fifth and Sixth Amendment *Miranda* rights).¹⁶³ Much appellate precedent on the waiver of rights reflects the high stakes of these prominent and preeminent examples from the criminal context:

A right is not a “known right” unless one not only is aware of the abstract legal principle, but also knows the facts that make that principle applicable to him “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” . . . Waiver is not to be presumed. Indeed, “there is a presumption against the waiver of constitutional rights” “To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights.”¹⁶⁴

But the standard for waiving a right is highly variable and dependent on both the right and the right-holder at issue: “[w]hether the [party] must participate personally in the waiver; whether certain procedures are

161. *Fay v. Noia*, 372 U.S. 391, 439 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

162. *United States v. Ruiz*, 536 U.S. 622 (2002) (upholding plea deal waiving right to trial and to prosecutor’s impeachment evidence); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (upholding plea bargains as a valid rights waiver).

163. *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (concerning a waiver of the right to remain silent); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (concerning consent to search).

164. *United States v. Parse*, 789 F.3d 83, 112 (2d Cir. 2015) (citing first *Brady v. United States*, 397 U.S. 742, 748 (1970); then *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); then *Glasser v. United States*, 315 U.S. 60, 70–71 (1942)).

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required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake."¹⁶⁵ So while a waiver must be given "voluntarily and understandingly," the precise meaning of this phrase shifts wildly.¹⁶⁶

Even in the criminal context, where the doctrine has developed to protect low-information defendants against the state, "implied waivers" of certain rights are permitted when a defendant (or their attorney) takes an action that is contrary to the exercise of the right.¹⁶⁷ Scholars have questioned whether these waivers can really be classified as "knowingly."¹⁶⁸ And courts are always reluctant to overturn a waiver where it perceives that a defendant benefited materially from it in some way,¹⁶⁹ whether for equitable reasons or because the proof of consideration is greater evidence that the waiver was made strategically and knowingly.

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165. *New York v. Hill*, 528 U.S. 110, 114 (2000) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). *See also* *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("The determination of whether there has been an intelligent waiver . . . depend[s], in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the [waiving party].")
166. *Boykin v. Alabama*, 395 U.S. 238 (1969).
167. Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 50 n.185 (1997) ("Courts have not required knowing waiver . . . in connection with the rights to avoid self-incrimination or to be present at one's trial, instead allowing defendants to waive these rights merely by failing to raise an objection or by taking an action contrary to the right."). *See, e.g.*, *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010) (When "a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.").
168. Sternlight, *supra* note 167, at 50 n.185; *see also* Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 496 n.64 (1981) ("While these rights must be waived voluntarily, they need not be waived knowingly.").
169. This is true even when the "benefit" is that the defendant won't receive the death penalty. *Brady v. United States*, 397 U.S. 742 (1970). *See also* *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *cf.* *Barker v. Wingo*, 407 U.S. 514, 528, 536 (1972) (rejecting the idea that a failure to object alone can constitute a waiver of the speedy trial right, but finding no due process violation where the defendant benefited from the waiver).

In the civil context, contractual consent, not knowing consent, is often fully sufficient to waive important constitutional rights.¹⁷⁰ If it weren't, and the same standard for the waiver of a criminal jury trial right were applied to every waiver of a civil jury trial right, the Federal Arbitration Act and most arbitration-by-adhesion contracts would be unconstitutional. While contract clauses directly waiving the right to a jury are treated to a slightly higher standard of knowing consent, given the fundamental nature of the jury right, it is still far below the exacting standards imposed on a criminal defendant who wishes to sign a plea deal waiving the same right.¹⁷¹ And when the jury-trial right is waived indirectly, through a contractual agreement to resolve disputes in arbitration or in foreign jurisdictions that don't honor a jury right, the standard is simple voluntariness and contractual consent.¹⁷² No court ever inquires whether the waiving party *knew* that they had no jury trial right in, say, Germany. The inquiry is limited to whether the signing of the contract was voluntary and conscionable and whether the plain terms of the contract state that any disputes must be adjudicated in Germany. It is the same story for forum-selection clauses, which waive a party's right to personal jurisdiction.¹⁷³

Parties can even contract out of civil due process rights altogether. The Supreme Court upheld civil waivers of notice and hearing rights for certain debt instruments or conditional sales in *Overmyer*, but the Court evaluates the disparity in bargaining power and whether the waiving party received consideration.¹⁷⁴ The Court has approved lien-granting contracts without even this level of review, finding that an adhesion contract signed by a consumer could waive the right to a predeprivation hearing.¹⁷⁵ And when the Court finds contractual language to be insufficient evidence of a due

170. Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 L. & CONTEMP. PROBS. 167, 182 (2004) ("While knowing consent to waive a constitutional right is *sometimes* not required in the criminal context, it is *often* not required in the civil context Instead, civil law waivers are judged according to contract-law principles.").

171. *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977). See Ware, *supra* note 170, at n.221–23 and accompanying text; see also Amanda R. Szuch, *Comment: Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Court*, 79 U. CIN. L. REV. 435 (2010).

172. Ware, *supra* note 170, at 190–92.

173. *Id.* at 188–93.

174. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 183, 186 (1972).

175. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 603–04 (1974).

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process waiver, its reasons sound in contract—unclear language, unconscionable terms—more than a voluntariness analysis of the rights waiver itself.¹⁷⁶

The bottom line is that it can be surprisingly easy to waive a fundamental, constitutional right through a contract. But it depends on the right. There are no precedents determining the terms of waiver for a religious right, perhaps because the right almost always inheres in a religious actor's relationship with *the government*. There are few commercial contracts between citizens where waiving religious rights even makes sense. But there are precedents for other First Amendment rights, including speech, press, and association, that are the closest analogue and ought to form the framework for a test of ministerial exception waiver.

The Supreme Court effectively upheld a waiver of First Amendment rights, without ever calling it such, in *Cohen v. Cowles Media Company*.¹⁷⁷ The Court allowed a compensatory damages order against a newspaper for publishing a source's identity, which is constitutionally protected behavior.¹⁷⁸ The newspaper had formed a contract when it received documents from Cohen in consideration for a promise not to print his name, and the newspaper had breached that contract under Minnesota state law.¹⁷⁹ There was no First Amendment violation in making a newspaper pay for constitutionally protected activity because there was no state action; the newspaper itself contracted to limit its behavior.¹⁸⁰ The state wasn't impinging a right because, the unstated logic went, the newspaper had voluntarily and knowingly waived its right to freely print this specific information.¹⁸¹

Lower courts have combined *Cohen* with *Overmyer* to find a host of First Amendment waivers in contracts “where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and

176. *Fuentes v. Shevin*, 407 U.S. 67, 95–96 (1972) (plurality opinion).

177. 501 U.S. 663, 665 (1991).

178. *Id.*

179. *Id.* at 665–66.

180. *Id.* at 669. For a case where the state was the other contracting party, the contract was therefore subject to a different state action analysis, and the contract was rejected on public policy ground, see *Overbey v. Mayor of Balt.*, 930 F.3d 215 (4th Cir. 2019).

181. *Cohen*, 501 U.S. at 671 (“The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed.”).

where the waiving party is advised by competent counsel and has engaged in other contract negotiations.”¹⁸² The “knowledge” standard applied to these “knowing, voluntary, and intelligent waivers” is whether the contractual “agreement clearly sets forth the restrictions on constitutionally protected speech,” but it does not require a “the talismanic recital of the words ‘first amendment.’”¹⁸³ In short, a party does not have to explicitly express its understanding of the First Amendment and the rights it provides so long as the party does fully express, in contract, the restrictions on its speech to which it is agreeing. The knowledge standard is about the content of the contract, not the subjective contents of the party’s head.

The Supreme Court has only directly addressed contractual First Amendment waivers once, in *Janus v. AFSCME*, when it found that mandatory public-sector union dues were a nonconsensual waiver of free speech rights.¹⁸⁴ As unions have shifted their dues infrastructure from *Hudson* notices to contracts in response to the case, lower courts have had to decide what a “clear[] and affirmative[] consent” to this First Amendment waiver would look like. They have applied the “knowledge” standard that had already been developed for First Amendment rights: so long as an employee affirmatively consents in contract to paying union dues, the

182. *Erie Telecomms. v. Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988); *e.g.*, *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993) (finding a valid First Amendment waiver in a union agreement that consented to restrictions on the right to petition); *Barnard v. Lackawanna Cnty.*, 194 F. Supp. 3d 337 (M.D. Pa. 2016) (finding a collective bargaining agreement was a binding waiver of the First Amendment right to participate in a strike or sympathy strike); *Kneebinding, Inc. v. Howell*, 201 A.3d 326, 349 (Vt. 2018) (upholding private permanent injunction against disparaging speech because “[p]rivate parties are free to contractually waive their First Amendment rights”); *Perricone v. Perricone*, 972 A.2d 666 (Conn. 2009) (allowing divorce confidentiality agreement as a valid waiver of First Amendment speech rights); *Verizon New Eng. v. PUC*, 866 A.2d 844 (Me. 2005) (upholding a First Amendment waiver that lasted for the length of the contract but was not permanent); *Messina v. Iowa Dep’t of Job Serv.*, 341 N.W.2d 52 (Iowa 1983) (finding a valid civil waiver of the right to call for a strike).

183. *Perricone*, 972 A.2d at 209–210.

184. *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2460 (2018).

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contract does not need to reflect their knowledge that they have a First Amendment right not to pay such dues.¹⁸⁵

This standard for a knowing and voluntary waiver—of a First Amendment right, in a civil context, between private contracting parties—is the one that applies to waivers of the ministerial exception. Where a sophisticated party voluntarily enters a contract and understands its terms, and where the facial application of those terms constrains the exercise of a constitutional right, the party is presumed to have waived its right in accord with those constraints. Under that test, many religious organizations are already engaging in these waivers.

PART III: NONDISCRIMINATION CLAUSES AS A KNOWING AND VOLUNTARY WAIVER OF THE MINISTERIAL EXCEPTION

As this Note has discussed, the ministerial exception has generated significant confusion, contradiction, and uncertainty for courts, theorists, and religious organizations seeking to understand their liability. But the costs of this ambiguity are almost entirely borne by workers. A religious organization that makes a mistake, by believing an employee to be a legal minister when a court finds otherwise, will only pay a penalty for this mistake if the organization committed some form of legally sanctionable discrimination or misconduct. A religious organization is able to moderate its exposure to this risk through its own actions. But an employee who makes a mistake about their legal standing as a minister forfeits rights, compensation, and damages to which they were otherwise entitled.¹⁸⁶

185. *Allen v. Ohio Civil Serv. Emples. Ass'n AFSCME, Local 11*, No. 2:19-cv-3709, 2020 U.S. Dist. LEXIS 48481, at *21 (S.D. Ohio Mar. 20, 2020) (“Because Plaintiffs opted to join and pay dues to the union, the properly framed right at issue here is not whether Plaintiffs have the right to not subsidize OCSEA’s speech but whether they have a right to tear up those contracts.”); *Polk v. Yee*, 481 F. Supp. 3d 1060, 1071 (E.D. Cal. 2020) (“In other words, plaintiffs must ‘clearly and affirmatively consent’ to paying union dues, not necessarily to waiving their First Amendment right in order to decline to pay union dues.”); *Creed v. Alaska State Emps. Ass’n/AFSCME Local 52*, No. 3:20-CV-0065-HRH, 2020 U.S. Dist. LEXIS 123964, at *6-8 (D. Alaska July 15, 2020) (rejecting plaintiffs’ argument that union membership agreement needed express First Amendment waiver after *Janus*); *Anderson v. Serv. Employees Int’l Union Local 503*, 400 F. Supp. 3d 1113, 1116 (D. Or. 2019) (same).

186. The exception does not operate on a libertarian baseline. The default is that employees possess rights under antidiscrimination statutes. *Hosanna-Tabor*,

There are no affirmative steps an employee can take to resolve ambiguity or protect themselves from this forfeiture of rights. They must wait for their employer to commit a legally sanctionable violation, and then they must take on the initial cost and burden of litigating the case. Furthermore, most employees are never “mistaken” about their ministerial status because most do not even know it to be an issue. And even those who do make efforts to secure *ex ante* contractual promises about their nondiscrimination protections often see those promises ignored or reversed by a court.

This asymmetric information system creates a market failure. Some jobs come with benefits and protections that other jobs are precluded from offering, and not even the most sophisticated jobseeker can know with complete certainty which jobs are which. Religious employers are in a better position than employees to find and disclose this information—not only because they have a more sophisticated understanding of the law and, at the moment of contract formation, have a clearer understanding of the position’s balance of religious and secular duties, but because *only they* know whether they will choose to affirmatively claim the ministerial exception if a dispute were to arise. Only they know the answer to the necessary threshold question that begins a ministerial exception inquiry: does this religious organization understand this person to be a minister?

Consider the contract that was agreed to by the former principal of a Lasallian school in Sacramento:

CBHS, mindful of its primary mission as an effective instrument of the educational ministry of the Church and as a witness to the love of Christ for all persons, does not discriminate against any applicant or employee in the employment practice because of the following legally protected characteristics: race, color, creed, sex, pregnancy (including childbirth, lactation and related medical conditions), age (40 and over), national origin or ancestry, physical or mental disability, or any other consideration protected by federal, state or local laws. . . . California law also prohibits discrimination against individuals providing services in the workplace pursuant to a contract, unpaid interns and volunteers on the basis of actual or perceived race, color, creed, sex, physical or mental disability, or age. The School will not tolerate discrimination or harassment

565 U.S. at 195 n.4 (clarifying that the ministerial exception bars an “otherwise cognizable claim”).

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based upon these characteristics or any other characteristics protected by applicable federal, state or local law.¹⁸⁷

This contract provision, and others like it, should be interpreted as a knowing and voluntary waiver of the ministerial exception right to be exempt from antidiscrimination laws.

A waiver like this one is voluntary. While adhesion contracts sometimes give rise to a waiver of rights,¹⁸⁸ they can create voluntariness concerns because of the imbalance in bargaining power and the potential for coercion. A contract written by a corporation, presumably with some legal advice, and proffered to an employee has no such risk.¹⁸⁹ In this situation, the school arguably holds the greater bargaining power. It dictates the terms of the legal relationship with the employee. And like the corporation that waived its due process rights in *Overmyer*, the school that offers this contract provision benefits from its inclusion—employees are more likely to sign the contract and to do so without demanding a higher salary to compensate for the lower job security of ministerial work. Relying on this statement, employees believe their income to be secure.

A waiver like the one above is *knowing*. The kind of waiver at issue in a ministerial exception case is more similar to a union member's agreement to allow the union to speak on their behalf,¹⁹⁰ or to a divorcing person's agreement not to say certain things about their former spouse,¹⁹¹ than to a criminal defendant faced with the full force of the state being asked to bargain away due process rights for a marginal decrease in punishment. The level of direct judicial oversight required to ensure that the parties understand their promises is drastically different. No employer needs to be haled into court for a colloquy in which they prove they understand the terms of the employment contracts they formed. A person who signs a contract is typically presumed to know its contents, and doubly so for one who participates in the drafting.

A knowing waiver in this context does not require a “talismanic recital” of the rights being waived; it requires only a detailed and clear recitation of the alternative being opted into.¹⁹² A ministerial employment contract need

187. Appellant's Excerpts of Rec. at 69–70, *Orr v. Christian Brothers High Sch.*, No. 21-15109 (9th Cir. Jan. 20, 2021), ECF No. BL-7.

188. *Mitchell*, 416 U.S. at 604.

189. *Overmyer*, 405 U.S. at 183, 186 (1972).

190. *Polk*, 481 F. Supp. 3d.

191. *Perricone*, 972 A.2d 666.

192. *Id.* at 209–10.

not say, “We waive our right to be exempt from antidiscrimination law by agreeing not to discriminate in accord with antidiscrimination law,” any more than a newspaper need say, “We waive our right to publish this information by agreeing not to publish this information.”¹⁹³ Waivers made in commercial contracts do not have to be so circular. They need to demonstrate knowledge and understanding of the practical implications of the waiver. An agreement not to discriminate on the basis of “any... consideration protected by federal, state or local laws” demonstrates that practical knowledge.¹⁹⁴

Importantly, this waiver argument is *not* an argument that the nondiscrimination statements made by religious organizations create a separate, binding contractual promise not to discriminate. If antidiscrimination law did not exist, almost all company nondiscrimination policies in contracts would be unenforceable for vagueness:¹⁹⁵ they do not specify a definition for discrimination, a method of enforcement, or remedies. Instead, this Note argues that, where antidiscrimination law applies but is made *inapplicable* by the ministerial exception right, a clear, knowing, and voluntary waiver can clear the way for the law to be applied.

193. *Cf. Cohen*, 501 U.S. at 671.

194. Appellant’s Excerpts of Rec. at 69, *Orr v. Christian Brothers High Sch.*, No. 21-15109 (9th Cir. Jan. 20, 2021), ECF No. BL-7. The district court considered the argument that this contract constituted a knowing waiver of the school’s statutory right to an exemption under the state Fair Employment and Housing Act (“FEHA”). *Id.* at 31–32. The court concluded that, although the handbook references “state law,” it does not specifically name FEHA and thus “Christian Brothers High School could not have intentionally relinquished the protections of FEHA’s religious exemption.” *Id.* at 32. This decision interpreted a California statute, and the state is free to make its statutory right nonwaivable or difficult to waive. It has no bearing on the constitutional waiver argument made by this Note. In the Constitutional rights waiver context, though, it would be absurd to require the school to describe its waiver with such specificity; people are free to make categorical waivers so long as they understand the *parameters of the category*, not its precise contents. For example, in the plea-bargaining context (where waiver of rights is at its most regulated), defendants can waive their right to all impeachment evidence they are entitled to under *Brady* without knowing the precise contents of that evidence. *United States v. Ruiz*, 536 U.S. 622 (2002). Thus the school can waive its right to be exempt from state antidiscrimination laws without needing to name each law.

195. *See* discussion *supra* note 105.

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Nondiscrimination clauses are a waiver of the right to be *excepted* from “otherwise cognizable claim[s].”¹⁹⁶

There are three reasons that an informed and sophisticated religious employer might include language like this in a contract with a ministerial employee without specifying that it does not apply to the employee: (1) The employer does not consider the employee a minister. Because an employer’s subjective view that the employee is a minister is a necessary but not sufficient factor for the ministerial exception to apply, this *ex ante* assessment, before the employer has a financial and legal incentive to say otherwise, should be fatal to an invocation of the exception. (2) The employer intends to deceive, or does not care if it deceives, the employee about their legal rights. At the extreme end, the employer could engage in this behavior in order to obtain an advantage in the contract discussion. The more banal expression involves an employer who simply does not care to engage in the hassle of writing an accurate contract and does not think about the consequences for its employee because the organization will not face any consequences for its complacency. This undermines the presumption of consent, good faith, and lack of fraud upon which the ministerial relationship and the exception depend,¹⁹⁷ and it should also be fatal to any attempt to assert the exception. (3) The employer means what it says in the contract and intends to waive its right not to be subject to antidiscrimination law, agreeing instead not to discriminate by the standards of secular law. The law should support religious organizations that seek to form these binding contracts by providing them recourse to secular courts. To hold religious organizations *inherently* incapable of forming enforceable employment contracts would relegate religious organizations to a kind of second-class commercial citizenship.¹⁹⁸

This waiver argument has never been addressed by the Supreme Court.¹⁹⁹ Even if the Court had considered it, it is possible that the

196. *Hosanna-Tabor*, 565 U.S. at 195 n.4 (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010)).

197. See discussion of Helfand’s framework for the exception, *supra* pp. 315-316 and notes.

198. Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 *Duke L.J.* 769, 821–22 (2015); Weinberger, *supra* note 49 at 28–29.

199. Justice Sotomayor called the nondiscrimination promise to *Morrissey-Berru* “notabl[e],” but she didn’t indicate why she found the provision notable or analyze its implications. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2078 (Sotomayor, J., dissenting).

nondiscrimination promise in Morrissey-Berru's contract would not have qualified as a knowing waiver. At the time of the contract's drafting, it was not at all clear that religious schoolteachers of primarily secular curricula could be "ministers" under the *Hosanna-Tabor* test. Even the most sophisticated religious school contract drafter might not have known that it possessed a ministerial exception right with respect to its teachers, and it thus might have been unable to knowingly waive the right, even under the lower knowledge standard for civil waivers.

The argument *has* been addressed—and rejected—by some circuit courts. Some circuit courts have rejected the waivability of the exception altogether.²⁰⁰ Others have addressed the argument only tangentially.²⁰¹ In one case, though, a court acknowledged that the ministerial exception could be waived in an employment contract and analyzed such a waiver—and flatly reached the wrong conclusion. The Third Circuit considered a case in 2006 between a Catholic university and its first female chaplain, who sought explicit representations that the university would not engage in gender discrimination against her, and who received just such a promise from the university president before beginning her tenure.²⁰² The Third Circuit ignored this oral contract, focusing instead on the boilerplate language in the written contract about the university being an "equal opportunity employer," and concluded that the university did not intend to waive its

200. See *supra* Section II.A.1 for an explanation of why these arguments rely on an inaccurate interpretation of the exception as a jurisdictional bar and are ultimately unconvincing.

201. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007). The contract in question was not between the parties to the dispute but between the religious institution and its accreditor. *Id.* The court correctly noted that, while the choice to discriminate against the plaintiff notwithstanding the nondiscrimination promise might have consequences for the institution's accreditation, it did not bear directly on the dispute at hand. *Id.* at 227. The court also made the mistake of relying almost entirely on precedents analyzing First Amendment waivers where the government was a party to the contract, which face a higher test than First Amendment waivers between private parties. Compare *id.* at 226 (citing *Sambo's Restaurants, Inc. v. Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981)), with *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993); see also *Erie Telecomms. v. Erie*, 853 F.2d 1084 (3d Cir. 1988).

202. Appellant's Brief at 21, *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006). While this description of events comes from Petruska herself without corroboration, it would have been accepted by the court as true when making its decision because the case was resolved on summary judgment.

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rights with this provision.²⁰³ The court wrote, “Gannon acknowledged only that it would comply with Title VII to the extent the statute applies to its employment decisions. It does not apply in this context.”²⁰⁴ That circular analysis begs the question. Is Title VII inapplicable in this context before or after the waiver argument is taken into consideration?

But most egregiously of all, the court only cites a single constitutional rights waiver case—a 1938 case challenging South Carolina’s contention that a Black man waived his right to counsel during his Jim Crow trial.²⁰⁵ The standard for a waiver, in that case, is clearly not analogous to the standard at play in a commercial, civil waiver between parties of equal bargaining power, and the court ignored the dozens of precedents that could have explained that standard. The Third Circuit was correct to acknowledge that the ministerial exception is a First Amendment right to which waiver analysis can be applied,²⁰⁶ but the remainder of its unpersuasive analysis should not deter future courts from taking up this question, finding waivers, and taking religious employers of ministers at their word.

These waivers are *already* being made. This Note is not arguing that religious organizations ought to begin making them or that more of them will include this contract language in the future. In fact, the most likely immediate result of courts adopting this Note’s waiver argument would be the removal of nondiscrimination language from ministerial contracts altogether. This is a good and desired result. At the very least, ministerial employees should not look back at their employment contracts and identify ways that they were duped about their rights. The removal of inaccurate waivers from ministerial contracts would also reduce unnecessary litigation and costs.

Of course, basic contract and behavior theory lead one to believe that very few employees are likely to modify their behavior—rejecting or accepting employment—as a result of the *exclusion* of rights-guaranteeing language in their contracts. The next step in addressing the market failure created by uncertainty and lack of information around the ministerial exception may be action by state or federal employment agencies to require religious employers to give an *affirmative* notice to ministerial employees

203. *Petruska*, 462 F.3d at 309.

204. *Id.*

205. *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

206. *Id.*

outlining their ministerial status and its implications for their rights.²⁰⁷ But for such a notice requirement to be legally valid, the threshold argument of this Note would first have the best accepted: religious employers, by their words or silence in an employment contract, have the power to waive the ministerial exception.

CONCLUSION

The best articulation of and justification for the ministerial exception positions it as non-jurisdictional—it is a *right* of religious organizations, rooted in the Religion Clauses, and it can be waived. That waiver should be evaluated by the same standards as waivers of other important constitutional rights by organizational actors, including First Amendment rights and civil trial rights. Under that standard, many religious organizations are already waiving their ministerial exception rights when they form employment relationships based on express spoken or written promises of nondiscrimination and other enforceable employment protections. And basic fairness and prudence should direct courts to recognize those waivers for what they are.

Applying accepted rights-waiver law to the ministerial exception is in the best interest of everyone involved. Nobody is aided by the confusion created when an entire sector of the economy is established on unenforceable contracts, misconceptions, and barriers to a true meeting of the minds between religious organizations and their employees. Religious organizations may resist the prospect of paying damages for discrimination that they promised not to engage in, but neither should they be comfortable with a legal landscape that threatens to undermine their ability to convince employees, ministerial or otherwise, to contract with them.²⁰⁸

Moreover, the prospect of waiver is not designed to wring those damages out of the religious organization at all. It is intended to induce

207. *E.g.*, 42 U.S.C.S. § 2000e-10; *see also* Amy Dygert, Note, *Reconciling the Ministerial Exception and Title VII: Clarifying the Employer's Burden for the Ministerial Exception*, 58 WASH. U. J.L & POL'Y 367, 387 (2019) (“[R]eligious organization employers should be required by courts to show that the employee they contend to be a minister was on notice prior to the dispute at hand that the position the employee holds or held was one of a minister, and therefore within the realm of the ministerial exception.”).

208. There is a broad body of scholarship about concerns that the religious question and church autonomy doctrines create barriers for religious organizations' ability to participate in commerce and secure secular enforcement for their contracts. *See, e.g.*, Helfand & Richman, *supra* note 198.

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religious organizations to amend their contracts, to be more transparent with ministerial employees, and to restore integrity to the process, so that a robust understanding of religious rights can persist without creating casualties that undermine the doctrine's public support. Waiver may be the ministerial exception's best chance of being workable enough and fair enough to set it up for long-term development.