First Amendment — Freedom of Religion — Ministerial Exception — Our Lady of Guadalupe School v. Morrissey-Berru

Eight years ago, the Supreme Court held in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[1] that religious institutions are immune from employment discrimination claims brought by certain employees.[2] The Court held that this so-called "ministerial exception" is necessary to protect religious institutions' First Amendment rights,[3] but it declined to adopt a clear test to determine which employees are subject to the exception.[4] Last Term, in *Our Lady of Guadalupe School v. Morrissey-Berru*,[5] the Supreme Court returned to that question. In two consolidated cases, the Court deemed two teachers at religious schools to be subject to the exception, despite neither teacher having the training or title of the plaintiff in *Hosanna-Tabor*.[6] However, the Court once again refrained from adopting a clear standard for determining who is a "minister." The Court's failure to do so reflects the impossibility of ever moving past general definitions and selecting objective criteria for "ministers" that can be applied to all religions. Instead, the Court should adopt a broad definition and then defer to the sincere judgments of religious institutions to determine who meets it.

Our Lady of Guadalupe was consolidated with another case, *St. James School v. Biel*.[7] The plaintiffs in both cases, Agnes Morrissey-Berru and Kristen Biel, worked as teachers at Catholic elementary schools in Southern California.[8] Morrissey-Berru was hired by the Our Lady of Guadalupe School in 1998 as a substitute teacher, but the school soon offered her a full-time position.[9] Her contract included a broad affirmation of her willingness to "model and promote" the school's religious mission;[10] she taught religion and other subjects; and she participated in religious activities, including taking her class to weekly Mass.[11] The school demoted her in 2014 and declined to renew her contract in 2015, citing performance issues, but she alleged these were a pretext for

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[1] 565 U.S. 171 (2012).
[2] *See id.* at 196.
[3] *See id.* at 188.
[4] *See id.* at 190.
[5] 140 S. Ct. 2049 (2020).
[6] *See id.* at 2055.
[7] 140 S. Ct. 2049.
[8] *See id.* at 2056, 2058. Biel died during the pendency of her suit, which her husband then litigated. *Id.* at 2058 n.6.
[9] *See* Appellant Agnes Morrissey-Berru's Opening Brief at 16, Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460 (9th Cir. 2019) (No. 17-56624).
[10] Appellee's Answering Brief at 16, *Morrissey-Berru*, 769 F. App'x 460 (9th Cir. 2019) (No. 17-56624).
[11] *See id.* at 17–18.

age discrimination.[12] Biel, meanwhile, was hired by the St. James Catholic School in 2012 as a substitute teacher, before she was also given a full-time position.[13] Her employment contract resembled Morrissey-Berru's, and her position similarly involved teaching her students religion among other subjects, taking her class to Mass, and praying with her students every day.[14] In 2014 she, too, was not offered a renewed contract officially due to poor performance, though she maintained the decision was motivated by her diagnosis with breast cancer.[15]

In separate cases, both women sued their employers in the Central District of California, with Biel alleging liability under the Americans with Disabilities Act[16] and Morrissey-Berru bringing her claim pursuant to the Age Discrimination in Employment Act.[17] Citing the ministerial exception, the district courts granted summary judgment to both schools.[18] Both plaintiffs appealed.

The Ninth Circuit heard Biel's appeal first.[19] In an opinion by Judge Friedland,[20] the court reversed the grant of summary judgment, holding that the ministerial exception did not apply.[21] To make this determination, the panel listed four factors that had guided the Supreme Court to apply the exception in *Hosanna-Tabor*, but concluded that Biel differed too greatly from the plaintiff in that case to be subject to the exception.[22] Specifically, Biel was not officially a "minister" but rather a "teacher," she lacked religious education, and she did not hold herself out to the public as a minister — and while she, like the *Hosanna-Tabor* plaintiff, did teach religion, that alone was not enough.[23] Judge Fisher, sitting by designation from the Third Circuit, dissented. He disputed the majority's analysis on several points, noting that the school did refer to Biel as a "Catholic school educator,"[24] and criticized the majority for applying *Hosanna-Tabor*'s factors formulaically rather than looking to the totality of the circumstances, which he argued showed Biel was subject to

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[12] *See id.* at 24–26; Appellant Agnes Morrissey-Berru's Opening Brief, *supra* note 9, at 19.

[13] *See* Appellant Kristen Biel's Opening Brief at 15–16, Biel v. St. James Sch., 911 F.3d 603 (9th Cir. 2018) (No. 17-55180).

[14] *See* Appellee St. James Catholic School's Answering Brief at 4–11, *Biel*, 911 F.3d 603 (9th Cir. 2018) (No. 17-55180).

[15] *See id.* at 13; Appellant Kristen Biel's Opening Brief, *supra* note 13, at 19–20.

[16] 42 U.S.C. §§ 12101–12213.

[17] 29 U.S.C. §§ 621–634; *see* Biel v. St. James Sch., No. CV 15-04248, 2017 WL 6002816, at *1 (C.D. Cal. Jan. 17, 2017); Morrissey-Berru v. Our Lady of Guadalupe Sch., No. 16-cv-09353, 2017 WL 6527336, at *1 (C.D. Cal. Sept. 27, 2017).

[18] *See* Biel v. St. James Sch., No. CV 15-04248, 2017 WL 5973293, at *3 (C.D. Cal. Jan. 24, 2017); *Morrissey-Berru*, 2017 WL 6527336, at *2–3.

[19] *See Biel*, 911 F.3d at 603.

[20] Judge Friedland was joined by Judge Watford.

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

[22] *See id.* at 607–09.

[23] *See id.* at 608–09.

[24] *Id.* at 616 (Fisher, J., dissenting) (alteration omitted).

the exception.[25] A few months later, another panel of the Ninth Circuit heard Morrissey-Berru's appeal and, citing *Biel*, reversed the grant of summary judgment in a brief memorandum.[26] Meanwhile, in Biel's case, the Ninth Circuit denied the St. James Catholic School's petition for en banc rehearing, drawing another dissent, this time from Judge Ryan Nelson.[27] He accused the panel majority of reading *Hosanna-Tabor* too narrowly and called on the circuit to adopt a functional test that he said would make Biel subject to the exception.[28]

After granting certiorari and consolidating the cases, the Supreme Court reversed the Ninth Circuit's decisions and remanded with instructions to reinstate summary judgment in favor of the schools.[29] Justice Alito delivered the opinion of the Court.[30] He began by reiterating the justification for the ministerial exception, writing that it was necessary to preserve religious institutions' constitutional right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[31] After reciting the facts, he recounted the exception's historical underpinnings and also reviewed the Court's reasoning in *Hosanna-Tabor*.[32] He pointed out that the *Hosanna-Tabor* opinion had declined to articulate a "rigid formula" for determining which employees are subject to the exception, and noted that while the Court had enumerated four "relevant circumstances"[33] in that case, it had not deemed any of them "essential."[34]

Justice Alito then discussed which of the factors identified in *Hosanna-Tabor* were most salient. He noted that the presence of a ministerial title could not be dispositive lest courts impose a Protestant-inspired vision of church organization on all religions.[35] For similar reasons, formal religious training could not be a prerequisite to qualify for the exception.[36] Instead, Justice Alito concluded: "What matters, at bottom, is

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[25] *See id.* at 620–21.

[26] *See* Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 461 (9th Cir. 2019). The panel was composed of Judges Rawlinson and Murguia and Judge Gilstrap, of the Eastern District of Texas, who was sitting by designation.

[27] *See* Biel v. St. James Sch., 926 F.3d 1238, 1239 (9th Cir. 2019). Judge Nelson was joined by Judges Bybee, Callahan, Bea, Milan Smith, Ikuta, Bennett, Bade, and Collins.

[28] *See id.* at 1239, 1247–48, 1251 (R. Nelson, J., dissenting from denial of rehearing en banc).

[29] *See Our Lady of Guadalupe*, 140 S. Ct. at 2069.

[30] Justice Alito was joined by Chief Justice Roberts and Justices Thomas, Breyer, Kagan, Gorsuch, and Kavanaugh.

[31] *Our Lady of Guadalupe*, 140 S. Ct. at 2055 (quoting Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952)).

[32] *See id.* at 2061–63.

[33] *Id.* at 2062 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012)).

[34] *Id.*

[35] *See id.* at 2063–64.

[36] *See id.* at 2064.

what an employee does."[37] And as to the question of which employee functions were religious, Justice Alito cited *Hosanna-Tabor* itself as well as statements within several traditions to establish that religious education is central to many faiths.[38] Justice Alito then applied this understanding to the cases. Both Morrissey-Berru and Biel, he wrote, "performed vital religious duties."[39] He noted that in addition to directly educating students in the Catholic faith, both women had "prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities."[40] These duties were enough to bring the plaintiffs within the bounds of the exception.[41] Justice Alito criticized the Ninth Circuit for failing to reach the same result, saying that the court had applied exactly the kind of rigid, formalistic approach that *Hosanna-Tabor* had cautioned against.[42] Finally, Justice Alito rejected as impracticable the argument that the exception should apply only to those "practicing" the same faith as their employers.[43]

Justice Thomas concurred.[44] He joined Justice Alito's opinion in full but wrote separately to advocate for the same deference to religious organizations that he had called for in *Hosanna-Tabor*.[45] He pointed out that secular judges lacked the expertise to answer the theological question of who qualifies as a "minister" and that no single definition could cover all religious traditions with their varied beliefs.[46] And while he praised the Court's decision as a "step in the right direction," he felt that simply deferring to the religious organizations' sincere understanding of whether their employees were "ministers" would have been a safer way to avoid improper entanglement in religious affairs.[47] Applying that deferential standard to this case, he cited language in the plaintiffs' faculty handbooks and teaching contracts as evidence of the schools' sincere belief that Morrissey-Berru and Biel had held ministerial roles.[48]

Justice Sotomayor dissented.[49] She accused the majority of misreading *Hosanna-Tabor* and "strip[ping] thousands of schoolteachers of their

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[37] *Id.* In reaching this conclusion, Justice Alito drew on his own concurrence, joined by Justice Kagan, in *Hosanna-Tabor*. *See id.* at 2063 (citing *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring)).

[38] *See id.* at 2064–66.

[39] *Id.* at 2066.

[40] *Id.*

[41] *Id.*

[42] *See id.* at 2066–68.

[43] *Id.* at 2068 (quoting Brief for Respondents at 13, *Our Lady of Guadalupe*, 140 S. Ct. 2049 (Nos. 19-267 & 19-348)); *accord id.* at 2068–69.

[44] Justice Thomas was joined by Justice Gorsuch.

[45] *See Our Lady of Guadalupe*, 140 S. Ct. at 2069–70 (Thomas, J., concurring).

[46] *See id.* at 2070.

[47] *Id.*; *see also id.* at 2070–71.

[48] *See id.* at 2071.

[49] Justice Sotomayor was joined by Justice Ginsburg.

legal protections."[50] She highlighted the importance of religious institutions submitting to generally applicable laws and noted that the ministerial exception is a "judge-made doctrine" that is "extraordinarily potent."[51] She noted that many lower court decisions had applied the exception only to religious leaders and consequently concluded that "[l]ay faculty, even those who teach religion at church-affiliated schools, are not 'ministers.'"[52] *Hosanna-Tabor*, Justice Sotomayor continued, had been consistent with this view,[53] reaching its conclusion because the plaintiff in that case held a "unique leadership role within her church."[54] While she agreed that *Hosanna-Tabor* had not required all the factors it identified to be present for an employee to qualify as a "minister," she accused the majority of rewriting the holding to focus only on an employee's function.[55] And because religious institutions are best positioned to decide whether an employee's function is religious, Justice Sotomayor cautioned that the Court had "traded legal analysis for a rubber stamp."[56]

Applying what she viewed as the correct standard, Justice Sotomayor concluded that neither Morrissey-Berru nor Biel was a "minister[]."[57] Reading the facts in the light most favorable to the plaintiff,[58] Justice Sotomayor noted that Biel's title had been "teacher" rather than "minister" and that, while she did teach religion, she did so for only about thirty minutes a day and "followed instructions in a workbook."[59] Though prayers were conducted in her class, Justice Sotomayor noted that they were led not by Biel but by student prayer leaders.[60] Turning to Morrissey-Berru, Justice Sotomayor emphasized that the teacher did not describe herself as a "practicing Catholic"[61] and that she, like Biel, taught religion among many other subjects and did so using a workbook.[62] Justice Sotomayor closed by warning that, in addition to doing violence to *Hosanna-Tabor*, the Court's analysis threatened the employment protections of not just teachers but also countless other nonclerical employees of religious institutions.[63]

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

51 *Id.*

52 *Id.* at 2073.

53 *Id.*

54 *Id.* at 2074.

55 *See id.* at 2075.

56 *Id.* at 2076.

57 *See id.*

58 *See id.* Justice Sotomayor accused the majority of failing to apply the appropriate standard for the summary judgment stage, *see id.* at 2077 n.5, a charge the Court denied, *see id.* at 2056 n.1 (majority opinion).

59 *Id.* at 2077 (Sotomayor, J., dissenting).

60 *See id.* at 2077–78.

61 *Id.* at 2078.

62 *See id.* at 2079.

63 *See id.* at 2082.

The majority in *Our Lady of Guadalupe* applied reasoning consistent with the primarily functional test for "ministers" Justice Alito had previously advocated in his *Hosanna-Tabor* concurrence. However, the majority did not proclaim any one test for determining who qualifies for the exception, and even if it had, a functional test would leave open the question of which employee functions are sufficiently "ministerial" to count. Given the diversity of human religious practice, the Court will never find a single objective test, beyond a broad definition, for who is subject to the ministerial exception. Nor is a judicial search for objectively applicable indicators of religiousness consistent with the values underpinning the ministerial exception. Instead, the key to a better approach lies in Justice Thomas's call for deference to the subjective beliefs of religious organizations.

Hosanna-Tabor was the culmination of a long process — by the time it was decided, every circuit except the Federal Circuit had found there to be a ministerial exception.[64] This outcome was not inevitable; the exception has often met with criticism on the grounds that it exempts religious institutions from generally applicable laws[65] or tolerates abuses in hiring,[66] and even proponents of the doctrine describe it as "very strong medicine."[67] Perhaps because of concerns about extending the doctrine too broadly, the Court's unanimous decision in *Hosanna-Tabor* explicitly declined to define the contours of the exception.[68] Even so, the opinions in that case suggested a few possible approaches. The opinion of the Court identified four factors — formal titles, educational and other requirements, self-presentation as a minister, and employee function[69] — that could be applied to each case, as in the Ninth Circuit's examination of Biel's position.[70] Justice Alito's concurrence stressed only the functional test.[71] This approach was in line with most circuits' pre-*Hosanna-Tabor* jurisprudence,[72] and several circuits have returned

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[64] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 & n.2 (2012) (collecting cases).

[65] *See* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1968 (2007).

[66] *See* Jessica R. Vartanian, Note, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049, 1060–63 (2009).

[67] *Courthouse Steps Decision:* Our Lady of Guadalupe School v. Morrissey-Berru, FEDERALIST SOC'Y (July 8, 2020, 3:30 PM), https://fedsoc.org/events/courthouse-steps-decision-our-lady-of-guadalupe-school-v-morrissey-berru [https://perma.cc/33NS-DZ98].

[68] *See Hosanna-Tabor*, 565 U.S. at 190.

[69] *See id.* at 192.

[70] *See* Biel v. St. James Sch., 911 F.3d 603, 607–09 (9th Cir. 2018).

[71] *See Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring).

[72] *See, e.g.*, Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985) (citing EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 284–85 (5th Cir. 1981)); *see also* Corbin, *supra* note 65, at 2027 (writing in 2007 that "courts have taken a functional approach to determining who counts as a minister").

to that approach.[73] Finally, Justice Thomas's concurrence suggested a subjective test in which courts defer to the judgments of religious organizations.[74]

The Court's opinion in *Our Lady of Guadalupe* suggests that, while the framework remains open, the functional approach has won out. As the Ninth Circuit pointed out in Biel's case, of the four *Hosanna-Tabor* factors, three weighed against holding that Biel — and, by extension, Morrissey-Berru — fell within the exception.[75] The Court reasoned that "teacher" might be read as a religious title, pointing out that "rabbi" literally means teacher.[76] But the majority did not claim that the English word "teacher" holds intrinsic religious significance, and the schools conceded that not all teachers were subject to the exception.[77] The majority also did not contest that the plaintiffs lacked the education of the plaintiff in *Hosanna-Tabor* and did not identify themselves as ministers.[78] Thus, while the Court did not explicitly announce any modification of the open-ended test used in *Hosanna-Tabor*, its reasoning suggested that future cases should be decided by looking first to "what an employee does."[79]

While this additional guidance may be helpful to lower courts in the majority of cases, a primarily functional test has its limitations. To begin with, it is not obvious *which* employee functions are sufficiently "religious" to justify the exception. As Professor Christopher Lund has noted, even many parish pastors devote most of their jobs to tasks — helping the poor, running fundraisers — that are also regularly performed by secular actors.[80] Justice Alito pointed out in his *Hosanna-Tabor* concurrence that there exists "a general category of 'employees' whose functions are essential to the independence of practically all religious groups,"[81] but this observation does not address ostensibly ministerial employees, such as nuns, who exist in only some traditions, or ostensibly nonministerial employees, such as accountants, whose roles are crucial to the independence of any organization.

Untangling which tasks are and are not religious is not just a hard practical question — it may be the kind of theological question that the

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[73] *See, e.g.*, Fratello v. Archdiocese of N.Y., 863 F.3d 190, 205 (2d Cir. 2017).

[74] *See Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring).

[75] *See Biel*, 911 F.3d at 608–09.

[76] *Our Lady of Guadalupe*, 140 S. Ct. at 2067. The Court also pointed out that both teachers were referred to as "catechists," though this was not part of either's formal title. *See id.*

[77] *See* Transcript of Oral Argument at 18–19, *Our Lady of Guadalupe*, 140 S. Ct. 2049 (2020) (No. 19-267), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-267_3e04.pdf [https://perma.cc/JKT2-EX4C].

[78] *See Our Lady of Guadalupe*, 140 S. Ct. at 2067–68.

[79] *Id.* at 2064.

[80] *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 69 (2011).

[81] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 200 (2012) (Alito, J., concurring).

First Amendment forbids courts from answering.[82] As the Fourth Circuit has observed, a functional test "necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church,"[83] undermining the *Our Lady of Guadalupe* majority's effort to avoid judicial entanglement with religion by eschewing theological questions.[84] These problems are illustrated by the Sixth Circuit's opinion in *Hosanna-Tabor*: applying a functional test,[85] the court calculated that only forty-five minutes of the plaintiff's average day went to religious instruction and prayer, with the remainder devoted to "secular" tasks, and therefore she was not subject to the exception.[86] The Supreme Court unanimously reversed this conclusion, noting that the Sixth Circuit placed too much weight on employment-function arithmetic.[87] Now, with *Our Lady of Guadalupe*'s endorsement of function as the primary basis for the exception, it is not clear what is stopping courts from again falling into the arbitrary and constitutionally suspect practice of identifying ministerial employees "by a stopwatch."[88]

The answer cannot be to base the test on a different objective factor or to balance more factors against one another. There is agreement on both sides of the ministerial exception debate that a ministerial title alone cannot be dispositive.[89] As the Court pointed out, a test that emphasized titles would privilege faiths that are more organized.[90] And though Justice Sotomayor emphasized "leadership" as an important characteristic of ministerial employees,[91] a leadership role is not necessary to "personify" a church's beliefs or convey them to the world at large.[92] For similar reasons, lower courts have applied the exception to press secretaries[93] and music directors,[94] and the ministerial exception

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[82] *Cf. id.* at 185–87 (majority opinion). Critics of the exception have often made this same point. *See, e.g.*, Lauren P. Heller, Note, *Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination Under Title VII While Maintaining First Amendment Protections of Religious Freedom*, 81 ST. JOHN'S L. REV. 663, 667 n.14 (2007).

[83] Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985).

[84] *See Our Lady of Guadalupe*, 140 S. Ct. at 2069.

[85] *See* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 778 (6th Cir. 2010), *rev'd*, 565 U.S. 171.

[86] *See id.* at 779–80.

[87] *See Hosanna-Tabor*, 565 U.S. at 193–94.

[88] *Id.* at 194.

[89] *Compare* Transcript of Oral Argument, *supra* note 77, at 5 (counsel for the schools arguing that "rel[ying] first and foremost on the employees' title . . . would wrongly elevate form over function"), *with id.* at 56 (counsel for the plaintiffs conceding that they "wouldn't rely solely on titles").

[90] *See Our Lady of Guadalupe*, 140 S. Ct. at 2064.

[91] *See id.* at 2073 (Sotomayor, J., dissenting).

[92] *See Hosanna-Tabor*, 565 U.S. at 188; *accord* Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985).

[93] *See* Alicea-Hernandez v. Cath. Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003).

[94] *See* Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036, 1041 (7th Cir. 2006), *abrogated on other grounds by Hosanna-Tabor*, 565 U.S. 171.

could plausibly apply to missionaries, even ones with no leadership role. Nor is the use of multiple factors together a satisfactory solution. Both the majority and the dissent in *Our Lady of Guadalupe* rightly rejected a formulaic approach that would have ignored the diversity of religious institutions.[95] Instead, the Court arrived at an approach that emphasizes function but leaves the inquiry open-ended.[96] However, an open-ended test leaves the lower courts with more discretion than is wise. Justice Sotomayor warned that the decision "invites . . . 'potential for abuse'"[97] and could be read to apply to vast numbers of ostensibly non-ministerial employees.[98] Meanwhile, proponents of a broad exception have warned that a functional test without more is open-ended enough to serve "as a Trojan horse spelling the end of the ministerial exception altogether."[99] If lower courts are left to their own devices, it is possible that both fears will be realized in different instances.

The best solution may be for the Court to look past objective factors altogether and instead adopt the test proposed by the concurrence. Justice Thomas argued that "[w]hat qualifies as 'ministerial' is an inherently theological question,"[100] and so the Court should "defer to religious organizations' good-faith claims" about an employee's role.[101] Under such a test, if a religious employer sincerely believed an employee carried out a key religious function,[102] that employee would be a minister. To be sure, this approach is not above critique. Empowering secular courts to question the honesty of religious believers provokes its own First Amendment concerns.[103] A factfinder asking whether a belief is sincere might be tempted to ask whether it is true.[104] But though this concern has persuaded several scholars to advocate for minimizing sincerity tests,[105] Professor Nathan Chapman argues persuasively that assessing religious sincerity does not present any unique practical or constitutional challenge.[106] Indeed, courts have long found the factual question of

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95 *Compare Our Lady of Guadalupe*, 140 S. Ct. at 2067, *with id.* at 2075 (Sotomayor, J., dissenting).

96 *See id.* at 2064, 2067 (majority opinion).

97 *Id.* at 2076 (Sotomayor, J., dissenting) (quoting Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 n.3 (8th Cir. 1991)).

98 *See id.* at 2082.

99 Lund, *supra* note 80, at 69.

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

101 *Id.* at 2069.

102 This formulation is derived from one previously used by Justice Alito, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 200 (2012) (Alito, J., concurring), though courts could define "minister" differently for legal purposes and still defer to religious organizations' understanding of whether that definition is met.

103 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting).

104 *See* United States v. Ballard, 322 U.S. 78, 92–93 (1944) (Jackson, J., dissenting).

105 *See, e.g.*, 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 123 (2006).

106 *See* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1191 (2017).

sincerity to be an acceptable alternative to prohibited religious inquiries,[107] and judgments of religious sincerity are commonplace in areas like draft exemptions, prison accommodations, and Religious Freedom Restoration Act claims.[108] By adding ministerial cases to the list, the Court could avoid difficult and reductive line-drawing exercises and leave courts with the familiar task of judging truthfulness.

The obvious objection is that such deference would tilt the scales too far against individual employees, but this would not necessarily be the case. The fear of appearing too extreme may have influenced the schools' decision not to argue for a strictly deferential standard at the Supreme Court.[109] But, as in other contexts, the burden of proving religious sincerity by a preponderance of the evidence would be on the party claiming the exception.[110] Some churches would doubtless claim that all their employees were ministers.[111] But by looking to familiar factors like the presence of ulterior financial motives,[112] the conformity of the religious organization's past behavior to the beliefs expressed at trial,[113] or the consistency of the religious entity's professed beliefs with those of entities it identifies as coreligionists,[114] courts would be reasonably well equipped to stop attempts to game the exception.

As Justice Thomas wrote, the schools would likely win the present cases based on the sincerity demonstrated within the record.[115] However, religious institutions would not be free to discriminate against the employees identified by Justice Sotomayor[116] unless they were prepared to argue they sincerely believed those employees were ministers of their faiths. Questions would remain, such as how important a school must believe an employee's religious function to be, but courts would have a starting point to explore those questions while fully respecting the First Amendment principles underpinning the ministerial exception.

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[107] *See, e.g.*, United States v. Seeger, 380 U.S. 163, 184–85 (1965).

[108] *See* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 60–64 (2014). Subjective tests mean that objectively similar facts can lead to different results, *see* Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1431, 1463 (2011), but this same peculiarity exists in familiar doctrines like "good faith," *see, e.g.*, Comment, *Rethinking the Good Faith Exception to the Exclusionary Rule*, 130 U. PA. L. REV. 1610, 1622–23 (1982).

[109] *See* Transcript of Oral Argument, *supra* note 77, at 24. The schools had argued for a sincerity test in the Ninth Circuit. *See* Appellee's Answering Brief, *supra* note 10, at 38; Appellee St. James Catholic School's Answering Brief, *supra* note 14, at 32.

[110] *See* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 328.

[111] *Cf.* EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981) (rejecting a seminary's argument that even its support staff were ministers).

[112] *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).

[113] *See, e.g.*, Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988).

[114] *See, e.g.*, Levitan v. Ashcroft, 281 F.3d 1313, 1321–22 (D.C. Cir. 2002).

[115] *See Our Lady of Guadalupe*, 140 S. Ct. at 2071 (Thomas, J., concurring).

[116] *See id.* at 2082 (Sotomayor, J., dissenting).