FIRST AMENDMENT — RELIGION — FOURTH CIRCUIT SCHISM SPOTLIGHTS UNHOLY CONSEQUENCES OF MINISTERIAL EXCEPTION DOCTRINE. — *Palmer v. Liberty University, Inc.*, 72 F.4th 52 (4th Cir. 2023).

Ministerial status traditionally implies a degree of qualification or responsibility. In Judaism, rabbis earn their titles by receiving *smicha* after years of study.[1] In Catholicism, priests have the sole authority to administer the sacrament of penance.[2] However, when it comes to the First Amendment, the requirements are less clear. Given the First Amendment's limitations on government interference with religion,[3] courts have "preclude[d] application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers" through the so-called "ministerial exception."[4] But the exception — first invoked in 1972[5] and twice ruled on by the Supreme Court[6] — has no rigid formula to determine which employees rise to the level of minister.[7] Recently, in *Palmer v. Liberty University, Inc.*,[8] Judge Motz's and Judge Richardson's dueling opinions displayed entirely different understandings of the doctrine and illustrated the exception's shortcomings: its nebulous assessment criteria beget confusion and inconsistent application, allowing for indiscriminate deference to religious institutions at the expense of employee protections.

Eva Palmer taught art at Liberty University for more than three decades.[9] She focused on traditional studio art, rather than digital art or religion.[10] In 2013, Palmer's supervisors rejected her application for a promotion, in part because they wanted her to develop her digital art skillset.[11] Palmer was eventually promoted to full professor in 2016 despite not meeting this expectation.[12] In the meantime, Liberty faced increased demand for digital art courses,[13] which the school determined

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1 *Jewish Ordination*, HARV. DIVINITY SCH., https://hds.harvard.edu/academics/ministry-studies/denominational-instruction/ordination-requirements/jewish-ordination [https://perma.cc/SS9L-KTN7].

2 1983 CODE c.965.

3 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

4 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

5 *See* McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972).

6 *Hosanna-Tabor*, 565 U.S. at 188; Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

7 *See Morrissey-Berru*, 140 S. Ct. at 2069.

8 72 F.4th 52 (4th Cir. 2023).

9 *Id.* at 57.

10 Palmer v. Liberty Univ., Inc., No. 20-cv-31, 2021 WL 5893295, at *1 (W.D. Va. Dec. 10, 2021).

11 *Palmer*, 72 F.4th at 58.

12 *Id.*

13 *Id.* at 59.

Palmer was not qualified to teach.[14] In 2018, when Palmer was seventy-nine years old, Liberty informed her that it would not renew her contract after considering her lack of digital art expertise.[15] Palmer claimed that Liberty actually fired her because of age-based animus.[16] In May 2020, she sued Liberty in the U.S. District Court for the Western District of Virginia, alleging that Liberty violated the Age Discrimination in Employment Act of 1967[17] (ADEA).[18] Liberty denied Palmer's allegations[19] and argued that, regardless of her claim's merits, the ministerial exception barred her suit.[20] Both parties moved for summary judgment.[21]

In December 2021, the district court issued two rulings. Judge Moon first addressed the ministerial exception.[22] While the Supreme Court has not adopted a set formula for ministerial determinations, Judge Moon noted that both of its ministerial exception cases — *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[23] and *Our Lady of Guadalupe School v. Morrissey-Berru*[24] — highlighted relevant considerations: "(1) how the employer held out the employee, including her title, (2) whether the employee had undergone significant religious training, (3) how the employee held herself out, and (4) what functions the employee performed."[25] No one factor is outcome determinative or relevant in every case, and the *Morrissey-Berru* Court cautioned against misconstruing these four factors as mandatory considerations.[26] Rather, courts should conduct fact-specific inquiries to determine, "at bottom, . . . what an employee does."[27]

Judge Moon addressed all four factors.[28] First, Liberty consistently held Palmer out as a nonministerial employee: she had a nonministerial title, had nonministerial job duties, and taught nonministerial art courses.[29] Accordingly, this factor favored Palmer.[30] Second, although Palmer held no ministerial degrees, she had taken graduate-level religion

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14 *Id.*

15 *Id.* at 59–60.

16 *Id.* at 60 (quoting Complaint ¶ 22, Palmer v. Liberty Univ., Inc., No. 20-cv-31, 2021 WL 5893295 (W.D. Va. Dec. 10, 2021)).

17 29 U.S.C. §§ 621–634.

18 Complaint, *supra* note 16, at ¶ 1.

19 Answer and Affirmative and Other Defenses to Complaint ¶¶ 1–25, *Palmer*, No. 20-cv-31.

20 *Id.* at 5.

21 Plaintiff's Motion for Summary Judgment on the Ministerial Exception at 1, *Palmer*, No. 20-cv-31; Liberty's Motion for Summary Judgment at 1, *Palmer*, No. 20-cv-31.

22 Palmer v. Liberty Univ., Inc., No. 20-cv-31, 2021 WL 6201273, at *1 (W.D. Va. Dec. 1, 2021).

23 565 U.S. 171 (2012).

24 140 S. Ct. 2049 (2020).

25 *Palmer*, 2021 WL 6201273, at *5 (citing *Hosanna-Tabor*, 565 U.S. at 190–92).

26 *Id.* (citing *Morrissey-Berru*, 140 S. Ct. at 2068).

27 *Id.* (quoting *Morrissey-Berru*, 140 S. Ct. at 2064).

28 *Id.* at *5–7.

29 *Id.* at *5.

30 *Id.*

courses and undergone Liberty-run religious professional development training.[31] While holding that this factor favored neither party, Judge Moon rejected Liberty's argument that Palmer's personal devotion to Christianity made her an "informally qualified" minister.[32] Third, Palmer did not hold herself out as a minister: she viewed herself as a "Christian teacher" who modeled Christian values, rather than as a "teacher of Christianity" who taught theology.[33] The third consideration thus favored Palmer.[34] Fourth, her core role as an art teacher "was secular in nature."[35] Palmer prayed with students at the start of classes but had no further ministerial obligations.[36] Therefore, the fourth consideration also favored Palmer.[37] Though Liberty claimed that its employee handbook obligated Palmer to integrate Christianity into her teaching, Liberty "provide[d] scant evidence" that she had actually done so.[38] Judge Moon therefore concluded that construing the exception to cover Palmer would "significant[ly] expan[d]" the doctrine, held that Palmer was not a minister, and granted her motion for summary judgment on the ministerial exception issue.[39]

Judge Moon, in a separate opinion, granted Liberty's motion for summary judgment on the ADEA issue.[40] He accepted Liberty's explanations for firing Palmer: Palmer had failed to improve her technological repertoire as laid out in her professional development plan,[41] and her resulting lack of digital skills rendered her unqualified.[42] Further, Judge Moon concluded that Palmer had neither presented direct evidence of[43] nor established a prima facie case for age-based discrimination in violation of the ADEA.[44]

The Fourth Circuit affirmed the district court's statutory holding but vacated its ministerial exception ruling.[45] Judge King, writing for the panel,[46] first upheld the ADEA ruling, agreeing that Palmer failed to produce sufficient evidence that age was the cause of Liberty's nonrenewal decision.[47] Palmer had not been meeting Liberty's expectations;

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[31] *Id.* at *6.
[32] *Id.*
[33] *Id.* Palmer did not hold herself out to be a minister in part because she believed that women could not be ministers. *Id.*
[34] *Id.* at *7.
[35] *Id.* at *8.
[36] *Id.*
[37] *Id.* at *7–8.
[38] *Id.* at *7.
[39] *Id.* at *9.
[40] Palmer v. Liberty Univ., Inc., No. 20-cv-31, 2021 WL 5893295, at *1 (W.D. Va. Dec. 10, 2021).
[41] *Id.* at *2.
[42] *Id.* at *3.
[43] *Id.* at *5.
[44] *Id.* at *7.
[45] *Palmer*, 72 F.4th at 56.
[46] Judge King was joined by Judge Motz.
[47] *Palmer*, 72 F.4th at 63–67.

although Liberty made "'repeated attempts to prompt Palmer to develop a digital art skillset,' . . . Palmer 'never developed that skillset.'"[48] The court then turned to the ministerial exception.[49] Citing the canon of constitutional avoidance, Judge King held that the court should not determine whether Palmer was a minister because it could decide the case on the ADEA claim alone.[50] Accordingly, the court vacated the ministerial exception ruling.[51]

Judges Richardson and Motz wrote separate opinions addressing the ministerial exception. Concurring in the judgment, Judge Richardson contended that the exception *did* cover Palmer.[52] He first advocated for an exception to constitutional avoidance principles[53] and cautioned that questioning religious institutions' motives for firing a minister — by looking into the merits of Palmer's ADEA claim, for example — risked an unconstitutional foray verging on religious entanglement.[54] Judge Richardson then painted a broad picture of the exception's scope: although Palmer held no religious title and taught art, she incorporated a "Biblical worldview" into her teachings, she prayed with her students, and Liberty considered her its minister.[55] He argued that, accordingly, under the Supreme Court's ministerial exception standard, Palmer was a minister.[56] Judge Richardson's wide-reaching conception of the exception would seemingly cover all Liberty professors, irrespective of their formal responsibilities or course content.[57]

By contrast, Judge Motz, in concurrence, argued that the exception should not apply: the Supreme Court's ministerial exception precedents did not extend to Palmer.[58] Because Palmer lacked formal religious responsibilities, Judge Motz distinguished her from the individuals in *Morrissey-Berru*, whom the Court subjected to the exception.[59] Judge Motz argued that Judge Richardson's vision represented "a dramatic

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[48] *Id.* at 66 (quoting *Palmer*, 2021 WL 5893295, at *7).

[49] *Id.* at 67–68.

[50] *Id.* at 68. The court noted that other circuits have similarly invoked the constitutional avoidance canon to avoid ministerial exception questions. *Id.* (citing Headley v. Church of Scientology Int'l, 687 F.3d 1173, 1181 (9th Cir. 2012); Penn v. N.Y. Methodist Hosp., 884 F.3d 416, 426 n.5 (2d Cir. 2018)).

[51] *Id.* at 69 (citing Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150, 161–62 (4th Cir. 2010)).

[52] *Id.* at 75 (Richardson, J., concurring in the judgment).

[53] *Id.* Because any inquiry into an employee's termination ends if the ministerial exception applies, Judge Richardson contended that the court should have addressed the ministerial exception issue first. *Id.* at 77, 79.

[54] *Id.* at 77–79.

[55] *Id.* at 79–82.

[56] *Id.* at 79 (citing Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064, 2066 (2020)).

[57] *See id.* at 79–80; *see also id.* at 74 n.3 (Motz, J., concurring) (objecting to the breadth of Judge Richardson's interpretation).

[58] *Id.* at 69, 71 (Motz, J., concurring) (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); *Morrissey-Berru*, 140 S. Ct. at 2055, 2060).

[59] *Id.* at 72–73.

broadening of the ministerial exception that would swallow the rule"[60] and that "[a]n employee does not shed her right to be free from workplace discrimination simply because she believes in God, prays at work, and is employed by a religious entity."[61] The ministerial exception, she emphasized, "is just that — an *exception*, applicable only to a subset of a religious entity's employees," rather than *every* employee.[62]

By using the same doctrine to reach opposite conclusions, Judges Richardson and Motz spotlighted a fatal flaw in ministerial exception jurisprudence: its ambiguity facilitates inconsistent — and sometimes flatly contradictory — applications. And this flaw is not merely academic; the exception's doctrinal ambiguity empowers judges to reason backward from their desired outcomes, enabling courts to sacrifice employee protections in the name of religious freedom.

The ministerial exception is enormously consequential for religious organizations: "It confers on religious institutions the extraordinary power to discriminate against ministerial employees on any basis whatsoever . . . ."[63] When read expansively, the exception allows religious entities to flout antidiscrimination employment laws at the expense of their employees.[64]

Yet despite the exception's power to bless otherwise impermissible employment discrimination,[65] its unclear scope leaves judges substantial discretion in how to apply it. In both of its ministerial exception cases, the Supreme Court discussed the exception without defining its contours.[66] The Court has provided no clear test or list of essential considerations to guide lower courts; while the *Hosanna-Tabor* Court did identify relevant factors, the *Morrissey-Berru* Court admonished the Ninth Circuit for using those factors "as checklist items to be assessed and weighed against each other in every case" rather than "tak[ing] all relevant circumstances into account."[67] Further, while leaving "minister" undefined, the Court *has* explicitly limited the ministerial exception

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[60] *Id.* at 74.

[61] *Id.* at 75.

[62] *Id.* at 71.

[63] Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Neither Party at 4, *Morrissey-Berru*, 140 S. Ct. 2049 (Nos. 19-267 & 19-348).

[64] *See* Marie Ashe, Hosanna-Tabor*, the Ministerial Exception, and Losses of Equality: Constitutional Law and Religious Privilege in the United States*, 4 OXFORD J.L. & RELIGION 199, 219 (2015) (arguing that the *Hosanna-Tabor* Court declined to "right[] the imbalance being accomplished through unduly expansive constructions of the 'ministerial' and by grants of blanket immunity to religious organizations engaging in discrimination contrary to the public policy expressed in anti-discrimination law").

[65] *See* Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NW. U. L. REV. 951, 962 (2012) ("[T]he [*Hosanna-Tabor*] Court's acceptance of the school's all-litigious-ministers-are-spiritually-deficient argument suggests that religious employers now have carte blanche to retaliate with impunity.").

[66] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012); *Morrissey-Berru*, 140 S. Ct. at 2067.

[67] *Morrissey-Berru*, 140 S. Ct. at 2067.

to "certain key employees."[68] Thus, individual decisionmakers retain discretion in selecting assessment criteria and delineating the exception's outer limits: before deciding who counts as a minister, each judge must decide which factors are encompassed by "all relevant circumstances."[69] Judges must also decide which employees are "key,"[70] rendering the exception's "certain key employees" qualifier functionally unrestrictive.

Judges Richardson and Motz hold antithetical visions of the doctrine, which led to their diametrically opposed conclusions. Yet surprisingly, both opinions are doctrinally faithful to the Court's existing standard. Absent guidance dictating otherwise, the judges permissibly disagreed about the relative weight of different circumstances and which employees were "key," leading them to apply the same *Morrissey-Berru* guidance to reach opposite outcomes. While they clashed about relevant criteria, both judges applied a form of the exception that can swallow the rule. Their divergence highlights the unholy doctrinal and practical consequences of ministerial exception jurisprudence.

If the exception is truly as expansive as Judge Richardson understands it to be — and "ministerial" effectively means advancing an institutional religious vision — then *all* employees at religious institutions could lose employment discrimination protections.[71] For pervasively religious institutions, Judge Richardson's exegesis of the ministerial exception equated "ministerial" and "religious." His reading deferred heavily to Liberty, consistent with recent developments in religious autonomy jurisprudence.[72] Because "the mere act of *questioning* the institution's motives . . . cheapens its authority over ecclesiastical affairs,"[73] in effect, the *only* relevant circumstance was the institutional context: Palmer's position at Liberty University, *a religious school*. This reading could cause apocalyptic consequences for employee protections — taken further, the assistant who ensures that the priest is never double booked for Sunday Mass and the janitor who cleans the mosque plausibly serve

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[68] *Id.* at 2055.

[69] *Id.* at 2067.

[70] *Id.* at 2055.

[71] The Supreme Court has indicated its willingness to entertain the idea that the ministerial exception stretches as far as Judge Richardson claimed: respecting the Supreme Court's denial of certiorari in *Gordon College v. DeWeese-Boyd*, 142 S. Ct. 952 (2022), *denying cert. to* 163 N.E.3d 1000 (Mass. 2021), Justice Alito (joined by Justices Thomas, Kavanaugh, and Barrett) called the Massachusetts Supreme Judicial Court's determination that a social work professor was not a minister "a troubling and narrow view of religious education." *Id.* at 954 (Alito, J., respecting the denial of certiorari).

[72] *See, e.g.*, Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 324 (2022) (examining data demonstrating that the Roberts Court rules in favor of religious institutions more than any previous bench since at least the Warren Court); Ian Prasad Philbrick, *A Pro-religion Court*, N.Y. TIMES (June 22, 2022), https://nytimes.com/2022/06/22/briefing/supreme-court-religion.html [https://perma.cc/8E4H-5BDE].

[73] *Palmer*, 72 F.4th at 78 (Richardson, J., concurring in the judgment).

religious purposes too.[74] This understanding dilutes the exception's limits: if the exception is truly for "certain key employees,"[75] then institutional context cannot be *the* cardinal criterion and transform all employees who facilitate faith into "ministers."

Conversely — but also faithful to the discretionary doctrine — Judge Motz considered relevant circumstances to be those rooted in objectivity: job description, responsibilities, educational background, and line of reporting.[76] For her, what mattered was what Palmer did in her capacity as an art professor, not, as Judge Richardson argued, the institutional context — what Palmer did in her capacity as an art professor at Liberty University, *a religious school*. Judge Motz's emphasis on formal duties suggested that the line between minister and nonminister exists somewhere between a teacher required to pray with her students and a teacher who voluntarily prays with her students.[77]

But viewed alongside *Morrissey-Berru*, this reasoning threatens to ensnare countless employees: *Morrissey-Berru* confirmed that the ministerial exception can cover teachers who spend only a small minority of their time on religious activities.[78] And Judge Motz implied that whether an employee is *required* to engage in religious activity may be dispositive.[79] Taken together, these two concepts would mean that an employer could anoint otherwise secular employees as ministers simply by commanding them to engage in de minimis religious instruction. While doctrinally kosher, this understanding ignores the fact that descriptions often vary from actual job functions.[80] And if all employees tasked with briefly praying before completing their otherwise secular jobs at religious institutions were christened as "ministerial," then the exception would no longer apply to only "certain key employees" as nominally intended;[81] it would again swallow the rule.

In its current form, the ministerial exception is not only logically incoherent but also practically harmful. Against the backdrop of toothless, unclear limitations and broad judicial latitude, courts may defer to religious organizations' subjective judgments in their "all relevant

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[74] *See id.* at 75 (Motz, J., concurring) (quoting *DeWeese-Boyd*, 163 N.E.3d at 1017). *But see* EEOC v. Roman Cath. Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000) ("[T]he exception would not apply to . . . purely custodial or administrative personnel.").

[75] *See Morrissey-Berru*, 140 S. Ct. at 2055.

[76] *Palmer*, 72 F.4th at 70–71 (Motz, J., concurring).

[77] *Id.* at 73–75.

[78] *See Morrissey-Berru*, 140 S. Ct. at 2080 (Sotomayor, J., dissenting) ("Here, the time Biel and Morrissey-Berru spent on secular instruction far surpassed their time teaching religion.").

[79] *See Palmer*, 72 F.4th at 75 (Motz, J., concurring).

[80] *See* Garcetti v. Ceballos, 547 U.S. 410, 424–25 (2006) ("We reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." (citations omitted)).

[81] *Morrissey-Berru*, 140 S. Ct. at 2055.

circumstances" and "certain key employees" determinations, and employees of religious organizations may thus lose the employment protections that shield their secular peers.[82] A broad exception — ostensibly allowable under the Court's current guidance and possible through either Judge Richardson's or Judge Motz's understanding — erodes any outer bound theoretically imposed by the Court's "certain key employees" qualifier. While some praise the deferential doctrine for protecting religious institutions' First Amendment rights,[83] others note that institutional protection comes at the expense of employees' First Amendment rights[84] and employment protections.[85] And crafty, or bad faith, religious entities can capitalize on this institutional deference by ordaining employees as quasi-ministerial, thus reaping the exception's institutional protections while desecrating the fundamental tenets of employment law. For example, recognizing the power of a broad ministerial exception, some religious institutions strategically incorporate religious language into job descriptions or subject *all* staff members to formal religious expectations.[86]

Palmer provides no useful answers about how future courts should understand the ministerial exception's confines. The simultaneous incompatibility and doctrinal permissibility of Judge Richardson's and Judge Motz's understandings testify to the ministerial exception's deficiencies in its current form. Going forward, to avoid converting the exception into a default, courts should institute a context-dependent functional analysis, reflecting the Supreme Court's guidance that "[w]hat matters, at bottom, is what an employee does."[87] "Ministerial" must require more than just working at a religious institution or nominally holding religious job duties. Otherwise, the ministerial exception risks becoming a Leviathan[88] — an uncontrolled beast with the potential to swallow employment protections at religious institutions. The next time a ministerial exception conflict arises, *Palmer*'s dueling concurrences may reveal themselves as an augury of the need for doctrinal clarity.

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[82] *See generally* Corbin, *supra* note 65; Justin Burnworth, *The Ministerial Exception Paradox*, 41 QUINNIPIAC L. REV. 463 (2023). However, even when the exception applies, employees may retain certain employment protections. *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, 268–82 (2019) (discussing cases in which the ministerial exception was held not to bar hostile work environment claims).

[83] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012) (Thomas, J., concurring) ("[I]n my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister.").

[84] *See, e.g.*, Burnworth, *supra* note 82, at 465–66.

[85] *See, e.g.*, Corbin, *supra* note 65, at 967.

[86] Jeremy Weese, *The (Un)holy Shield: Rethinking the Ministerial Exception*, 67 UCLA L. REV. 1320, 1359–62 (2020).

[87] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020).

[88] *E.g.*, *Tehillim* 74:14.