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ABSTRACT

An understandable clamor occurred following the Supreme Court's decision in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, *which solidified the ministerial exception under the First Amendment. The exception, according to the Court, affords certain religious entities significant institutional autonomy under the Religion Clauses. The decision, short on details regarding the content of the exception, led to much speculation about outcomes in future litigation. This Article is the first attempt at assessing whether the chief criticisms of the decision—its potential breadth and inherent ambiguity—have led to divergent, incoherent, and unjustifiable results. It observes that neither the warnings of the decision's critics nor the hopes of the decision's proponents have fully materialized. Rather, the actions of lower courts following* Hosanna-Tabor *are somewhat predictable; courts have reached divergent conclusions while emphasizing the same parts of the Court's opinion, and have struggled adequately to define both aspects of the exception, namely which entities may invoke it and which employees constitute ministers. This Article ultimately suggests that, although the language of* Hosanna-Tabor *suggests a link, courts are failing adequately to comprehend the connection between those two inquiries. As such, the Article proposes a workable analytical framework that links both inquiries and that is faithful to the doctrinal basis for the exception outlined by the Court. It argues that the scope of the definition of "minister" should correspond to the type of entity that seeks application of the exception. It suggests that who is a minister in a particular context depends on what type of ministry the entity in question engages in and whether it can be said that the entity, as a whole, is engaging in religious activity when the employee acts. This approach differs from the approaches of many lower courts post-*Hosanna-Tabor, *which tend to focus*

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on the individual activities of the employee within the institution rather than whether the employee's activities are institutional in nature.

INTRODUCTION

HOSANNA-Tabor Evangelical Lutheran Church and School v. EEOC ("*Hosanna-Tabor*")[1] solidified the ministerial exception to anti-discrimination employment statutes that seek to regulate the hiring and firing process and terms and conditions of employment.[2] Moving forward, the Religion Clauses of the First Amendment unequivocally recognize the autonomy of religious entities[3] to invoke the exception as an affirmative defense in employment discrimination litigation.[4] At its core, the exception prevents the government from interfering with the internal governance of a religious entity insofar as it relates to ministers within the entity.[5]

Following the decision, some commentators expressed concern at the Court's willingness to so easily dismiss duly-enacted, popularly supported, anti-discrimination laws that target unlawful discrimination.[6] Some expressed the fear that religious entities would go rogue and subvert generally applicable laws that have noble objectives.[7] These concerns have been more formally expressed in scholarship and existed before the Court's decision as well.[8] In contrast, proponents of institutional religious autonomy[9] deemed the outcome to be sound, and ultimately let out a sigh

1. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

2. *See* The Civil Rights Act of 1964, 42 U.S.C. § 2000e.

3. I use the phrase "religious entity" in this Article to refer to those entities that *might* be capable of invoking the exception. This ambiguity stems from the Court's unwillingness to clarify which entities are in fact capable of using the exception. *See infra* Part I.C. "Entity" may include churches, organizations, institutions, and groups.

4. *Hosanna-Tabor*, 132 S. Ct. at 709 n.4 ("We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.").

5. *Id.* at 702 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

6. *See* Howard Friedman, *Analysis: Some Thoughts on Church Autonomy After Today's* Hosanna-Tabor *Decision*, RELIGION CLAUSE, (Jan. 11, 2012) [http://perma.cc/YZ2N-D2KV].

7. *Hosanna-Tabor and Religion Clause Anarchy*, RELIGIOUS LEFT LAW, [http://perma.cc//2u92-66k9].

8. *See also* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007) (arguing that religion is not privileged under contemporary First Amendment doctrine); Jane Rutherford, *Equality As the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996). *See generally* Richard Schragger & Micah Schwartzmann, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013).

9. *See, e.g.*, Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 63 (2011); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 64 (2007); 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, 1374 (1981) (recognizing how churches have a right to be free from government interference).

of relief, after years of wondering whether the Court would legitimize the consensus that had developed at the circuit court level.[10]

The Court spoke unanimously, thereby rendering the ministerial exception an aspect of First Amendment jurisprudence that is here to stay. While the Court solidified the ministerial exception somewhat differently than the lower courts,[11] it also answered the broader question of whether the First Amendment provides special solace to the value of institutional autonomy. That answer was a resounding yes, although scholars disagree about its ultimate foundation.[12]

Following *Hosanna-Tabor*, courts have attempted to apply the Court's language regarding the ministerial exception.[13] Somewhat predictably, the Court's vague characterization of the exception and its content has rendered this exercise difficult. Lower courts have struggled with the task of fleshing out the meaning of the exception, in practice, thereby producing divergent results.[14] While this type of result holds true for most broad doctrinal pronouncements made by the Court, and the Court itself acknowledged that its opinion was short on details,[15] the stakes are high given the intrinsically contentious nature of the two areas of law implicated by the ministerial exception: religious freedom and protections against employment discrimination that have been around for fifty years. In other words, those who advocate for broad institutional autonomy tend to strongly guard the liberty recognized by the Court,[16] while those who litigate discrimination claims tend to prioritize the goods associated with resolving unjust employment actions over other constitutional values.[17]

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10. *See* John H. Cushman, Jr., *Religious Groups Greet Ruling with Satisfaction*, N.Y. TIMES (Jan. 11, 2012), [http://perma.cc/3P79-J48N]; Thomas Messner, *Supreme Court Decision in* Hosanna-Tabor *A Major Win for Religious Freedom*, THE DAILY SIGNAL (Jan. 11, 2012), [http://perma.cc/9CMG-CB3R] ("For several reasons, the Court's ruling is a landmark victory for religious freedom."). A few weeks after the Court's decision, the Obama Administration announced its decision regarding a controversial Dept. of Health and Human Services mandate for contraceptive services under the Patient Protection and Affordable Health Care Act. Journalists were quick to apply the spirit of deference in *Hosanna-Tabor* to the controversy and supporters of last summer's decision in *Hobby Lobby v. Burwell* cited the same when supporting the decision. *See, e.g.*, Horace Cooper, *The Birth Control Mandate Is Unconstitutional*, NAT'L POLICY ANALYSIS (Feb. 2012), [http://perma.cc/JS7G-WPMM].

11. *Hosanna-Tabor*, 132 S. Ct. at 705 (citing several circuit courts that had found the ministerial exception).

12. *See* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008); Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1053 (2013); Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839 (2012).

13. *See infra* Part II.

14. *See* Katherine Hinkle, *What's in a Name? The Definition of "Minister" in* Hosanna-Tabor Evangelical Lutheran School v. Equal Employment Opportunity Commission, 34 BERKELEY J. EMP. & LAB. L. 283, 288 (2013).

15. *Hosanna-Tabor*, 132 S. Ct. at 707.

16. *See* Lund, *supra* note 9.

17. Schragger & Schwartzman, *supra* note 8, at 918–20 (2013) (arguing against special rights and autonomy for religious institutions); Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance:* Hosanna-Tabor *and the First Amendment*, 13

This Article is the first to assess the early results following *Hosanna-Tabor* and reflect on how those results will and should inform future pronouncements by the Court related to the ministerial exception. Although it has been only three years since the Court announced its decision, the opinion has been cited in over one hundred cases.[18] Many of these cases address the precise issues at stake with the ministerial exception: which entities may invoke it as a defense and which employees qualify as ministers, although many more cases focus on the latter inquiry, often without reference to the preceding issue.[19] Thus, lower courts generally have approached these separate, but intertwined, inquiries differently; some have recognized them as analytically distinct whereas other courts have impliedly acknowledged that they are two sides of the same coin and therefore inseparable.[20] Different focuses understandably have led to different outcomes and that oversight is addressed in Part III.

The structure of the Article is as follows: Part I will outline the specific contribution of *Hosanna-Tabor* following decades of circuit court decisions that already recognized the ministerial exception. It pays special attention to the Court's statements regarding the definition of minister, and, interestingly, its lack of clarity regarding which entities may invoke the exception,[21] an inquiry that would seem to precede the other. Part II explains how lower courts are applying *Hosanna-Tabor*. It acknowledges attempted extensions of *Hosanna-Tabor* as well as attempted restraints and identifies where courts are struggling to flesh out the Court's decision. It also discusses the cases in light of the two inquires within the exception. Part III critically reflects on the difficulties of lower courts and proposes an analytical framework that links the inquiry of who qualifies as a minister to the more foundational question of what type of entity is attempting to invoke the exception. It ultimately suggests that the Court should clearly enunciate that who qualifies as a minister is contingent on the religious attributes, mission, and institutional activities of the entity in question. In other words, awareness of an entity's ministry is essential to determining whether an employee is acting as a minister.

I. THE CONTENT OF THE MINISTERIAL EXCEPTION

Prior to the Court's announcement in *Hosanna-Tabor*, the ministerial exception existed at the federal circuit level and in various state jurisdic-

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ENGAGE 114, 118 (2012) (cautioning that *Hosanna-Tabor* could leave "religion unregulated and out of control").

18. A simple citing references search on Westlaw at the time of this draft yielded one hundred and eight indexed cases that have cited *Hosanna-Tabor*.

19. *See, e.g.*, Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668 (N.D. Ill. 2012); Cannata v. Catholic Diocese of Austin, 700 F.3d 169 (5th Cir. 2012).

20. *See* Kyle R. Cummins, *The Intersection of* CLS *and* Hosanna-Tabor*: The Ministerial Exception Applied to Religious Student Organizations*, 44 U. MEM. L. REV. 141, 177 (2013).

21. *See* Brian M. Murray, *The Elephant in* Hosanna-Tabor, 10 GEO. J.L. PUB. POL'Y 493, 494 (2012); *see also* Zoe Robinson, *What is a "Religious Institution"?*, 55 B.C. L. REV. 181, 183 (2014).

tions.[22] Keeping with the trend, *Hosanna-Tabor* solidified the ministerial exception as a product of the Religion Clauses of the First Amendment. But before discussing how lower courts are following *Hosanna-Tabor*, it is necessary to grasp what the Court actually announced in its opinion. The opinion came in broad strokes and provided very little guidance for lower courts. This holds for both the values underlying the exception and the bases for the doctrine ultimately communicated by the Court. Thus, this Part will begin with a discussion of the broader values articulated by the Court. Then it will articulate the precise statements made by the Court with respect to the content of the ministerial exception and recognize where the Court's language lays the seeds for the actions of lower courts.

A. Doctrinal Bases for the Exception

The Court emphatically announced that both Religion Clauses support the exception.[23] More pointedly, the Court acknowledged that conflicts between religious entities and anti-discrimination norms must be viewed through the prism of liberty rather than equality.[24] The Free Exercise Clause protects against state intrusion into the internal governance of a religious entity, particularly the selecting of ministers.[25] The Establishment Clause also forbids government involvement in the decisions that the ministerial exception protects.[26] After *Hosanna-Tabor*, it is undeniable that institutional religious autonomy is a matter of constitutional law.[27]

A combination of the historical relationship between the institutional church and state, both in the United States and England; precedent; and

22. *See, e.g.*, Natal v. Christian and Missionary All., 878 F.2d 1575, 1578 (1st Cir. 1989); Petruska v. Gannon Univ., 462 F.3d 294, 303–07 (3d Cir. 2006); EEOC v. Roman Catholic Diocese, 213 F.3d 795, 800–01 (4th Cir. 2000); 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 Hosp., 929 F.2d 360, 362–63 (8th Cir. 1991).

23. *Hosanna-Tabor*, 132 S. Ct. at 702 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

24. *Hosanna-Tabor* concludes with the following statements: "When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be *free to choose* those who will guide it on its way." *Id.* at 710 (emphasis added).

25. *Id.* at 706 ("The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.").

26. *Id.* ("According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.").

27. *See* Robinson, *supra* note 21, at 182 n.4 ("Post-*Hosanna-Tabor*, if a litigant can show that it is a 'religious institution,' it is entitled to a First Amendment right to absolute constitutional protection for any activity covered by the institutional right.").

consensus at the circuit court level formed the basis of the majority opinion. Chief Justice Roberts recognized that the First Amendment religion clauses are the offspring of historical conflict between the church and the state.[28] The tortuous relationship between the English Crown and the state church motivated the founders to locate institutional autonomy in the Religion Clauses, unthreatened by secular authority, and thereby preclude the state from interfering with the internal governance of religious entities.[29]

According to the Court, that intention served as the basis for its rulings in prior church autonomy cases, particularly in the context of property disputes.[30] The church property cases, while recognizing the impropriety of governmental interference, suggest more broadly that interference, per se, is suspect. It took only a small step to extend the logic of those cases to the conclusion that it is "impermissible for the government to contradict a church's determination of who can act as its ministers."[31] If internal property disputes are off limits, then the decision about who to employ as a teacher of doctrine and a representative of the church is as well. This history, precedent, and the consensus held by the circuit courts[32] formed the doctrinal basis for the majority opinion.

Notably, despite the Court's apparent confidence in a firm doctrinal basis, the Court felt it necessary to qualify the breadth of its holding. Significantly, it made no comment on the horizontal reach of the exception, particularly to other types of discrimination claims and common law contract and tort claims.[33] The Court was reluctant to engender confusion on this point, thereby anticipating future litigation involving issues beyond the content of the exception.

B. Guidance for Defining "Minister"

While *Hosanna-Tabor* is first known for solidifying the ministerial exception as a viable constitutional principle, perhaps the most significant aspect of the decision is what it did not say. The lack of clarity regarding the definition of minister is impossible to avoid given that the Court communicated its unwillingness to adopt a "rigid formula" for this inquiry.[34] Instead, the Court simply felt comfortable declaring that the employee

28. *See Hosanna-Tabor*, 132 S. Ct. at 702–04.

29. *Hosanna-Tabor*, 132 S. Ct. at 703 ("By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices.").

30. *Id.* at 704–05.

31. *Id.* at 704.

32. *Id.* at 705 ("[T]he Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment.").

33. *Id.* at 710 ("We express 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. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.").

34. *Id.* at 697.

met an unarticulated standard.[35]

In fairness, the Court did offer a few considerations for lower courts to ponder, particularly "the formal title given . . . by the Church, the substance reflected in that title . . . [the employee's] use of that title, and the important religious functions . . . performed for the Church."[36] But the Court did not unpack each of these considerations and lower courts are attempting to do so as we speak.[37] Instead, the majority opinion only elaborated slightly on the issue of one's title as well as job functions. According to the Court, an employee's title alone is insufficient to qualify one as a minister.[38] However, the Court was receptive to the notion that how an entity classifies an employee is relevant.[39] Thus, when a religious entity gives an employee a title that connotes a ministerial position, the Court suggests that lower courts should take that classification into account. Precisely how much remains unclear, but that answer is tempered by the Court's overarching language that title alone is not dispositive. Regardless, the Court implies a spirit of deference to religious entities on the issue of title and seemingly concedes a degree of subjectivity to this inquiry, cloaked in deference.[40]

The Court also made sure to clarify examinations into the functions of employees as many circuit courts had applied the primary duties test when analyzing cases under the ministerial exception.[41] According to the Court, error occurs when a court focuses too much on the time an employee spends on secular duties.[42] Rather, the existence of secular duties does not preclude application of the exception.[43] Swinging the pendulum the other way, the Court announced that the mere presence of some religious functions assists the cause for ministerial classification.[44] In fact, secular functions should be viewed in light of religious functions, not the

35. *Hosanna-Tabor*, 132 S. Ct. at 707 ("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.").

36. *Id.*

37. *See infra* Part II.

38. *Hosanna-Tabor*, 132 S. Ct. at 708.

39. *Id.* ("Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant.").

40. The crux of Justice Thomas's concurring opinion concerns this issue. For Justice Thomas, the question of whether an employee is a minister is "itself religious in nature." *Id.* at 710 (Thomas, J., concurring). Cognizant of establishment concerns, Justice Thomas worries that *judicial definitions* of minister will chill religious expression by inadvertently forcing religious entities to conform their definitions: "[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." *Id.* at 710–11. Hence, Justice Thomas calls for significantly more deference to the entity's classification of the employee, tempered by "good-faith." *Id.* at 710. On a side note, it is unclear why Justice Thomas, seeing as he does not define "good-faith," refrains from viewing the ministerial exception as a jurisdictional bar instead of an affirmative defense. The logic of his position would seem to support that view.

41. *Hosanna-Tabor*, 132 S. Ct. at 708–09 (majority opinion).

42. *Id.*

43. *Id.*

44. *Id.*

other way around: "The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above."[45] The Court seemed to suggest that whether someone is a minister or not should be viewed through the prism of the values underlying the exception in the first place, as well as the four factors identified earlier in its opinion, although it did not clarify what it meant by "other considerations."[46]

That ambiguity continued when the Court also tied the idea of religious functions to the notion that such an employee has a "role in conveying the Church's message and carrying out its mission."[47] The Court reiterated this concept when summarizing the purpose of the exception, stating that it "ensures that the authority to select and control who will minister to the faithful . . . is the church's alone."[48] Interestingly, these statements would seem consistent insofar as they identify ministers as wedded to the message and mission of the religious entity. But the interpretation could proceed in a few different directions. First, this understanding has the potential to broaden who may be classified as a minister as the communication of a message and pursuit of a mission could extend to a range of activities beyond church walls. Alternatively, the statement could be construed to narrow the breadth of the exception as not all religious entities are in the business of primarily sending messages, at least not like churches. Finally, the latter statement also could be construed to narrow the definition of minister to those who represent the entity to co-religionists, adherents, or members of the particular entity. Regardless of which direction the Court intended, there is a lack of clarity about the connection between the two inquiries within the exception, and the uncertainty has affected the lower courts.

Although the Court provided scant guidance with respect to who qualifies as a minister, it did clarify that the exception could extend to employment actions based on non-religious reasons.[49] In other words, the purpose of the exception is to *safeguard a church's decision* about its internal affairs, full stop, regardless of the motivations.[50] The exception exists to emphasize the ability to *decide* as an institution, irrespective of "judicial second-guess[ing]."[51] When considering the ambiguity surrounding the definition of minister, and the Court's comment that the exception may cover employment decisions without a religious motivation,[52]

45. *Id.* at 709.

46. For example, does the Court mean the values serving as the doctrinal basis of the opinion, or simply the factors it used to analyze Perich's status as an employee?

47. *Hosanna-Tabor*, 132 S. Ct. at 698.

48. *Id.* at 709.

49. *Id.* ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason.").

50. *Id.*

51. *Id.* at 716.

52. *Id.* at 698.

the exception as crafted leaves religious employers with ample discretion. And although the Court refers to internal decision-making, "internal" is not defined and the effects of such decisions still can be felt beyond the entity's walls.[53]

Justice Alito's contributions, expressed in his concurring opinion, deserve mention because, as will be demonstrated below, lower courts are struggling to separate the "who-is-a-minister" inquiry from the type of institution that is invoking the exception as a defense.[54] Perhaps foreseeing this analytical difficulty, Justice Alito called for a definition that leans on function rather than title due to the diversity in form and type when it comes to ministers.[55] For Alito, the exception should be tailored to "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[56] It is easy to see how these considerations would potentially catch more employees by remaining cognizant of the function of the underlying institution. Although the statement uses language that describes formal churches, or their analogue, the statement suggests that employees at parachurches, and religiously affiliated organizations, such as schools or universities, might be labeled ministers under some circumstances. Alito's recognition that ministers can communicate to non-adherents also supports this point given that lots of religious entities have missions devoted to serving non-adherents.[57] As discussed below, Alito's attempt to craft a standard that is cognizant of the diversity of form amongst religious entities anticipated the struggles of the lower courts.

C. Assumption of Religious Institutions

Hosanna-Tabor rested on a massive assumption, namely that the school in question, affiliated with a church, was the type of religious entity capable of having ministers.[58] The ambiguity began at the start of the opinion, which chose to characterize the school as a "religious group."[59] The Court proceeded to use that phrase seven times in its opinion.[60] More significantly, the Court used that phrase and multiple others synonymously, interchanging church, religious group, religious organization, re-

53. *Hosanna-Tabor*, 132 S. Ct. at 705–07.

54. *See id.* at 711–16 (Alito, J., concurring).

55. *Id.* at 711

56. *Id.* at 712

57. *Id.* at 713 ("A religious body's control over such 'employees' is an essential component of its freedom to speak in its own voice, both to its own members *and to the outside world.*").

58. *See* Murray, *supra* note 21, at 496–97. In fairness, this issue was not a question presented before the Court. *See Hosanna-Taber*, 132 S. Ct. at 699–710 (majority opinion). But the absence of any recognition of the potential issue renders the guidance the Court seeks to provide regarding who is a minister less helpful.

59. *Hosanna-Tabor*, 132 S. Ct. at 699.

60. *See id.* 699–70.

ligious institution, and religious employer.[61]

Treating these terms synonymously occurs at various points of the opinion, including the historical discussion that precedes the holding and its application to the facts before the Court.[62] According to the Court, deciphering the relationship between church and state involves delineating the line between the government and a "religious group."[63] But the Court's historical discussion focuses entirely on the relationship between a church proper–the Church of England–and its government counterpart.[64] The discussions of precedent also focus on hierarchical churches and congregations.[65] In other words, while the Court seems to impliedly connect the concept of a church to places of worship, it simultaneously uses different words without explanation to describe entities possibly included in the exception.[66] The key passage affirming the existence of the ministerial exception is a microcosm of the ambiguity plaguing the opinion:

> We agree that there is such a ministerial exception. The members of a *religious group* put their faith in the hands of their ministers. Requiring a *church* to accept or retain an unwanted minister, or punishing a *church* for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the *church*, depriving the *church* of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a *religious group's* right to shape its own faith and mission through its appointments.[67]

The majority opinion confuses its future audience even more when declaring, at the end of its decision, that "the ministerial exception is not limited to the head of a religious congregation."[68] If not purely a protection for churches and houses of worship, then to whom does it extend to, and to which entities must they belong?

The consequence of using similar but distinct language is that the Court never acknowledges an analytical inquiry inherent in the concept of the ministerial exception, namely which entities may invoke the exception. And that shortcoming by definition disallowed any statements about a possible connection between the two aspects of the exception. Although

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61. *See id.* Specifically, the Court uses "church" over forty times, "religious group" seven times, "religious organization" seven times, "religious institution" three times, and "religious employer" three times. *See id.*

62. *Id.* at 702–04.

63. *Id.* at 702 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

64. *Id.* at 702–04.

65. *Hosanna-Tabor*, 132 S. Ct. at 704–05.

66. Murray, *supra* note 21, at 502 ("Roberts, while solely highlighting formal 'churches' in this history, interestingly summarizes this section by stating 'the Free Exercise Clause prevents [the government] from interfering with the freedom of religious groups to select their own.'").

67. *Hosanna-Tabor*, 132 S. Ct. at 706 (emphasis added).

68. *Id.* at 707.

neither of the parties challenged the religious quality of the school in question, the Court's language fails to account for that possibility.[69] While it is possible that the Court's language could have been purposefully broad, in an effort to cast a wide net, that seems unlikely given that a deferential definition for entities would run up against the concerns shared by the majority in *Employment Division v. Smith*,[70] particularly entities becoming laws unto themselves.[71] Notably, reading between the tealeaves in Justice Alito's opinion suggests that he is open to a broad definition of religious entity for purposes of the exception.[72] He barely uses the word "church."

The import of these ambiguities is that lower courts have even less guidance on this issue than what exists for determining who is a minister. Aside from Justice Alito's opinion, a possible link between the two inquiries was never explicitly discussed by the Court, although it would seem that both inquiries are two sides of the same coin, or at least related, given that what a minister does will in theory be connected to the type of entity he or she is associated with on a daily basis.[73] Hence, determining the precise religious attributes of an entity attempting to invoke the exception could be essential to making the ministerial exception workable. Fortunately, some courts are already engaging in this task, as the issue is ripe given the prevalence of unconventional religious entities and religiously-affiliated institutions that engage in significant activities that mirror the work of secular organizations.[74] The next section aims to report the results of these decisions.

II. LOWER COURT APPLICATION OF *HOSANNA-TABOR*

While *Hosanna-Tabor* solidified the ministerial exception as a matter of federal constitutional law, lower courts generally have been cautious when confronted with novel theories of its relevance to particular claims.

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69. *Id.* at 694–716 (majority opinion).

70. 110 S. Ct. 1595 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. C. No. 103-141, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 135 S. Ct. 853 (2015).

71. *See* Murray, *supra* note 21 at 523–25 (noting how "the Court cannot extend the deference that it shows religious institutions with regard to internal affairs to the threshold issue of whether the organization is religious" because "[t]o do so would violate its own characterization of *Smith*").

72. *See Hosanna-Tabor*, 132 S. Ct. at 701–16 (Alito, J., concurring). For example, when Justice Alito discusses the history that the majority relies on in its opinion, he refers to the entities as "religious bodies" rather than churches. *Id.* at 712. Additionally, when discussing the content of the word "minister," Justice Alito links ministers to "religious organizations." Finally, his focus on functions for defining minister stems from his belief that functionality relates to institutional autonomy, thereby implying that the mission or function of an entity will color who may be classified as a minister: "The protection of the First Amendment to roles of religious leadership, worship, ritual, and expression focuses on the objective functions that are important for the autonomy of *any* religious group, regardless of its beliefs." *See id.* (emphasis added).

73. *See id.* at 711–16 (Justice Alito uses the word "church," or some variation thereof, twenty-one times in his concurrence.).

74. *See* Murray, *supra* note 21, at 508, 510–13.

For example, the exception has not been extended to tortious conduct such as clergy-abuse claims.[75] Courts are divided on whether the exception applies to private contract claims, with some going that far.[76] Specifically, in *DeBruin v. St. Patrick Congregation*,[77] the Wisconsin Supreme Court concluded that judicial adjudication of a contract dispute between an employee and an entity that would be capable of invoking the exception in a statutory context would involve the type of state action that implicates the Religion Clauses.[78] In other words, judicial review and enforcement of a private contract is state action that may allow for application of the exception despite the absence of a statute.[79]

Most significantly for purposes of this Article, lower courts have struggled to articulate the content of the exception, including which entities it applies to and which employees may be classified as ministers within those entities.[80] Courts are split between those who recognize the two-part inquiry associated with the ministerial exception and those that do not, although the reasons for refraining from acknowledging both inquir-

75. *See, e.g.*, Doe v. Corp. of Catholic Bishop of Yakima, 957 F. Supp. 2d 1225, 1231–32 (E.D. Wash. 2013) (noting how *Hosanna-Tabor* restricts its holding to claims of employment discrimination and does not include negligent hiring claims as they relate to tortious conduct); Givens v. St. Adalbert Church, No. HHDCV126032459S, 2013 WL 4420776, at *7–8 (Conn. Super. Ct. July 25, 2013); Doe No. 2 v. Norwich Roman Catholic Diocesan Corp., No. HHDX07CV125036425S, 2013 WL 3871430, at *3 (Conn. Super. Ct. July 8, 2013). *But see* Erdman v. Chapel Hill Presbyterian Church, 286 P.3d 357, 365–67, 370–71, 373–75 (Wash. 2012) (barring negligent hiring and supervision claims, but not involving clergy-abuse).

76. *See, e.g.*, DeBruin v. St. Patrick Congregation, 816 N.W.2d 878, 890 (Wis. 2012) (barring wrongful termination and breach of contract claims against Catholic parish in the Archdiocese of Milwaukee because court would have to examine *why* the church terminated the employee under the contract); Simons v. Ron Lewis, No. A-4600-12T2, 2014 WL 4916616, at *4 (N.J. Super. Ct. App. Div. Sept. 9 2014) (noting that *Hosanna-Tabor* bars interpretation of church by-laws as they relate to hiring and firing); Mills v. Standing Gen. Comm'n on Christian Unity, 117 A.D.3d 509, 509–10 (N.Y. App. Div. 2014) (barring wrongful termination contract claim); Reese v. Gen. Assembly of Faith Cumberland Presbyterian Church in Am., 425 S.W.3d 625, 628 (Tex. App.—Dallas 2014, no pet.) (breach of contract and other torts). *Contra* Petruska v. Gannon Univ., 462 F.3d 294, 295, 299, 307, 310 (3d Cir. 2006) (holding that exception does not apply to private contracts); Yong Pyo Hong v. Life Univ., B226987, 2012 WL 882518, at *9 n.7 (Cal. Ct. App. Mar. 15, 2012) (noting that ministerial exception only applies to employment statutes).

77. *DeBruin*, 816 N.W.2d at 878.

78. *Id.* at 885–86, 888–90 (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948)). The Wisconsin Supreme Court stated: "Where a plaintiff alleges that her termination was based on an improper reason, it does not matter whether she seeks damages based on a contract theory or a statutory theory. In either case, the State is effectively enjoined by the First Amendment from interfering with the religious institution's right to choose its own ministers." *Id.* at 889.

79. *Id.* at 887–90. The *DeBruin* court writes: "When a ministerial employee is terminated, the religious institution's decision about who shall teach its faith and how that shall be done are intertwined with the decision to terminate the employee. Courts can have no role in affirming or overturning such a decision based on the reason why the religious institution terminated the employment . . . The First Amendment gives St. Patrick the absolute right to terminate DeBruin for any reason, or for no reason, as it freely exercises its religious views." *Id.* at 887–88.

80. *See* Murray, *supra* note 21, at 510–11; cases cited *infra* note 84.

ies are unclear.[81] Nevertheless, the general theme is that courts concede that *Hosanna-Tabor* does little more than legitimize the exception as a matter of constitutional law. A details vacuum has ensued and, to fill the void, courts are attempting to emphasize what they perceive to be the most relevant factors of the analysis, and, in some instances, adding meat to the bones of the Court's opinion. The following two sections discuss the divergent results despite similar approaches amongst courts.

A. Defining "Minister"

Lower courts have been willing to extend the label of minister, post-*Hosanna-Tabor*, to traditionally liturgical positions,[82] as well as employees that further the mission of an entity by helping to convey the entity's message, even if the job functions of the employee are not exclusively religious.[83] The results seem to follow from *Hosanna-Tabor*'s subtle preference for a totality of the circumstances, multi-factored approach to the inquiry and its emphasis on how the employee relates to the mission of the entity.[84] The approach has blessed extension of the minister classification to employees that are not involved in the leadership of the entity, thereby legitimizing some decisions that occurred pre-*Hosanna-Tabor*.[85]

1. Employees at Church-like Entities

Hence, non-leadership employees who engage in activities that connect to the overall religious message of such entities, especially an entity that is inherently religious, like a church proper, have been classified as ministers. For example, the music director of a Catholic parish, who played the piano at Mass, was found to be a minister.[86] The act of playing the piano, while not inherently religious, occurred within an exclusively religious setting.[87] Performances within this setting contributed to conveying the message of the entity because the job responsibilities were an "important function during the service," which is the primary means by which the Church conveys its message.[88] Despite little to no leadership responsibili-

81. For example, in some cases one of the parties concedes one of the inquiries or chooses not to challenge the religiosity of the particular institution. *See Hosanna-Tabor*, 132 S. Ct. at 694–713.

82. *See, e.g.*, Saunders v. Richardson, No. 5:12-CV-511-FL, 2013 WL 4008184, at *3 (E.D.N.C. Aug. 5, 2013) (holding that clergyman at African Methodist Episcopal Church was a minister).

83. *Hosanna-Tabor*, 132 S. Ct. at 708–09.

84. *Accord* Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 175–76 (5th Cir. 2012) (recognizing that the three-part test within circuit that had existed pre-*Hosanna-Tabor* cannot apply now because *Hosanna-Tabor* recognizes inherent diversity in the definition of "minister").

85. In fairness, some courts had already walked this line prior to *Hosanna-Tabor*. *See, e.g.*, Archdiocese of Wash. v. Moersen, 925 A.2d 659, 677 (Md. 2007) (organist was not a minister); Starkman v. Evans, 198 F.3d 173, 175 (5th Cir. 1999) (music director was minister).

86. *Cannata*, 700 F.3d at 177.

87. *Id.* at 180.

88. *Id.*

ties,[89] no theological training,[90] and responsibilities that extended almost entirely to the logistical and administrative aspects of the position,[91] the employee could still be classified as a minister given the connection of those activities to furthering the message of the entity.[92] The fact that the activities engaged in by the employee were not inherently religious was immaterial given the setting in which those activities were performed and their importance to propagating the message of the entity.[93]

But not all courts extend this logic down the line to any and every employee. For a Federal District Court in Maryland, in *Davis v. Baltimore Hebrew Congregation*,[94] the minister label did not apply to a facilities manager whose responsibilities were almost exclusively janitorial.[95] The facilities manager had "'direct responsibility for all maintenance, repair, custodial, janitorial aspects of the Temple building, other facilities and grounds, including electrical, plumbing, carpentry, cabinet work, painting, purchasing material, and supervising staff.'"[96] For the court, these duties were "entirely secular."[97] The fact that they occurred within a religious setting–or perhaps more appropriately described as touching a religious setting–did not matter.[98] When compared with *Cannata*, the missing component appears to be a connection to conveying the message of the entity beyond a but-for like causation sense.[99] Whereas the music director in *Cannata* participated in liturgical and spiritual activities that actively promoted the message of the entity, the facilities manager in *Baltimore Hebrew Congregation* was a maintenance employee whose work never touched the functions of the entity beyond a physical sense.[100] This logic was followed by another District Court in North Carolina where an administrative assistant's "duties were not considered 'important to the spiritual and pastoral mission of the church.'"[101] In short, these cases seem to teach that within church-like entities, job responsibilities that are not exclusively religious, or even downright secular, may still support a minister classification if the responsibilities help convey the spiritual mes-

89. *Id.* at 171, 173, 177–78 (noting that ministers can be remote from central leadership of entity).

90. *Id.* at 171, 177–78 (noting how employee did not have requisite education, training, and experience to coordinate liturgical activities).

91. *Id.* at 171 (explaining how the music director oversaw the budget, managed sound systems, and maintained musical equipment).

92. *Id.* at 177.

93. *Id.*

94. Davis v. Baltimore Hebrew Congregation, 985 F. Supp. 2d 701 (D. Md. 2013).

95. *Id.* at 711.

96. *Id.* at 707 (quoting Pl.'s Opp. Ex. 6, No. 15-17).

97. *Id.* at 711.

98. *Id.*

99. *Id.*; *cf.* Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 177 (5th Cir. 2012).

100. Davis v. Baltimore Hebrew Congregation, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (noting how the manager's "function as Facilities Manager was not 'important' to the Defendant's religious mission in the sense contemplated" by earlier Fourth Circuit cases); *cf. Cannata*, 700 F.3d at 177.

101. McCallum v. Billy Graham Evangelistic Ass'n, No. 3:09CV381-RLV, 2012 WL 4756061, at *5 (W.D.N.C. Oct. 5, 2012).

sage of the entity beyond simply being a necessary physical condition for any type of message giving. Piano playing during Mass helps communicate the *religious* aspect of the message because music is an integral part of conveying the *religious* message; in contrast, maintaining the physical space by which religious activity is made possible is no different from maintaining a space that is not religious.

2. *Cases at Religiously-affiliated Educational Entities*

Courts have tried to import the idea of an employee contributing to conveying the message of an entity in the cases involving religiously affiliated schools. These entities are one step removed from churches and their parallels because they engage in activity that many non-religious entities also engage in, namely educating, including in secular subjects. Pre-*Hosanna-Tabor*, lower courts struggled with classifying teachers at religious schools.[102] Since the decision, a few courts have been willing to classify teachers of religious subjects at exclusively religious schools as ministers,[103] but courts continue to struggle, especially in light of the fact that *Hosanna-Tabor* involved a "called teacher."[104] The task is even more difficult given that primary school teachers often have duties that blur the line between the purely secular and religious.

One of the first cases to tackle the issue was *Herzog v. St. Peter Lutheran Church*.[105] *Herzog* involved an elementary school, "lay" teacher,[106] who was "called" to the ministry,[107] recognized by the congregation as such,[108] and who claimed a special income tax exemption for ministers.[109] As for her teaching responsibilities, she taught secular subjects.[110] Although the teaching handbook asked all teachers to incorporate religious instruction, she stated that she never did.[111] With that said, she also taught religion classes, attended church services with her class, and led one church service each year.[112]

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102. *See* Redhead v. Conference of Seventh-Day Adventists, 440 F. Supp. 2d 211, 220–22 (E.D.N.Y. 2006); Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849, 852-53 (S.D. Ind. 1998); DeMarco v. Holy Cross High Sch., 4 F.3d 166, 171–72 (2d Cir. 1993); Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, 768 N.W.2d 868, 880-84 (Wis. 2009).

103. *See, e.g.*, Galetti v. Reeve, 331 P.3d 997, 1000-03 (N.M. Ct. App. 2014) (assumed to be a minister, although case involves discussion of ecclesiastical abstention doctrine); Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination, 975 N.E.2d 433, 442–43 (Mass. 2012) (teacher of religious subjects at after school religious school that also met on Sundays).

104. *Hosanna-Tabor*, 132 S. Ct. at 694.

105. 884 F. Supp. 2d 668 (N.D. Ill. 2012).

106. *Id.* at 669.

107. *Id.* As a called teacher, she must "perform all duties of her office according to the Word of God and the confessional standards of the Evangelical Lutheran church as drawn from the Sacred Scriptures and contained in the Book of Concord." *Id.* at 669–70.

108. *Id.* at 670.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

Unsurprisingly, the court looked to *Hosanna-Tabor* for guidance because it had similar facts. *Herzog* characterized *Hosanna-Tabor* as focusing on four factors: whether the institution held the person to be a minister, the theological training of the employee, whether the employee self-identifies as a minister, and whether the job duties played a role in conveying the church's message and carrying out its mission.[113] In an anti-climactic analysis, *Herzog* applied the minister label, finding that the school classified the employee as a minister, the employee had studied theology and self-identified as a minister, and her teaching duties, including teaching religion and leading some devotional practices were sufficient for being a minister.[114] For the *Herzog* court, the last factor seems to be doing most of the work, as it suggests a strong link between the employee's responsibilities and the religious aspects of the message of the educational institution.

Herx v. Diocese of Ft. Wayne-South Bend Inc.[115] involved similar facts but resulted in a different outcome. The District Court in *Herx* also emphasized the four factors that the *Herzog* court pulled from *Hosanna-Tabor*.[116] But unlike that plaintiff, the *Herx* plaintiff did not have any theological training or self-identify as a minister.[117] Further, and perhaps most importantly, the employee's participation in religious services did not extend beyond supervision of the students at the services.[118] The last point led the court to qualify the fourth factor from *Hosanna-Tabor* by finding that mere supervision of religious activities, as a teacher, is not the same as spiritual participation in those same activities.[119] Participation involves spiritual contributions to the overall religious message of the entity whereas mere presence simply makes propagation of that message easier in a logical sense. Interestingly, this seems to mirror the *Davis* case above in its rejection of formalistic logic; both hold that mere association with a religious entity, or employment by a religious entity, cannot carry the day itself, especially when the employee's activities are not exclusively religious.[120] This logic has been extended to non-teachers in religiously affiliated schools as well.[121]

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113. *Id.* at 673.
114. *Id.* at 673.
115. 48 F. Supp. 3d 1168 (N.D. Ind. 2014).
116. *Id.* at *7–8.
117. *Id.* at *8.
118. *Id.*
119. *Id.* ("Labeling Mrs. Herx a 'minister' based on her attendance and participation in prayer and religious services with her students, which was done in a supervisory capacity, would greatly expand the scope of the ministerial exception and ultimately would qualify all of the Diocese's teachers as ministers, a position rejected by the *Hosanna-Tabor* court . . . . [it] would moot the religious exemptions of Title VII.").
120. *See* Herx v. Diocese of Ft. Wayne-South Bend Inc., 48 F. Supp. 3d 1168 (N.D. Ind. 2014); Davis v. Baltimore Hebrew Congregation, 985 F. Supp. 2d 701 (D. Md. 2013).
121. *See, e.g.*, Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012) (refusing to accept notion that a teacher at a sectarian school is automatically a minister by virtue of employment at a religiously affiliated school). It is important to note that both the *Herx* and *Dias* cases involved plaintiffs who did not have theological training and who did not self-identify as ministers while employed. In this re-

Interesting results have occurred within the higher education setting, namely at colleges and seminaries. Two cases were decided by the Supreme Court of Kentucky around the same time and involve the same employer and tenured professors: *Kirby v. Lexington Theological Seminary*[122] and *Kant v. Lexington Theological Seminary*.[123] These cases rival any other in terms of analytical depth for who qualifies as a minister and provide a unique opportunity to assess how a court treats similarly situated plaintiffs with slightly different attributes that make all the difference.

At Lexington Theological Seminary, faculty members were expected to "serve as models for ministry," prepare "faithful leaders," and "participate in formal Seminary events."[124] The faculty also was "expected," but not required to participate in Seminary worship services and convocations.[125] *Kirby* adopted the ministerial exception as a matter of state law when an employee is directly involved in promulgating and espousing the tenets of the employer's faith.[126] The "contribution to the message" aspect of the doctrine, according to the court, is why *Hosanna-Tabor* focuses on the four factors mentioned above.[127] Those factors relate to conveying the mission of an entity because they involve how the entity classifies the individual and how the individual represents or does not represent the entity. *Kirby* involved a tenured professor who taught Christian Social Ethics, who, as "a professor at an ecumenical Seminary, instructing on Christian principles, serv[ed] as a representative of the Seminary's message."[128] Representing the entity in a fashion that conveyed its overall religious message was the linchpin of the analysis and allowed the court to classify the tenured professor as a minister.

With that said, the *Kirby* court called for increased analysis under the four factors referenced in *Hosanna-Tabor*, stating that more discussion of the "actual acts or functions conducted by the employee would be prudent."[129] This is another example of a court attempting to provide clarity after *Hosanna-Tabor*. Fortunately, the *Kirby* court took a crack at the problem, arguing that inquiries should probe deeper into the four factors

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gard, it is unclear how significant those attributes were for the plaintiff in *Herzog*. With that said, both *Herx* and *Dias* seem to suggest that courts are considering the fourth factor in *Hosanna-Tabor*, namely how the employee affects the entity's mission, integral to any analysis of whether an individual is a minister or not. *See also* Hough v. Roman Catholic Diocese of Erie, No. 12-253, 2014 WL 834473 (W.D. Penn. Mar. 4, 2014) (holding that the testimony of Vicar of Education within the archdiocese that former teachers were ministers by virtue of being teachers was insufficient, alone, to qualify someone as a minister within the exception).

122. 426 S.W.3d 597 (Ky. 2014).

123. *Id.*

124. Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 602–03 (Ky. 2014).

125. *Id.* at 603.

126. *Id.* The *Kirby* opinion does not make it clear why the Kentucky Supreme Court felt compelled to make this announcement because, after all, the ministerial exception is part of the First Amendment, which is applicable to the states.

127. *Id.* at 612.

128. *Id.*

129. *Id.* at 613 (citing J. Alito's concurring opinion in *Hosanna-Tabor*).

offered by the Supreme Court because the "amalgam of secular and religious duties . . . necessitat[es] a highly malleable method of determining whether an employee is a minister."[130] Specifically, related to titles given by the entity, courts should ask whether the employee's title suggests that he or she represented the entity on matters of faith.[131] This would involve analyzing the responsibilities associated with the title, including whether they carry substantial religious significance, involved supervision or participation in ritual and worship, or spread the tenets or doctrine of the faith.[132] Additionally, inquiries into the functions of an employee should gauge whether the responsibilities were essentially liturgical, closely related to the doctrine of the institution, resulted in the personification of the religious institution's beliefs, or were performed in the presence of the faith community.[133] This is the *Kirby* court's attempt at putting meat on the bones of the four factors; these additions suggest emphasizing how an individual represents and contributes to the internal, spiritual livelihood of the institution as a whole.[134]

Interestingly, the Supreme Court of Kentucky decided another case, involving a tenured professor, differently, at roughly the same time. In *Kant v. Lexington Theological Seminary*, the tenured professor was not a minister because the professor did not espouse the tenets of the entity, either through the professor's daily duties, such as teaching, or at formal events.[135] Notably, the professor was Jewish and taught historical and religious subjects.[136] He did not participate in significant religious functions, proselytize on behalf of the seminary, or represent the seminary other than through teaching.[137] The Court followed its reasoning in *Kirby*, holding that simple promotion of mission, "alone, provides little insight into whether the duties or responsibilities undertaken by the employee 'carried substantial religious significance.'"[138] Allowing that, or "categorical application of the ministerial exception that would treat all

130. Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 613 (Ky. 2014).

131. *Id.* at 613–14 ("'[The employee's] own use of the title' should include consideration of whether the position involved, expected, or required proselytizing on behalf of the religious institution. Or did the employee use the title in a manner that would indicate to the members of the particular faith community or to the public that he was a representative of the religious institution authorized to speak on church doctrine?").

132. *Id.*

133. *Id.*

134. The *Kirby* court's attempt at supplementing the doctrine occurs in the context of analyzing whether an employee *at an admittedly religious entity* is a minister. Arguably, this tempers the language it uses when outlining its approach. As will be discussed later, it makes sense to link the analytical inquiries within the ministerial exception, but any such link must account for the diversity of religious entities that exists. Therefore, any metric by which to measure who is a minister cannot be unduly restrictive in the sense that it links the quality of being a minister to what ministers do or how they are classified in a particular religious entity, such as a church. Arguably, the *Kirby* court emphasizes the liturgical and worship aspects of ministry to a fault.

135. *See generally* Kant v. Lexington Theological Seminary, 426 S.W.3d 587 (Ky. 2014).

136. *Id.* at 591–92.

137. *Id.* at 589, 594.

138. *Id.* at 594 (citing Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 613–14 (Ky. 2014)).

seminary professors as ministers under the law," would render the exception meaningless.[139] Rather, the Court requires the conduct that promotes the mission of an entity to be linked to the "tenets of the religious institution's faith."[140] In other words, "a minister, in the commonly understood sense, has a very close relationship with the doctrine of the religious institution the minister represents."[141] This is why "the members of the congregation or faith community view a minister as one who is, among other things, the face of the religious institution, permitted to speak for the religious institution, the embodiment of the religious institution's tenets, and leader of the religious institution's ritual."[142] For the professor in question, there was a distinction between teaching religion and teaching about religion.[143] Further, the professor's personal attributes precluded a close relationship to the doctrinal tenets of the institution because as a member of the Jewish community the professor could not be said to personify the institution's doctrine.[144] The absence of liturgical functions within the entity was only the icing on the cake.

3. *Cases at Parachurches, Non-Profit, and Religiously-Affiliated Entities*

Non-profit employers have been found to contain ministers, which does not differ significantly from pre-*Hosanna-Tabor* jurisprudence.[145] Some religiously affiliated non-profits, such as subsidiaries of larger religious entities or missions, have been found to contain ministers in a fashion that is similar to a church because they are in the business of promoting a particular message.[146] In these situations, courts are classifying employees as ministers when those employees engage in spiritual activities or are instrumental in conveying the message of the entity or the larger entity, even if the responsibilities of the job are not inherently religious.[147] Furthermore, employees who represent a religious entity, even

139. *Id.* at 588.
140. *Id.* at 594.
141. *Id.* at 592.
142. *Id.*
143. *Id.* at 594–95.
144. *Id.*
145. *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); Hope Int'l Univ. v. Superior Court, 119 Cal. App. 4th 719 (2004); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007) (hospital workers); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698 (7th Cir. 2003) (press secretary); EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795 (4th Cir. 2000) (director of music ministry at local cathedral elementary school); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999) (choir director).
146. *See, e.g.*, Conlon v. InterVarsity Christian Fellowship USA, 13 F. Supp. 3d 782 (W.D. Mich. 2014) (spiritual director for staff members conceded that she was a minister and court appeared to agree). InterVarsity Christian Fellowship's main goal is to evangelize college campuses. *See* InterVarsity, *Our Vision*, INTERVARSITY CHRISTIAN FELLOWSHIP USA, https://intervarsity.org/about/our/our-vision [http://perma.cc/Q48P-553D].
147. *See* Mills v. Standing Comm'n on Christian Unity, 958 N.Y.S.2d 880 (Sup. Ct. N.Y. 2013) (involving general secretary in ecumenical agency established by the church proper); Fisher v. Archdiocese of Cincinnati, 6 N.E.3d. 1254 (Ct. App. Ohio 2014) (involving cemetery director of cemetery owned by the Archdiocese).

while engaging in activities that are not exclusively religious, still may be helping to convey the entity's message.[148] Hence, an employee who engages in secular duties within a religiously affiliated agency can still be a minister "if his job duties 'reflected a role in conveying the Church's message and carrying out its mission.'"[149] Why courts are more open to including these types of employees at non-profits than at educational institutions is unclear.

More interestingly, ministers also have been located in settings that are not exclusively religious but maintain religious affiliation, such as hospitals.[150] In *Penn v. N.Y. Methodist*, the employee engaged in pastoral care at the hospital, distributing religious texts and conducting memorial services.[151] The employee also identified as a minister.[152] And the employee had been hired specifically to engage in ministry activities within the hospital.[153] Thus, as existed pre-*Hosanna-Tabor*,[154] employers that are not exclusively religious, and that maintain fewer institutional religious activities than schools, may maintain ministers post-*Hosanna-Tabor*.

The cases in the above discussion represent the most significant pronouncements to date regarding the application of *Hosanna-Tabor* to different circumstances. They serve as evidence that courts are struggling to define the precise point at which an employee affects conveying an entity's mission "enough." By implication, they also suggest that linking the definition of minister to the "message" of an institution, without paying particular attention to the other, non-message sending activities of an entity may lead to lack of clarity or inconsistent results. In other words, perhaps the definition of who qualifies as a minister should be more cognizant of the involved entity's entire operation, not just what it communicates. Before unpacking that further, however, the next part addresses which entities have been found by courts to be capable of even invoking the exception in the first place.

B. Types of Religious Entities Post-*Hosanna-Tabor*

Various kinds of self-declared religious entities have attempted to invoke the exception following *Hosanna-Tabor*. Courts have easily acknowledged bona fide churches and houses of worship as capable of claiming the exception.[155] The same is true for religiously affiliated

148. Fisher v. Archdiocese of Cincinnati, 6 N.E. 3d 1254, 1259 (Ohio Ct. App. 2014).

149. *Id.* (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 708 (2012)).

150. Penn v. N.Y. Methodist Hosp., No. 11-CV-9137, 2013 WL 5477600 (S.D.N.Y. Sept. 30, 2013). *But see* Ockletree v. Franciscan Health Sys., 317 P.3d 1009, 1026 n.4 (Wash. 2014) (suggesting that case involving a desk clerk responsible for administering nametags at a Catholic hospital did not involve the ministerial exception).

151. *Penn*, 2013 WL 5477600, at *6.

152. *Id.*

153. *Id.*

154. *See* Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007).

155. *See, e.g.*, Cannata v. Catholic Diocese of Austin, 700 F.3d 169 (5th Cir. 2012) (parish that was part of the archdiocese); Ginyard v. Church of God in Christ, Inc., No. 3:13-

schools.[156] But, interestingly, in *Herzog* and *Herx*, the plaintiff sued both the church and the school, and the district courts chose to combine both for analytical purposes.[157] In other words, those courts did not engage in an analysis about a possible distinction between the types of entities within the ministerial exception doctrine. This analytical oversight, intentional or not, confirms that at least some courts have not considered–out loud–whether some entities are beyond the exception or whether the exception is very inclusive. The cases discussed below demonstrate that courts are struggling with how to classify self-declared religious entities.

The blurriest cases occur with religiously-affiliated entities that are not linked to a larger religious apparatus, are linked to a less traditional religious entity or belief system, or that maintain a mission that does not restrict the entity's work service to adherents. These entities, or "parachurches," often come in the form of non-profit organizations. Thus, InterVarsity, a fairly well-known Christian-based fellowship organization that primarily engages in mission work on college campuses, attempted to invoke the exception.[158] Although the plaintiff conceded the entity's religious qualities, and therefore the Western District Court of Michigan was not tasked with analyzing the question, the court cited pre-*Hosanna-Tabor* authority for the notion that untraditional religious entities can qualify for the ministerial exception.[159] The citation involved *Hollins v. Methodist Health Care Inc.*,[160] which involved a religiously-affiliated hospital system that engages in tons of non-exclusively religious activities. As such, the court seemed to communicate that parachurches, and analogous entities, are contemplated by the exception.

The Sixth Circuit confirmed this approach on appeal and arguably widened it by articulating its reasoning in greater detail.[161] Interestingly, it acknowledged that *Hosanna-Tabor* involved a "church," but InterVarsity

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CV-931-H, 2014 WL 1089625 (W.D. Ky. Mar. 14, 2014) (Pentecostal church); Davis v. Baltimore Hebrew Congregation, 985 F. Supp. 2d 701 (D. Md. 2013) (synagogue); Saunders v. Richardson, No. 5:12-CV-511-FL, 2013 WL 4008184 (E.D.N.C. Aug. 5, 2013) (African Methodist Episcopal Church); Erdman v. Chapel Hill Presbyterian Church, 286 P.3d 357 (Wash. 2012) (recognizing church, at bottom of religious hierarchy, as part of larger religious institution); DeBruin v. St. Patrick Congregation, 816 N.W.2d 878 (Wis. 2012) (Catholic parish in the Archdiocese of Milwaukee).

156. *See, e.g.*, Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668 (N.D. Ill. 2012) (Lutheran parochial school that is connected to the church proper); Herx v. Diocese of Ft. Wayne-South Bend Inc., 48 F. Supp. 3d 1168 (N.D. Ind. 2014) (Catholic parochial school); Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012) (plaintiff conceded that Catholic parochial school was a religious institution).

157. Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668 (N.D. Ill. 2012) (Lutheran parochial school that is connected to the church proper); Herx v. Diocese of Ft. Wayne-South Bend Inc., 48 F. Supp. 3d 1168 (N.D. Ind. 2014) (Catholic parochial school).

158. Conlon v. InterVarsity Christian Fellowship USA, 13 F. Supp. 3d 782 (W.D. Mich. 2014).

159. *Id.* at 781 (citing Hollins v. Methodist Health Care, Inc., 474 F.3d 223, 225 (6th Cir. 2007)).

160. 474 F.3d 223 (6th Cir. 2007).

161. *Conlon*, 13 F. Supp. 3d at 833–34.

is a "'religious group' under *Hosanna-Tabor*."[162] Again, the court cited *Hollins* for this broad reading of religious institution.[163] Specifically, the court stated that "the ministerial exception's applicability does not turn on its being tied to a specific denominational faith; it applies to multidenominational and nondenominational religious organizations as well."[164] Citing the Fourth Circuit, the court stated that a religious entity is one "'whose mission is marked by clear or obvious religious characteristics.'"[165] InterVarsity's "Christian name" and "mission of Christian ministry and teaching" were enough.[166] Noticeably, the court did not probe the contents of InterVarsity's self-proclaimed Christian ministry and mission.[167]

Despite the existence of *Hollins* pre-*Hosanna-Tabor*, the status of religiously affiliated non-profit hospitals is another area of the doctrine that is less than steady at the moment. The most notable case post-*Hosanna-Tabor*, *Penn v. N.Y. Methodist*,[168] involved a hospital that was a member of the Presbyterian Healthcare System.[169] The hospital had a long history of affiliation with a church, although that link was allegedly severed in the 1970s.[170] It also continued to maintain a separate Pastoral Care Department and employed ministers from a host of religions.[171] The Southern District of New York acknowledged, from the outset, that invocation of the ministerial exception requires a two-step analysis.[172] For the court, the hospital's decision to sever relations with the church undermined its case for remaining a religious entity.[173] With that said, the court remained open to the possibility; its decision was based entirely on the allegations in the plaintiff's complaint.[174]

Higher educational institutions that maintain religious affiliations are seeking to utilize the exception. Several state courts have struggled with

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162. *Id.* at 834. Again, the astute reader will notice the incorporation of the terms used interchangeable in the Supreme Court's opinion in *Hosanna-Tabor*.

163. *Id.* at 782 ("[W]e have previously held that a Methodist hospital is a 'clearly religious organization' for First Amendment purposes.").

164. *Id.*

165. *Id.* (citing Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004) ("applying the ministerial exception to a Jewish nursing home")).

166. *Id.*

167. *See* Murray, *supra* note 18, at 523–24 (discussing the problems with total deference to deferring to an entity's self-characterization given the demands of *Smith*).

168. Penn v. N.Y. Methodist Hosp., No. 11-CV-9137, 2013 WL 5477600 (S.D.N.Y. Sept. 30, 2013).

169. *Id.* at *1.

170. *Id.* at *8.

171. *Id.* It is unclear whether having ministers from multiple religions as part of the Pastoral Care Department aided the hospital's argument. One can see how it could, on the one hand, undermine the hospital's case for classification as a religious institution. Employing members of various faiths could be seen as an attempt to dilute the religious character of the hospital. On the other hand, it could be seen as an amplification of the religious character of the entity.

172. *Id.* In fact, the court acknowledged how "the Supreme Court did not question whether the church-owned school was a religious group for purposes of the ministerial exception." *Id.* at *7.

173. *Id.* at *8.

174. *Id.*

whether these entities are close enough to parent churches or other institutions to warrant protection. *Winbery v. Louisiana College*,[175] an intermediate state court case in Louisiana, contains a detailed reflection on both ministerial exception inquiries. Notably, it is one of the few post-*Hosanna-Tabor* decisions that recognize that the exception involves two-sub questions.[176] Louisiana College, a liberal arts institution, sought to insulate itself after terminating the employment of certain faculty and staff members.[177] The Plaintiff cited *EEOC v. Mississippi College*[178] as support for its assertion that the college could not invoke the exception.[179] The state court distinguished *Mississippi College*, which involved a liberal arts institution that was owned and operated by the Baptist Convention, which in turn consisted of Baptist churches.[180] Furthermore, Louisiana College did not have a direct affiliation with a church like the primary school in *Hosanna-Tabor*.[181] In short, the absence of a direct link to a recognizable religious entity, like a church, was fatal. The existence of a history of affiliation was not enough. This seems to be in line with the assumed reasoning in *Herzog*[182] and *Herx*,[183] but the lack of analysis in those cases prevents a firm conclusion.

The *Kirby* court, discussed in detail above with respect to its reasoning about who may qualify as a minister, also attempted to clarify which types of entities can invoke the exception. *Kirby* involved an accredited graduate theological institution of the Christian Church (Disciples of Christ).[184] The institution's goal was to prepare "faithful leaders for the Church of Jesus Christ."[185] It received funding from the church, maintained a covenant with the church, and had to agree to support the total mission of the church.[186] After explicitly stating that the "ministerial exception requires two main inquiries," including "is the employer a religious institution," *Kirby* held that "an entity, allegedly religiously affiliated, will be considered a 'religious institution' for purposes of the ministerial exception 'whenever that entity's mission is marked by clear or obvious religious characteristics.'"[187] Classifying the entity's mission, rather than its functions or activities, was the dominant feature for the *Kirby* court.[188] Direct

175. 124 So. 3d 1212 (La. Ct. App. 2013).
176. *Id.* at 1215 ("[I]n order for Defendants to garner the protection of the ministerial exception, two findings are required: (1) that the institution in question is a church; and (2) that the plaintiffs are ministers of that church.").
177. *Id.* at 1213–14.
178. 626 F.2d 477 (5th Cir. 1980).
179. *Winbery*, 124 So. 3d at 1214–15.
180. *Id.* at 1216.
181. *Id.* (citing the trial court opinion).
182. Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668 (N.D. Ind. 2012).
183. Herx v. Diocese of Ft. Wayne-South Bend Inc., 48 F. Supp. 3d 1168 (N.D. Ind. 2014).
184. Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 602 (Ky. 2014).
185. *Id.*
186. *Id.* at 609.
187. *Id.*
188. *Contra* Fishers Adolescent Catholic Enrichment Soc'y, Inc. v. Bridgewater *ex rel* Bridge, 990 N.E.2d 29, 33, 46 (Ind. Ct. App. 2013) (holding that a private, non-profit organ-

relationship to a church proper provided the "obvious religious characteristics" because the church has an obvious religious mission.[189] That type of reasoning also allowed a cemetery owned by the Archdiocese of Cincinnati to invoke the exception because the purpose of the entity was intrinsically religious as it related to Catholic burial rituals, which were extension of the mission of the Church overall.[190] But astute observers will notice that the *Kirby* court failed to note how a mission contains obvious religious characteristics.[191]

If there is one takeaway from the paucity of case law entertaining whether an entity is even capable of maintaining ministers, it is that the question needs more attention because it would seem that the answer to the first inquiry could helpfully inform the second inquiry. Put differently, the classification of an entity in terms of its religious characteristics and non-religious characteristics informs the type of ministry that the entity maintains, which in turn would inform which employees are actually connected to that particular ministry. Such an approach could be useful for the most difficult cases that involve the religiously-affiliated entities, with apparent and defined "religious" missions, that also simultaneously engage in activities that many non-religious entities also pursue on a daily basis. It is possible that these "hybrid" entities are out of luck and cannot maintain ministers. It also could be the case that these entities can maintain a lot more ministers because of the potential relationship between an employee and the mission, however attenuated. But a third option could be that entities maintain ministers to the extent that the employee's titles,

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ization that receives charitable funding and has religious, educational, and social features for home-schooled students is not a religious employer under *Hosanna-Tabor* because its primary function was education-related).

189. *Kirby*, 426 S.W.3d at 608.

190. Fisher v. Archdiocese of Cincinnati, 6 N.E. 3d 1254, 1256 (Ohio Ct. App. 2014) ("[A] manifestly religious institution established for the sacred purpose of carrying out the liturgical rite of Catholic burial and the subsequent care of the burial spaces.").

191. Defining "religious characteristics," or "religion," has had its share of treatment by legal scholars. *See, e.g.*, Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1063 n.51 (1978); Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139, 150 (1982); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 789 (1984). The Supreme Court has recognized the special constitutional status of religion, but has generally conceded broad definitions, likely due to cognizance of the Establishment Clause. *See* United States v. Welsh, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). Various circuit courts have attempted to define "religious institution" for purposes of Title VII. *See, e.g.*, Spencer v. World Vision, 619 F.3d 1109, 1111 (9th Cir. 2010) ("There is no dispute that the Employees were fired for religious reasons. For purposes of this appeal, such termination was permissible if–and only if–World Vision is a 'religious corporation, association, . . . or society' under 42 U.S.C. § 2000e-1(a). Our only inquiry, therefore, is a de novo review of the district court's summary judgment that World Vision qualifies for the exemption."); Leboon v. Lancaster Jewish Cmty. Ctr., 503 F.3d 217, 226–27 (3d Cir. 2007); Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997). For my own thoughts on how to define entities for purposes of the ministerial exception given other aspects of the jurisprudence of the Free Exercise and Establishment clauses, see Murray, *supra* note 21, at 525–28 (calling for a rebuttable presumption of religiousness that is evaluated by reasonable analogy to obviously religious entities and that also contains a sincerity element).

activities, and functions mirror the form, type, and religious functions of the underlying institution.

III. CONNECTING THE TWO INQUIRIES

Part II communicates that courts are struggling to define who may qualify as a minister, particularly at institutions that are not churches but that maintain religious attributes and that engage in activities that are not exclusively religious but may be motivated in part by religion. Finding the magical line had been the project of courts for decades before *Hosanna-Tabor* and it appears that project is far from over.[192] This Part suggests that the difficulty arises due to the failure of those courts to properly and thoroughly analyze the form, mission, and functions of the entity that seeks to invoke the exception and then correlate those attributes to the minister inquiry. The sparse guidance in *Hosanna-Tabor* only involves the attributes of a minister and only, impliedly at best, suggests that courts remain mindful of the type of institution that employs the employee.[193] While the Court emphasizes the need for flexibility, some of the factors it chooses to mention lean towards liturgical religious activity, which is only one small part of the universe of religious activity.[194] The divergent results at similar institutions–for example in *Herx* and *Herzog*–reflect how the guidance offered by the Court has confused the lower courts.[195] Both opinions focus on the religious activities of the individual, rather than locating them within the larger institutional whole.[196]

In other words, rather than focusing on the individual activities of the employee in question, and whether they are religious, courts should consider connecting the definition of minister inquiry more directly to the nature of the entity that seeks to claim an employee as a minister. Who qualifies as a minister depends first on the type of ministry that the entity engages in, not simply the individual religious activities of the minister within the entity, as characterized by looking at a few possible factors. Comprehending the religious attributes of an entity will allow courts to determine whether the employee's responsibilities correlate to those religious attributes that make the entity a religious institution in the first place.

It is important to note that this is not the same as classifying entities in terms of religiosity, which is likely beyond the purview of courts given the Establishment Clause.[197] Rather, the goal is identifying the precise religious attributes possessed by a particular entity in order to delineate what

192. *See* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 Nw. U. L. REV. 1183, 1189 (2014) ("[T]here is simply no natural point of differentiation between ministers and non-ministers.").

193. *Hosanna-Tabor*, 132 S. Ct. at 697.

194. *Id.* at 706, 707–08.

195. Herx v. Diocese of Ft. Wayne-South Bend Ind., 48 F. Supp. 3d 1168 (N.D. Ind. 2014); Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668 (N.D. Ind. 2012).

196. *Herx*, 48 F. Supp. 3d at 1177; *Herzog*, 884 F. Supp. 2d at 673–74.

197. *See* Spencer v. World Vision, 619 F.3d 1109, 1114 (9th Cir. 2010).

that entity attempts to do as an institutional whole, and therefore what ministers within that organization are primarily tasked with doing. Admittedly, identifying the religious elements of an entity is a difficult task.[198] But focusing on the religious attributes of the institution allows for differentiating between the ministerial activities of a church and a religiously affiliated school, which can be substantively different.

Once courts focus precisely on the specific religious characteristics of an entity, and how that entity seeks to act as an institutional whole, who exists as a minister comes into better focus as courts can search for whether the employee's activities correlate to the religious characteristics possessed by the entity in question. Perhaps this may be called the entity-minister correlation approach. It squares with *Hosanna-Tabor* on its face, which emphasizes how the minister inquiry is linked to the mission of the entity.[199] But it goes a step further, by recognizing that missions take various shapes and forms and vary according to the entity. A church has an intrinsically different mission from a religiously affiliated school, even though some aspects of the missions of both may overlap. But nevertheless, each has its own mission and objectives and pursues those objectives, institutionally, in different ways. Therefore, it only makes sense that the employees whose responsibilities mirror the unique religious characteristics of the mission be classified as ministers. Employees with responsibilities that fail to parallel the entity's unique attributes would exist beyond the minister label. This is why *Hosanna-Tabor* refers to "those who will personify [the entity's] beliefs."[200]

This approach manifests itself in some of the cases identified above. Thus, a piano player may be classified as a minister because contributions to the music aspects of a message-based worship ministry within a church or house of worship are indicative of promoting the main objective of the entity: communicating a religious message.[201] Churches—in the proper sense of the term—are primarily in the business of spreading a religious message during worship opportunities and sometimes outside of them. That explains why janitorial and support staff employees at churches are not ministers: their responsibilities do not mirror the entity's ministry activity because they do not help communicate a religious message in any real sense, precisely because the work done by the employee does not mirror the objectives of the institution.[202] Alternatively, in the case of the

198. *See* Robinson, *supra* note 21, at 190–93 (2014) (identifying ways in which courts and commentators have tried to define religious institutions in various contexts, including by analogy to churches, the structure of the institution in question, the not-for-profit status of the entity, and the perspectives of employees). Some scholars also have attempted to locate the analysis by pointing to implied consent doctrines. *See* Michael A. Helfand, *What is a Church? Implied Consent and the Contraception Mandate*, 21 CONTEMP. LEGAL ISSUES, 401, 409, 424–25 (2013).

199. Hosanna-Tabor Evangelical Church & Sch. v. EEOC, 132 S. Ct. 694, 708 (2012).

200. *Id.* at 706.

201. *See, e.g.*, Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 177 (5th Cir. 2012).

202. Interestingly, tort causation concepts might be useful to help explain this idea. Defining who is a minister in a but-for causation sense would be overbroad because just as there are an infinite number of but-for causes of any particular event, there could, in the-

piano player, his responsibilities mirror the institutional religious activity: communication of the Gospel, especially within a worship setting.

But the helpfulness of this new approach is most apparent in the religiously affiliated school context, an arena where defining the boundaries of the ministerial exception is the most difficult given the fact that education is not an exclusively religious activity. After *Hosanna-Tabor*, courts are tasked with looking at the employee's title, the substance reflected in the title, the employee's use of the title, and the functions performed for the entity.[203] But these factors are too broad and treat entities as the same in form, which is of course not the case when considering the unique and distinct missions of a church or temple versus a school. Titles vary across the board and the theological training that may be sufficient for a minister in one type of religious entity is different than in another entity. Additionally, the focus by lower courts on whether the employee helps convey a message fails to appreciate that not all religious entities have message sending as their primary objective. Finally, the missions of entities vary in form, depth, and scope as well. In short, while the factors maintain the guise of flexibility, through a totality of the circumstances type inquiry, they simultaneously mask a one-size-fits-all approach.

But those factors are a start; they simply need to be tempered by cognizance of the variation in form amongst religious entities, particularly educational entities. The entity-minister correlation proposal would define ministers at religiously-affiliated schools as those employees who maintain responsibilities that parallel the institutional religious activities of the school and, that, in fact, contribute to the entity's institutional religious activity as an institution. For example, employees who engage in prayer or other religious activity as an overarching *institutional exercise* may be classified as ministers. In other words, when a school employee engages in responsibilities that directly cause or contribute to *institutional religious activity as a whole*, not *simply religious activity within the institution,* that employee enters the possible minister discussion. The factors within *Hosanna-Tabor* can serve as guidance, in addition to others, when determining whether the employee affects institutional activity.

Again, something like this reasoning appears in the distinction between the outcomes in the *Kant* and *Kirby* cases from the Supreme Court of Kentucky. Whereas the professor in *Kirby* represented the school at institutional functions and engaged in religious activities at those functions, sometimes overseeing them entirely, the professor in *Kant* only participated in institutional activities.[204] But whereas the *Kirby* court seems to

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ory, be an infinite number of ministers, the existence of which affected the entity's action as a whole. The better approach is to require a proximate connection between the minister and the entity's activity, focusing on responsibility for the entity's action. Application of proximate causation definitions to whether a particular employee's actions "cause" the institution to act religiously might be worth additional attention.

203. *Hosanna-Tabor*, 132 S. Ct. at 708.

204. *See* Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 611–13 (Ky. 2014); Kant v. Lexington Theological Seminary, 426 S.W.3d 587, 595 (Ky. 2014) (recognizing that

focus on the fact that the professor "represented" the seminary,[205] the correlation approach goes one step further. Instead of focusing on whether the employee is a representative of the institution, the inquiry should be whether the employee acts in such a fashion that affects the direction or religious activity of the institution as an entity.[206] In other words, when the purported minister acts, is the institution engaging in institutional ministerial activity? Being a representative might be one way of doing that, but representation often involves message sending, which, again, is only one way in which an entity acts religiously. Thus, representation cannot be the linchpin. Rather, the question is whether the employee's act synchronizes with institutional religious activity in such a way that it could be said that the institution is acting when the employee is acting.

This approach makes sense of the fact that some religious entities, other than churches, engage in activities that are not exclusively religious.[207] Therefore, when an employee engages in religious activity at such an entity that causes or contributes to that entity, as a whole, engaging in the same religious activity, that employee might be classified as a minister, or more appropriately said, as acting in a ministerial fashion, all things considered. When an employee engages in activity that does not "move" the institution toward religious activity connected to the mission, that action is not ministerial, and that employee might not be a minister. "Might" is the operative word because the Court's aspiration for flexibility after *Hosanna-Tabor* requires an examination of particular circum-

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professor participated in religious activities but that he did not have a "relationship with the tenets of the Seminary's faith"). The Kentucky Supreme Court's language in *Kant* evinces reasoning similar to my proposal. It emphasizes how the professor "did not play 'an important role in transmitting the [Seminary's] faith to the next generation.'" *Kant*, 426 S.W.3d at 595. In other words, the professor's responsibilities did not parallel the institution's main responsibility–communicating a religious message. While the professor engaged in religious activities within the institution, those activities did not coordinate, entirely, with the institution's activities. Hence, *Kant* ends with this: "[T]he functions performed by Kant were not liturgical, did not personify the Seminary's beliefs, and were not performed in the presence of the faith community . . . . [t]he nature of Kant's work. . . serves as the basis for the determination that Kant is not a minister." *Id.* This quote appears within a discussion about the employer's tenets. *Id.*

205. *Kirby*, 426 S.W.3d at 612.

206. For a variation of this approach regarding churches, see Mark Steiner, *Who is a Minister? Broadening the Scope of the Ministerial Exception After* Hosanna-Tabor, 60 WAYNE L. REV. 261, 275 (2014) ("[L]ower courts should consider not *just* the duties of religious officials, but put a greater weight on the *ability* of the employee, through the exercise of religious judgments, to influence the religious experience of individual members of their church."). Whereas Steiner's objective appears to be broadening the definition for employees within churches, this Article's approach, while accomplishing that goal, also makes a workable framework for entities that engage in activities that are not exclusively religious, namely schools. But Steiner's overall objective regarding churches makes sense in light of the fact that churches are the most obviously religious entities, thereby warranting the most autonomy based on the Religion Clauses. That is an assertion that history supports as well considering that the rise of parachurches is a relatively recent phenomenon.

207. *See generally* Roger W. Dyer, *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split Over Proper Test*, 76 MO. L. REV. 76 (2010) (discussing various tests for determining whether an organization is "religious").

stances, and this proposal does not disturb that.[208]

It also is important to remember that institutional activity can be either inward looking or external. So, in the school context, a teacher who leads the entire school's prayer ceremony, or other religious activity that involves the entire community, is presumptively acting like a minister, regardless of whether the purpose of the activity is to cater to one's flock versus evangelization or message sending to a broader community. In either context, the teacher's action personifies the institution's religious activity because institutional religious activity occurs when the individual teacher acts. In contrast, a teacher who recites a morning prayer at the beginning of each day is not *automatically* a minister because that teacher is engaging in religious activity *within* the institution but not necessarily acting institutionally.[209]

Most importantly, the correlation approach is consistent with the doctrinal basis for the exception, namely an appreciation for institutional religious autonomy and the space that institutions should have to operate in society, both externally and internally.[210] Institutional religious autonomy is a foundational aspect of the free exercise of religion and its basis comes from the recognition that mediating institutions often contribute to society in ways that the state cannot, and, perhaps more importantly, limit the

208. As mentioned earlier, it is likely that the Establishment Clause requires a circumstantial inquiry. Additionally, as Paul Horwitz writes, "[t]he nature and extent of judicial deference should follow the nature of the institution." *See* Horwitz, *supra* note 12, at 1053.

209. It might be argued that this approach has a principal-agency feel to it, particularly the identification of apparent authority for agents. The ambiguities and need for flexibility in the ministerial exception (given other constitutional demands in the Religion Clauses) suggest that apparent authority principles are somewhat analogous to this proposal. Apparent authority normally exists when a principal manifests to a third party that the agent is authorized to act on his behalf and the third party "reasonably" relies on the manifestation. 3 AM. JUR. 2D AGENCY § 71 (2015). The latter part of the definition corresponds to finding liability and probably is not as relevant in this context. But the first part of the definition might be instructive, as institutions that allow individuals to act in such a way that reasonably indicates institutional activity, suggests a degree of apparent authority within that institution. But the entity-minister correlation proposal is broader because it accounts for the fact that not all ministers are in positions of authority. Said in another way, plenty of figures who do not possess authority could be said to cause an institution to act institutionally on a particular occasion. For example, the teacher in the above example might only be a regular member of the faculty. But at the ceremony, the teacher is a member of the faculty who is causing the institution to engage in prayer as an institution.

210. *Hosanna-Tabor*, 132 S. Ct. at 702–05; *see also* Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 175 (2011) ("For nearly a thousand years, the tradition of Western constitutionalism—the project of protecting political freedom by marking boundaries to the power of government—as has been strengthened by the principled commitment to religious liberty and church-state separation."); Garnett, *supra* note 12, at 274; Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 84–90 (2009).

reach of the state.[211] In short, the "freedom of the church"[212] is about allowing institutions room to operate. The exception provides the requisite space for that type of authentic expression of the entity in society. Institutional autonomy is about the ability of entities to participate freely and offer their unique mission to society–without unnecessary confrontation from the civil authority.

IV. CONCLUSION

Because the ministerial exception protects external freedom and internal affairs simultaneously, the classification of ministers should reflect how employees affect institutional religious activity as an institution, namely external activity, not just whether the employee engaged in religious activity within the institution or the entity considers the individual to be a minister. The latter approach mistakenly focuses the inquiry on individual activity rather than remaining mindful of the connection between that activity and the entity's mission and objectives. Put simply, ministers are those employees that "move" their institutions to engage in institutional religious behavior with the capacity to affect the entity's mission as a whole. Employees that merely engage in some individual religious behavior within the entity, even at the suggestion of the institution, are not necessarily ministers because they have not necessarily caused the institution to, as a whole, engage in religious activity. The entity's institutional integrity is less at stake under those circumstances. But when an employee's activities correspond to the institutional religious activities, whether as a representative or not, and the institution could be said to be acting when the employee acts, that employee should be classified as a minister.

211. *See* Berg et al., *supra* note 210, at 175 ("A community that respects both the importance of, and the distinction between, independent spheres of political and religious authority is one in which the fundamental rights of all are more secure. A government that acknowledges this distinction acknowledges limits to its own reach. Such a government, history shows, will more consistently protect and vindicate the liberties of both individuals and institutions."); *see also*, Robinson, *supra* note 21, at 205 (noting how religious institutions provide and "fulfill a unique and important role in our democracy" when justifying significant constitutional protection for first-order religious institutions).

212. *See* Garnett, *supra* note 9, at 14–16; *see* Horwitz, *supra* note 12, at 1053 ("These institutions developed alongside, and in some cases preexisted, the liberal state itself, and have long been coordinate parts of our broader social structure. The state—and its limits—formed with these institutions in mind. No mysticism is required to suggest that this might be constitutionally relevant.").