A Prayer for Relief: Checking the Ministerial Exception's Effect on State-Funded Employment Discrimination

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INTRODUCTION

The ministerial exception is a judicially created doctrine that bars claims concerning the employment relationship between a religious institution and its ministers.[1] In essence, it operates as an affirmative defense when entities are sued for employment discrimination. The Supreme Court established this doctrine in accordance with the principles of the First Amendment—to prevent unnecessary court entanglement with religious institutions, and to protect the right of those religious institutions to employ ministerial leadership that reflects their values.[2] At the intersection of the Establishment Clause and the Free Exercise Clause, the ministerial exception balances the importance of religious autonomy[3] against the possibility of unlawful employment discrimination.[4] Until recently, the Free Exercise benefits have outweighed the costs. But the calculus changed with the adoption of the non-discrimination theory of state aid[5] and the expansion of the definition of "minister" to include a much wider array of employees.[6] The ministerial exception now poses a greater threat of harm than it did before in three different ways.

First, by broadening the definition of a "minister," the likelihood of state-funded discrimination increases. Under recent court precedent, a minister may not need to be a "leader" of a local religious institution, as was traditionally understood.[7] Instead, the concept of "minister" has come to include many positions of varying religious responsibility and even

1. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) (recognizing for the first time the existence of a ministerial exception which "precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers."); *see also id.* at 195 n.4 ("[T]he exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar."); Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 304 (2021) ("[T]he ministerial exception is a constitutional doctrine that protects the ability of congregations to employ religious leaders in ways that otherwise would violate civil rights law.").

2. *See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof[.]").

3. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 458 (2017) ("[T]here is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels.").

4. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting) ("When [the ministerial exception] applies, the exception is extraordinarily potent: It gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their 'ministers' . . . .").

5. *See generally* Carson *ex rel.* O.C. v. Makin, 596 U.S. 767 (2022); 1 WILLIAM W. BASSETT ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW § 4:16 (2d ed. 2021) (summarizing the "no-aid" and "non-discrimination" theories and the historical shift from the former to the latter).

6. *See Our Lady*, 140 S. Ct. at 2064, 2069 (expanding the definition of minister and dropping the requirement that the minister be of a particular faith or currently practicing to qualify).

7. *Id.* at 2067 n.26.

varying religiosity.[8] For example, choir directors, teachers, principals, and school librarians have all been regarded as "ministers" by the court.[9] The breadth of the definition means that the ministerial exception will not always be used to protect religious autonomy and instead will result in a surge of employment discrimination without the possibility of a remedy for the victim.

The harm of allowing a legal out for those committing employment discrimination is compounded when the state funds the organization that engages in the discrimination. The ministerial exception creates a workaround to funding requirements that allow employers to harm employees while also depriving them of any possible legal recourse.[10] State-funded religious harm is antithetical to the principles underpinning the Establishment Clause—namely that the State shall not balance the scales in favor or against any particular religion.[11] After *Carson v. Makin*, it is considered discrimination for a state to exclude private religious organizations from receiving funds that are available to private secular organizations.[12] *Carson*, combined with the ministerial exception, has

8. *Id.* at 2076 (Sotomayor, J., dissenting) ("[T]he Court's apparent deference here threatens to make nearly anyone whom the schools might hire 'ministers' unprotected from discrimination in the hiring process."); *see, e.g.,* Zachary R. Carstens, *The Right to Conscience vs. the Right to Die: Physician-Assisted Suicide, Catholic Hospitals, and the Rising Threat to Institutional Free Exercise in Healthcare*, 48 PEPP. L. REV. 175, 209-11 (2021) (arguing that, under the new definition, healthcare workers may be considered "ministers[]"); *see also* Tebbe, *supra* note 1, at 304 ("What is more controversial—in fact, sharply so—is the application of the ministerial exception to situations where discriminatory hiring is not required by a congregation's theology.").

9. *Hosanna-Tabor*, 565 U.S. at 171 (holding a Catholic school principal with no religious title was barred from recovery by the ministerial exception); *Our Lady*, 140 S. Ct. at 2049 (determining teachers who engage in the "religious education and formation of students" fall within the exception); Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 177 (5th Cir. 2012) (including a music director within the definition of minister); and Dayner v. Archdiocese of Hartford, 23 A.3d 1192 (Conn. 2011) (determining that a principal was a minister).

10. *See Our Lady*, 140 S. Ct. at 2076 (Sotomayor, J., dissenting) ("[T]he Court's apparent deference here threatens to make nearly anyone whom the schools might hire 'ministers' unprotected from discrimination in the hiring process."); *see also* 2 THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779), *reprinted in* THE PAPERS OF THOMAS JEFFERSON 545, 545 (Julian P. Boyd et al., ed., 1950) [hereinafter A BILL FOR ESTABLISHING RELIGIOUS FREEDOM] ("[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves . . . is sinful and tyrannical . . . ."); *see also* Brown v. Board of Education, 347 U.S. 487, 494 (1954) (highlighting that the harm to citizens is greater when it is the state engaging in discrimination, not just private individuals or organizations).

11. *See* U.S. CONST. amend. I (The Establishment Clause); *see also* A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (discussing the principle and value of religious freedom with respect to the Constitution of Virginia).10

12. *See Carson*, 596 U.S. at 789 (holding that a "'nonsectarian' requirement for [] otherwise generally available tuition assistance payments violate the Free Exercise Clause of the First Amendment"); *see also id.* at 2013 (Sotomayor, J., dissenting) ("[T]he Court revolutionized Free Exercise doctrine by equating a state's decision not to fund a religious organization with presumptively unconstitutional discrimination on the basis of religious status.").

created an environment in which states may be forced to fund the very employment discrimination they seek to protect their citizens from.[13] The broad immunity prevents nearly 1.7 million employees from accessing legal protections, even though these employees are equally deserving of protection from discrimination.[14]

Second, the ministerial exception creates inequality between private and religious employers.[15] Private secular organizations must bear costs associated with minimizing exposure to employment litigation, not to mention the costs of litigation itself, including attorney's fees, discovery, and settlement or damages.[16] Meanwhile, religious employers are effectively exempted from any of those burdens. This unequal treatment[17] runs contrary to the principle that the Religion Clauses "aspire[] to create a 'benevolent neutrality'—one which would 'permit religious exercise to exist without sponsorship and without interference.'"[18]

Third, when the ministerial exception applies to non-managerial employees, it unfairly strips those employees of their protections under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, religion, color, national origin, and sex in

13. *See id.* at 2014 (Sotomayor, J., dissenting) ("From a practical perspective, today's decision directs the State of Maine (and, by extension, its taxpaying citizens) to subsidize institutions that undisputedly engage in religious instruction.").

14. *Religious Organizations in the US – Employment Statistics 2004–2007*, IBISWORLD (Sept. 24, 2021), http://www.ibisworld.com/industry-statistics/employment /religious-organizations-united-states/ [https://perma.cc/KQ3Q-XCQR]; *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2021-3, SECTION 12: RELIGIOUS DISCRIMINATION (2021).

15. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("These principles provide the framework forbidding the State to exercise viewpoint discrimination.").

16. According to the Equal Employment Opportunity Commission ("EEOC"), in 2022, employers paid $39,700,000 in benefits to employees as a result of EEOC enforcement suits filed. *See EEOC Litigation Statistics, FY 1997 through FY 2022*, EEOC (last visited Dec. 7, 2023), https://www.eeoc.gov/data/eeoc-litigation-statistics-fy-1997-through-fy-2022. With respect to litigation in the same year, "[t]he EEOC also secured approximately $343 million for 32,298 plaintiffs in the private sector and state and local government workplaces through mediation, conciliation, and settlements during the administrative process, and over $39.7 million for 1,461 individuals as a direct result of litigation resolutions." *Looking Back and Looking Forward: EEOC Enforcement Efforts*, MAYNARDNEXSEN (Oct. 11, 2023), https://www.maynardnexsen.com/publication-looking-back-and-looking-forward-eeoc-enforcement-efforts#:~:text=The%20EEOC%20also%20secured%20approximately,direct%20result%20of%20litigation%20resolutions.

17. *See Carson*, 586 U.S. at 803 (Breyer, J., dissenting) ("It may appear to some that the State favors a particular religion over others, or favors religion over nonreligion.").

18. *Id.* at 791 (Breyer, J., dissenting) (citing Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 668 (1970)); *see also Walz*, 397 U.S. at 669 ("[T]he basic purpose of these provisions . . . is to ensure that no religion be sponsored or favored, none commanded, and none inhibited.").

employment.[19] Employees who are not in managerial positions may not have had any notice that they ceded legal protections by accepting employment with a religious employer. Applying the ministerial exception to employees who did not know they were "ministers" or who are secular, non-managerial employees without formal religious training[20] is an unjust deprivation of employees' protections.

To correct these imbalances, a new test that addresses the possibility of state-funded employment discrimination is needed. This Note will discuss the evolving landscape of the ministerial exception and the increased costs it now exacts. Then, it will argue in favor of a test that would modernize the ministerial exception to conform with recent Supreme Court decisions: Unlawful employment discrimination claims—by employees considered "ministers"— against state-funded private religious employers are barred by the ministerial exception only if an employer can show that the basis for the adverse employment action is related to the employee's ministerial functions.

I. BACKGROUND

A. The Ministerial Exception

1. *Hosanna-Tabor* Established an Exception to Employment Discrimination Claims When the Employee is a "Minister"

The Supreme Court officially recognized the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*.[21] This decision arrived on the coattails of numerous circuit court decisions recognizing the existence of a "ministerial exception" after the passage of Title VII of the Civil Rights Act of 1964 and other employment discrimination laws.[22] In *Hosanna-Tabor*, the Court analyzed whether the employment relationship between a religious institution and its ministers was protected by the First Amendment.[23] Under the Court's reasoning, since the Free Exercise

19. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (detailing unlawful employment practices, including discrimination).

20. *See, e.g., Our Lady*, 140 S. Ct. at 2079 (Sotomayor, J., dissenting) ("[N]either school publicly represented that either teacher was a Catholic spiritual leader or 'minister.' Neither conferred a tittle reflecting such a position. Rather, the schools referred to both Biel and Morrissey-Berru as 'lay' teachers, which the circuit courts have long recognized as a mark of nonministerial, as opposed to 'ministerial' status.").

21. *Hosanna-Tabor*, 565 U.S. at 188.

22. *Id.* at 188, 206 n.2; *see* 42 U.S.C. § 2000e-2 (listing unlawful employment practices).

23. Meghan McCarthy, Our Lady of Guadalupe Sch. v. Morrissey-Berru*: A Broadening of the "Ministerial Exception" to Employment Discrimination in Religious Institutions*, 47 AM. J.L. & MED. 131, 133 (2021).

Clause "protects a religious group's right to shape its own faith and mission through its appointments," imposing the state's will on a group's choice of religious leadership "interferes with the internal governance of the [religious group.]"[24] By imposing its own will, the state "also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."[25] Wary of religious entanglement with the state or the judiciary and mindful of the importance of religious sovereignty, the Supreme Court adopted the ministerial exception with respect to employment discrimination claims.[26] This exception "precludes application of [Title VII and other employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers."[27]

Based on this rule, cases involving the ministerial exception would hinge entirely on whether the employee is a "minister" or not. *Hosanna-Tabor* provided guidance to the lower courts on what they should consider when deciding whether the ministerial exception applies or not.[28] Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor School") "operated a small school in Redford, Michigan, offering a 'Christ-centered education' to students in kindergarten through eighth grade."[29] The school primarily employed "called" teachers and only hired "lay" teachers when "called" teachers were unavailable.[30] Called teachers were "regarded as having been called to their vocation by God through a congregation[,]" and were required to have "satisf[ied] certain academic requirements," like a Lutheran colloquy program.[31] Once formally called, a teacher was designated a "Minister of Religion, Commissioned."[32] Cheryl Perich began working at Hosanna-Tabor School as a lay teacher and eventually became a called teacher after she met the requirements.[33] In addition to regular teaching duties, "[s]he also taught a religion class

24. *Hosanna-Tabor*, 565 U.S. at 188.

25. *Id.* at 189; *see also* Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 20 LEWIS & CLARK L. REV. 1265, 1267 (2017) ("*Hosanna-Tabor* stands in a long line of decisions, grounded primarily in the Establishment Clause, that prohibit state adjudication of 'strictly and purely ecclesiastical' questions.") (footnote omitted); *id.* at 1282–84 (arguing that the ministerial exception works as a prophylactic rule in employment discrimination cases involving ministers, keeping courts from reaching ecclesiastical questions).

26. *Hosanna-Tabor*, 565 U.S. at 188–89.

27. *Id.* at 188.

28. *Id.* at 190–92.

29. *Id.* at 177.

30. *Id.*

31. *Hosanna-Tabor*, 565 U.S. at 177.

32. *Id.*

33. *Id.* at 178; *see id.* at 177 (identifying the requirements necessary to become a called teacher).

four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service[, and] led the chapel service herself about twice a year."[34]

Perich was diagnosed with narcolepsy and consequently went on disability leave for several months to receive treatment.[35] Even though Perich notified the school of her impending return, the school contacted a lay teacher to fill Petrich's position and asked for Perich's resignation.[36] Upon Perich's refusal to resign, the school informed Perich that she would likely be fired.[37] After she communicated her intent to assert her legal rights under the Americans with Disabilities Act (ADA), the school terminated Perich's employment.[38] Ultimately, the school justified its adverse action, stating that she exhibited "insubordination and disruptive behavior" and damaged her working relationship with the school by threatening to pursue legal recourse as reasons for her termination.[39] In response, Perich filed a claim with the Equal Employment Opportunity Commission, alleging retaliation under the ADA.[40] The reviewing District Court found that "the suit was barred by the ministerial exception and granted summary judgment in Hosanna-Tabor's favor."[41]

On review, the Supreme Court declined to adopt a rigid test "for deciding when an employee qualifies as a minister."[42] Rather, the Court identified four relevant, but not determinative, circumstances that served to qualify Perich as a minister in the case at hand.[43] The primary factors that led the Court to conclude that Perich's claim was barred by the ministerial exception were "the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church."[44] Since then, the courts have continued to expand what jobs may be considered a

34. *Id.* at 178.

35. *Id.*

36. *Id.*

37. *Hosanna-Tabor*, 565 U.S. at 179.

38. *Id.*

39. *Id.*

40. *Id*.

41. *Id.* at 180–81.

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

43. First, Perich's position was that of "Minister of Religion, Commissioned"—distinct in both title and role from that of a lay teacher. *Id.* at 191. Second, the position required "a significant degree of religious training followed by a formal process of commissioning." *Id.* Third, Perich "held herself out as a minister of the Church by accepting the formal call to religious service" and "claimed a special housing allowance on her taxes available only to employees . . . 'in the exercise of the ministry.'" *Id.* at 191–92. Fourth, "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 192.

44. *Id.* at 192.

"minister," and in doing so, they have indirectly decreased the protections employees have when subjected to discriminatory conduct.

2. Our Lady Expanded the Definition of a "Minister"

The Supreme Court recently clarified its understanding of the ministerial exception in the consolidated case of *Our Lady of Guadalupe School v. Morrissey-Berru*.[45] In the first case, Agnes Morrissey-Berru alleged that Our Lady of Guadalupe School violated the Age Discrimination in Employment Act of 1967 by demoting her and failing to renew her contract in favor of a younger teacher.[46] In the second case, Kristen Biel alleged that St. James School "discharged her because she had requested a leave of absence to obtain breast cancer treatment" in violation of the ADA.[47] In both cases, the United States District Court for the Central District of California granted summary judgment to the schools, citing the ministerial exception.[48]

The United States Court of Appeals for the Ninth Circuit then reversed the District Court's judgments and found that neither teacher was employed as a "minister" for the purposes of the ministerial exception.[49] The Ninth Circuit distinguished *Hosanna-Tabor* by focusing on Morrissey-Berru and Biel's lack of clerical titles, as well as comparing the relative significance of their religious duties with those of Perich and the schools' formal religious schooling requirements with those of Hosanna-Tabor School's.[50] In other words, the Ninth Circuit considered the factors that the Supreme Court identified in *Hosanna-Tabor* and concluded that neither plaintiff was employed as a minister.[51]

Rather than accept the literal application of its precedent to new facts, the Supreme Court disagreed with the Ninth Circuit's conclusion.[52] The Court determined that the Ninth Circuit treated the circumstances identified in *Hosanna-Tabor* like a "checklist" or a "rigid test," which the Supreme Court had explicitly avoided doing in *Hosanna-Tabor*.[53] In reversing the Ninth Circuit's judgment, the Supreme Court re-emphasized its instruction to lower courts "to take all relevant circumstances into account and to determine whether each particular position implicated the

45. *Our Lady*, 140 S. Ct. at 2055 (explaining that the Court was applying *Hosanna-Tabor* to this new context of elementary school teachers at Catholic schools).

46. *Id.* at 2058.

47. *Id.* at 2059.

48. *Id.*

49. *Id.*

50. *Id.* at 2066–68.

51. *See Our Lady*, 140 S. Ct. at 2066.

52. *Id.*

53. *Id.* at 2066–67.

fundamental purpose of the exception."[54] Justice Alito framed it: "What matters, at bottom, is what an employee does."[55] Because Biel and Morrissey-Berru were employed as teachers at a religious school, the Court reasoned that they were necessarily considered ministers, as "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[56] In concluding that both teachers were "ministers," the Court heightened immunity for religious institutions.[57]

Traditionally, the ministerial exception's purpose was to ensure an organization's religious autonomy in "select[ing] and control[ing]" its leadership.[58] The Court in *Our Lady* stated that the fundamental purpose of the ministerial exception is to "protect [religious] autonomy with respect to internal management decisions that are essential to the institution's central mission."[59] Religious autonomy, as it was originally used, connoted leadership. Literally, the ability of the church to select its leaders. Internal management decisions essential to the mission, however, could include any internal decision of the organization, subjecting almost any decision to ministerial exception protection. Firing a blue-collar worker is an internal management decision, but it does not affect the church's autonomy the same way removing the regional leadership of a religion might. Under the "internal management decision central to the mission" understanding of the ministerial exception, a religious employer could explain almost any employment decision as central to its mission, barring claims for discriminatory adverse actions. So now, the new ministerial exception, as applied to protect internal management decisions, can be interpreted far more broadly than the old exception protecting religious autonomy.[60]

Overall, *Our Lady* expands the scope of the ministerial exception by changing the test from one that analyzed the employee's position in the context of leadership and ecclesiastical autonomy to one that analyzes the

54. *Id.* at 2067.

55. *Id.* at 2064.

56. *Id.*

57. *Our Lady*, 140 S. Ct. at 2067. *Hosanna-Tabor* focused on protecting a religious group's right to shape its own faith and mission through its appointments and avoiding religious entanglement with the government. *See* discussion *supra* Part I.A.i (providing an overview of the Court's holding and reasoning in *Hosanna-Tabor*).

58. *Hosanna-Tabor*, 565 U.S. at 194–95.

59. *Our Lady*, 140 S. Ct. at 2060.

60. *See id.* at 2075–76 (arguing that the Court—in allowing the religious institutions' own explanation of employees' roles to dominate consideration regarding application of the ministerial exception—"traded legal analysis for a rubber stamp.").

position in the context of the employer's mission.[61] While this expansion of the ministerial exception alone may not merit an ameliorative rule, the expansion in combination with more state-funding for religious entities demands one.

B. Non-Discrimination Theory

1. *Carson v. Makin* Increased the Likelihood that States Will Fund Private Religious Employers

A long history of tension between the Establishment Clause and the Free Exercise Clause precedes the development of the non-discrimination theory, but it appears that the Free Exercise Clause is prevailing.[62] This Note will discuss the most recent holding on this topic, *Carson v. Makin*,[63] as it is highly relevant to the current interpretation of the ministerial exception.[64]

In *Carson*, the Court invalidated Maine's tuition aid program[65] which excluded religious schools from receiving state funds. Specifically, the tuition aid program required schools to meet certain requirements to receive the assistance.[66] One requirement in particular was at issue: Any school eligible to receive tuition assistance payments must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution."[67] Justice Roberts opined: "[T]he State pay[ing] tuition for certain students at private schools" but excluding religious schools from participation "is discrimination against religion" in violation

61. *See Our Lady*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting). A question remains regarding the scope of entities that may assert the ministerial exception. Aside from directly mentioning churches, *Our Lady* does not define which entities qualify as "religious institutions." *See id.* at 2072–82. The Internal Revenue Service ("IRS") has very strict rules for defining a religious organization for tax purposes, but would those factors be pertinent when applying the ministerial exception? Title VII also defines what types of organizations fall within its religious exemptions. 42 U.S.C. § 2000e-2(e). Yet it is still unclear if "religious institutions" means the same thing. Could a privately held company with a religious mission apply the ministerial exception? It remains a cause of concern that the entity types that may qualify is so vague, considering the new breadth of the ministerial exception itself.

62. *See generally Carson*, 596 U.S. at 767; Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985)); BASSETT ET AL., *supra* note 5, at § 4:16.

63. *See generally Carson*, 596 U.S. at 767.

64. The scholarship on the history of the "play in the joints" between the two clauses is robust if the reader would like to know more. *See generally* Douglas Laycock, *Overviews and History*, *in* 1 RELIGIOUS LIBERTY (2010); 37 A.L.R. Fed. 3d Art. 12, § 8 (2018); 16A C.J.S. *Constitutional Law* § 859 (2022); BASSETT ET AL., *supra* note 5, at § 4:16.

65. ME. REV. STAT. tit. 20–A, § 5204(4).

66. *Carson*, 596 U.S. at 771.

67. ME. REV. STAT. tit. 20–A, § 2951(2).

of the Free Exercise Clause.[68] This ruling firmly established a non-discrimination approach to state funding of private organizations.[69]

The Supreme Court's reasoning is based on two ideas found in the Free Exercise Clause. First, that "[t]he Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'"[70] Second, that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."[71] The Court then applies these two principles to Maine's tuition aid program which excludes religious schools from receiving assistance and, more generally, attempts to withhold public benefits from religious organizations.[72] The Court ultimately found that conditioning the availability of benefits solely on a private school's religious character "effectively penalize[d] the free exercise" of religion.[73] Such a law must be analyzed under strict scrutiny.[74] Maine's tuition aid program did not survive strict scrutiny on compelling interest grounds.[75] The Court noted that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause."[76] Based on that premise, Maine's law "promotes stricter separation of church and state than the Federal Constitution requires."[77] Therefore, the Court held that a state's "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise."[78]

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68. *Carson,* 596 U.S. at 781.

69. *Id.* at 788.

70. *Id.* at 778 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)).

71. *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

72. *Id.*

73. *Id.* at 779 (quoting McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion)). *But see id.* at 810 (Sotomayor, J., dissenting) ("If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens.").

74. *Carson,* 596 U.S. at 779 (citing Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020)).

75. *See id.* at 780–81 (noting that "only in rare cases" will a law targeting "religious conduct for distinctive treatment" survive strict" and going on to conclude that "[t]his is not one of them") (citations omitted).

76. *Id.*

77. *Id*.

78. *Id.* at 781 (quoting *Espinoza*, 140 S. Ct. at 2260). *But see Rosenberger*, 515 U.S. at 875 ("The Court . . . has categorically condemned state programs directly aiding religious activity."); Wolman v. Walter*,* 433 U.S. 229, 254 (1977) (striking down a field trip aid program because it was "an impermissible direct aid to sectarian education"); Meek v. Pittenger, 421 U.S. 349, 365 (1975) (rejecting a material and equipment loan program to nonpublic schools because it did not allow "aid [to be channeled] to the secular without providing direct aid to the sectarian"); Levitt v. Comm. for Pub. Ed. & Religious Liberty, 413 U.S. 472, 480 (1973) (striking state funds for

Plainly stated, states are not required to subsidize public education, but those that elect to do so "cannot disqualify some private schools solely because they are religious . . . ."[79] Under this non-discrimination rule, private religious schools, and other types of religious employers, are much more likely to receive state funding, but will more likely subject their employees to state–sponsored discrimination.[80]

II. ARGUMENTS IN FAVOR OF AN ADDITIONAL TEST

This Section highlights how the costs of the ministerial exception now outweigh the benefits. It proceeds in three parts. The first part establishes the state interest in anti-discrimination laws and then argues that state-funded discrimination will increase because of the holdings in *Our Lady* and *Carson*. The second part demonstrates that the ministerial exception now imposes a greater burden on private secular employers than it does on private religious employers. The third part illustrates the effect the expanded definition of "minister" will have on employees without an ecclesiastical position and argues that stripping these employees of their Title VII protections is patently unfair.

A. *Our Lady* and *Carson* Increased the Costs of the Ministerial Exception By Increasing the Possibility of State-Funded Employment Discrimination.

1. States Have a Strong Interest in Discouraging Discriminatory Conduct

Since the Civil Rights Act of 1964, state governments have passed progressive legislation to prohibit discrimination on a number of bases.[81]

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nonpublic schools for state-mandated tests because the State did not "assure that the state-supported activity is not being used for religious indoctrination"); Tilton v. Richardson, 403 U.S. 672, 683 (1971) (plurality opinion) (holding a 20–year limit on the prohibition of religious use in federal construction program for university facilities as insufficient because the short-term limitation "is in effect a contribution of some value to a religious body" after the time period is up).

79. *Carson*, 596 U.S. at 780 (quoting *Espinoza*, 140 S. Ct. at 2261).

80. *See* Moriah Balingit, *High Court Opens the Door to More Public Funding of Religious Schools*, WASH. POST (June 21, 2022, 7:24 PM), https://www.washingtonpost.com/education/2022/06/21/religious-school-supreme-court-carson/ [https://perma.cc/S5SP-RQ6W]. *But see Carson*, 596 U.S. at 785 ("The State retains a number of options: it could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own."). *See also* Aaron Tang, *Who's Afraid of* Carson v. Makin*?*, YALE L. J. (Nov. 17, 2022) (explaining how *Carson* poses a danger by requiring states to subsidize religious schools even if they discriminate against LGBT students).

81. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *see* JAMES BUCHWALTER, ET AL., 14 C.J.S. *Civil Rights* § 58 (2022) (listing many of the cases upholding state laws which protect civil rights and prohibit discrimination); *see also* Jerome Hunt, A STATE-BY-

In an attempt to root out discriminatory conduct, states have predicated various funding measures on private entities' compliance with anti-discrimination laws.[82] These measures span many areas of public interest, ranging from education[83] to foster care programs.[84] Funding is the carrot that incentivizes organizations to participate in a benefits program, and anti-discrimination requirements are the stick that promote equal treatment for citizens.

Under *Carson*, however, private religious institutions may take the carrot and use the ministerial exception to dodge the stick.[85] While some stick dodging is necessary to further the ministerial exception's purpose, the new breadth of the exception allows employers to completely disregard anti-discrimination laws while receiving funding. This is not to say that religious employers are seeking funding invidiously, content in the knowledge that they are safe from litigation. Most organizations do not take adverse employment actions with the goal of thumbing their nose at employment law. The stick is there to protect individuals from discrimination when discrimination, inevitably, arises. And while states may not have a strong interest in taking punitive measures against employers, they certainly have an interest in protecting their citizens, and want their citizens to have access to legal protections if—and when—the time comes.[86] As evidenced by the fact that during the course of the litigation, Maine amended its laws to protect students from "educational discrimination . . . on the basis of sex, sexual orientation or gender identity" in *any* school that accepts public funding.[87] While this policy change will protect students from discrimination, what about employees?

The ministerial exception and third-party funding make it easier for employers to engage in employment discrimination as they face no consequences for doing so. This lack of deterrence, in combination with *Carson*'s funding mandate, effectively forces states to fund the very discriminatory conduct they seek to deter (albeit, "through the independent

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STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES, https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf.

82. *See* CIVIL RIGHTS AND DISCRIMINATION, AM. L. REPS. INDEX (Updated Oct. 2022) (listing state laws that prohibit discrimination).

83. *See generally Carson*, 596 U.S. at 767.

84. *See* Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

85. *See* discussion *supra* Part I.B.1.

86. State laws broadly protect against employment discrimination on the following bases: race in 49 states, national origin in 48 states, religion in 48 states, age in 48 states, disability in 49 states, sex/gender in 49 states, pregnancy in 45 states, and, as part of an upward trend, sexual orientation, and gender identity in 25 states and marital/familial status in 23 states. *See Employment Discrimination Laws: 50-State Survey*, JUSTIA (last visited Oct. 8, 2022), https://www.justia.com/employment/employment-laws-50-state-surveys/employment-discrimination-laws-50-state-survey/ [https://perma.cc/JLN2-LUPS].

87. ME. REV. STAT. Tit. 5, § 4602(1) & (5)(c) (Cum. Supp. 2021).

choices of private benefit recipients.").[88] Justice Alito posits that neutrally funding schools does not offend the Establishment Clause.[89] Yet, allowing private benefit recipients to follow only some state and federal laws means states will inevitably be forced to both fund and tolerate discrimination.[90] This is a serious abrogation of state autonomy. In order to return some power to the states, a test that checks the ministerial exception is necessary.[91]

2. *Our Lady* and *Carson* Have Increased the Possibility of State-Funded Discrimination

Our Lady expanded what positions may qualify as a "minister" under the ministerial exception, denying employees viable legal recourse to employment discrimination.[92] Almost simultaneously, *Carson* significant ly increased the likelihood of private religious employers receiving state funding.[93] Given these two cases, the ministerial exception will likely become an increasingly common affirmative defense used by private religious employers.[94] Because the ministerial exception completely bars the recovery of damages and injunctive relief,[95] the risk that state-funded unlawful employment actions will be swept away by the exception is now much greater.

The original justifications for the ministerial exception were twofold: (1) To protect religious organizations' ability to choose their leadership, and (2) To prevent any unnecessary entanglements with religious

88. *Carson*, 596 U.S. at 779.

89. *Id.*; Locke v. Davey, 540 U.S. 712, 723 (2004) (listing state constitutions that prohibit "*any* tax dollars from supporting the clergy"). *See* Pa. Const., Art. II (1776) ("[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent"); N.J. Const., Art. XVIII (1776) (similar); Del. Const., Art. I, § 1 (1792) (similar); Ky. Const., Art. XII, § 3 (1792) (similar); Vt. Const., Ch. I, Art. 3 (1793) (similar); Tenn. Const., Art. XI, § 3 (1796) (similar); Ohio Const., Art. VIII, § 3 (1802) (similar).

90. *But see* Norwood v. Harrison, 413 U.S. 455, 463 (1973) ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.").

91. *See* discussion *infra* Part III.A.**Error! Reference source not found.**

92. *See* discussion *supra* Part I.A.2; *see also* Zachary R. Carstens, *The Right to Conscience vs. the Right to Die: Physician-Assisted Suicide, Catholic Hospitals, and the Rising Threat to Institutional Free Exercise in Healthcare*, 48 PEPP. L. REV. 175, 205 (2021) ("[F]rom the moment of its judicial inception, the 'ministerial exception' has been more than just an exception and applied to more than just ministers.").

93. *See* discussion *supra* Part I.B.1.

94. *See Our Lady*, 140 S. Ct. at 2072–82 (Sotomayor, J., dissenting) ("As the Government (arguing for Biel at the time) explained to the Ninth Circuit, 'thousands of Catholic teachers' may lose employment-law protections because of today's outcome.").

95. *Hosanna-Tabor*, 565 U.S. at 196 ("The case before us is an employment discrimination suit . . . . we hold only that the ministerial exception bars such a suit.").

organizations.[96] *Our Lady* watered down the religious autonomy argument by permitting the use of the exception for an as-yet-undefined amount of positions.[97] *Carson* weakened entanglement concerns by explicitly taking a non-preferential[98] view of the Establishment Clause, and implicitly incentivized the financial intermingling of church and state. The effects of these two holdings will encourage employers to claim that some or all of their employees are "ministers," thereby excluding them from *any* employment law remedies.[99] The ministerial exception still serves a vital constitutional interest: To protect the free exercise of religious organizations. However, the original understanding of the exception has changed, as well as the present-day context in which the exception takes effect.[100] The balance between the protection of free exercise and the risk of unlawful employment actions now leans heavily toward free exercise, and an alteration is needed to correct the imbalance.

It could be argued that generally applicable anti-discrimination laws are already effective buttresses to prevent, or at least mitigate, the worst cases of religious discrimination.[101] For example, Maine's 2021 revision of its school funding law "forbids discrimination based on gender identity and sexual orientation, and it applies to every private school that chooses to accept public funds, without regard to religious affiliation."[102] In response, some private religious schools declared that they would decline state funds if required to change their admissions standards.[103] Utilizing

96. *Id.* at 188–89.

97. *Our Lady*, 140 S. Ct. at 2072–82 (Sotomayor, J., dissenting); *see also Hosanna-Tabor*, 565 U.S. at 188 ("[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so . . . interferes with the internal governance of the church, *depriving the church of control over the selection of those who will personify its beliefs*." (emphasis added)).

98. *See* 1 Douglas Laycock, *Overviews and History*, *in* RELIGIOUS LIBERTY 617–18 (2010) (describing non-preferentialism).

99. *See Carson*, 596 U.S. at 791–95 (Breyer, J., dissenting); *see* Sunu P. Chandy & Laura Narefsky, *Exception Swallowing the Rule? The Expanding Ministerial Exception Puts Workers at Religious Employers at Risk of Losing Civil Rights Protections*, ABA (July 5, 2022) (explaining that the expansion of the exemption puts employees at risk of going without employment legal protections), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/exception-swallowing-the-rule/ [https://perma.cc/8MHD-S8SW].

100. *See* discussion *supra* Part I.A.

101. *See* Tebbe, *supra* note 1, at 305 ("Employment discrimination laws like Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act are neutral and generally applicable."); Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/opinion/supreme-court-guns-religion.html [https://perma.cc/ZDK4-U6UH] (noting that states can require private schools to accept LGBT students if the schools choose to accept public funds).

102. Tang, *supra* note 101.

103. *Id.*

this chilling effect, a state could also tie funding to a prohibition on employment discrimination based on gender identity and sexual orientation.[104] This type of law would have three positive effects: (1) protecting the civil rights of employees whose employers accept state money, (2) allowing religious entities the opportunity to turn down state funds if they do not want to accept the conditions, and (3) maintaining the separation of church and state. But the ministerial exception is so lethal to employment discrimination claims that employers could take adverse employment actions against employees on these exact grounds without evidence of their discrimination ever seeing the light of day. The claim itself is barred if the position is considered a "minister," and that is where the inquiry ends. And after *Our Lady* expanded the categories of employees that could be covered, the employee very likely is a "minister."[105]

So, the question of discrimination cannot even be reached when the ministerial exception is applied. This means thousands of employees are left without adequate protections in their workplace,[106] secular employers are treated differently by state anti-discrimination laws, and states are required to fund religious activities. All this in a time when the EEOC is seeing a significant increase in its litigation filings.[107] A neutral law of general applicability may have a chilling effect, but it cannot prevent a religious employer from unlawfully discriminating. To summarize, at the confluence of *Our Lady* and *Carson* is the propagation of unlawful employment discrimination by religious employers funded by the State, and neither the government nor private citizens have the ability to enforce

104. The unconstitutional conditions doctrine is only implicated insofar as *Employment Division v. Smith* allows. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."); *see also* Emp. Div., Dep't of Hum. Res. Of Or. V. Smith, 494 U.S. 872, 878–79 (1990).

105. *See* McCarthy, *supra* note 23, at 131.

106. *See Our Lady*, 140 S. Ct. at 2072–82 (Sotomayor, J., dissenting) ("As the Government (arguing for Biel at the time) explained to the Ninth Circuit, 'thousands of Catholic teachers' may lose employment-law protections because of today's outcome.").

107. "According to preliminary data, the U.S. Equal Employment Opportunity Commission (EEOC) filed 143 new employment discrimination lawsuits in fiscal year 2023, representing more than a 50% increase over fiscal year 2022 suit filings. The fiscal year 2023 suit filings include 25 systemic lawsuits, almost double the number filed in each of the past three fiscal years and the largest number of systemic filings in the past five years. Also, the EEOC filed 32 non-systemic class suits seeking relief for multiple harmed parties and 86 suits seeking relief for individuals." *EEOC Announced Year-End Litigation Round-Up for Fiscal Year 2023*, EEOC (Sept. 29, 2023) https://www.eeoc.gov/newsroom/eeoc-announced-year-end-litigation-round-fiscal-year-2023.

employment protections against religious entities that receive state funds.[108]

B. The *Carson*/*Our Lady* Era of the Ministerial Exception Burdens Private Secular Employers More than Religious Employers

The Court interprets the exclusion of private religious employers from publicly available financial benefits as a form of discrimination by the states against religious groups, which it holds to be a violation of free exercise rights.[109] However, in correcting for the discrimination against religious employers, the Supreme Court has now unequally burdened private secular employers by granting religious employers a windfall—foreclosing employment liability under the ministerial exception—while secular employers remain burdened with costly litigation. This result seems to run counter to the Court's reasoning that "[i]n proscribing all laws 'respecting an establishment of religion,' the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally."[110]

Abiding by the various employment anti-discrimination laws is a costly endeavor for employers.[111] For private religious employers, the *Our Lady* ministerial exception nearly precludes paying this cost.[112] The wide breadth of the exception means that many employees, if not all, may fall within the exception's ambit depending on the nature of the employer's business.[113] Take, for example, religious schools at the far end of the

108. *See Our Lady*, 140 S. Ct. at 2049; *Carson*, 596 U.S. at 767.

109. *See Carson*, 596 U.S. at 781 (stating that it is "discrimination against religion" for a state to "pay[] tuition for certain students at private schools—so long as the schools are not religious").

110. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 8 (1989). In this case, the Court held that "Texas' sales tax exemption for periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teaching of the faith lacks sufficient breadth to pass scrutiny under the Establishment Clause.". *Id.* at 14. *See also* BARBARA J. VAN ARSDALE, ET AL., AM. JUR. CONSTITUTIONAL LAW § 441 (2D ED. 2022) ("Under the Establishment Clause, the government cannot set up a church, pass laws which aid one religion, pass laws which aid all religions, officially prefer one religious denomination over another, or prefer religion to irreligion . . . .").

111. *See* Edward Segal, *After Setting a New Record In 2020, Workplace-Related Litigation Will Remain a Source of Significant Financial Exposure for Employers*, FORBES (Jan. 5, 2021, 6:00 AM), https://www.forbes.com/sites/edwardsegal/2021/01/05/after-setting-a-new-record-in-2020-workplace-related-litigation-will-remain-a-source-of-significant-financial-exposure-for-employers/?sh=1520615678bd [https://perma.cc/J459-Y7X2].

112. *See* discussion *supra* Part I.A.2,

113. *Our Lady*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting) ("[S]ources tally over a hundred thousand secular teachers whose rights are at risk. And that says nothing of the rights of countless coaches, camp counselors, nurses, social-service workers, in house lawyers, media-relations personnel, and many others who work for religious institutions. All these employees could be subject to discrimination for reasons completely irrelevant to their employers' religious tenets." (citations omitted)).

spectrum. These schools could feasibly require an element of faith-based teaching or role-modeling in every employee position, making every employee a "minister."[114] In comparison, private secular schools have no special protections from employment discrimination lawsuits.[115] The secular school is left far more vulnerable to litigation than a religious one. As a result, the pendulum has now swung in favor of religious employers, resulting in a sizeable reduction in employment-related costs.[116] The higher standards of employment discrimination that secular/atheistic institutions must meet can be viewed as "imposing special disabilities on [the] basis of religious views or religious status."[117] Here, the status is secular, and the disability is litigation costs.[118]

This Note does not argue that religious and secular institutions must be treated exactly the same. Religion continues to hold a unique position in the Constitution and our society, and the ministerial exception serves both the Establishment and Free Exercise Clauses.[119] But it can be checked

114. Because a "minister" is defined by the employer's mission, if the mission entrusts every employee with modeling the faith for the students, every employee could conceivable be a "minister." *See Our Lady*, 140 S. Ct. at 2069 ("When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.").

115. *See* 42 U.S.C. § 2000e-2(e) (listing exceptions to Title VII, none of which apply to secular schools).

116. *See* Segal, *supra* note 111; *see also* Eric Bachman, *How Much Money is an Employment Discrimination Case Worth?*, FORBES (Apr. 26, 2022, 12:05 PM), https://www.forbes.com/sites/ericbachman/2022/04/26/how-much-money-is-an-employment-discrimination-case-worth/?sh=b7062b675072 [https://perma.cc/HZ7T-X5QD]. For example, "[a]ccording to preliminary data, the U.S. Equal Employment Opportunity Commission (EEOC) filed 143 new employment discrimination lawsuits in fiscal year 2023, representing more than a 50% increase over fiscal year 2022 suit filings. The fiscal year 2023 suit filings include 25 systemic lawsuits, almost double the number filed in each of the past three fiscal years and the largest number of systemic filings in the past five years. Also, the EEOC filed 32 non-systemic class suits seeking relief for multiple harmed parties and 86 suits seeking relief for individuals." *EEOC Announced Year-End Litigation Round-Up for Fiscal Year 2023*, EEOC (Sept. 29, 2023), https://www.eeoc.gov/newsroom/eeoc-announced-year-end-litigation-round-fiscal-year-2023.

117. ARSDALE ET AL., *supra* note 110, at § 425.

118. As recognized in *Texas Monthly, Inc. v. Bullock*, directing a windfall to religious organizations while burdening nonbeneficiaries is an unjustifiable award to religious organizations. *Tex. Monthly, Inc.*, 489 U.S. at 15 ("[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it 'provide[s] unjustifiable awards of assistance to religious organizations.'" (citations omitted)). In a way, the ministerial exception acts as a subsidy to religious organizations because it exempts them from most costs associated with employment litigation.

119. *See* Lupu & Tuttle, *supra* note 25, at 1311 ("In such cases, the ministerial exception represents an exercise in constitutional prophylaxis, steering courts away from the forbidden territory of adjudicating the quality of ministerial performance and protecting religious employers from adjudicative mistakes.").

so that religious institutions do not take such precedence over our secular ones. By requiring state-funded religious employers to state the basis of the employment action in a ministerial exception claim, courts leave the door to litigation cracked open as opposed to fully shut. This small step would even the playing field between employers of all views while continuing to give religion the due deference the Constitution requires. All of which would protect employees' ability to enforce their civil rights.

C. Applying the Ministerial Exception to Non-Managerial Secular Employees Unfairly Strips Them of Their Rights

Under the ministerial exception, employees of religious employers have less employment protections than their secularly employed counterparts.[120] Whether these protections are lost depends solely on the employer's religious beliefs.[121] Essentially, deference to the religious employer comes at the cost of undue hardship to employees.[122]

This disparity between secular and religious employees was strongly justified when the ministerial exception applied primarily to ecclesiastical leaders.[123] Individuals considered "ministers" under the *Hosanna-Tabor* analysis chose a religious employment path.[124] This is self-evident from the *Hosanna-Tabor* factors themselves: The title of the job, the duties therein, any special religious training, and how the employee views themself.[125] People who took positions of overt religiousness or positions high in a religious hierarchy ceded major employment rights to an organization that operated with special exceptions in our government.[126] Applying the ministerial exception in these cases meant that potentially unlawful harm was done to willing participants who accepted leadership

120. Anyone who meets the broad definition of a minister is now unable to bring any kind of employment discrimination claim. *See* discussion *supra* Part I.A.i.

121. *Hosanna-Tabor*, 565 U.S. at 188 (holding that there is "such a ministerial exception" to Title VII cases that "precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers").

122. *See* Tebbe, *supra* note 1, at 308 ("[W]hen free exercise exemptions were explicitly provided, they were generally constrained to situations in which exempting one private citizen would not entail undue hardship to any other identifiable private citizen. This practice was grounded both in the Free Exercise Clause itself and in the Establishment Clause. Yet today, there are signs that such precedent is unlikely to be observed.").

123. *See Hosanna-Tabor*, 565 U.S. at 196 ("The church must be free to choose those who will guide it on its way.").

124. *See Our Lady*, 140 S. Ct. at 2062–63; *see also* Rweyemamu v. Comm'n on Hum. Rts. & Opportunities, 911 A.2d 319, 323 (Conn. App. Ct. 2006) (concerning a case in which a black African ordained Catholic priest from Tanzania, East Africa, Father Justinian, alleged that he was refused a promotion to administrator of the parish and a less-qualified white deacon was appointed in his place)

125. *See Our Lady*, 140 S. Ct. at 2062–63.

126. *See* discussion *supra* Part I.A.i.

positions that placed them in a position of higher authority and, therefore, greater vulnerability.

Applying this same theory to an employee who holds no leadership position, does not profess a belief in the faith, and never intended to wield religious power is different. This kind of employee did not make the same choice as the ecclesiastical leader. It is the fundamental difference between a person waiving protection and having that protection taken from them. This is not to say that non-managerial secular employees should not be considered "ministers." The Court has made it clear that the term "minister" is to be applied broadly in line with the employer's mission.[127] The abrogation of employee autonomy is simply another distinguishable cost that the new ministerial exception exacts. A cost that, with the tools we currently have, is too burdensome on employees.

One counterargument to the unfair deprivation of rights is that these employees were not forced to work for a religious employer. These employees voluntarily gave up employment protection by choosing this employer to begin with and are free to seek other protected secular employment. However, for many of these employees, the religiosity of the employer may have played little to no part in their decision.[128] It is even possible that an employee who is considered a "minister" might not even be fully cognizant of the employer's religious designation[129] or what that designation entails. Indeed, many law students and professionals are completely unaware of the ministerial exception's existence. How can we expect laypersons to understand the significance of religious employment if even we, the legal professionals, are often unaware of the risks?

Carson itself proves a fitting example.[130] Maine's tuition assistance program stemmed directly from the lack of public schools in rural areas.[131] The result of *Carson* is that Maine will pay the tuition costs for parents in these rural areas who choose to send their children to an available private religious school.[132] Now consider the potential employees of such a school

127. *See Our Lady*, 140 S. Ct. at 2064–66.

128. *See id.* at 2069 ("Respondents argue that Morrissey-Berru cannot fall within the *Hosanna-Tabor* exception because she said in connection with her lawsuit that she was not 'a practicing Catholic.'").

129. Hobby Lobby is a good example of how broad the exemption could be applied. Hobby Lobby is a for-profit corporation that "employ[s] thousands of persons of different faiths." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 757 n.19 (2014) (Ginsburg, J., dissenting). In *Burwell v. Hobby Lobby Stores, Inc.* the Supreme Court held that the Religious Freedom Restoration Act ("RFRA") applied to Hobby Lobby, even though it is a for-profit corporation. *Id.* at 707–709. There is no Supreme Court caselaw that delineates what a religious institution is for the purpose of applying the ministerial exception. If Hobby Lobby can apply the ministerial exception, how many of its supervisors could, unwittingly, be considered ministers?

130. *See Carson*, 596 U.S. at 767.

131. *See id.* at 796–97 (Breyer, J., dissenting).

132. *See id.* at 787–89 (majority opinion).

in this rural area. A secular teacher who wishes to teach students in their community may only have one choice of school to work for—the private religious school. Should this teacher receive less employment protection than their peers in urban areas with more schools? This scenario exemplifies the fact that two similarly situated employees may be treated differently, not because of a choice they made, but because of their employer.

One counterargument still lurks in the background because one can easily then ask: Why doesn't the rural teacher just move to a place with a public school? But at what point does the Court admit that it is asking an employee to change too much just to find equal employment protection under the law? Forcing them to move? Choosing a different profession? All of these are burdensome on an employee who is seeking employment and who often faces limited options.

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Despite its necessity in Free Exercise jurisprudence, the costs of the *Our Lady* ministerial exception are real and must be acknowledged.[133] If something can be done to minimize those costs while staying true to the ministerial exception's protection of religious autonomy, then shouldn't that something be done?

III. A NEW TEST TO CHECK THE MINISTERIAL EXCEPTION'S EFFECT ON STATE-UNDED EMPLOYMENT DISCRIMINATION

A. The Bona Fide Ministerial Function Test

Because *Our Lady* and *Carson* have increased the costs of the ministerial exception, a new test is needed to offset the imbalance. This Note proposes that courts adopt the following test when deciding whether the ministerial exception applies in cases where the entity receives state funds: Unlawful discrimination claims by employees considered "ministers" against private religious employers that receive state funding are *only* barred by the ministerial exception when an employer shows that the basis for the adverse employment action is related to the employee's ability to perform their ministerial functions.[134] The test has four parts: (1)

133. *See* Lupu & Tuttle, *supra* note 25, at 1311 ("We recognize that reasonable people can differ about the wisdom of a prophylactic rule in this context. For scholars in the dissenting camp, adjudicative mistakes that permit discriminatory firings are far worse than adjudicative errors that pressure religious entities to tolerate unacceptable performance in ministry. In a world in which the size, frequency, and direction of errors will always be uncertain, the ministerial exception appears to some as a blunt and destructive instrument.").

134. *See Our Lady*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting) ("[The exception] gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their 'ministers,' even when the discrimination is wholly unrelated to the employer's religious beliefs or practices.").

The employee must meet *Our Lady's* definition of a "minister"; (2) The test only applies to religious employers which receive state funding; and (3) The employer bears the burden of production to show that (4) The adverse employment action must be related to the employee's ability to perform their ministerial function.[135]

Let's break down the test further. Part one—This prong employs *Our Lady's* definition of a "minister" and embraces the new form of the ministerial exception. The case law on the ministerial exception has always centered on one question: Is the person a minister?[136] The answer to this question has typically been the end-all-be-all of the case since if the employee is a "minister," then the claim is barred.[137] Rather than taking for granted that the ministerial exception applies automatically upon a finding that the employee is a "minister," this test asks whether the ministerial exception should still apply when the adverse employment action does not implicate any ministerial function.[138]

Part two—The test only applies to religious employers which receive state funding—attenuates the test to only address the heightened harm that occurs when the State is implicated in the ministerial exception. One might argue that if the test is restricted so narrowly, it will not have a large enough impact to warrant its adoption. Before *Carson*, that may have been a valid criticism. However, *Carson* laid the groundwork for a constitutional requirement that States "must"[139] offer private religious organizations the benefits that secular organizations have been enjoying for years.[140] As a result, more and more private religious employers will begin to receive a variety of state benefits that they were previously prohibited from receiving under States' outdated understanding of the Establishment Clause. In time, this test may come to apply to more religious employers than not and will have a sizeable impact on litigation that employees bring.

Part three necessarily puts the burden of production on the employer because "minister" is now defined by the employer's mission and

135. *See id.*

136. *See id.* at 2063–64; *Hosanna-Tabor*, 565 U.S. at 190–92.

137. *See* Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008) ("We therefore conclude, based on the facts of this case—in particular, the nature of Father Justinian's duties and the basis for his dismissal—that the ministerial exception bars Father Justinian's Title VII claim.").

138. *See Our Lady*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting) ("[The Court] swings the pendulum in the extreme opposite direction, permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs.").

139. *But see Carson*, 596 U.S. at 785 ("The dissents are wrong to say that under our decision today Maine "must" fund religious education.").

140. *See id.* at 794–98 (Breyer, J., dissenting); Fulton v. City of Phila., 141 S. Ct. 1868, 1882 (2021).

description of the job.[141] Only the employer is in a position to define their mission and the scope of the employee's ministerial functions. Furthermore, a "religious institution's explanation of the role of such employees in the life of the religion in question is important."[142] Per Justice Alito's opinion, the employer's view of the employee is important, so the burden naturally rests on the religious employer.

Part four—The adverse employment action must be related to the employee's ability to perform their ministerial functions—is the heart of the solution.[143] Requiring a relationship between the adverse employment action and the employee's ministerial functions is a solution that flows directly from Justice Sotomayor's dissent in *Our Lady*.[144] Its rationale also closely follows that of the bona fide occupational qualification defense ("BFOQ") in Title VII cases.[145] Thus, the test may be dubbed the "Bona Fide Ministerial Function" test ("BFMF") for our purposes.

"Ministerial functions" are best understood as those duties/functions related to the institution's mission or that otherwise qualify the employee as a minister.[146] Tying the application of the ministerial exception to ministerial functions would put an end to the most egregious employment discrimination cases "wholly unrelated to the employer's religious beliefs or practices."[147] The BFMF is best understood in action. Take the following example:

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141. *Our Lady*, 140 S. Ct. at 2066 ("religious institution's explanation of the role of such employees in the life of the religion in question is important.").

142. *See* Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008) ("We therefore conclude, based on the facts of this case—in particular, the nature of Father Justinian's duties and the basis for his dismissal—that the ministerial exception bars Father Justinian's Title VII claim.").

143. *See id.* at 2072 (Sotomayor, J., dissenting) ("[The exception] gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their 'ministers,' even when the discrimination is wholly unrelated to the employer's religious beliefs or practices."); Tebbe, *supra* note 1, at 304 ("[T]he ministerial exception was applied to teachers in Catholic schools without any inquiry into whether the alleged discrimination—on the basis of disability and age—was required by the church's theology.").

144. *See Our Lady*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting). The test's rationale also closely follows that of the bona fide occupational qualification defense ("BFOQ") in Title VII cases *See* 42 U.S.C. § 2000e-2(e); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IN. L. J. 981, 1016 (2013) ("Title VII allows employers to use religion, sex, or national origin as a bona fide occupational qualification (BFOQ) whenever 'reasonably necessary to the normal operation of that particular business or enterprise.'"); *see also* EEOC v. Boeing Co., 843 F.2d 1213, 1214 (9th Cir. 1988).

145. *See id.* at 794–98 (Breyer, J., dissenting); Fulton v. City of Phila., 141 S. Ct. 1868, 1882 (2021).

146. A court could even turn to the *Hosanna-Tabor* factors to determine whether the employee's ministerial function is implicated. *See Hosanna-Tabor*, 565 U.S. at 190–92.

147. *See Our Lady*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

> Mr. X is employed by Private Religious School ("PRS"), which receives vouchers from the state to aid student commutes. PRS's mission is to educate students in line with its religious values. One tenet of the faith is that no one may consume chicken. One day, Mr. X brings in a plate of chicken parmesan for lunch and eats alongside his students in the cafeteria. PRS fires Mr. X for violating the chicken tenet in front of students.
>
> Mr. X files a claim alleging that he was unlawfully fired on the basis of sex.
>
> PRS defends by asserting the ministerial exception. Mr. X is found to be a "minister" by the Court based on the fact that teachers play a vital role in the PRS's mission to educate students in accordance with its values.
>
> To apply the ministerial exception, PRS must then meet the requirements of the new BFMF test. PRS must show that the adverse employment action was related to the employee's fundamental purpose as a minister. PRS produces evidence that shows Mr. X was fired "because Mr. X violated the chicken tenet." Furthermore, PRS produces evidence from its mission statement that states "Teachers must serve as role models of every tenet for students." This combined evidence shows that Mr. X's firing was directly related to his ability to perform his ministerial function: serving as a role model for students. The ministerial exception is permitted as an affirmative defense and the claim is barred.

The above example illustrates how the BFMF does not interfere with the ministerial exception when the employment action relates to private religious employer's exercise of religious autonomy. However, in a hypothetical where an employer is unlawfully discriminating for non-religious reasons, the BFMF proves its value:

> Mrs. Y is employed by Private Religious School ("PRS"), which receives vouchers from the state to aid student commutes. PRS's mission is to educate students in line with its religious values.
>
> Mrs. Y is in a severe car accident and must use a wheelchair for a year. Mrs. Y requests that PRS provide her with a ramp-accessible first-floor classroom. PRS puts Mrs. Y on unpaid leave "so that she has time to recover." Mrs. Y asserts that she is fully capable of teaching and

> requests that PRS allow her to work. PRS then fires Mrs. Y, citing general teacher layoffs due to funding issues.
>
> Mrs. Y files a claim alleging that she was unlawfully fired because of a disability.
>
> PRS defends by asserting the ministerial exception. The court finds Mrs. Y to be a "minister" based on the fact that teachers play a vital role in PRS's mission to educate students in accordance with its values.
>
> To apply the ministerial exception, PRS must then meet the requirements of the new BFMF test. PRS must show that the adverse employment action was related to the employee's fundamental purpose as a minister. PRS produces its statement that Mrs. Y was fired "because PRS did not have the funding to retain her any longer."
>
> Because this evidence is unrelated to Mrs. Y's ability to perform her ministerial functions the ministerial exception should not apply, and the claim may be heard.

In the latter example, the claim is rightfully heard on the merits. There is a genuine issue of material fact and a distinct possibility of unlawful discrimination. Applying the ministerial exception to this hypothetical would not further the ministerial exception's purported "fundamental purpose" to protect a religious employer's ability to make internal management decisions that are essential to the institution's central mission.[148] The employer, PRS, is still able to independently make any and all decisions necessary to educate students in line with its values. PRS is not free, however, to make internal management decisions unrelated to its religious values which are based on unlawful discrimination.

The BFMF is also flexible because it considers varying levels of internal management decision-making that different hierarchies are responsible for. Take a school principal whose responsibilities are much broader than those of a teacher. A principal's ministerial functions could include managing staff, budgeting, safety compliance, hiring, and much more. These are all central to the institution's internal management because those functions operate the institution itself. Therefore, a private religious employer would be able to take adverse employment actions against a principal/manager that are related to a much larger range of ministerial functions. This, in turn, allows the ministerial exception to be applied more easily. Essentially, the higher up the employment chain one goes, the greater the likelihood the ministerial exception will apply.

148. *See id.* at 2060; *see also* discussion *supra* Part I.A.2.

The relatability clause serves the ministerial exception's original purpose to preserve the autonomy of religious organizations to select their leadership[149] and reduces the number of instances in which the ministerial exception bars valid employment discrimination claims. It does so by acknowledging a simple fact: Private religious institutions are both religious entities and employers. Logically, the ministerial exception should apply when religious autonomy or doctrine is implicated. When religious autonomy or doctrine is not implicated, the employer should have to follow the same employment laws that secular businesses must follow when they both receive state funds.[150]

B. Counterarguments

1. Judicial Entanglement with Religion

One criticism that should spring to mind is judicial entanglement[151] and the issue of whether the BFMF test requires courts to determine what courts are religiously related.[152] If the answer is yes, the BFMF test offends the original intention behind the ministerial exception—independence from the courts.[153] But the BFMF does not require courts to make religious determinations. The court is only required to rule on the evidentiary basis for the adverse employment action. A judge must decide whether the employer has met the burden of production showing the adverse employment action was related to the employee's ability to perform their ministerial functions. Because employers define their mission and the scope of what constitutes a "minister" when they originally raise the

149. *See Hosanna-Tabor*, 565 U.S. at 187 ("[T]he First Amendment permits hierarchical religious organizations to establish their own rules and regulations for internal discipline.") (citing Serbian Eastern Orthodox Diocese for US & Can. v. Milivojevich, 426 U.S. 696, 796 (1976)).

150. *See* City of Boerne v. Flores, 521 U.S. 507, 514 (1997). ("[N]eutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." (citing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990)).

151. *See* Tebbe, *supra* note 1, at 304 (explaining that one rationale for the Court's "expansive rule" in *Hosanna-Tabor* "is that adjudicating such cases would inevitably require courts to make impermissible determinations of religious significance, such as whether a pastor was performing well."). *But see* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1188 (2017) ("Courts and government officials adjudicate religious sincerity in a wide variety of contexts: fraud; immigration; employment discrimination; prisoner religious accommodations; conscientious objection from service in the armed forces; and statutory accommodations from general laws.").

152. *See* Lupu & Tuttle, *supra* note 25, at 1282–84 (arguing that the ministerial exception works as a prophylactic rule in employment discrimination cases involving ministers, keeping courts from reaching ecclesiastical questions).

153. *See* discussion *supra* Part I.A.i.

exception, the court has no reason to question a ministerial function's sincerity or plausibility.[154]

The ministerial exception should not apply when an employer cannot provide evidence—from their mission statement, training, manual, list of duties, or otherwise—that rationally supports an inference that the adverse employment action was related to the employee's ministerial functions. The employer defines each of these terms. Thus, the employer is in the best position to demonstrate how the adverse employment action and the ministerial functions are related. A failure to connect the dots, when the employer is the one who drew them, indicates that the case should be heard on the merits.

There is a more difficult hypothetical to consider regarding entanglement, though. What if a religious employer fires an employee in retaliation for threatening to bring an employment discrimination case, then claims that attempting to resolve issues outside the church is a violation of its religious tenets? This case should sound familiar since it was the argument presented by the school in *Hosanna-Tabor*.[155] The Court did not have to reach this question once Perich had been declared a minister because the claim was already barred.[156]

There is minimal risk of entanglement in a case like this. If the defendants claim that a resolution through litigation would violate their belief in internal resolution and that this belief caused the adverse employment action, a judge need only look to the plaintiff's factual claim to make their determination. If a plaintiff took reasonable steps to resolve the dispute internally, then the defendants fail the BFMF test and the ministerial exception should not apply. This does not require a judge to make a religious determination, just an evidentiary one. The ultimate question is simple: How can a "minister" violate a belief in internal resolution if they took every reasonable step to resolve the issue internally? A religious employer cannot realistically claim that a belief in internal resolution should supersede every external plea for assistance. To do so "would be to make the professed doctrines of religious belief superior to

154. *See* Redhead v. Conf. of Seventh-day Adventists, 566 F. Supp. 2d 125, 133 (E.D.N.Y. 2008) (identifying that where employment disputes can be decided without a court "having to question the validity or plausibility of a religious belief, or having to favor a certain interpretation of religious doctrine, [then they] do not pose a similar risk" of substantive entanglement between government and religion).

155. *See Hosanna-Tabor*, 565 U.S. at 180 ("According to the Church, Perich was a minister, and she had been fired for a religious reason—namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."); *Rweyemam*u, 520 F.3d at 209; *see also* text accompanying notes 28–41.

156. *See Hosanna-Tabor*, 565 U.S. at 180–81.

the law of the land, and in effect to permit every citizen to become a law unto himself."[157]

Hosanna-Tabor is the perfect example. Perich notified the principal she could work the following month.[158] Three days later the school administrators offered to pay a portion of Perich's health premiums in exchange for Perich's resignation because the school was worried Perich could not fulfill her duties.[159] Perich refused and showed them a doctor's note stating she was fit to work.[160] Three weeks later Perich was medically cleared to work and showed up at school where she was then asked to leave.[161] The principal called Perich later that day and told her she would likely be fired.[162] Only then did Perich say she intended to assert her legal rights.[163] Perich only sought external assistance once the school made it clear that the issue *could not be resolved internally*.[164] Therefore, to pass the BFMF test, an employer cannot claim the internal resolution belief as a justification for the ministerial exception when the employer left the employee no other choice but to seek external help.

2. Loopholes to the BFMF Test?

The counterargument to entanglement raises another point of contention: Can't religious employers get around the BFMF test easily? One way to do so would be to facially discriminate against a protected characteristic in the employer's mission.[165] If an employer's mission is based on white supremacy, refusing to hire an applicant of color for a ministerial position would be a protected action under the ministerial exception and the BFMF test.[166]

Two considerations counteract the problem of employers skirting the test. The first is that most organizations are reticent to facially discriminate.[167] The anti-discrimination laws have had a substantial effect

157. *Smith*, 494 U.S. at 879 (quoting Reynolds v. U.S., 98 U.S. 145, 166–67 (1879)).

158. *Hosanna-Tabor*, 565 U.S. at 178.

159. *Id.*

160. *Id.*

161. *Id.* at 179.

162. *Id.*

163. *Hosanna-Tabor*, 565 U.S. at 179.

164. *Id.*

165. *See* Griffin, *supra* note 144, at 1019 (identifying that in a post-*Hosanna-Tabor* world, ministers "may be fired for racially discriminatory reasons").

166. *But see* Tebbe, *supra* note 1, at 304 ("[The ministerial exception] has even been applied in situations where church doctrine prohibits the alleged discrimination."); *see also* B. Jessie Hill, *Change, Dissent, and the Problem of Consent in Religious Organizations*, THE RISE OF CORPORATE RELIGIOUS LIBERTY 419, 432–33 (Micah Schwartzman et al. eds., 2016) (noting cases in which the exception applied in spite of the church doctrine's prohibitions on the alleged discrimination and how they undermine the consent rationale for church autonomy protections).

167. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

over the years, and public opinion has shifted against those organizations that blatantly discriminate.[168] For proof of this point, one need only look to the X (the app formerly known as "Twitter") exodus that has occurred due to fears of increased discriminatory content.[169] The BFMF test is not likely impactful enough to incentivize religious employers to adopt blatantly discriminatory missions. The second consideration is that discrimination is still subject to neutral laws of general applicability.[170] The Supreme Court stated that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[171] This rule from *Employment Division v. Smith* means that states may impose conditions—like anti-discrimination clauses—on those who voluntarily contract with the state.[172] The problem with applying neutral laws of general applicability in the context of religious employment is, as previously rebutted,[173] the fact that the ministerial exception allows for pretextual discrimination to occur. However, the BFMF test would make neutral laws of general applicability relevant to discriminatory employers once more.[174] This is because the BFMF test requires the employer to show *some* evidence relevant to the adverse employment action to utilize the ministerial exception.[175] Facially discriminatory evidence may be used, in turn, to prove that a religious organization that takes state funding is discriminatory in violation of a neutral law of general applicability.

In a related scenario, a religious employer whose mission is to further the cause of white supremacy may be incentivized to include white supremacist values in its employment requirements.[176] Doing so would

168. *See* Kate Conger et al., *Elon Musk's Twitter Faces Exodus of Advertisers and Executives*, N.Y. TIMES (Updated Nov. 2, 2022), https://www.nytimes.com/2022/11/01/technology/elon-musk-twitter-advertisers.html [https://perma.cc/9PZB-VVKD].

169. *See id.*; *see also Boy Scouts of Am.*, 530 U.S. 640.

170. *See Smith*, 494 U.S. at 879; *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531 ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

171. *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

172. *See Smith*, 494 U.S. 872; *see also* City Respondents' Brief in Opposition at 26, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2019 WL 5189127 ("Substantial authority supports the City's prerogative to impose generally applicable conditions—including nondiscrimination conditions—on those who voluntarily undertake to contract with the City to perform a taxpayer-funded public function.").

173. *See* counterargument discussion *supra* Part II.A.ii.

174. *See* discussion *supra* Part II.A.ii; *see also* Douglas Laycock, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016).

175. *See supra* notes 111–18.

176. *See* Griffin, *supra* note 144, at 1019 ("Another advantage is that, because freedom of association protects expressive association, it forces organizations to be clear about their

allow the employer to easily claim whiteness is related to the employee's ministerial functions thereby permitting the use of the ministerial exception to bar claims of employment discrimination on the basis of race. Yet, this power comes with a price, because documentation of white supremacist employment requirements is blatant evidence of discrimination that generally applicable and neutral anti-discrimination laws could begin to address again. Without the BFMF test, employers have been able to claim the ministerial exception without any explanation, rendering anti-discrimination laws toothless. By forcing employers to explain discriminatory content in their mission statement, we give anti-discrimination laws some ability to bite again. The religious employer is then faced with a choice: To accept the funds knowing the ministerial exception will be applied more strictly, or to reject the funds and retain the ability to apply the ministerial exception broadly. Ultimately, this serves the ministerial exception's original purpose of protecting religious autonomy by giving employers the power to manage their own risk.[177] The BFMF test encourages employers to make a cost-benefit analysis which results in decreased harm in either case. The choice will either decrease the likelihood of employment discrimination or prevent the state from funding discriminatory organizations. A win-win scenario.

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The BFMF test will not solve the problem of employment discrimination in religious organizations. What it does effectively, though, is mitigate the harm caused by the new ministerial exception while staying aligned with the policy goals in *Our Lady*.[178] Taken as a whole, the four parts of the BFMF test all work to prevent the worst instances of state-funded employment discrimination that will likely occur under the new ministerial exception. It also gives states more power to regulate employment discrimination, despite the ministerial exception, through the use of neutral laws of general applicability. Importantly, religious employers retain their autonomy and independence from the state while still having the option to access state funding under *Carson*.

CONCLUSION

The ministerial exception was a constitutional doctrine that barred claims concerning the employment relationship between a religious

membership rules and about what membership in their organizations represents and expresses. It would be better to force religious organizations to state openly their willingness to discriminate on the basis of race, gender, disabilities, sexual orientation, national origin, and age than to give them the free pass to disobey the laws for any reason that the Court awarded them in *Hosanna-Tabor*." (citations omitted)).

177. *See Hosanna-Tabor*, 565 U.S. at 171.

178. *See Our Lady*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting).

institution and its leadership. But now it is also a constitutional doctrine that permits state-funded religious employers to fire the majority of their employees at will for any reason.

Adopting this Note's Bona Fide Ministerial Function test will decrease the likelihood that the ministerial exception will shield private religious employers from the consequences of unlawful employment discrimination. Employees would also have some protection from bad-faith employer conduct again. In addition, requiring private religious organizations to state the grounds for their adverse employment action revitalizes neutral laws of general applicability and gives some spending power back to the states. At the same time, private secular employers are no longer as unequally burdened by the high cost of litigation. The Bona Fide Ministerial Function test preserves the soul of the ministerial exception while exorcising the worst of its excesses.