MAKING SENSE OF THE MINISTERIAL EXCEPTION IN THE ERA OF *BOSTOCK*

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In Bostock v. Clayton County*, the Supreme Court recognized that Title VII protects employees from discrimination based on sexual orientation and gender identity. But it also noted that that protection might not apply equally to all employees—particularly where the "employment relationship between a religious institution and its ministers" is concerned. Just three weeks later, the Court issued its decision in* Our Lady of Guadalupe v. Morrissey-Berru*, which held that, in deciding when the ministerial exception applies (which shields religious organizations from anti-discrimination laws), courts should focus primarily on the "religious functions" that the employee performs. Today, just over a year after the Court announced these two decisions, lower courts have struggled to reconcile the doctrines in any principled and consistent way, leading, at best, to vague or imprecise considerations about what qualifies for the ministerial exception; and, at worst, occasions for courts to surreptitiously smuggle in value judgments about which religious organizations should or should not be protected.*

After reviewing the historical and current rationales underlying the ministerial exception, we propose a synthesized definition of "religious functions" which respects the interests of both sides and imposes some consistency on the resolution of these cases in the lower courts. Put simply, courts should understand a "religious function" as one that advances or contributes to the formation or development of faith through teaching and promoting religious doctrines. As discussed more fully within, this definition helps to clarify when the ministerial exception applies in a way that accommodates the important interests at issue, while also remaining faithful to Supreme Court precedent. Better still, we believe this definition is one that lower courts can apply right now to resolve these hard cases.

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I. INTRODUCTION

Suppose a parochial school hires a teacher—let's call her Jane—to teach math to sixth graders. Apart from the standard job qualifications for teaching Sixth-grade math, the school requires that Jane (like the rest of its teachers) "be a witness to the teaching of the church in both word and deed."[1] One day, the school learns that Jane is engaged in a same-sex relationship and moves to fire her. Do anti-discrimination laws protect Jane, or may the school terminate Jane's employment under the "ministerial exception"[2] of the First Amendment? What if, by school tradition, Jane leads her Sixth graders in prayer at the start of every school day? Does the assessment change if the school hired Jane knowing she was not a practitioner of the faith or had no religious training?

Such is the tension created by the Supreme Court's recent decisions in *Bostock v. Clayton County*[3] and *Our Lady of Guadalupe School v. Morrissey-Berru*.[4] These cases, decided just three weeks apart,[5] create two zones in employment law—one where anti-discrimination laws do not bind religious organizations due to the ministerial exception, and another, applicable to any other private employer, where LGBTQ[6] individuals cannot be fired "merely for being gay or transgender" under Title VII of the Civil Rights Act.[7]

The extent of the problem posed by these cases is evident when one considers the number of individuals affected. Research from the Human Rights Campaign Foundation (HRC) indicates that nearly fourteen million Americans

1. This language derives from a statement from a Catholic high school after the school fired a teacher for being gay. The spokesperson for the school stated, "Our Catholic schools expect teachers and staff to be witnesses to the teaching of the Catholic Church in both word and deed. Public witness is a critical part of Catholic education. . . . These expectations are clearly articulated in our teacher-minister contracts." Jeremy P. Kelley, *Gay Catholic School Teacher Ousted; Alter Principal Calls It 'Unfortunate'*, DAYTON DAILY NEWS, Apr. 28, 2020 https://www.daytondailynews.com/news/local-education/gay-catholic-school-teacher-ousted-alter-principal-calls-unfortunate/Y1hK2VgRGomfGNY7NxStBK/ [https://perma.cc/MHC5-YF6L]. Some religious school contracts are more pointed: "TEACHER recognizes that Catholic schools and Catholic education are vital participants in the apostolic teaching ministry of the Roman Catholic Church. TEACHER is familiar with and understands the importance of the teachings of the Roman Catholic Church and agrees to give Christian witness in his/her personal and professional life. TEACHER understands and agrees that, as an instructor for SCHOOL, TEACHER is performing a ministerial role which is important to the spiritual and pastoral mission of the Roman Catholic Church and the PARISH." Ostrander v. St. Columba Sch., No. 3:21-CV-00175-W-LL, 2021 WL 3054877 at *6 (S.D. Cal. July 20, 2021).

2. *See infra* Part III.

3. Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

4. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

5. *Bostock* was released on June 15, 2020, and *Our Lady of Guadalupe School* was released on July 8, 2020.

6. Referring to lesbian, gay, bisexual, transgender, and queer/questioning individuals.

7. *Bostock*, 140 S. Ct. at 1754. Indeed, in the *Bostock* opinion itself, Justice Gorsuch was careful to note "that the First Amendment can bar the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its ministers.'" And, in her dissent in *Our Lady of Guadalupe*, Justice Sotomayor anticipated how the Court's "sweeping result" would "upend[] antidiscrimination protections for many employees of religious entities." *Our Lady of Guadalupe*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting).

identify as LGBTQ.[8] In addition, the North American Industry Classification System (NAICS), which collects statistical data on the U.S. business economy, estimates that religious organizations employ almost two million workers in industries ranging from education to hospitals and home health and child care services.[9] *Bostock* makes clear that these fourteen million LGBTQ Americans are now protected against discrimination under Title VII.[10] But does that protection not extend to the two million workers employed by religious organizations? Balancing the competing rights and interests implicated here is important to both LGBTQ employees and religious employers—LGBTQ individuals want protection from discrimination and religious organizations want to be able to hire people consistent with the dictates of their faith. Currently, though, the balance is unclear, leading to confusion and uncertainty for parties on both sides of the issue.[11]

This Essay discusses this tension in three parts. Part II outlines the Supreme Court's opinion in *Bostock* and briefly explains its effect on labor law. Part III traces the history and expansion of the "ministerial exception" from its origin in the Fifth Circuit to its adoption by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*[12] and its recent expansion in *Our Lady of Guadalupe School v. Morrissey-Berru*.[13] Finally, Part IV explores the tension created by these two doctrines in two Sections: Section A reviews lower court decisions that have attempted to apply *Our Lady of Guadalupe*'s "religious function" test, revealing inconsistencies in the test's application, while Section B proposes a more precise definition for the "religious function" test. Specifically, Section B argues that lower courts should understand the "religious functions" test to apply to activities that advance or contribute to the formation or development of faith through the teaching and promotion of religious doctrines. This definition is consistent with the historical

8. Charlie Whittington, Katalina Hadfield & Carina Calderón, *The Lives & Livelihoods of Many in the LGBTQ Community Are at Risk Amidst COVID-19 Crisis*, HUM. RTS CAMPAIGN FOUND. (2020), https://assets2.hrc.org/files/assets/resources/COVID19-IssueBrief-032020-FINAL.pdf [https://perma.cc/R48P-ERJZ]. And even that number may be conservative, considering recent studies that suggest nearly 50% of LGBT Americans are closeted at work. Kari Paul, *Nearly 50% of LGBTQ Americans Are in the Closet at Work*, MKT. WATCH, https://www.marketwatch.com/story/half-of-lgbtq-americans-are-not-out-to-co-workers-2018-06-27 [https://perma.cc/P366-NBUR] (Oct. 11, 2019, 2:49 PM).

9. *See* Brief of The Nat'l Emp. Laws. Ass'n et al. as Amici Curiae in Support of Respondents, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (Nos. 19-267 & 19-348), 2020 WL 1478591, at *15 (providing data regarding employment of religious organizations) (citing Occupational Employment Statistics, *May 2016 National Industry Specific Occupational Employment and Wage Estimates, NAICS 8131-Religious Organizations*, U.S. BUREAU OF LAB. STATS. (Mar. 30, 2018), http://www.bls.gov/oes/2017/may/naics4_813100.htm [https://perma.cc/QEQ7-AU7T]).

10. , 140 S. Ct. at 1754.

11. Indeed, some religious advocates have seized on the lack of balance in the Court's ministerial exception jurisprudence by creating "How-To" guides for organizations that wish to bring all of their employees under the ministerial exception regardless of what function the employee performs. *See* Brief of Nat'l Women's Law Ctr. et al. as Amici Curiae in Support of Respondents, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (No. 19-267 & 19-348), 2020 WL 1433942 at *22–26, *30–31 (explaining how religious employers have tried to expand the ministerial exception).

12. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012).

13. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

and current rationales undergirding of the ministerial exception, but also honors the rights of LGBTQ individuals and religious organizations.

II. BOSTOCK

Bostock v. Clayton County consolidated three cases testing the scope of the "because of sex" language of Title VII of the Civil Rights Act of 1964 ("Title VII").[14] In two cases, *Bostock v. Clayton County*[15] and *Altitude Express, Inc. v. Zarda*,[16] gay employees were fired after their employers learned of their sexuality. In the remaining case, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*,[17] a transgender woman was fired after telling her employer that she would embrace her gender identity at work. Each of these employees sued for violations of Title VII, arguing that firing an employee because of their sexual orientation or transgender identity necessarily hinges on the employee's sex, thus violating Title VII.

In *Bostock*, a 6-3 majority of the Supreme Court agreed, holding that Title VII protects employees from discrimination based on sexual orientation and gender identity.[18] Writing for the Court Justice Gorsuch emphasized the "ordinary public meaning" of the word "sex" as used in the statute.[19] In a now-well-known

14. *Bostock*, 140 S. Ct. at 1754.

15. Bostock v. Clayton County Board of Commissioners, 723 Fed. App'x 964 (Mem) (11th Cir. 2018). Gerald Bostock, a highly regarded child services advocate in Clayton County, Georgia, was fired from his position as the County Court's Special Advocate in 2013 after several community members made disparaging comments about his participation in a gay softball league. Shortly after his termination, Bostock sued the County for discrimination under Title VII. Following Eleventh Circuit precedent, the District Court dismissed Bostock's claim, and the Eleventh Circuit affirmed. Bostock v. Clayton County, No. 1:16-CV-1460 (N.D. Ga. July 21, 2017). The Supreme Court granted Bostock's petition for certiorari on April 22, 2019, and consolidated the case for oral argument with *Zarda* and *Harris Funeral Homes*. Bostock v. Clayton County, 139 S. Ct. 1599 (2019).

16. Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018). In 2013, Donald Zarda worked as a skydiving instructor and was fired after he mentioned his sexuality to a customer. Shortly thereafter, Zarda brought suit in federal court under Title VII. Following Second Circuit precedent, the District Court granted Altitude Express's motion for summary judgment finding that Title VII did not protect employees from discrimination for sexual orientation. In an en banc proceeding, the Second Circuit held that "sexual orientation discrimination is properly understood as "a subset of actions taken on the basis of sex." Zarda, 883 F.3d at 112 (quoting Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 343 (7th Cir. 2017) The Supreme Court granted Altitude Express's petition for certiorari on April 22, 2019, and consolidated the case for oral argument with *Bostock* and *Harris Funeral Homes*.

17. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.., 884 F.3d 560 (6th Cir. 2018). After working for R.G. & G.R. Harris Funeral Homes Inc. for over six years, Aimee Australia Stephens, who was assigned the male gender at birth, was fired in July 2013 for notifying her employer that she intended to transition to living as a woman. Following her termination, Stephens filed a claim with the EEOC who brought suit against the employer on Stephens' behalf. While the District Court permitted the case to proceed, it later granted summary judgment in favor of Harris Funeral Homes finding that the Religious Freedom Restoration Act (RFRA) exempted the funeral home from Title VII liability. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d. 837 (E.D. Mich. Aug. 18, 2016). The Sixth Circuit reversed holding that termination based on transgender status is sex discrimination under Title VII. The Supreme Court granted Harris Funeral Homes's petition for certiorari on April 22, 2019, and consolidated the case for oral argument with *Bostock* and *Zarda*.

18. *Bostock*, 140 S. Ct. at 1754.

19. *Id*. at 1738.

hypothetical, Justice Gorsuch considers two similarly situated employees who are attracted to men.

> The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. Suppose the employer fires the male employee for no reason other than that he is attracted to men. In that case, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex.[20]

The same logic applies to discrimination based on gender identity.[21] In both contexts, "sex plays an unmistakable and impermissible role in the discharge decision,"[22] even though other factors (e.g., romantic attraction), may also be said to have motivated the termination.[23]

The dissenting opinions, written by Justices Alito and Kavanaugh, argued that traditional principles of statutory interpretation are concerned with understanding the meaning of the word when the text was written.[24] "If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation —not to mention gender identity."[25] Justice Kavanaugh asserted that the Court should apply the original understanding of the phrase "because of sex" rather than parse it into smaller, more legalistic parts.[26] For the dissenting Justices, it matters that "'[s]ex,' 'sexual orientation,' and 'gender identity' are different *concepts*."[27]

While the majority opinion effectively recognized Title VII protections for LGBTQ individuals, Justice Gorsuch was careful to note that the First Amendment "can bar the application of employment discrimination laws to claims concerning the employment relationship between a religious institution and its ministers."[28] What appears to be merely a passing reference to a potential tension now effectively captures the incongruence between the Court's construction of the anti-discrimination statute at issue in *Bostock* and its ministerial exception jurisprudence. To better understand this tension, the next Part explains the history and modern application of the ministerial exception.

20. *Id*. at 1741.

21. *Id*.

22. *Id*. at 1741–42.

23. *Id*. at 1739–40 (explaining that while Title VII's "because of" language requires but-for causation, the prohibited factor, in this case sex, does not need to be the only but-for cause).

24. *Id.* at 1755 (Alito, J., dissenting).

25. *Id.*

26. *Id.* at 1825 (Kavanaugh, J., dissenting) (arguing that "courts must follow ordinary meaning, not literal meaning" and "courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase").

27. *Id*. at 1758 (Alito, J., dissenting) (emphasis added).

28. *Id.* at 1754 (majority opinion).

III. MINISTERIAL EXCEPTION JURISPRUDENCE

A. History of the Ministerial Exception

The ministerial exception traces its intellectual and constitutional roots back to early English law.[29] In 1215, the first clause of Magna Carta set the stage for a nominally independent church, declaring that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired."[30] But, of course, the lived reality for many Englishmen was that both their civic and religious lives were governed by the state.[31] In drafting and ratifying the religion clauses of the First Amendment to the United States Constitution, the Founders wanted to avoid such entanglement with the structure and operations of churches.[32] In America, the Founders thought, nominal separation was not enough; the church had to be *actually* free of state coercion.[33]

While the Founders largely agreed on these general principles, employment law doctrines regarding the separation of church control from the state did not come into focus until the passage of Title VII of the Civil Rights Act in 1964.[34] Following the passage of Title VII, the Fifth Circuit became the first to confront how this new statute interacted with the First Amendment in *McClure v. Salvation Army*.[35] Attempting to remedy the perceived conflict between the statute and the protection of the First Amendment, the Fifth Circuit explained that the "relationship between an organized church and its ministers is its lifeblood."[36] As understood by the Fifth Circuit, "[t]he minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[37] Accordingly, the Fifth Circuit held that applying provisions of Title VII to the employment relationship existing between The Salvation Army ("a church") and Mrs. McClure ("its minister"), would lead to "an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[38] This new religious exception was understood to be "grounded in the First Amendment" and "preclude[d] application of such legislation to claims concerning the employment relationship between a

29. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 182 (2012).

30. *Id*.

31. *Id.*

32. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2061 (2020) (stating that "16th-century British statutes had given the Crown the power to fill high 'religious offices' and to control the exercise of religion in other ways, and we explained that the founding generation sought to prevent a repetition of these practices in our country").

33. *See* Letter from James Madison to Bishop John Carroll (Nov. 20, 1806), reprinted in 20 Records of the American Catholic Historical Society 63–64 (1909) (stating that the "scrupulous policy of the Constitution in guarding against a political interference with religious affairs," stopped the state from interfering with the "selection of ecclesiastical individuals."). This letter is cited in *Hosanna-Tabor*, 565 U.S. at 184.

34. 42 U.S.C. § 2000e et seq.

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

36. *Id.* at 558.

37. *Id.* at 559.

38. *Id*. at 560. We quote this in full to show the exact language used by the court.

religious institution and its ministers."[39] Despite never using the phrase, the Fifth Circuit's logic in *McClure* gave birth to what came to be known as the "ministerial exception."[40]

Slowly but surely, the ministerial exception worked its way across the country, eventually becoming the law in every circuit in one form or another.[41] Courts quickly realized, however, that merely recognizing the exception was only half the battle; they next had to figure out how to apply it. A few tests were developed to meet this challenge. The Fourth Circuit led the way in *Rayburn v. General Conference of Seventh-day Adventists*, when it created the "primary duties test."[42] Under that test, which a plurality of circuit courts subsequently adopted,[43] courts apply the ministerial exception "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[44] The Third and D.C. Circuits held that the ministerial exception applied to employees who "perform particular spiritual functions."[45] Similarly, the Second Circuit instructed that courts not only consider the employee's function, but also whether the type of claim asserted have some religious nexus.[46]

B. Modern Development of the Ministerial Exception

Forty years after *McClure*, the Supreme Court acknowledged the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*[47] In that case, Cheryl Perich, a teacher who had to take disability leave due to narcolepsy, sued Hosanna-Tabor Lutheran School, claiming that her employment had been terminated in violation of the Americans with Disabilities

39. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012).

40. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (citing to *McClure v. Salvation Army* for the proposition that the doctrine "acquired the label 'ministerial exception' because the individuals involved in pioneering cases were described as 'ministers'").

41. *Hosanna-Tabor*, 565 U.S. at 188 n.2 (citing the following cases to show that every circuit had adopted the ministerial exception: *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198 (2nd Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–04 (3rd Cir. 2006); *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000); *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *Hollins v. Methodist Healthcare*, 474 F.3d 223, 226 (6th Cir. 2007); *Alicea-Hernandez v. Cath. Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Cath. Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996)).

42. Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985); *see also* Cong. Research Serv., R42464, The Ministerial Exception of the First Amendment: Employment Discrimination and Religious Organizations 7 (2014).

43. Petruska v. Gannon Univ., 462 F.3d 294, 307 (3d Cir. 2006); *Rayburn*, 772 F.2d at 1168–69; Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007), *abrogated by* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012), E.E.O.C. v. Cath. Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996).

44. *Rayburn*, 772 F.2d at 1169.

45. See *Petruska*, 462 F.3d at 307; *Cath. Univ. of Am.*, 83 F.3d at 464.

46. Rweyemamu v. Cote, 520 F.3d 198, 208 (2d Cir. 2008).

47. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012).

Act (ADA).[48] Perich was a "called" teacher within the Lutheran school, which distinguished her from a "lay" teacher and meant that she had "been called to [her] vocation by God through a congregation."[49] Her duties as a fourth-grade teacher included teaching "math, language arts, social studies, science, gym, art, []music, [and] . . . a religion class four days a week."[50] She also "led the students in prayer and devotional exercises each day, . . . attended a weekly school-wide chapel service," and "led the chapel service herself about twice a year."[51] Following her termination, Petrich filed a complaint with the Equal Employment Opportunity Commission (EEOC).[52] In response, the church argued that the suit was "barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers."[53]

The Supreme Court agreed with the church and formally recognized the ministerial exception. The Court held that, given the circumstances of Perich's employment at the school—"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"—she was a minister as contemplated by the ministerial exception.[54] In reaching this conclusion, the Court adopted a four-factor test based on (1) the employee's title; (2) what that title revealed about the employee's job; (3) the employee's presentation of her job; and, (4) the employee's religious functions.[55] Although scholars and lower courts focused on the fourth factor,[56] the Court's opinion stressed that it was not relying solely on religious function.[57] But the Court emphasized that it was "reluctant" to adopt a rigid formula for deciding when an employee qualifies as a minister.[58] "It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment."[59] This formulation thus became known as the "totality of the circumstances" test.[60]

48. *Hosanna-Tabor*, 565 U.S. at 178–79.

49. *Id*. at 177.

50. *Id.* at 178.

51. *Id*.

52. *Id*. at 179.

53. *Id.* at 180.

54. *Id.* at 192.

55. Thomas Johnson II & Tanya Warnke, *U.S. Supreme Court Expands the Ministerial Exception,* JD SUPRA (July 15, 2020), https://www.jdsupra.com/legalnews/the-u-s-supreme-court-expands-the-96963 [https://perma.cc/5TH8-NX9K].

56. Fratello v. Archdiocese of N.Y., 863 F.3d 190, 204–06 (2d Cir. 2017) (finding that function is key, and the other factors are just mere recommendations).

57. *See Hosanna-Tabor*, 565 U.S. at 193 ("We express no view on whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations we have discussed.").

58. *Id.* at 190.

59. *Id*.

60. Brian M. Murray, *A Tale of Two Inquiries: The Ministerial Exception After* Hosana-Tabor, 68 SMU L. REV. 1123, 1135 (2015); *see also* Grussgott v. Milwaukee Jewish Day Sch., Inc. 882 F.3d 655, 661 (7th Cir. 2018).

In July 2020, the Court updated the ministerial exception doctrine in *Our Lady of Guadalupe School v. Morrissey-Berru*.[61] In that case, which had been consolidated on appeal with *St. James School v. Biel*,[62] the Court considered whether the ministerial exception covered elementary school teachers at a Catholic school. The plaintiffs, Agnes Morrissey-Berru and Kristen Biel, worked as teachers at Catholic schools in Southern California, where they were employed under similar contracts. Those contracts outlined the schools' mission to promote the Catholic faith and the school's commitment to religious instruction, worship, and personal modeling of the faith.[63] Under their contracts, both plaintiffs taught religion as part of their instruction on other subjects and participated in religious activities with their students (including taking the students to school Mass every week).[64] Eventually, each employee was terminated, allegedly for poor performance.[65] Both Morrissey-Berru and Biel challenged their termination—Morrissey-Berru under the Age Discrimination in Employment Act (ADEA)[66] and Biel under the ADA,[67] alleging age discrimination and pregnancy discrimination, respectively. In both cases, the district courts granted summary judgment under the ministerial exception. And in both cases, the Ninth Circuit reversed, applying the four-factor test that the Court had previously laid out in *Hosanna-Tabor*.[68]

After granting certiorari and consolidating the cases for oral argument, the Supreme Court reversed the Ninth Circuit's holding. Writing for the majority, Justice Alito emphasized that, when deciding whether the ministerial exception applies, courts should look to the function performed by the employee rather than the employee's title.[69] "[E]ducating 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."[70] Thus, in *Our Lady of Guadalupe*, unlike in *Hosanna-Tabor*, the Court emphasized the importance of the "religious function" element,[71] finding that even though Morrissey-Berru and

61. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

62. Biel v. St. James Sch., 911 F.3d 603 (9th Cir. 2018), *rev'd and remanded sub nom.* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

63. *Our Lady of Guadalupe School*, 140 S. Ct. at 2056, 2058.

64. *Id*. at 2057, 2059.

65. *Id.* at 2058–59.

66. 29 U.S.C. §§ 621–34.

67. 42 U.S.C. §§ 12101–12213.

68. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012).

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

70. *Id.*

71. *Id*. at 2066 (emphasizing that, despite the fact that the teachers' "titles did not include the term 'minister,' and they had less formal religious training," still their "core responsibilities as teachers of religion" required them to "perform[] vital religious duties," such as "[e]ducating and forming students in the Catholic faith . . . pray[ing] with their students, attend[ing] Mass with the students, and prepar[ing] the children for their participation in other religious activities."). Additionally, their "employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility," and expecting them to "guide their students, by word and deed, toward the goal of living their lives in accordance with the faith." *Id.*

Biel did not meet the first three factors—religious title,[72] religious education/training,[73] presentation of religious identity[74]—they still fell under the ministerial exception because of the functions they performed. Justice Alito further emphasized that the "circumstances that informed [the Court's] decision in *Hosanna-Tabor* were relevant because of their relationship to [the teacher's] role in conveying the Church's message and carrying out its mission."[75] The majority then explained that the title of "minister" is neither necessary nor sufficient;[76] religious training and/or education is only informative, not dispositive;[77] and that in short, "these circumstances, while instructive in *Hosanna-Tabor*, are not inflexible requirements and may have far less significance in some cases."[78] "What matters, at bottom, is what an employee does."[79] Thus, the majority downplayed the importance of the first three factors present in *Hosanna-Tabor* and accentuated "the important religious functions [one] perform[s] for the Church."[80] Once this new test was established, the majority had no problem finding that both Morrissey-Berru and Biel were covered by the ministerial exception because there was "abundant record evidence that they both performed vital religious duties."[81]

Justice Sotomayor dissented. In addition to highlighting the role that the ministerial exception plays in allowing religious organizations to discriminate based on protected categories,[82] she criticized the majority for effectively "rewriting" the "holistic" and "well-rounded" standard laid down in *Hosanna-Tabor*.[83] In promulgating the "vague" religious function test, Justice Sotomayor argued, the Court merely "traded legal analysis for a rubber stamp" to religious organizations."[84]

The Court has not addressed the ministerial exception since *Our Lady of Guadalupe*.[85] In a recent concurrence in a denial of certiorari, however, Justices Alito, Thomas, Kavanaugh, and Barrett wrote to further explain their view of the

72. *Id*. at 2062 ("We identified four relevant circumstances but did not highlight any as essential. First, we noted that her church had given Perich the title of 'minister, with a role distinct from that of most of its members.'").

73. *Id*. ("Second, [the teacher's] position 'reflected a significant degree of religious training followed by a formal process of commissioning.'").

74. *Id.* ("Third, '[the teacher] held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms,' and by claiming certain tax benefits.").

75. *Id*. at 2063 (internal quotes omitted).

76. *Id*. at 2063–64 ("Simply giving an employee the title of 'minister' is not enough to justify the exception. And by the same token, since many religious traditions do not use the title 'minister,' it cannot be a necessary requirement.").

77. *Id.* at 2064 ("The academic requirements of a position may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith.").

78. *Id.*

79. *Id.*

80. *Hosanna-Tabor*, 565 U.S. at 192.

81. *Our Lady of Guadalupe*, 140 S. Ct. at 2066.

82. *Id*. at 2072 (Sotomayor, J., dissenting).

83. *Id.* at 2075.

84. *Id*. at 2075–76.

85. Justice Alito's concurrence in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1916 (2021), briefly addresses the ministerial exception but only in the context of asserting that it is in tension with *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990).

exception's proper application. In *DeWeese-Boyd v. Gordon Coll.*,[86] the Supreme Judicial Court of Massachusetts held that though Gordon College qualified as a religious organization, it could not invoke the ministerial exception to avoid scrutiny of the decision to not promote Margaret DeWeese-Boyd to full professor.[87] The Massachusetts high court reasoned that DeWeese-Boyd was not a minister because she did not "undergo formal religious training, pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum."[88] The court also held that Gordon College's requirement that its professors "integrate the Christian faith into [its] teaching, scholarship, and advising" was "different in kind, and not degree" from the type of religious instruction that would make someone a "minister" for the purposes of the ministerial exception.[89]

Concurring in the denial of certiorari, Justice Alito expressed skepticism of this reasoning, stating it reflects a "troubling and narrow view of religious education."[90] Justice Alito explained that religious education is not strictly limited to teaching a religion course but rather, should be understood to encompass factors such as the fact that "the college asks each member of the faculty to 'integrate' faith and learning, i.e., 'to help students make connections between course content, Christian thought and principles, and personal faith and practice.'"[91] While not precedential, the *Gordon* concurrence is instructive because it reveals how at least four Justices think about the religious functions test.

IV. DEFINING *OLG*'S "RELIGIOUS FUNCTION" REQUIREMENT

A. Confusion in the Lower Courts

In the wake of *Our Lady of Guadalupe*, lower federal and state courts have struggled to apply the Court's analysis even-handedly to a variety of factual scenarios. As in *Hosanna-Tabor*, the Court's opinion in *Our Lady of Guadalupe* declined to adopt firm rules for the lower courts to follow, opting instead to only "decide the cases before us."[92] As a result, courts dealing with any case falling outside the specific facts of either *Hosanna-Tabor* or *Our Lady of Guadalupe* must grapple with how these factors (or a single factor) apply. A review of lower court cases decided after the Court's decision in *Our Lady of Guadalupe* reveals sharp inconsistencies in how judges apply the "religious function" test.

86. 163 N.E.3d 1000 (Mass. 2021).

87. *Id.* at 1017–18.

88. *Id.* at 1017.

89. *Id.*

90. Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 954 (2022); *see also id.* at 955 ("For those reasons, I have doubts about the state court's understanding of religious education and, accordingly, its application of the ministerial exception.").

91. *Id.* at 955 (internal citation omitted).

92. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020). ("Respondents argue that the *Hosanna-Tabor* exception is not workable unless it is given a rigid structure, but we declined to adopt a 'rigid formula' in *Hosanna-Tabor*, and the lower courts have been applying the exception for many years without such a formula. Here, as in *Hosanna-Tabor*, it is sufficient to decide the cases before us.").

For example, a court in the Eastern District of Pennsylvania has found that the ministerial exception does not extend to a Vice President of Student Services at a Lutheran seminary, even though the employee was an ordained minister and the seminary asserted that her duties were religious in nature.[93] At the same time, a court in the Eastern District of Michigan has extended the ministerial exception to college students who lead campus Christian organizations,[94] because these leadership roles entail a "significant spiritual commitment," which required students to agree with the organizations "Doctrine and Purpose Statements" and "exemplify Christ-like character, conduct and leadership."[95]

Inconsistencies exist even when the employee's job descriptions or contracts specify their religious obligations. For example, a court in the Southern District of California declined to extend the ministerial exception to a teacher whose contract designated her a minister and outlined her ministerial functions, because "[s]imply giving an employee the title of minister is not enough to justify the exception."[96] At religious schools in the District of New Jersey, however, one court found that an individual who chairs the Religious Department and is contractually considered the "Campus Minister" falls under the ministerial exception, even though the record is devoid of any religious duties the employee undertook.[97]

Thus, the current landscape presents varying outcomes based on the judge one is before. In one district, an ordained minister who has religious duties and is referred to by students as "Pastor Trina"[98] does not fall under the ministerial exception, while in another, college students do. In one court, a contract designates an employee as a "minister" and yet the minister fails to qualify for the ministerial exception, while across the country a person with the title "campus minister" does. These inconsistencies highlight the shortcomings of the Court's current religious functions test.[99] The next Section proffers clarity on how to define this test.

93. Trotter v. United Lutheran Seminary, No. 20-570, 2021, WL 3271233, at *4 (E.D. Pa. July 30, 2021). The court stated that "Johnsten's status as an ordained minister is not dispositive" because "[w]hat matters, at bottom, is what an employee does," which, in her case, was manage staff and oversee school processes. *Id.* (quoting *Our Lady of Guadalupe*, 140 S. Ct. at 2067).

94. InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ. 534 F. Supp. 3d 785 (E.D. Mich. 2021), *reconsideration denied*, 542 F. Supp. 3d. 621 (E.D. Mich. 2021).

95. *InterVarsity*, at 797, 808.

96. Ostrander v. St. Columba Sch., No. 3:21-CV-00175-W-LL, 2021 WL 3054877, at *6 (S.D. Cal. July 20, 2021) (the contract specified that "TEACHER is performing a ministerial role which is important to the spiritual and pastoral mission of the Roman Catholic Church and the PARISH.").

97. Simon v. Saint Dominic Acad., No. 19-CV-21271, 2021 WL 1660851, at *3 (D.N.J. Apr. 28, 2021). As Chairperson of the Religious Department and Campus Minister at Saint Dominic Academy, Simon identified herself "as an 'experienced professional with over four decades' of theology teaching experience and had a master's degree in Theology." Extrapolating from her job title, the Court held that "as Campus Minister her duties appear to fit squarely within the ministerial exception," even though the record did not reflect any actual, religious duties.

98. *Trotter*, at *4.

99. Jim Davids, *The Cutting Issues in Ministerial Exception Cases*, FOUNDING FREEDOMS LAW CTR. (Aug. 30, 2021), https://www.foundingfreedomslaw.org/legal-blog/issues-in-ministerial-exception-cases [https://perma.cc/R7XW-WDR2].

B. Understanding "religious functions"

Given the discordant applications in the lower courts, more guidance is needed. Under current doctrine, fact scenarios ranging from "employee leads a Bible study every day" to "employee walks students over to synagogue" are all presented to the court as part of *Our Lady of Guadalupe's* "religious function" analysis. At best, this lack of clarity leads to vague or imprecise considerations about what qualifies for the ministerial exception; at worst, it allows courts to surreptitiously smuggle in value judgments about which employees should or should not be protected.

Existing proposals for fixing the exception do not comport with current doctrine. Some have advocated the view espoused by Justice Thomas, joined by Justice Gorsuch, in his *Our Lady of Guadalupe* concurrence, arguing that the courts should extend the ministerial exception whenever deference to a religious organization's "good-faith claims that a certain employee's position is 'ministerial'" requires it.[100] While this proposal would greatly circumscribe the fact-intensive nature of the current test, courts appear hesitant to adopt it because it risks allowing the exception to swallow the rule. Of course, if given a choice, most religious organizations would insist that *all* employees are ministers because they are *all* tasked, at some level, with carrying out a religious mission. As one court has observed, however, if church autonomy "w[ere] so expansive as to create in all religious employers a First Amendment right to engage in employment discrimination, then there would be no need to have a ministerial exception."[101]

Other commentators have suggested that the exception should be restricted to employees who perform "exclusively religious functions."[102] This view is also incompatible with current doctrine and contradicts the historic practice of the ministerial exception, which held that a mashgiach,[103] director of the Music Ministry,[104] faculty and administrative staff,[105] and others were covered under more narrow readings of the exception. Under this view, judges would be required to determine whether an individual in a certain religion—a religion which the judge may not know much about—is analogous to a Christian minister.[106] This would

100. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069–70 (2020) (Thomas, J., concurring); *see also The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776 (2008).

101. *See* Lonnie Billard v. Charlotte Cath. High School, No. 3:17-CV-00011, 2021 WL 4037431, at *12 (W.D.N.C. Sept. 3, 2021).

102. Jeremy Weese, *The (Un)Holy Shield: Rethinking the Ministerial Exception*, 67 UCLA L. REV. 1320, 1367 (2020).

103. Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309–10 (4th Cir. 2004). A "mashgiach" is a kosher standards supervisor of a predominantly Jewish nursing home.

104. EEOC v. Roman Cath. Diocese of Raleigh, 213 F.3d 795, 800–02 (4th Cir. 2000).

105. EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 283–85 (5th Cir. 1981).

106. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020) ("Requiring the use of the title would constitute impermissible discrimination, and this problem cannot be solved simply by including positions that are thought to be the counterparts of a "minister," such as priests, nuns, rabbis, and imams. Nuns are not the same as Protestant ministers. A brief submitted by Jewish organizations makes the point that 'Judaism has many "ministers,"' that is, 'the term "minister" encompasses an extensive breadth of religious functionaries in Judaism.'").

force judges to scrutinize the traditions, practices, and customs of a given faith and second-guess whether an individual is, in fact, a "minister." Not only would this lead to ineffective and likely clumsy analysis, but it could also lead to discrimination.[107]

In any event, both of these suggestions are foreclosed by the Court's ministerial exception jurisprudence. In *Hosanna-Tabor* and *Our Lady of Guadalupe*, the Court declined to adopt these positions and opted instead to strike a middle, albeit ambiguous, ground between these two absolutes.[108] Unlike the existing proposals, ours seeks not to displace the current jurisprudence but to build on it.

After reviewing the history of the ministerial exception and its application in past cases, we propose a definition of "religious functions" which respects the competing interests[109] and imposes some consistency on the resolution of these cases in the lower courts. Put simply, a "religious function" is one that advances or contributes to the formation or development of faith through teaching and promoting religious doctrines.[110] "Formation or development of faith," means both the general development of the religious organization and the particular development of individuals within that faith. "Teaching or promoting religious doctrines" extends to employees who are involved in the dissemination or advocacy of religious beliefs or practices.[111]

107. *Id.* ("For Muslims, 'an inquiry into whether imams or other leaders bear a title equivalent to "minister" can present a troubling choice between denying a central pillar of Islam—*i.e.*, the equality of all believers—and risking loss of ministerial exception protections'") (quoting Brief for Asma T. Uddin as *Amicus Curiae* 2.

108. Some scholars have argued that these cases reveal compromise on this issue within the Court. *See* Michael W. McConnell, *On Religion, the Supreme Court Protects the Right to Be Different*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/opinion/supreme-court-religion.html [https://perma.cc/2N2X-4P7X a]; Mark Movsesian, *The Roberts Court Attempts a Compromise*, FIRST THINGS (July 15, 2020), https://www.firstthings.com/web-exclusives/2020/07/the-roberts-court-attempts-a-compromise [https://perma.cc/YU74-DZP5]. For arguments on why we should be skeptical of this compromise, *see* Timothy J. Tracey, *Deal, No Deal:* Bostock*,* Our Lady of Guadalupe*, and the Fate of Religious Hiring Rights at the U.S. Supreme Court*, 19 AVE MARIA L. REV. 105 (2021).

109. Religious organizations have an interest in ensuring that those they entrust with spreading their faith speak and live in accordance with the tenets of their religion. In the religious education context specifically, the organization has a responsibility to ensure that "a wayward minister's preaching, teaching, and counseling" does not lead the congregation away from the faith. *Our Lady of Guadalupe*, 140 S. Ct. at 2060. LGBTQ individuals have an interest in being able to find and retain gainful and meaningful employment, free from the fear of losing their jobs for a morally arbitrary, immutable characteristic.

110. We take this opportunity to distinguish our proposal from another that might, at first blush, sound similar. In *The Expansive Scope of the Ministerial Exception After* Our Lady of Guadalupe School v. Morrissey-Berru, Allison Ferraris suggests that courts should "confine the ministerial exception by only applying it to employees who have discernibly essential religious functions." Allison R. Ferraris, Comment, *The Expansive Scope of the Ministerial Exception After* Our Lady of Guadalupe School v. Morrissey-Berru, 62 B.C. L. REV. E. SUPP. II.-280, Il.-301 (2021). Though we agree with her goal of clarification, her application of the exception to "employees who have discernibly essential religious functions," merely begs the question, which functions are discernibly essential to religion? We submit that our synthesized definition offers an answer by further defining facially ambiguous terms.

111. Thus, an employee who leads a Bible study would be teaching on faith; while an administrative assistant in charge of scheduling and reserving the room for the Bible study but does not participate, would not be.

In determining whether a function "advances or contributes to the formation or development of faith," we propose a subjective-objective standard,[112] requiring courts to consider (1) whether, in the view of the organization, a specific employee shares in the organization's religious mission; and, (2) whether that employee's everyday functions actually contribute to that mission.[113] By combining such subjective and objective factors into a single test, we acknowledge—as does the First Amendment—the radical diversity of America's religious landscape, and that a purely objective test, which might make sense in the Christian context, would likely not reach smaller, more idiosyncratic religions.

This test is not a policy invention of ours. Rather, we distilled these factors from the current doctrine and historic principles underlying the ministerial exception.[114] Instead of reversing course or pivoting in a new direction, we have attempted to stay faithful to Supreme Court precedent. In *Our Lady of Guadalupe*, the Court explained that "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school," [115] and emphasized the teacher's "role in conveying the Church's message and carrying out its mission."[116] Similarly, in the *Gordon* concurrence, Justices Alito, Thomas, Kavanaugh, and Barrett focused on the religious function of integrating "faith and learning" to "help students make connections between course content, Christian thought and principles, and personal faith and practice."[117] "Educating,"

112. Other areas of constitutional law are replete with such blended standards. For example, under the Fourth Amendment, courts look first to whether an individual had an actual expectation of privacy and then to whether that expectation was reasonable. See *Katz v. United States*, 389 U.S. 347, 361 (1967). First Amendment jurisprudence similarly intermixes subjective and objective tests. In the defamation context, for example, courts attempt to discern whether contested statements were made with either subjective reckless disregard to their falsity, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), "serious doubts" *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), as to the truth of the statements, or a "high degree of awareness of probable falseness" *St. Amant*, 390 U.S. at 731, with regard to the statements. In reality, courts apply the test so mechanically that its operation often seems objective. *See* R. George Wright, *Objective and Subjective Tests in the Law*, 16 U. N.H. L. REV. 121, 138–141 (2017).

113. Here, we give "actually" its legally understood meaning: actual as opposed to hypothetical or theoretical. *See Mickens v. Taylor*, 535 U.S. 162, 171 (2002) (explaining that the Court adopts an understanding of actual meaning "'an *actual* conflict of interest' meant precisely a conflict that affected counsel's performance—as opposed to a *mere theoretical* division of loyalties") (emphasis added). *Cf. F.A.A. v. Cooper*, 566 U.S. 284, 296–98 (2012) (distinguishing actual damages from generalized damages because actual damages require "prov[ing] pecuniary loss" which indicates the loss must be shown to be real by evidence as opposed to only asserted in theory). In short, the question at this stage is whether there is evidence that the employee engaged in the actions/activities that the employer says are central to the organization's religious mission under the first prong. This prong can also be fairly analogized to standing, where one's injuries have to be concrete and particularized, rather than abstract and hypothetical.

114. *See supra* Part III.

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

116. *Id.* at 2063.

117. Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 955 (2022). Admittedly, the denial of certiorari is not precedential, but it is instructive of how the author of *Our Lady of Guadalupe* thinks the religious functions test applies to new facts. The denial opinion confirms our focus on the broader context of what is expected of employees and the religious functions they actually perform and eschews any narrow, per se rules about whether someone is a "minister," such as whether they pray with students. Indeed, when the Massachusetts high court

"inculcating," "training," "conveying," "carrying out," and "help[ing] students" all imply that the employee is invested in concrete, ongoing actions to support the religious organization's mission and the students' faith development. This emphasis on advancing the religious mission of the institution and guiding individuals in the advancement of their faith are directly reflected in the test we propose here. In this way, our test is not a departure from *Our Lady of Guadalupe*'s "religious function" test, but an explanation of how it could apply to various facts. This consistency with current doctrine means that our test has the additional benefit of being put to immediate use by lower courts in resolving these thorny disputes.

Under our proposed test, a religiously-affiliated hospital that, as part of its mission, expects its nurses to provide spiritual guidance to patients but can point to no evidence of concrete actions to support that expectation would not be entitled to claim the benefits of the ministerial exception. In the school context, a teacher who counsels her students on matters of religious beliefs is performing a religious function in a way that a teacher who merely recites a morning prayer along with the rest of her students is not. Similarly, a principal who guides their school through decisions about how to best instill faith development in their students is engaged in a religious function in a way that a custodian—even one who participates in prayers and church services at her parochial school—is not.

To better elucidate how this rule would apply in practice, we examine two actual cases decided by the lower courts in the wake of the Court's decisions in *Bostock* and *Our Lady of Guadalupe*. Take the recent case of Lonnie Billard, a substitute drama teacher who was fired from Charlotte Catholic High School in 2014 because of his sexuality.[118] As a substitute, Billard most often covered English and drama courses—neither of which were taught from a religious perspective.[119] The school argued that Billard was a "minister" under the ministerial exception because he allowed his students to participate in prayer and took them to Mass.[120] Under our proposed definition, the court would look to whether Billard plays an important role in fostering the faith of and spiritually developing his students.

While the first prong presumptively credits the religious organization's good faith classification, even that prong is unlikely to be met in this case. To prevail under the first prong, the religious organization is required to allege facts sufficient to substantiate why they consider the employee a minister. Although this prong is deferential to the party claiming the ministerial exception, post hoc rationalizations will not do.[121] Here, Charlotte Catholic offered no substantiation

reasoned that an adjunct was not a minister because she did not do specific actions, like "pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum," *id.* at 954, Justice Alito expressed "doubts" about this "troubling and narrow view." *Id*. at 954–55.

118. *See* Lonnie Billard v. Charlotte Cath. High School, No. 3:17-CV-00011, 2021 WL 4037431, at *1 (W.D.N.C. Sept. 3, 2021).

119. *Id.* at *2.

120. *Id.* at *4.

121. The first prong effectively serves as an evidentiary standard, requiring the party seeking to claim the ministerial exception must demonstrate that it understood the employee to be acting in a ministerial capacity

of its claim. As the district court noted, Billard was "discourage[d]. . . from instructing students on any sort of religious subject."[122] Furthermore, as a teacher of a secular subject, Billard was only "occasionally" leading prayer to begin his classes and even that occasional prayer was not required to be "strictly Catholic."[123]

Even assuming that the religious organization would or should prevail under the more deferential first prong, their claim would fail under the second. On the facts presented to the district court, there was no evidence that any of Billard's employment tasks at Charlotte Catholic actually advanced that organization's religious mission. That Billard occasionally participated in morning prayer alongside students is not to the contrary because students at Catholic schools are typically required to say morning prayer together and attend Mass at school; therefore, Billard's reciting the prayer with his students or walking them to Mass did not lead to their faith development or religious education. Unlike in *Gordon*, where the faculty handbook explained that professors were expected "'to participate actively in the spiritual formation of. . . students into godly, biblically-faithful ambassadors for Christ'" [124] and DeWeese-Boyd understood that the "'work of integration' required 'pursuing scholarship that is faithful to the mandates of Scripture,"[125] nothing in the record before the district court in *Billard* supported finding that Billard's actions were supposed to allow or had the result of allowing students to become better educated or inculcated in their faith. As such, under our proposed test, Billard would not be covered under the ministerial exception.

Next, consider the case of *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*[126] There, the court was asked to decide if the ministerial exception bars a Title VII claim brought by a guidance counselor who was fired because "her 'civil union is a violation [of her] contract and contrary to the teaching of the Catholic Church."[127] In that case, the religious organization defined the role of a guidance counselor to include "praying with students, teaching and celebrating Catholic traditions and conveying the Church's message and modeling a Christ-centered life." [128]

In this scenario, the first prong is met: the school claims in good faith that the counselor is a "minister," and the record allows the court to credit that determination. Under the second prong, the court would consider whether the guidance counselor plays an active role in helping others in their (or the school in its) faith development (as opposed to simply participating in the ritual of daily prayer or only offering secular advice about which college to attend), and then look to

before the litigation commenced. Contractual language, school traditions, etc. are all sufficient to make such a showing.

122. *Billard* No. 3:17-CV-00011. at *4.

123. *Id.*

124. DeWeese-Boyd v. Gordon, 163 N.E.3d 1000, 1006 (Mass. 2021).

125. Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 954 (2022).

126. Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195 (S.D. Ind. 2020).

127. *Id.* at 1203.

128. *Id.* at 1206.

whether the counselor's specific functions support that contention. Both of these considerations are supported by the record. Not only were the guidance counselor's religious tasks delineated in writing, but the record also contained evidence that she actually participated in each of those activities—any of which could advance the organization's religious mission.

As our analysis of these cases demonstrates, by focusing on whether the functions performed by the employee advance the goal of fostering faith and spreading religious doctrines, courts can separate rote, mechanistic religious functions from those that go to the heart of the organization's spiritual and moral mission. This will help elucidate which individuals "play certain key roles" [129] within the religious organization and are thus covered by the ministerial exception. In closing out this Section, we should note that in both cases the district court reached the outcome that would have resulted had the courts applied our test; but in each case, the court's value judgments seemed to drive its analysis.[130] Our proposed test removes such value judgments by offering a principled way to evaluate these cases. That way, all judges would have to engage in the same analysis and show their work.

V. CONCLUSION

In sum, we believe this definition of "religious function" helps to clarify when the ministerial exception applies in a way that accommodates the important interests at issue, while also remaining faithful to Supreme Court precedent. Those who want robust Title VII protections for as many employees as possible can delineate between a teacher who is actually performing religious functions and one who is not. For example, a religion teacher who is tasked with—and actively participates in—the moral and spiritual development of her students would qualify as a minister; but a math teacher who does not discuss faith in his classroom would not be eligible. And those who wish for more religious liberty in the area of employment law can seek to structure the job duties of their teachers and employees in ways that require them to perform actual religious functions if they want them to fall within the ministerial exception. If a parochial school wants its math teacher to incorporate faith discussions into his daily lessons, they can choose to do that. Consequently, parents can choose to send or not send their children to that school knowing that religion is incorporated into math class, and teachers can choose to work there or not work there with that same knowledge.

Regardless of whether one thinks *Bostock* and *Our Lady of Guadalupe* are in tension or in concert, the task is now on the hundreds of lower courts across the country to apply these cases to unanticipated and vastly differing fact

129. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

130. Rather than apply a synthesized test based on the Supreme Court's language and reasoning and asking if these facts fall within the ministerial exception, the courts seemed to base their analysis on whether they thought these facts *should* fall within the ministerial exception and decided the case accordingly. Even assuming good faith from all judges, the opaque nature of the current doctrine leaves open opportunities for courts to surreptitiously smuggle in normative thoughts and judgments.

patterns. With *Our Lady of Guadalupe*'s emphasis on religious function, it is important to have a clear, workable definition so that both Title VII and the ministerial exception are vigorously and transparently applied in the proper circumstances. This Article provides one such definition.