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The Expanding Role and Dwindling  
Protection for Private Religious  
School Teachers During the  
Pandemic: Rethinking the Ministerial  
Exception After *Morrissey-Berru*

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V. TWO POSSIBLE SOLUTIONS FOR CLARIFYING THE MINISTERIAL  
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During the COVID-19 pandemic, teachers in the United States have become frontline workers.<sup>1</sup> They are in the classroom managing students' mask wearing and policing social distance between students while trying to teach. Or, they are fully remote and dealing with crises in their own homes and crises in homes that they observe, given their unique window into students' lives.<sup>2</sup> Others are struggling with the now infamous "hybrid" model, as they balance the needs of in-person and virtual students.<sup>3</sup> Teachers shifted to their new reality in March 2020, and then more fully adjusted to the new reality during their summer breaks, all while managing personal issues such as health concerns and childcare for their own children.<sup>4</sup> Many school districts and private schools required teachers to return to campus in August, making some accommodations,<sup>5</sup> but otherwise requiring their in-person attendance. As a result, teachers resigned, were fired, or returned despite concerns about health issues. Most had little voice in the decisions about reopening.<sup>6</sup>

Take, for instance, Elaine Sage, a schoolteacher at St. Francis Xavier School, a Catholic private school in Wilmette, Chicago for fourteen years. Ms. Sage did not return to work in August 2020, when St. Francis Xavier required teachers to return for in-person instruction.<sup>7</sup> The school

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<sup>1</sup> Emma Goldberg, *What It's Like to Be a Teacher in 2020 America*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/05/us/teachers-covid-schools-pandemic.html> [https://perma.cc/VKU4-NV7R].

<sup>2</sup> See Melissa Mills, *Hero Teacher Calls Police on Predator Abusing Child in First Grade Zoom Class*, PARENTS (Oct. 22, 2020), <https://www.parents.com/news/hero-teacher-calls-police-on-predator-abusing-child-in-first-grade-zoom-class/> [https://perma.cc/2G9Z-B69M].

<sup>3</sup> The "hybrid" method of teaching during the pandemic typically refers to teaching students both virtually and in person during the same class. Anya Kamenetz, *5 Things We've Learned About Virtual School in 2020*, NPR (Dec. 4, 2020), <https://www.npr.org/2020/12/04/938050723/5-things-weve-learned-about-virtual-school-in-2020> [https://perma.cc/PZP6-N9Q2].

<sup>4</sup> See Jessie Pounds, *Online Learning Forces Parents, Teachers, and Students to Adapt*, GREENSBORO.COM (May 14, 2020), [https://greensboro.com/news/education/online-learning-forces-parents-teachers-and-students-to-adapt/article\\_42e6fddb-2a6e-5f9b-b675-2070c0d3af06.html](https://greensboro.com/news/education/online-learning-forces-parents-teachers-and-students-to-adapt/article_42e6fddb-2a6e-5f9b-b675-2070c0d3af06.html) [https://perma.cc/7L77-ESTN].

<sup>5</sup> Aliyya Swaby & Emma Platoff, *Texas Schools Tell Teachers with Medical Risks They Must Return to Classroom During Pandemic*, TEX. TRIB. (Oct. 20, 2020), <https://www.texastribune.org/2020/10/20/texas-schools-teachers-coronavirus-pandemic/> [https://perma.cc/XWX2-TD47].

<sup>6</sup> See Alexandra Robbins, *Too Many Parents and Decision Makers Treat Teachers Like They Don't Matter*, CNN (Dec. 21, 2020), <https://www.cnn.com/2020/12/21/opinions/protect-teachers-from-covid-robbins/index.html> [https://perma.cc/96HY-XQRM].

<sup>7</sup> Brónagh Tumulty, *Suburban Catholic School Teacher Says She Was Let Go After Voicing Concerns About In-Person Learning*, WGNTV (Aug. 22, 2020), <https://wgntv.com/news/>

would not accommodate her request to teach remotely and thus released Ms. Sage from her contract for her failure to return.<sup>8</sup> Ms. Sage, sixty-three and married to a cancer survivor, felt unsafe returning to an in-person classroom.<sup>9</sup> However, the Archdiocese's director indicated she was not eligible for a leave of absence, telling Ms. Sage that "[a]s we are returning to in-person instruction, it is critical that our teachers be available to teach in-person for classes that are in-person."<sup>10</sup> In a letter to Ms. Sage, St. Francis Xavier School's Principal noted that in-person teaching was necessary for "the academic, spiritual, and emotional well-being of our children."<sup>11</sup> Ms. Sage was certainly not asked for input regarding the significant decisions regarding how teaching would occur to satisfy student needs.

Ms. Sage's circumstances are not unique. The pandemic has created a class<sup>12</sup> of private school teachers who are not leaders and decision-makers when it comes to how the school handles the pandemic, but who are, according to the Supreme Court, "ministers" when it comes to fulfilling the schools' religious educational mission.<sup>13</sup> These decisions affect the teachers directly and, arguably, impact the spiritual enrichment of students. This Essay explores this incongruity: courts will deem a private school secular-subjects teacher with no say in fashioning pandemic teaching policies (based on the academic and spiritual needs of students) a minister under the ministerial exception.

Around the same time that school administrators were deciding how to handle reopening in mid-2020, schoolteachers at private, religious schools<sup>14</sup> suffered a substantial diminution of legal protections when the United States Supreme Court decided *Our Lady of Guadalupe School v. Morrissey-Berru*.<sup>15</sup> In *Morrissey-Berru*, the Court decided that

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coronavirus/suburban-catholic-school-teacher-says-she-was-let-go-after-voice-concerns-about-in-person-learning/ [https://perma.cc/U34S-MS6Z].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Javonte Anderson & Sophie Sherry, *A Suburban Catholic School Teacher Was Fired After Refusing to Return to Class Due to Covid-19*, CHI. TRIB. (Aug. 20, 2020), <https://www.chicagotribune.com/coronavirus/ct-covid-19-catholic-school-teacher-chicago-20200820-yxvc52jxqzbdpazki5msjdlbeu-story.html> [https://perma.cc/N7ET-8VAZ].

<sup>11</sup> *Id.*

<sup>12</sup> This pun was unintended.

<sup>13</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

<sup>14</sup> This Essay does not use the term "parochial" schools because that term, for some, denotes only Catholic schools, rather than schools of other religious faiths. Private schools may be religious or nonsectarian. Thus, this Essay uses private, religious schools to refer to private schools that teach both religious and secular subjects.

<sup>15</sup> See generally *Morrissey-Berru*, 140 S. Ct. 2049.

schoolteachers working for religious schools who teach primarily secular subjects, but also have a smattering of “religious duties,”<sup>16</sup> qualify as “ministers” under the ministerial exception. After this ruling, these teachers cannot avail themselves of statutory employment discrimination protections afforded to most employees.

This Essay briefly discusses teachers’ role during the pandemic and then looks at the Court’s decision in *Our Lady of Guadalupe School v. Morrissey-Berru* and how it curtails these teachers’ legal protection against workplace discrimination. This Essay offers a description of the ministerial exception as it relates to teachers and proposes two solutions for remedying the current challenges with the ministerial exception test. Ultimately, this Essay argues the exception should apply only to the religious institutions’ decision-makers, i.e., those who decide how to apply religious doctrine, which religious ceremonies should occur, which music should accompany ceremonies to fulfill religious mission, and, in religious schools, which curriculum should be taught to fulfill the schools’ religious mission. The question becomes with whom does “the buck stop” when it comes to religious missions of the organization and matters of religious ceremony and faith. The exception should apply to only those employees who are religious decision-makers.

#### I. TEACHERS’ ROLE DURING THE COVID-19 PANDEMIC

Teachers’ role has expanded dramatically during the COVID-19 pandemic.<sup>17</sup> Teachers are now expected to serve as babysitters, emotional support providers, technology experts, guardians of student safety, and educators.<sup>18</sup> Arguably, teachers have always played a multi-

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<sup>16</sup> As described below in detail, the two teachers in the case taught secular subjects and, as required by the school, led daily prayers and sometimes coordinated larger religious ceremonies. *Id.* at 2079. While the Ninth Circuit referred to these duties as “significant,” the teachers followed school dictates in terms of religious duties. See *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018), *rev’d*, *Morrissey-Berru*, 140 S. Ct. 2049. The teachers implemented the school’s religious requirements. *Morrissey-Berru*, 140 S. Ct. at 2079.

<sup>17</sup> See Goldberg, *supra* note 1; Shelby Webb, ‘Overwhelmed’ Houston Teachers Struggling to Juggle Online, In-Person Classes, HOUS. CHRON. (Oct. 30, 2020), <https://www.houstonchronicle.com/news/houston-texas/education/article/houston-teachers-struggle-in-person-online-covid-15689150.php> [https://perma.cc/HVD8-MYLC].

<sup>18</sup> See Anna Brand, *Teachers Share Anonymous Feelings About Going Back to School amid Coronavirus Pandemic*, NBC NEWS (Aug. 10, 2020), <https://www.nbcnews.com/news/education/teachers-share-anonymous-feelings-about-going-back-school-amid-coronavirus-n1236268> [https://perma.cc/THD3-428B] (“I thought I was a teacher. Oh no, a social worker. Wait, a police officer. Now a front-line health care worker. Just stop!!!”).

faceted and under-appreciated role. Now, this role has certainly expanded, and parents and the public at large are noticing.<sup>19</sup> Teachers are both technically and practically-speaking “essential workers”<sup>20</sup> during the pandemic, giving not only academic but also emotional support.<sup>21</sup> As one teacher recently described:

Perhaps even more important than ever in the recent past, we need to help students feel connected and cared for. Forming connections with students and families should ideally begin before school begins. Reaching out to students or meeting them in small groups before school starts can help students feel valued members of their class and help ease the return back to school.<sup>22</sup>

These new duties continue a trend of putting teachers on the front line in terms of caring for and protecting students.<sup>23</sup>

When the school year started in August 2020, school administrators faced the novel challenge of how to educate students while maintaining the safety of students, staff, teachers, and the community. Principals and school administrators had to decide between allowing teachers to teach remotely or requiring them to teach on campus, often with a “hybrid” model. Much of this was driven by parents demanding students be on campus, as parents faced the extraordinary challenges of either in-person or remote work while overseeing their childrens’ learning. Many

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<sup>19</sup> Marshall Shepherd, *An Open “Thank You” Letter to Teachers in a Covid-19 World*, FORBES (Oct. 5, 2020), <https://www.forbes.com/sites/marshallshepherd/2020/10/05/an-open-thank-you-letter-to-teachers-in-a-covid-19-world/?sh=2bc0bdde39da> [https://perma.cc/V3QT-UGA6].

<sup>20</sup> Madeline Will, *Deemed “Essential Workers,” Some Teachers Told to Skip Quarantine After COVID-19 Exposure*, EDUCATIONWEEK (Aug. 21, 2020), <https://www.edweek.org/leadership/deemed-essential-workers-some-teachers-told-to-skip-quarantine-after-covid-19-exposure/2020/08> [https://perma.cc/NTD7-XEUN].

<sup>21</sup> See Gabriella Borter & Brendan O’Brien, *Trump Administration Classifies Teachers Essential Workers During Pandemic*, REUTERS (Aug. 20, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa/trump-administration-classifies-teachers-essential-workers-during-pandemic-idUSKBN25G1ZK> [https://perma.cc/L7RM-48BU]; Shareefah Mason, *Don’t Forget that Teachers Are on the Front Lines of the Coronavirus Pandemic, Too*, DALL. MORNING NEWS (Apr. 12, 2020), <https://www.dallasnews.com/opinion/commentary/2020/04/12/dont-forget-that-teachers-are-on-the-front-lines-of-the-coronavirus-pandemic-too/> [https://perma.cc/GY2B-MJZP].

<sup>22</sup> Debbie Niderberg, *Teachers Must Expand Their Roles amid Coronavirus Pandemic*, JEWISH NEWS SYNDICATE (Aug. 6, 2020), <https://www.jns.org/opinion/teachers-must-expand-their-roles-amid-coronavirus-pandemic/> [https://perma.cc/J49L-S23J].

<sup>23</sup> See, e.g., Jeanie Lindsay, *How Do Teachers Prepare for and Prevent School Shootings?*, WFYI (Aug. 17, 2018), <https://www.wfyi.org/news/articles/how-do-teachers-prepare-for-and-prevent-school-shootings> [https://perma.cc/TZW4-TSCV].

parents of private school students threatened to withhold tuition if students were not allowed to return to campus.<sup>24</sup>

As a result, teachers felt pressure to return for their students and to keep their jobs;<sup>25</sup> yet, numerous teachers and administrators are considered high risk.<sup>26</sup> Several teachers have died from COVID-19 complications.<sup>27</sup> Thus, many teachers were forced to make the difficult choice between returning to the classroom or losing their jobs.

Part of my concern with school reopening is that nationwide, about a quarter of our teachers are in the age range where this is really dangerous. They're playing Russian roulette with the most experienced educators. I just had a conversation with a group of teachers, and it's so bad that I know a couple of them are leaving. They're done. School principals shouldn't be the ones having to make life-or-death decisions for our communities. It's not on our backs how the economy does. But every time there's a crisis in our communities, in some ways,

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<sup>24</sup> See Lindsey M. Burke, *The Coronavirus Will Crush the Private School Industry*, HERITAGE (June 16, 2020), <https://www.heritage.org/education/commentary/the-coronavirus-will-crush-the-private-school-industry> [https://perma.cc/U98P-KBF7]; Jessica Costello, *Local Private Schools Expect Parents to Pay Child's Tuition Despite COVID-19 Pandemic*, 14 NEWS (May 14, 2020), <https://www.14news.com/2020/05/14/local-private-schools-expect-parents-pay-childs-tuition-despite-covid-pandemic/> [https://perma.cc/FP9U-DXXX].

<sup>25</sup> Dana Goldstein & Eliza Shapiro, *"I Don't Want to Go Back": Many Teachers are Fearful and Angry over Pressure to Return*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/07/11/us/virus-teachers-classrooms.html> [https://perma.cc/BZB9-U6SS].

<sup>26</sup> About one in five of the nation's public-school teachers are fifty-five or older, according to the AEI report, which relies on federal data from 2017–18. The rate is even higher in private schools, where about one in four teachers is in that group. Kalyn Belsha, *A Looming Issue for Schools: Teachers with Health Worries Who Can't or Won't Go Back*, CHALKBEAT (May 9, 2020), <https://www.chalkbeat.org/2020/5/9/21252608/older-teachers-health-concerns-coronavirus-return-to-schools> [https://perma.cc/JFZ8-8QPM]. Adults over age sixty-five account for the vast majority of COVID-19 deaths in the U.S. And eighteen percent of public and private school teachers and twenty-seven percent of principals are fifty-five or older, according to federal data. Katie Reilly, *With No End in Sight to the Coronavirus, Some Teachers Are Retiring Rather than Going Back to School*, TIME (July 8, 2020), <https://time.com/5864158/coronavirus-teachers-school/> [https://perma.cc/H4FF-VZM2].

<sup>27</sup> Jemima McEvoy, *At Least 6 U.S. Teachers Have Died from Covid-19 Since Schools Reopened*, FORBES (Sept. 10, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/09/10/at-least-6-american-teachers-some-in-their-20s-and-30s-dead-from-covid-19/?sh=231ed3584049> [https://perma.cc/BV5J-46VA].

there's the perception that we're supposed to be the ones handling it.<sup>28</sup>

At the same time, some private schools became more popular with the pandemic because, generally speaking, these schools could more nimbly handle the pandemic.<sup>29</sup> Private schools can offer smaller classes and have an easier time adapting to necessary measures for COVID-19 as they are not part of a school district.<sup>30</sup>

The litany of potential legal issues concerning teachers' employment during the pandemic has yet to unfold; the issues are certain to be varied and complex.<sup>31</sup> What legal recourse school teachers have for refusing to return to the classroom because of health concerns under employment discrimination laws, FMLA,<sup>32</sup> FFCRA,<sup>33</sup> and ADA<sup>34</sup> will vary with

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<sup>28</sup> Katie Reilly, *This Is What It's Like to Be a Teacher During the Coronavirus Pandemic*, TIME (Aug. 26, 2020), <https://time.com/5883384/teachers-coronavirus/> [<https://perma.cc/PBE5-8WB8>].

<sup>29</sup> As of late July, forty percent of private schools were planning on full in-person reopening, nineteen percent were preparing for entirely virtual instruction, and forty-one percent were offering a mix of both, according to a survey by the National Association of Independent Schools, which represents 1,600 private schools across the U.S. See, e.g., Katie Reilly, *Public Schools Will Struggle Even More as Parents Move Kids to Private Ones During the Pandemic*, TIME (Aug. 31, 2020), <https://time.com/5885106/school-reopening-coronavirus/> [<https://perma.cc/H4EQ-EGDF>]; Jane Ridley, *Parents Risk Going Broke Paying for Private Schools over Virtual*, N.Y. POST (Oct. 6, 2020), <https://nypost.com/2020/10/06/parents-risk-going-broke-paying-for-private-schools-over-virtual/> [<https://perma.cc/LM8G-8CL8>]; Paul Sullivan, *Private Schools Hold New Attraction for Rich Parents*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/10/09/your-money/private-schools-wealthy-parents.html> [<https://perma.cc/Q77H-WZUR>].

<sup>30</sup> Yet, not all private schools enjoyed these advantages and increases in attendance. Many private schools have closed as a result of the pandemic. Private schools often educate low and middle-income families. By early July 2020, the Cato Institute reported ninety-seven private schools that would close, in part, because of the pandemic.

<sup>31</sup> See Goldberg, *supra* note 1.

<sup>32</sup> The Family Medical Leave Act may provide temporary relief to teachers for COVID-19 related leave. TEX. EMP'T AGENCY, 20-21 EMPLOYMENT MATTERS 1 (2020), [https://tea.texas.gov/sites/default/files/covid/20-21\\_employment\\_matters.pdf](https://tea.texas.gov/sites/default/files/covid/20-21_employment_matters.pdf) [<https://perma.cc/H5PL-YK8N>].

<sup>33</sup> See, e.g., Elijah Collins, *Teachers Protected by "Families First Coronavirus Response Act" for the Upcoming School Year*, KHQ (July 8, 2020), [https://www.khq.com/regional/teachers-protected-by-families-first-coronavirus-response-act-for-the-upcoming-school-year/article\\_ae352203-3de3-55a9-9913-83d777f54974.html](https://www.khq.com/regional/teachers-protected-by-families-first-coronavirus-response-act-for-the-upcoming-school-year/article_ae352203-3de3-55a9-9913-83d777f54974.html) [<https://perma.cc/3LEZ-WKSW>]; Mark Walsh, *Teachers' Rights Under COVID-19: Anxiety Meets Legality*, EDUCATIONWEEK (Nov. 19, 2020), <https://www.edweek.org/teaching-learning/teachers-rights-under-covid-19-anxiety-meets-legality/2020/11> [<https://perma.cc/RJW3-BSZ9>].

<sup>34</sup> See Walsh, *supra* note 33 ("With many schools having reopened for in-person instruction, some educators have sought accommodations under which they may work

teachers' circumstances.<sup>35</sup> For instance, "[t]he racial disparities exacerbated by COVID-19 could also potentially be the bases for novel employment claims related to discrimination, given that schools situated in predominantly Black communities are subject to greater health risks for teachers."<sup>36</sup> Yet, the ministerial exception may bar many private school teachers from recovering on employment discrimination claims arising during the pandemic merely because they teach in a private, religious school.

## II. THE PURPOSE AND ORIGINS OF THE MINISTERIAL EXCEPTION

Countless articles describe the purpose and origin of the ministerial exception.<sup>37</sup> Briefly, both the purpose and origin stem from courts' reluctance under the First Amendment's religion clauses to interfere with religious institutions' internal governance and spiritual doctrine. The First Amendment allows religious institutions to decide, free from courts' meddling, matters of faith, doctrine, and governance,<sup>38</sup> as

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remotely. Such scenarios are largely governed by the Americans with Disabilities Act of 1990, advocates say.").

<sup>35</sup> See, e.g., Cory Collins, *Educators' and Students' Rights During COVID-19, Teaching Tolerance*, TOLERANCE (Aug. 31, 2020), <https://www.tolerance.org/magazine/educators-and-students-rights-during-covid19> [<https://perma.cc/U9J7-BGYG>] [hereinafter *Educators' and Students' Rights*] ("Teachers in over half of the states, Puerto Rico and the Virgin Islands may be protected by [Occupational Safety and Health Administration, or] OSHA-approved state plans. . . . States that have teachers' unions may have additional options available under their collective bargaining agreements."); Walsh, *supra* note 33.

<sup>36</sup> Collins, *Educators' and Students' Rights*, *supra* note 35.

<sup>37</sup> See, e.g., Marsha B. Freeman, *What's Religion Got to Do with It? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exception*, 16 U. PA. J.L. & SOC. CHANGE 133 (2013) (describing the difference between exception and exemption); William A. Galston, *Why the Ministerial Exception Is Consistent with Smith—And Why It Makes Sense*, 53 SAN DIEGO L. REV. 147 (2016); Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981 (2013) [hereinafter *The Sins of Hosanna-Tabor*]; Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839 (2012); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183 (2014); Ira Lupu & Robert W. Tuttle, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 249 (2019); Summer E. Allen, Note & Comment, *Defining the Lifeblood: The Search for a Sensible Ministerial Exception Test*, 40 PEPP. L. REV. 645 (2013); Jeremy Weese, Comment, *The (Un)Holy Shield: Rethinking the Ministerial Exception*, 67 UCLA L. REV. 1320 (2020); Michael J. West, Note, *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861 (2017). See generally Leslie C. Griffin, *Religious Freedom, Human Rights, and Peaceful Coexistence*, 50 LOY. U. CHI. L.J. 77 (2018) [hereinafter *Religious Freedom*].

<sup>38</sup> See *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 120-21 (1952).

“[c]ourts temporal are not ideally suited to resolve problems that originate in the spiritual realm.”<sup>39</sup> The ministerial exception, which flows from the broader church autonomy doctrine,<sup>40</sup> permits religious employers to decide who will lead their faithful without court intervention.<sup>41</sup> The exception ensures that the authority to select and control who will minister to the faithful is the church’s alone.<sup>42</sup> Courts also describe the exception’s purpose in the negative: without this autonomy “a wayward minister’s preaching, teaching, and counseling could contradict the church’s tenets and lead the congregation away from the faith.”<sup>43</sup>

According to commentators, the Fifth Circuit “created” the exception in 1972 in *McClure v. Salvation Army*.<sup>44</sup> In *McClure*, which involved an officer of The Salvation Army who sued after the organization terminated her officer status, the Fifth Circuit described the risk of state encroachment on a religious employer’s free exercise of religion regarding a “minister’s assignment, his salary, and his duties”:

An application of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern.<sup>45</sup>

This Essay narrows the focus to courts’ application of the exception to teachers at private, religious schools. It starts by describing *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>46</sup> which involved teacher Cheryl Perich, and the original four-factor ministerial exception test the Court announced in that case. This Essay then describes the following three distinct approaches courts have taken when applying

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<sup>39</sup> *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 432-33 (2d Cir. 1981).

<sup>40</sup> See *Korte v. Sebelius*, 735 F.3d 654, 678 n.16 (7th Cir. 2013) (citing articles related to the doctrine).

<sup>41</sup> *Id.* at 730.

<sup>42</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

<sup>43</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

<sup>44</sup> See *McClure v. Salvation Army*, 460 F.2d 553, 560-61 (5th Cir. 1972); Griffin, *Religious Freedom*, *supra* note 37, at 87 n.74 (listing pre-*Hosanna* cases).

<sup>45</sup> *McClure*, 460 F.2d 553 at 560.

<sup>46</sup> See *Hosanna-Tabor*, 565 U.S. at 188.

the ministerial exception to teachers after *Hosanna-Tabor*: (1) functional approach with an emphasis on religious duties/functions, (2) sliding scale approach, and (3) deferential approach. The Essay then describes the latest approach, which the Court announced in *Morrissey-Berru* and which the Essay calls “function-lite.” Using this approach, the Court focuses on the fourth factor, the employee’s duties, requiring only that the teacher follow the dictates of the institution in terms of fulfilling religious responsibilities.

Ultimately, the Essay promotes two entirely different approaches for courts to use to avoid interfering with matters of church doctrine, faith, and governance. It does so both to recommend a workable ministerial exception test, as well as to reconcile the tension resulting from teachers at private, religious schools who have no voice in how the school will manage COVID-19 to promote the spiritual, educational, and safety needs of students being treated as “ministers” — faith leaders — of their religious organizations for purposes of the exception.

### III. HOSANNA-TABOR DECISION AND FOUR-FACTOR TEST

In 2012, a unanimous United States Supreme Court decided *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*<sup>47</sup> and, in doing so, formally established the ministerial exception. The exception acknowledges the First Amendment rights of churches to select and retain their ministers without government interference. It bars ministers’ statutory employment discrimination claims against religious organizations for which they work.<sup>48</sup> In a footnote, the *Hosanna* Court clarified that the exception is an affirmative defense, rather than a jurisdictional bar.<sup>49</sup>

In *Hosanna-Tabor*, Cheryl Perich, a secular-subjects teacher who also taught a religion class at a church school,<sup>50</sup> sued under the Americans with Disabilities Act (“ADA”) after developing narcolepsy and being fired for alleged insubordination and disruptive behavior when she attempted to return to work after her medical leave.<sup>51</sup> The school contended she violated Lutheran doctrine by attempting to use external means of resolving the employment dispute. Because her employer was

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<sup>47</sup> See *id.* at 171.

<sup>48</sup> *Id.* at 181.

<sup>49</sup> *Id.* at 195 n.4.

<sup>50</sup> Perich taught “math, language arts, social studies, science, gym, art, and music. . . . [Perich] also taught a religion class four days per week . . . and [she] attended a chapel service with her class once a week for thirty minutes.” *Id.* at 178.

<sup>51</sup> *Id.* at 179.

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a religious institution and Perich was a minister, the United States Supreme Court held that Perich's lawsuit was barred.<sup>52</sup>

In evaluating who is a minister, the *Hosanna-Tabor* Court analyzed the following considerations regarding Perich: (1) the formal title the religious institution gave her (whether the position required education and training related to title);<sup>53</sup> (2) the substance reflected in Perich's role (whether the religious organization "held her out" as a minister to the congregation, with a role distinct from other members); (3) Perich's use of the title (whether she "held herself out" as a minister by "accepting the formal call to religious service," claiming a special housing allowance on taxes, or calling herself a minister);<sup>54</sup> and (4) the important religious functions Perich performed (whether these tasks conveyed the religious mission of the organization).<sup>55</sup>

When analyzing Perich's case, the Court noted that at the school's request "Perich accepted the call" and was thus designated a "commissioned" minister.<sup>56</sup> In addition to teaching secular subjects, Perich "taught a religion class . . . led the students in daily prayer and devotional exercises each day, and attended a weekly school-wide chapel service."<sup>57</sup> The Church "held out" Perich as a minister: "when Hosanna-Tabor extended her a call, it issued her a 'diploma of vocation' according her the title 'Minister of Religion, Commissioned.'"<sup>58</sup> The Court said her title of minister "reflected a significant degree of religious training followed by a formal process of commissioning."<sup>59</sup> When Perich completed her education, she was commissioned as a minister "only upon election by the congregation, which recognized God's call to her to teach."<sup>60</sup>

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<sup>52</sup> The *Hosanna-Tabor* Court did not opine of whether the exception would bar other types of lawsuits, saying "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise." *Id.* at 196.

<sup>53</sup> Courts typically look to requisite education and training relating to the title. *See Fratello v. Roman Catholic Archdiocese of N.Y.*, 175 F. Supp. 3d 152, 164, 166 (2016), *aff'd*, 863 F.3d 190, 203 (2d Cir. 2017).

<sup>54</sup> Courts look to whether the minister accepted a formal call or claimed ministerial status for tax or other formal purposes. *See id.* at 166.

<sup>55</sup> Courts look to whether the person led prayers and adhered to religious values and planned services. *Id.* at 167.

<sup>56</sup> *Hosanna-Tabor*, 565 U.S. at 178.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 191.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

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Perich held herself out as a minister “by accepting the formal call to religious service, according to its terms.”<sup>61</sup> In addition, she claimed a housing allowance on her taxes available only to ministers.<sup>62</sup> Describing Perich’s function, the Court identified the following tasks as “conveying the Church’s message and carrying out its mission”: she taught her students religion and led them in prayer several days a week, she led a school-wide chapel service twice a year (choosing the prayers and hymns), and in her final year teaching, she led a devotional exercise each day.<sup>63</sup>

After *Hosanna-Tabor*, courts struggled with how to apply the four-factor test. The Supreme Court clarified it was not prescribing a “rigid formula,”<sup>64</sup> but the Court provided little else in terms of guidance. This Essay will describe various approaches courts adopted after *Hosanna-Tabor* and then discuss the Supreme Court’s approach in the recent *Morrissey-Berru* decision.

#### IV. FOUR APPROACHES EMERGE

After *Hosanna-Tabor*, courts struggled to apply the four-factor test. Four main approaches arose, each of which this Essay describes and illustrates. Ultimately, this Essay argues for a fifth approach that focuses on the employee’s religious leadership and decision-making functions, essentially evaluating whether the employee helps shape the institution’s religious mission and ceremonies. Before describing this approach, this Essay will provide the foundation by illustrating challenges with the existing ways in which courts have applied the ministerial exception.

##### A. Functional Approach

Many courts focus on an employee’s “function,” one of the *Hosanna-Tabor* factors, to determine whether an employee is a minister. Justices Alito and Kagan described function as the touchstone for analyzing whether someone is a minister: “the ‘ministerial’ exception should be tailored to this purpose. It should apply to any ‘employee’ who leads a

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 192.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 190.

religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”<sup>65</sup>

Before *Hosanna-Tabor*, to determine if an employee qualified as a minister for the exception, some courts used the “primary duties” test, which reviewed whether “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.”<sup>66</sup> Courts applied this test to analyze the employee’s job duties to decide whether these duties related to the organization’s religious mission.<sup>67</sup> In *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*,<sup>68</sup> for instance, the Fourth Circuit applied the exception to a mashgiach<sup>69</sup> after describing his duties as supervising and participating in religious ritual by kosherizing the kitchen, overseeing the food preparation, and consulting with authorities to resolve concerns.<sup>70</sup> However, in *Hosanna-Tabor*, the Court considered other circumstances to determine whether Cheryl Perich was a minister and admonished courts not to apply a “rigid formula”<sup>71</sup> when deciding who is a minister.

In their *Hosanna-Tabor* concurrence, Justices Kagan and Alito described how not only did Perich satisfy all four factors, but she satisfied the religious function factor in spades. For this factor, the Court detailed how Perich engaged in the following religious duties:

She taught religion to her students four days a week and took them to chapel on the fifth day. She led them in daily devotional

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<sup>65</sup> *Id.* at 199 (Alito, J., concurring); see *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (emphasizing the function of the music director in furthering the mission of the church and conveying the church’s message when deciding to apply the ministerial exception).

<sup>66</sup> *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)).

<sup>67</sup> See, e.g., *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006). Courts conduct this inquiry independently, without deferring to the church’s conception of the spiritual significance of particular responsibilities. See, e.g., *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (“While religious organizations may designate persons as ministers for their religious purposes . . . bestowal of such a designation does not control their extra-religious legal status.”).

<sup>68</sup> *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004).

<sup>69</sup> *Id.* at 301 (defining mashgiach as “an inspector appointed by a board of Orthodox rabbis to guard against any violation of Jewish dietary laws”).

<sup>70</sup> *Id.* at 303.

<sup>71</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

exercises and in prayer three times a day. She also alternated with the other teachers in planning and leading worship services at the school chapel, choosing liturgies, hymns, and readings, and composing and delivering a message based on Scripture.<sup>72</sup>

By these functions, Perich served a vital role in the religious role of the organization: “[R]espondent played an important role as an instrument of her church’s religious message and as a leader of its worship activities.”<sup>73</sup>

Thus, apart from her secular teaching duties, Perich had substantial responsibilities that were religious in nature. As such, “[b]ecause of these important religious functions, Hosanna-Tabor had the right to decide for itself whether respondent was religiously qualified to remain in her office.”<sup>74</sup>

After *Hosanna-Tabor*, many courts emphasized the “function” factor to determine whether an employee is a minister. In *Yin v. Columbia International University*,<sup>75</sup> for instance, the district court decided the ministerial exception protected a religious university, Columbia International University (“CIU”) in Columbia, South Carolina, because it “trains Christians for global missions, full-time vocational Christian ministry in a variety of strategic professions and marketplace ministry.”<sup>76</sup> The school aims to “educate people ‘from a biblical worldview to impact the nations with the message of Christ.’”<sup>77</sup> CIU employed Lishu Yin as a TEFL-ESL<sup>78</sup> instructor and then Director of the TESOL<sup>79</sup> program from 2008 until 2014.<sup>80</sup> CIU claimed it terminated her employment because of financial difficulties.<sup>81</sup> Yin sued claiming the school violated Title VII by discriminating against her on the basis of sex, religion, and national origin.<sup>82</sup> The parties filed cross-motions for summary judgment.<sup>83</sup>

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<sup>72</sup> *Id.* at 204 (Alito, J., concurring).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> 335 F. Supp. 3d 803 (D.S.C. 2018).

<sup>76</sup> *Id.* at 814-15.

<sup>77</sup> *Id.* at 806.

<sup>78</sup> *Id.* at 807 n.1 (“Teaching English as a Foreign Language (‘TEFL’) . . . English as a Second Language (‘ESL’).”).

<sup>79</sup> *Id.* (“Teaching English to Speakers of Other Languages (‘TESOL’) . . .”).

<sup>80</sup> *Id.* at 807.

<sup>81</sup> *Id.* at 808.

<sup>82</sup> *Id.* at 808-09.

<sup>83</sup> *Id.* at 809.

The district court held that the substance reflected in Yin's title and the fourth factor, Yin's functions, weighed in favor of applying the exception and thus concluded she was a minister.<sup>84</sup> The court noted that as a TEFL-ESL instructor, Yin sought to develop students' spirituality, "ministry orientation, and the professional skills necessary for service in a variety of cultural contexts," as well as to "embody and to implement CIU's purpose and mission."<sup>85</sup> Regarding function, the court noted Yin "required her students to pray together over the course of the semester, integrated biblical materials into her courses, and prepared students for ministry roles."<sup>86</sup> This factor, to the court, "weighs heavily" in favor of the exception.<sup>87</sup> Despite the court calling the decision "an extremely close case," the court noted that "it seems that Yin's position was 'important to the spiritual and pastoral mission of the church.'"<sup>88</sup>

*Biel v. St. James School* provides an instance of courts applying a functional analysis and reaching a result favoring the employee. In *Biel*, a divided panel of the Ninth Circuit decided the exception should not apply to a fifth-grade teacher at St. James Catholic School who was fired after telling the school she had to miss work to receive chemotherapy for breast cancer treatment.<sup>89</sup> Biel sued under the ADA; the lower court granted summary judgment,<sup>90</sup> and the Ninth Circuit reversed and remanded, holding the ministerial exception did not bar Biel's claim.<sup>91</sup>

The two-judge majority held Biel did not satisfy any of the first three factors and focused its analysis solely on whether she performed religious functions.<sup>92</sup> The court found Biel's role was only similar to that

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<sup>84</sup> See *id.* at 816-17.

<sup>85</sup> *Id.* at 815.

<sup>86</sup> *Id.* at 817.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Biel v. St. James Sch.*, 911 F.3d 603, 605 (9th Cir. 2018), *rev'd*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

<sup>90</sup> *Biel v. St. James Sch.*, No. 15-04248, 2017 WL 5973293, at \*3 (C.D. Cal. Jan. 24, 2017), *rev'd*, 911 F.3d 603 (9th Cir. 2018), *rev'd*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). In its order denying rehearing and the petition for rehearing *en banc*, Justice Nelson chastises the Court for splitting "from the consensus of our sister circuits that the employee's ministerial function should be the key focus" and for "turning a blind eye to St. James's religious liberties." *Biel v. St. James Sch.*, 926 F.3d 1238, 1239-40 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 680 (Dec. 18, 2019) (No. 19-348) (Nelson, J., dissenting). He describes the Court's decision as "the narrowest construction" of the ministerial exception, challenging not the decision on fact issues but the Court's approach to applying the *Hosanna-Tabor* test. *Id.*

<sup>91</sup> *Biel*, 911 F.3d at 605.

<sup>92</sup> *Id.* at 608-09.

of Perich in *Hosanna-Tabor* with respect to the fourth factor — both taught religion classes.<sup>93</sup> The court said that while Biel taught lessons on Catholicism four days a week and followed the school’s required curriculum, which included teaching religious themes and symbols,<sup>94</sup> this was not enough to satisfy the exception.<sup>95</sup> The court rejected the school’s argument that by teaching religion, her functions were religious rather than secular.<sup>96</sup> The court stated, “[a] contrary rule, under which any school employee who teaches religion would fall within the ministerial exception, would not be faithful to *Hosanna-Tabor* or its underlying constitutional and policy considerations. Such a rule would render most of the analysis in *Hosanna-Tabor* irrelevant.”<sup>97</sup> In an unpublished opinion for the companion case of *Biel*, the Ninth Circuit concluded that one factor alone cannot suffice for the exception.<sup>98</sup>

As discussed below, the United States Supreme Court reversed the Ninth Circuit, holding because Biel helped fulfill the school’s religious mission, the exception should apply. The Court rejected the need for applying the remaining factors, saying courts should consider “all relevant circumstances . . . to determine whether each particular

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<sup>93</sup> *Id.* at 609.

<sup>94</sup> *Id.*

<sup>95</sup> *See id.* at 609-10. It is possible the Ninth Circuit based its decision on the amount of time she spent doing religious as opposed to secular, but the Supreme Court in *Hosanna-Tabor* rejected this as a measure. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 174 (2012).

<sup>96</sup> *See Biel*, 911 F.3d at 609-10. Similarly, in *Richardson v. Northwest Christian University*, the lower court rejected Christian University’s claim that the ministerial exception barred claims of an assistant professor who had a secular job title and lacked religious training. *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1145-46 (D. Or. 2017). The court held that even though she performed some religious functions, “any religious function was wholly secondary to her secular role: she was not tasked with performing any religious instruction and she was charged with no religious duties such as taking students to chapel or leading them in prayer.” *Id.* at 1145.

<sup>97</sup> *Biel*, 911 F.3d at 610. In Justice Fisher’s lengthy dissent, the Justice chides the majority for evaluating “the relative importance of a ministerial duty to a religion’s overall mission or belief system,” and then goes on to disagree with the Court’s holding based on “the importance of [Biel’s] stewardship of the Catholic faith to the children in her class.” *Id.* at 619, 621 (Fisher, J., dissenting). Justice Fisher cites *Catholic Bishop* for the purported truism concerning “the critical and unique role of the teacher in fulfilling the mission of a church-operated school.” *Id.* at 621.

<sup>98</sup> *See Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App’x 460, 461 (9th Cir. 2019), *rev’d*, 140 S. Ct. 2049 (2020) (“Aside from taking a single course on the history of the Catholic church, Morrissey-Berru did not have any religious credential, training, or ministerial background. Morrissey-Berru did not hold herself out to the public as a religious leader or minister.”).

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position implicated the fundamental purpose of the exception.”<sup>99</sup> The Court used what this Essay calls “function lite” — an approach by which the court assesses whether the employee performs a religious function but requires only the teacher’s compliance with whatever the religious institution requires. For religious doctrine and ceremony, the teacher facilitates whatever decisions the organization’s leadership mandates.

This function lite approach is problematic for at least three reasons. First, the approach is not true to the *Hosanna-Tabor* four-factors test because it not only emphasizes just one factor but also eliminates consideration of the other factors. Also, it requires courts to analyze and assess whether duties are secular or religious and to judge the gravity of the religious duties, thus entangling them in the decisions they seek to avoid.<sup>100</sup>

And, while the religious institution can present evidence to show its belief regarding the role’s nature, evidence which the court typically treats as authoritative,<sup>101</sup> the plaintiff employee can provide only its opinion without any of the credence given to the religious institution’s belief.<sup>102</sup> Thus, in effect, it becomes the deferential approach described below, in which courts lack even a limited gatekeeping role, other than discerning an obvious sign of subterfuge.<sup>103</sup>

### B. Sincerity of Belief/Deference Approach

Other courts adopted a deferential approach such as that advocated by Justice Thomas’ concurrence in *Hosanna-Tabor*, giving deference to a religious organization’s sincerely-held belief about who qualifies as a minister.<sup>104</sup> In *Grussgott v. Milwaukee Jewish Day School, Inc.*,<sup>105</sup> for

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<sup>99</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2067 (2020).

<sup>100</sup> *See id.* at 2068.

<sup>101</sup> *See Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 456 (2018) (“This does not mean that we can never question a religious organization’s designation of what constitutes religious activity, but we defer to the organization in situations like this one, where there is no sign of subterfuge.”).

<sup>102</sup> *See generally* Maxine D. Goodman, *Courts’ Failure to Use Religion Experts to Decide Difficult Fact Questions Concerning Who Is a Minister for the Ministerial Exception: A Holy Mess*, 72 BAYLOR L. REV. 1 (2020) (discussing courts’ resistance to use expert witnesses in lawsuits involving the ministerial exception).

<sup>103</sup> *See Grussgott*, 882 F.3d at 660.

<sup>104</sup> *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196-98 (2012) (Thomas, J., concurring).

<sup>105</sup> *Grussgott*, 882 F.3d at 661-62 (“The school intended Grussgott to take on a religious role . . .”).

instance, the Seventh Circuit affirmed the lower court's grant of summary judgment in favor of defendant, the Milwaukee Jewish Day School, on grounds the ministerial exception barred Grussgott's ADA claim.<sup>106</sup> Miriam Grussgott was hired to teach Hebrew and Jewish studies to first and second graders.<sup>107</sup> After her medical treatment and recovery from a brain tumor in 2013, Grussgott returned to the school in 2014.<sup>108</sup> In 2015, Grussgott was unable to remember an event, which led to an incident with a parent, and, consequently, the school firing Grussgott.<sup>109</sup> She sued under the ADA,<sup>110</sup> and the trial court held that the ministerial exception barred Grussgott's suit.

The parties disputed her teaching duties in the relevant year (2014–2015).<sup>111</sup> Grussgott said she taught Hebrew and was no longer required to attend services. Grussgott acknowledged that she taught Jewish values, Torah portions, and prayers, saying she did so from a cultural and historical, rather than religious, perspective.<sup>112</sup> The school said she was employed in 2014 and 2015 as a Hebrew and Jewish Studies teacher and was required to attend Jewish studies meetings.<sup>113</sup>

The district court in *Grussgott* first posited that Grussgott's teaching position "does not fit neatly within the factors *Hosanna-Tabor* found relevant."<sup>114</sup> The court noted she was not ordained, and her role did not require prior religious training.<sup>115</sup> The district court focused on the third and fourth factors. As to the third factor — the substance flowing from her title — Hebrew teachers at the school were required to follow a certain curriculum that integrated religious teachings into their lessons.<sup>116</sup>

For the function factor, the court concluded that she performed important religious functions by teaching her students about Torah portions, Jewish holidays, and prayers. The court rejected her contention that she taught these topics from a historical, cultural perspective. The district court judge concluded that Grussgott's

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<sup>106</sup> *Id.* at 656. The court describes the school as "a private school dedicated to providing a non-Orthodox Jewish education to Milwaukee schoolchildren." *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 657.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See id.* at 656-57.

<sup>112</sup> *See id.* at 656.

<sup>113</sup> *See id.* at 657.

<sup>114</sup> *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 260 F. Supp. 3d 1052, 1058 (E.D. Wis. 2017).

<sup>115</sup> *Id.*

<sup>116</sup> *See id.* at 1059-61.

teaching of Torah portions, prayers, and holidays served a religious function, fulfilling the school's religious mission, rather than a cultural, historical one.<sup>117</sup> The court concluded that Grussgott's job was "a ministry of Judaism"; thus, the exception should apply.<sup>118</sup>

The Seventh Circuit affirmed, illustrating the deferential approach: absent evidence of "subterfuge" by the religious institution, the court adopted the institution's position on religious versus secular functions.<sup>119</sup> The Court in *Grussgott* stated that while deciding the religious/secular fact questions "impermissibly entangles the government with religion,"<sup>120</sup> it does not mean the court should give complete deference to the religious institution's position: "[t]his does not mean that we can never question a religious organization's designation of what constitutes religious activity, but we defer to the organization in situations like this one, where there is no sign of subterfuge."<sup>121</sup>

In the recent *Morrissey-Berru* concurrence, Justices Gorsuch and Thomas re-urged this deferential approach, stating that courts should "defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'"<sup>122</sup> According to the concurring opinion, "the record confirms the sincerity of petitioners' claims that, as lay teachers, Morrissey-Berru and Biel held ministerial roles at these parish schools."<sup>123</sup>

The primary challenge to the deferential approach is that, like the functional analysis, it requires judicial analysis of the religious institution's sincerely held beliefs. And, because it strips the court of responsibility to analyze the factors (by either assessing each one for sincerity or not assessing them at all and just agreeing with the institution's position), and thus serve as gatekeeper, the deferential approach serves more as rubber stamping<sup>124</sup> the institution's position than analyzing it. Arguably, any teacher employed at a religious school

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<sup>117</sup> See *id.* at 1060-61 ("Regardless of any secular duties Plaintiff may have had, this role included an unmistakable religious dimension.").

<sup>118</sup> *Id.* at 1061.

<sup>119</sup> See *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 456 (2018).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* The circuit court cites *Tomic v. Catholic Diocese of Peoria*, in which it used the example of a church claiming all its janitors were ministers as an example of subterfuge. *Id.* (citing *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006)).

<sup>122</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069-70 (2020) (Thomas, J., concurring).

<sup>123</sup> *Id.* at 2071.

<sup>124</sup> See *id.* at 2076 (Sotomayor, J., dissenting).

would easily fall in the ministerial exception if the school administrators contend the employee has some religious duties, which subverts the *Hosanna-Tabor* notion that courts should engage in some type of analysis of the employee's position at the religious institution.

### C. Sliding Scale Approach

The sliding scale approach, advocated primarily by the Second Circuit, suggests “[t]he more pervasively religious an institution is, the less religious the employee’s role need be in order to risk first amendment infringement.”<sup>125</sup>

For instance, in an employment discrimination case against a hospital, the court ruled that when the employee’s role is “pervasively religious,” the employer need not be as religious as other religious entities for the ministerial exception to apply.<sup>126</sup> In *Penn*, Marlon Penn served as a duty chaplain in New York Methodist Hospital’s Department of Pastoral Care. When the hospital terminated Penn’s employment, alleging various acts of misconduct, he sued the hospital alleging race and religious discrimination.<sup>127</sup> The hospital defended against Penn’s claims based on the ministerial exception.

Penn argued the hospital had severed official ties with the Methodist Church and thus was not a religious institution for purposes of the ministerial exception.<sup>128</sup> In disagreeing with this argument, the district court noted that because Penn’s role at the hospital was “pervasively religious,” the court should apply the exception to the hospital, even if it was less religious than other employers.<sup>129</sup> Accordingly, the district court granted summary judgement based on the ministerial exception, and the Second Circuit affirmed.<sup>130</sup>

*Penn* illustrates the Second Circuit’s sliding scale approach. As one court describes in a case against a church employer:

[T]he ministerial exception should be viewed as a sliding scale, where the nature of the employer and the duties of the employee are both considered in determining whether the exception applies. . . . [T]he more “pervasively religious an institution is,

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<sup>125</sup> *Musante v. Notre Dame of Easton Church*, No. 3:01CV2352, 2004 U.S. Dist. LEXIS 5611, at \*18-19 (D. Conn. Mar. 30, 2004).

<sup>126</sup> See *Penn v. N.Y. Methodist Hosp.*, 158 F. Supp. 3d 177, 182 (S.D.N.Y. 2016), *aff’d*, 884 F.3d 416 (2d Cir. 2018).

<sup>127</sup> *Id.* at 178.

<sup>128</sup> *Id.* at 182.

<sup>129</sup> See *id.* at 182-83.

<sup>130</sup> *Id.* at 184.

the less religious the employee's role need be in order to risk first amendment infringement."<sup>131</sup>

This rule also works in reverse; the more religious the employee's role, the less religious the organization must be for entanglement concerns.<sup>132</sup>

This approach shares the same challenges as the prior one: determining how religious the employer is requires courts' highly subjective inquiry; it thus invites court intervention into the inner workings of the institution's religious practices and beliefs to make this determination.

#### D. Morrissey-Berru and "Function Lite" Approach

The Supreme Court's May 2020 decision involved consolidated cases brought by two teachers who taught secular subjects at religious schools.<sup>133</sup> The schools fired the teachers for alleged poor performance with secular teaching duties, and the teachers sought legal protection for alleged employment discrimination.<sup>134</sup> The Court ruled against the teachers based on the ministerial exception after deciding the teachers' function — teaching religion along with primarily secular subjects at a religious school — barred them from legal protection.<sup>135</sup>

The teachers in the two cases shared some similarities with Cheryl Perich of *Hosanna-Tabor*. Agnes Morrissey-Berru taught at Our Lady of Guadalupe ("OLG") School, a Roman Catholic school in Los Angeles, beginning in 1998 as a substitute teacher. She was forty-seven when she began teaching. She taught all subjects, including religion, to fifth or sixth grade students for many years. She started or ended each day with

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<sup>131</sup> *Musante v. Notre Dame of Easton Church*, No. 3:01CV2352, 2004 U.S. Dist. LEXIS 5611, at \*19 (D. Conn. Mar. 30, 2004); *see also* *Stabler v. Congregation Emanuel of N.Y.*, No. 16 Civ. 9601, 2017 U.S. Dist. LEXIS 118964, at \*18 (S.D.N.Y. July 28, 2017); *Penn*, 158 F. Supp. 3d at 182.

<sup>132</sup> *See Penn*, 158 F. Supp. 3d at 182. In *Penn*, the plaintiff served as hospital chaplain and the court considered whether the hospital, which had lost its religious charter and severed ties with the United Methodist Church, was still a religious organization for purposes of the exception. The court concluded the hospital continued "to maintain a connection to the church and operate the Hospital with religious values." In determining the religious affiliation of the hospital, the court found that "insofar as Plaintiff is a Methodist and was responsible . . . for preaching the Christian faith, the relationship between Plaintiff and NYMH (specifically, the pastoral care department) was that of a religious employee and a religious institution." *Id.*

<sup>133</sup> *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

<sup>134</sup> *See id.* at 2056-59.

<sup>135</sup> *Id.* at 2055.

a Hail Mary. After many years of teaching at OLG, in 2014, the school first asked Morrissey-Berru to move from full-time to part-time teacher, and the following year, the school failed to renew her contract, stating her difficulty in teaching a new reading program as the reason.<sup>136</sup> Morrissey-Berru claimed the school terminated her to replace her with someone younger.<sup>137</sup>

The Ninth Circuit concluded that using the *Hosanna-Tabor* factors the ministerial exception did not bar Morrissey-Berru's claim.<sup>138</sup> She lacked the formal title minister, had little formal religious training, and did not hold herself out as a minister.<sup>139</sup> According to the Ninth Circuit, "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework."<sup>140</sup> As described below, the Supreme Court disagreed.

The other teacher, Kristen Biel, taught for a little over a year at St. James School, a Catholic primary school in California.<sup>141</sup> She substitute-taught a first-grade class and then taught a fifth-grade class for a year. She taught all subjects, including Catholicism, and attended prayer services with students. The school declined to renew Biel's contract after her full year at the school, citing alleged poor performance at keeping an orderly classroom and sticking to the planned curriculum.<sup>142</sup> She alleged she was fired because she had requested time off to receive breast cancer treatment.<sup>143</sup>

The Ninth Circuit held Biel did not satisfy any of the first three factors and focused its analysis solely on the fourth factor, whether she performed religious functions.<sup>144</sup> The court noted that Biel taught religion from a book the school required.<sup>145</sup> And, unlike Perich, who led students in prayer, Biel's students led their own prayers.<sup>146</sup> The court held this was not enough to satisfy the exception.<sup>147</sup>

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<sup>136</sup> *Id.* at 2057-58.

<sup>137</sup> *Id.* at 2058.

<sup>138</sup> *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460, 461 (9th Cir. 2019).

<sup>139</sup> *Id.* at 461.

<sup>140</sup> *Id.* The district court granted the school's motion for summary judgment after finding that aside from the first *Hosanna-Tabor* factors, all the others applied. The district court focused on Morrissey-Berru's duties. *See id.*

<sup>141</sup> *Biel v. St. James Sch.*, 911 F.3d 603, 605 (9th Cir. 2018).

<sup>142</sup> *See Morrissey-Berru*, 140 S. Ct. at 2059.

<sup>143</sup> *See Biel*, 911 F.3d. at 605.

<sup>144</sup> *Id.* at 608-09.

<sup>145</sup> *Id.* at 609.

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* at 609-10. *But see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 193-94 (2012) (rejecting the amount of time an employee spends

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In evaluating the cases, the Supreme Court in *Morrissey-Berru* arrived at the thesis: “What matters, at bottom, is what an employee does.”<sup>148</sup> Justice Alito focused on the function factor, as he did in his *Hosanna-Tabor* concurrence. “Religious education is vital to many faiths practiced in the United States.”<sup>149</sup> Justice Alito described the teachers’ religious duties, “pray[ing] with their students, attend[ing] Mass with [them], and prepar[ing] the children for their participation in other religious activities,”<sup>150</sup> as sufficient. The Court also noted the deference to be paid the religious institution’s assessment of the employee’s duties, saying, “[a] religious institution’s explanation of the role of such employees . . . is important.”<sup>151</sup> The Court stated that both schools saw the teachers as furthering the schools’ religious missions.<sup>152</sup>

In the dissenting opinion, Justices Sotomayor and Ginsburg challenged the majority opinion on both procedural and substantive grounds. The dissenting justices contended the cases should have gone to trial because of disputed fact issues on the employer/schools’ summary judgment.<sup>153</sup> Second, the justices contended the Court’s analysis — reversing the lower court because the schools believed these primarily-secular teachers were instrumental to the faith — expanded the exception “far beyond its historic narrowness” and upended the already existing statutory exceptions for religious employers dealing with employment disputes.<sup>154</sup>

#### V. TWO POSSIBLE SOLUTIONS FOR CLARIFYING THE MINISTERIAL EXCEPTION TEST TO PROTECT PRIVATE RELIGIOUS SCHOOL SECULAR TEACHERS

The *Hosanna-Tabor* four-factor test the Supreme Court developed to decide whether to apply the ministerial exception suffers from a lack of clarity both in terms of what the factors mean and how the test works. It also suffers from the obvious challenge of relying on factors such as title when many faiths appoint leaders with titles other than “minister” (and many faiths do not have “called” clergy, as Perich was in *Hosanna-*

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doing religious duties as opposed to secular duties as a measure for applying the ministerial exception).

<sup>148</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 2066.

<sup>151</sup> *Id.*

<sup>152</sup> *See id.* at 2068.

<sup>153</sup> *Id.* at 2079 (Sotomayor, J., dissenting) (arguing that the Court should have viewed facts in light most favorable to employees, not school).

<sup>154</sup> *See id.* at 2082.

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*Tabor*).<sup>155</sup> Moreover, implementing the test almost always requires courts to engage in the very scrutiny they want to avoid — subjectively assessing whether an employee’s duties are religious or secular. Accordingly, this Essay offers two alternatives.

First, commentators have previously argued the four-factor test asks the wrong question,<sup>156</sup> and this author agrees. If the purpose of the exception is to allow religious organizations to retain as employees only those who support their religious mission, as this latest Supreme Court decision suggests, the test should then concern itself with only why the religious institution chose to fire the individual (obviously, the institution liked them enough to hire them).<sup>157</sup> If the reason is religiously based (Perich’s complaint violated Lutheran doctrine, for instance), courts should not interfere, and the exception should apply. If the purported reason is secular — the employee is too old, has health problems, or cannot manage the secular curriculum — courts should interfere, and federal statutory laws should apply.

Using this test, Perich’s claim would still be barred; Biel’s would not. Perich was fired for allegedly violating the Church’s “belief that Christians should resolve their disputes internally,”<sup>158</sup> while Biel allegedly performed poorly and kept a disorderly classroom. This might mean an accountant or bookkeeper loses protection of employment laws if the religious organization fires the individual for a religious reason; for example, if the bookkeeper makes collections calls to members of the congregation and makes statements during the calls not in keeping with religious tenets. This would certainly align with the exception’s purpose of keeping the courts out of matters involving how the church governs and administers affairs according to its faith principles.

The criticism that this test would require courts to determine if the reason for firing is religious or secular rings hollow. Courts are currently deciding if an employee’s duties are religious or secular. Deciding whether the reason for firing an employee is secular or religious requires less investigation into the religious employer’s doctrine and practice than courts evaluating an employee’s primary duties and whether these duties are religious or secular. This solution also eliminates many of the existing problems with the exception: courts struggle with how to apply the four-factor test; courts disagree

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<sup>155</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 198 (2012) (Alito, J., concurring).

<sup>156</sup> See Griffin, *The Sins of Hosanna-Tabor*, *supra* note 37, at 998.

<sup>157</sup> See *id.*

<sup>158</sup> *Hosanna-Tabor*, 565 U.S. at 180.

on whether one factor should suffice; courts disagree on whether to apply a sliding scale approach to the factors; and courts disagree on what the *Hosanna* factors and Court's language means.<sup>159</sup> Yet, courts have rejected this approach.<sup>160</sup>

The other option is for courts to adopt a test similar to what Justices Alito and Kagan described in their *Hosanna-Tabor* concurrence. With a very slight modification, their test becomes a substantial religious function test. Rather than applying the exception to “any employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith,”<sup>161</sup> change the series from disjunctive to conjunctive. Thus, the exception would only apply to the faith leaders who lead the organization, conduct religious events, and teach the faith. It would include only the decision-makers, those in charge of deciding religious curriculum, music,<sup>162</sup> and ceremony in keeping with mission and faith.<sup>163</sup>

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<sup>159</sup> *Id.* at 198 (Alito, J., concurring) (noting the language issue in *Hosanna*, Justices Alito and Kagan remarked in their concurrence that courts should focus on an employee's function because the designation minister “is rarely if ever used in this way [as a member of the clergy] by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart,” with other faiths).

<sup>160</sup> *See, e.g., id.* at 174 (majority opinion) (“The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for religious reason.”); Griffin, *The Sins of Hosanna-Tabor*, *supra* note 37, at 998 (“[T]he most astonishing part of *Hosanna-Tabor* is its blithe assertion that religious employers win even when there is no religious dispute at stake . . .”).

<sup>161</sup> *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring).

<sup>162</sup> *See, e.g., Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (deciding that a music director was a “minister,” the Fifth Circuit highlighted the Church's evidence that “the Music Director provides a major service by overseeing the planning and coordination of the church's music program, fostering the active participation of the ‘liturgical assembly’ in singing, and promoting the various musicians — choir members, psalmists, cantors, and organists — all of whom play instruments in service of the liturgy. Thus, the person who leads the music during Mass is an integral part of Mass and ‘a lay liturgical minister actively participating in the sacrament of the Eucharist’”).

<sup>163</sup> In the Jewish faith, at a synagogue, this test would clearly apply to a Rabbi, Cantor, and Religious School Director, as these three employees lead, conduct ceremonies, and teach; they also decide religious doctrine questions and questions of religious curriculum. It would not apply to the office manager or executive director, as these employees generally serve to facilitate whatever religious decisions the prior three enact.

Ultimately, courts should apply the exception to “the deciders”<sup>164</sup> regarding matters of religious faith, doctrine, ceremony, teaching, and governance in their religious institutions. In the *Morrissey-Berru* cases, the teachers did not decide what religious curriculum to teach along with their secular subjects or whether to include daily prayers; they did so at the behest of their schools’ leadership.<sup>165</sup>

In the pandemic context, if teachers are not afforded a say in how to handle instruction during the pandemic, i.e., “what’s the Catholic response to COVID to global pandemic,” they should not be treated as “ministers” for purposes of the exception. If a teacher serves as a decision-maker in terms of the religious institution’s response, the organization should certainly be able to fire that teacher without court meddling.

This substantial religious function differs from “primary duties” test sometimes used by courts pre-*Hosanna-Tabor*. The “primary duties” test as applied by the Sixth Circuit means, “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.”<sup>166</sup> This could mean the employee spends most of her time on religious functions or the position is somehow “important to the spiritual and pastoral mission of the church.”<sup>167</sup> Courts struggled with how broadly to interpret this test, leading to inconsistent results.<sup>168</sup>

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<sup>164</sup> President George W. Bush popularized the term “the decider” when announcing that he would decide, by saying “I’m the Decider,” whether to fire then Secretary of Defense, Donald Rumsfeld. See Sheryl Gay Stolberg, *The Decider*, N.Y. TIMES (Dec. 24, 2006), <https://www.nytimes.com/2006/12/24/weekinreview/the-decider.html> [https://perma.cc/5RYG-LSHK].

<sup>165</sup> See *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020) (“The school reviewed Morrissey-Berru’s performance under religious standards [and] evaluated whether Catholic values were ‘infused through all subject areas’ and whether there were religious signs and displays in the classroom.”); *Biel v. St. James Sch.*, 911 F.3d 603, 608 (9th Cir. 2018) (“Biel’s role in Catholic religious education was limited to teaching religion from a book required by the school and incorporating religious themes into her other lessons.”).

<sup>166</sup> *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) *abrogated on other grounds by Hosanna-Tabor*, 565 U.S. at 195.

<sup>167</sup> See *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

<sup>168</sup> See Katherine Hinkle, Note, *What’s in a Name? The Definition of “Minister” in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 34 BERKELEY J. EMP. & LAB. L. 283, 286 (2013); Mark Steiner, Note, *Who Is a Minister? Broadening the Scope of the Ministerial-Exception After Hosanna-Tabor*, 60 WAYNE L. REV. 261, 262 (2014) (examining “[s]ome of the differences in application of the ‘primary duties’ test . . . since courts have not used any uniform analysis in applying the test.”).

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This Essay urges courts to afford these teachers the legal protections afforded other teachers and employees of non-religious institutions unless the teachers serve as leaders and decision-makers regarding the organizations' spiritual matters. Ideally, courts should shift from a four-factor test to a substantial religious function analysis, with greater clarity about what the religious function factor means. The religious function requirement should be substantial, not secondary to the employee's secular role. If the exception's purpose is to keep courts out of church governance and matters of religious faith and doctrine, it should apply to those employees whose roles guide decisions regarding church governance and religious doctrine.

Going back to Elaine Sage, the teacher who would not return to work at the school because of health concerns, because she had no voice in significant decisions about the school's handling of COVID-19 (arguably according to religious doctrine), the law should not treat her as a "minister" for purposes of the ministerial exception.

#### CONCLUSION

This Essay does not contest the need for a ministerial exception to keep secular courts from interfering with religious organizations' governance and matters of religious doctrine. It contests the Court's current application of the exception in *Morrissey-Berru*, as overly broad. If meant for "ministers," the exception should apply to religious organizations' leaders and decision-makers, not those who facilitate the organizations' decisions regarding matters of faith and governance.