I. INTRODUCTION

On January 11, 2012, the United States Supreme Court decided EEOC v. Hosanna-Tabor Evangelical Lutheran Church. In that case, for the first time, the Supreme Court recognized the existence of the “ministerial exception” to state and federal employment laws. That exception precludes “ministers” from bringing certain employment-related claims against a “church” or religious educational organization. The Supreme Court held that the exception applied to a teacher in a Lutheran school whose duties were mainly secular, but who also provided some key functions directly related to spreading the Lutheran faith.

The ministerial exception is one of the most unique and theoretically extraordinary doctrines in U.S. employment law. It is well known that since the passage of the Civil Rights Act of 1964, federal law has prohibited discrimination for reasons such as race, gender, and religion. Since then, federal law has expanded protections to prohibit discrimination on the basis

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of disability, age, and other factors. The same is true of state laws, which often include sexual orientation and marital status as protected classifications.

From the perspective of all this statutory law, the first thing one needs to know about the ministerial exception is that there is no ministerial exception. The exception is contained in no statute and is instead entirely the creation of federal and state judges. For decades, lower courts have applied the exception out of constitutional necessity. That is, they have universally understood that the First Amendment’s establishment clause and free exercise clause preclude the government’s involvement in the selection or removal of those who serve in religious positions. In developing the ministerial exception, judges have interpreted the power of these First Amendment protections to allow qualifying religious organizations literally to ignore the words of federal and state anti-discrimination laws. Like the formation of a black hole from the invisible but powerful force of gravity, judges have deduced the existence of the ministerial exception from the First Amendment’s protection from government interference in religious expression.

The ministerial exception reflects tacit judicial acknowledgement that the Country’s political origins trace back to sharply different religious groups fleeing persecution in Europe who sought safety and opportunity in a new world. The religion clauses in the U.S. Constitution’s First Amendment, adopted in 1791, constituted a promise that the new federal government would not interfere with the religious organizations created by those groups.

Since that time, of course, labor and employment regulation in the United States has proliferated rapidly to include laws prohibiting discrimination based on protected classifications, governing collective bargaining, and setting wage and hour standards. The obscure ministerial exception, however, operates to trump these laws in order to keep a century’s old promise of autonomy to religious organizations.

Obviously, knowing which positions are “ministerial” has profound importance for employees and employers. Though broad, the ministerial exception does have limits. For example, as described below, many have argued, rightly or wrongly, that it does not apply to harassment lawsuits based on protected classification. Some have also asserted that it does not permit an employer to make “pretextual” decisions, such as, an employment
decision that purports to be based on religious tenets but is in fact simply improper discrimination. This article will explain the U.S. Supreme Court’s decision in *Hosanna-Tabor* and explore the potential limits of its decision.

**II. WHICH SCHOOLS QUALIFY AS “RELIGIOUS?”**

The first determination a court must make before allowing an entity to exercise the ministerial exemption is whether the entity qualifies as religious. Courts will not simply accept a school’s assertion that it is a religious educational institution. In one case involving an independent school, an applicant failed to obtain a position as a substitute French teacher because she did not meet the school’s Protestant-only requirement. When the applicant filed a claim for religious discrimination, and the EEOC brought suit, the school countered that it could not be sued under federal law. The school rightly asserted that religious educational institutions were specifically exempted from claims of religious discrimination under federal law.

Nonetheless, the Ninth Circuit did not simply accept that the schools were religious education institutions. Instead, it set out a six-part test to determine whether the school was “primarily religious or secular.” Those factors were:

- **Ownership and Affiliation.** The Court noted that no religious organization has ever controlled or supported the school and the school was not affiliated with any denomination of Protestants nor with any organization or association of religious schools.

- **Purpose.** Though the school described itself as “Protestant” when advertising for the substitute teacher, the school’s purpose was primarily secular. The Court noted that the purpose and emphasis of the school had shifted over the years from providing religious instruction to equipping students to make their own moral judgments.

- **Faculty.** The school consistently adhered to the Protestant-only requirement for on-campus teachers, but did not have a religious requirement for off-campus programs. Moreover, the school never required its teachers to maintain active membership in a church and did not inquire into the substance of a teacher’s beliefs.

- **Student Body.** The religious affiliations of prospective students were not considered.
• **Student Activities.** Students participated in a wide variety of activities, some of which had religious overtones. For example, teachers in kindergarten through eighth grade led their classes in daily prayer. Athletic teams prayed before games, and the school’s daily bulletin usually reprinted a Bible verse. Other activities such as student clubs were purely secular.

• **Curriculum.** The school described themselves as “comprehensive.” Most of the school’s courses were secular and were taught from a secular perspective. However, students in kindergarten through sixth grade did receive religious instruction for 15-30 minutes once a week for one semester. In the upper grades, students were exposed to the comparative study of religions.

After weighing these factors, the Court concluded “that the Schools’ purpose and character is primarily secular, not primarily religious.” As a result, the EEOC could bring suit for religious discrimination on behalf of the applicant. Moreover, in California, schools must also consider whether they will incorporate within the state as a religious or secular school. That incorporation status could be a factor in a court’s determination as to whether the school qualifies as a religious educational institution. Schools should, therefore, consider these types of factors before concluding they are covered by the ministerial exception.

### III. WHICH JOB POSITIONS ARE INCLUDED IN THE EXCEPTION?

Once an entity qualifies as a religious entity, the second significant issue in applying the exception has been determining whether the employee in question occupies a ministerial job position. Courts applying the doctrine have agreed that the exception applies to more than just “ministers,” and more than just rabbis, priests, imams, and other leaders in religious groups. Different courts have, however, applied different tests. A leading test (until the Supreme Court decided *Hosanna-Tabor*, as described below) was the “primary duties” test. Under that test, the exception applies to the job position “if the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or

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participation in religious ritual and worship.” Courts in many jurisdictions, however, declined to apply this test. The Second Circuit, which encompasses New York and other states, for example, viewed the test as “too rigid,” and applied tests that took into account all of the duties of a particular job position, not just the primary ones. The Fifth Circuit, which encompasses Texas, Mississippi, and other states, at one point advanced an alternative test – whether the employee was chosen for the position based “largely on religious criteria” and performs some religious duties and responsibilities.

Applying these various tests, Courts have found the following job positions to be subject to the exception:

- A church music director, whose primary duties involved selection, teaching, and presentation of music as part of Catholic worship service.
- Seminarian who had not yet been ordained but had entered seminary to become a priest, was assigned to church maintenance, and assisted with mass.
- Faculty at a Baptist seminary, even though some of the faculty were not ordained ministers.
- Chaplain at a religious hospital.
- Director of religious formation for a Catholic diocese.
- “Administrators” of a Salvation Army rehabilitation center who led worship and had other religious functions, but also spent significant time supervising Salvation Army thrift shops.
- A Mashgiach, or kosher supervisor, of a predominately Jewish nursing home.

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4 Rayburn v. Gen. Conf. of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (emphasis added).
5 Rweyemamu v. Cote, 520 F.3d 198, 208 (2d Cir. 2008).
6 See Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999).
8 Alcazar v. Corporation of Catholic Archbishop of Seattle, 627 F.3d 1288, 1292 (9th Cir. 2010) (court did not articulate specific test).
9 EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283-85 (5th Cir. 1981) (faculty were selected based on religious criteria and their duties included religious duties).
10 Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360, 362-63 (8th Cir. 1991) (court would “consider these situations on a case-by-case basis”).
11 Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238, 1244 (10th Cir. 2010) (applying case-by-case analysis, concluding that job position was “important to the spiritual and pastoral mission of” the diocese).
12 Schleicher v. Salvation Army, 518 F.3d 472, 475-78 (7th Cir. 2008) (considering all job duties and not just primary ones).
• A choirmaster and director of music at a Methodist church.\textsuperscript{14}
• A Catholic nun denied tenure for a canon-law teaching position at Catholic University of America.\textsuperscript{15}

IV. WHICH CAUSES OF ACTION IN EMPLOYMENT LAW HAS THE EXCEPTION PRECLUDED?

The final important element of the ministerial exception’s scope is determining to which causes of action it applies. Courts throughout the country have applied the ministerial exception in different ways, and there is no general consensus among the courts outside of paradigm situations (such as gender discrimination claims based on the ability to be a Catholic priest, etc.). In addition, a list of causes of action cannot be applied by rote because whether the ministerial exception bars a particular cause of action will often depend on whether the cause of action arises from an employment decision or a decision on working conditions that has some relationship to the religious precepts of the organization. For example, it is clear that discrimination claims that seek to compel the organization to act contrary to religious tenets are barred by the exception. But a minister’s garden variety sexual harassment claim against a religious employer is not barred in some jurisdictions if the claim arises from facts having nothing to do with interpreting or applying the religious tenets of the organization.

Given how the ministerial exception has developed in various circuits around the country, it is important to bear in mind that these are examples of what has happened in some circuits. Courts have adopted a variety of approaches and rulings, some in conflict with each other, making it clear that not every federal circuit will reach the same end when presented with the same facts. That being said, the following are illustrative examples of what has been happening around the country to this point:

• Gender Discrimination and Retaliation: In the landmark case articulating the ministerial exception, the Firth Circuit found that the ministerial exception barred a claim by a female minister that the

\textsuperscript{14} Starkman v. Evans, 198 F.3d 173, 175-77 (5th Cir. 1999) (employee was selected based on religious criteria and had significant religious duties).
\textsuperscript{15} EEOC v. Catholic Univ., 83 F.3d 455, 461, 464 (D.C. Cir. 1996) (applying primary duties test)
Salvation Army discriminated against women in pay and other matters, and that it had retaliated against her in its employment decisions because she had complained to the EEOC.\textsuperscript{16}

- **Age Discrimination:** The Seventh Circuit, encompassing Illinois and other states, held that the ministerial exception barred a priest’s claim under the Age Discrimination in Employment Act ("ADEA").\textsuperscript{17}
- **Race Discrimination:** The Seventh Circuit held that the ministerial exception precluded a Title VII race discrimination claim by a minister.\textsuperscript{18}
- **Disability Discrimination:** The Fifth Circuit held that the exception precluded a choir director’s claim under the Americans with Disabilities Act.\textsuperscript{19}
- **Wage and Hour:** The Ninth Circuit held that the exception precluded an overtime wage claim under state law.\textsuperscript{20} The Fourth Circuit has held that the ministerial exception precluded an overtime claim under the federal Fair Labor Standards Act ("FLSA").\textsuperscript{21}
- **Defamation, Privacy, and Similar Claims Relating to Employment Decisions:** A California Court of Appeal, which covers California, Washington, and other states, has held that the ministerial exception applies to tort claims for defamation, intentional infliction of emotional distress, and invasion of privacy that arise from employer statements in the course of hiring, firing or discipline.\textsuperscript{22}

On the other hand, the following are causes of action to which the exception has been found not to apply:

- **Sexual Harassment:** The Ninth Circuit found that the ministerial exception does not apply to a sexual harassment cause of action. The Court reasoned that the circumstances of the claim in that case did not require interpretation of religious tenets or application of religious laws to any employment decision.\textsuperscript{23}

\textsuperscript{16} McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972); see also Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir. 1991) (exception barred gender discrimination suit).

\textsuperscript{17} See Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1038-39 (7th Cir. 2006).

\textsuperscript{18} See Young v. N. Illinois Conference of United Methodist Church, 21 F.3d 184, 186 (7th Cir. 1994).

\textsuperscript{19} Starkman v. Evans, 198 F.3d 173, 177 (5th Cir. 1999).

\textsuperscript{20} See Alcazar v. Corporation of Catholic Archbishop of Seattle, 627 F.3d 1288, 1293 (9th Cir. 2010).


\textsuperscript{23} See Bollard v. California Province of Society of Jesus, 196 F.3d 940, 945 (9th Cir. 1999).
• Retaliatory Harassment: The Ninth Circuit has also found that a cause of action for retaliatory abuse, based on the employee’s complaining of sexual harassment, was not barred by the exception. The Court noted, however, that if the retaliation manifested itself in employment decisions, the exception would apply.

These cases are only a representative sample of those nationwide that have decided whether or not to apply the exception to particular causes of action. The trend is that causes of action relating to employer decisions as to hiring, firing, and working conditions are covered, particularly if the employment decisions in question relate to application of church tenets. Outside this context, and particularly in the realm of harassment unrelated to the employer’s status as a religious organization, coverage becomes less likely in some circumstances, although there are strong arguments that the purposes behind the exception – guaranteeing that religious organizations alone address internal employment matters concerning “ministers” – still justify applying the exception in those circumstances as well.

V. **THE HOSANNA-TABOR DECISION**

A. **Hosanna-Tabor’s Facts, Holding, and Reasoning**

Most observers of the Court expected it to uphold the ministerial exception, but the more difficult question was how broadly the Court would view the exception – that is, how broad a definition of “minister” it would adopt. Like many cases involving the exception, the Hosanna-Tabor case did not concern an actual “minister” – or priest, rabbi, or other individual with strictly religious duties. Instead, it involved a teacher at a religious school who instructed primarily on secular topics.

The facts of Hosanna-Tabor are as follows: Hosanna-Tabor Evangelical Lutheran Church and School operates a church and an elementary school. It has two types of faculty: (1) limited-term “lay” or “contract” teachers and (2) for-cause “called” teachers. Called teachers must complete a course of religious study and receive a certificate of admission into the teaching ministry. They receive the title of “commissioned minister.”

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24 See Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 965 (9th Cir. 2004).
In 2000, Cheryl Perich began work as a contract teacher but shortly thereafter changed her status to a “called” teacher. Her employment duties remained essentially the same. She taught math, language arts, social studies, science, gym, art, and music. However, Perich also taught a religion class four days per week, attended a chapel with her class once a week, and led her classes in prayer.

In 2004, Perich went out on disability leave. The school board ultimately offered Perich a “peaceful release” agreement wherein she would release claims against the school in return for a monetary payment. When Perich refused and threatened legal action, however, the board fired her. It gave the religious reason (as the Supreme Court described it) that “her threat to sue the Church violated the Synod’s belief that Christians should resolve their disputes internally.”

Perich filed a charge with the Equal Employment Opportunity Commission (“EEOC”) for disability discrimination and retaliation under the Americans with Disabilities Act (“ADA”), and the EEOC decided to litigate the charge of retaliation on her behalf. The District Court determined that Perich was covered by the ministerial exception and granted summary judgment to the school. But the U.S. Court of Appeals for the Sixth Circuit reversed. It found that because most of Perich’s job duties did not have a religious character, and because her “primary” functions were secular, the ministerial exception did not apply.

The U.S. Supreme Court, in a unanimous opinion authored by Chief Justice Roberts, held that the ministerial exception did apply. The opinion began by describing that both of the “religion clauses” of the First Amendment (the free exercise clause and the establishment clause) “bar the government from interfering with the decision of a religious group to fire one of its ministers.” The opinion then recited the history of government interference, or at times deliberate non-interference, in religious organizations’ employment decisions, from the Magna Carta through the Cold War. Following this narration of history and case law, the Court announced that it officially recognized the existence of the ministerial exception.

The Court then held that the exception applied to Perich’s job at Hosanna-Tabor. In so holding, however, the Court declined to adopt any particular test from among those articulated above. The Court instead described that its holding would be narrow: “Every Court of Appeals to have considered
the question has concluded that the ministerial exception is not limited to the
head of a religious congregation, and we agree. We are reluctant, however,
to adopt a rigid formula for deciding when an employee qualifies as a
minister. 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.”

The Court identified a number of factors it found significant in determining
that Perich’s employment was subject to the exception:

First, Hosanna-Tabor held Perich out as a minister, with a role distinct from
that of most of its members.

Second, Perich’s title as a minister reflected a “significant degree of
religious training” and election to her position was by a vote of the church
congregation.

Third, Perich claimed a special housing allowance on her taxes that was
available only to employees earning their compensation “in the exercise of
the ministry” (known as parsonage).

Fourth, Perich’s job duties reflected a role in conveying the Church’s
message and carrying out its mission. The Court observed, among other
things, that “Perich taught her students religion four days a week, and led
them in prayer three times a day.” She had a number of other religious
duties as well. The Court made clear that the fact that Perich had a
substantial number of secular responsibilities was not dispositive of whether
the ministerial exception applied to her.

The Court also quickly dismissed the EEOC’s claim that the Hosanna-
Tabor’s religious reasoning for firing Perich was “pretext.” Chief Justice
Roberts wrote “[t]hat suggestion misses the point of the ministerial
exception. The purpose of the exception is not to safeguard a church’s
decision to fire a minister only when it is made for a religious reason. The
exception instead ensures that the authority to select and control who will

26 Id.
27 Id. at 708.
28 Id.
“minister to the faithful” is a matter for the church to make alone without interference from a civil court.29

Although the October 5, 2011 oral argument before the Supreme Court yielded opinions from the Justices that covered a very broad range of topics and reflected disparate interpretations of the doctrine, the Court’s January 11, 2012 opinion largely set aside the apparent differences and focused on areas of agreement. Two Justices wrote concurring opinions that may serve as guides to future interpretations of the exception.

Justice Thomas wrote in a short concurring opinion that the determination of whether an employee qualified as a “minister” for a certain faith was – in itself – a question that could really only be resolved by the religious organization on religious grounds, and not by a secular court. Accordingly, in his view courts should defer to “good faith” decisions by religious organizations as to who qualifies as a minister.

The final concurrence by Justice Alito, thought to be one of the Court’s most conservative members, joined by Justice Kagan, thought to be one of its most liberal, addressed two issues. It noted that the term “minister” is misleading and should not distort the way the exception applies to religions that do not have “ministers.” It also expounded a fairly broad understanding of the term “minister” which included all employees performing a religious function or serving as a messenger or teacher of the faith.

B. Effect of Hosanna-Tabor on Existing Framework

The Court’s opinion provides substantial clarity as to how the ministerial exception applies, but does not touch directly on a number of subjects that remain to be developed further. For example, how are the four factors identified by the Court to be weighed? What types of institutions may use the exception? To what causes of action does it apply? While lower courts have addressed these issues, the Supreme Court chose not to clarify these points. As Chief Justice Roberts wrote near the conclusion of his decision, “There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”30

29 Id. at 709.

30 Hosanna-Tabor, 132 S. Ct. at 710.
What the Supreme Court did clarify in *Hosanna-Tabor*, however, is to what job positions the exception applies. The Court’s opinion does not state that it is overruling the widely adopted “primary duties” test, but it seems clear that the Court’s reasoning rejects it. The Court stated that one of the reasons the Court of Appeal had erred in finding Perich not subject to the exception was by placing too much emphasis on the fact Perich did not spend much time on her religious duties. The Supreme Court took pains to point out that the issue of who qualifies for the exception: “is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee’s status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.” 31

In addition, the Court did not emphasize the factor considered by the Fifth Circuit of whether the employee had been selected based on religious criteria. The Court never stated the factor was irrelevant, but the fact that it did not appear explicitly in the Court’s reasoning means that judges in the future will need to address the factors the Court did set forth, described above, as primary considerations, and not the test the Fifth Circuit has developed.

**VI. CONCLUSION**

Accepting the existence of the ministerial exception is no longer a matter of faith. The United States Supreme Court has explicitly recognized a ministerial exception emanating from the First Amendment. It precludes those performing religious duties from bringing certain employment-related claims against religious educational institutions. But, which positions qualify as a “minister” has not been clearly delineated, nor has the particular claims to which it will apply. Similarly, the Court did not explore which religious schools would qualify for its protections. Those cases have yet to be litigated before the high court.

Still, religious schools are not without guidance. They should consider whether they have policies and guidelines in place to help ensure a court will likely view them as a religious educational institution. They should look

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31 *Hosanna-Tabor*, 132 S. Ct. at 709.
specifically at their hiring and admissions policies as well as their curricula. They should ensure that the school’s religious purpose is clearly articulated in its governing documents and handbooks and that it adheres to them.

Schools should also analyze positions to determine whether they would likely qualify as religious positions given the Court’s recent guidance. Some positions, like a campus minister, will clearly fall within the ministerial exception, but what about Hebrew or Latin teachers whose duties are confined to language instruction as part of a broader religious curriculum? Or administrators who do not teach but whose functions make possible a religious education? We simply do not know, but schools should take time now to identify employees who perform a religious function central to the purpose of the school. Where there is uncertainty, schools should scrutinize their employment agreements, policies, and practices more generally to determine whether a legitimate religious purpose exists for positions which are not clearly religious in nature. Otherwise there may be a greater chance the next case considered by the Supreme Court will come from your school.

From a best practices perspective, schools need to be extremely cautious when relying on the ministerial exception. For some schools - even those which view themselves as "religious" - making a religiously-motivated employment decision may be patently illegal. For other schools, the ministerial exception may only apply to very few, if any, positions. Moreover, given the broad spectrum of practices within religious schools, those who rely on the ministerial exception should tread with particular care. It is not a one-size-fits-all doctrine. Finally, legal issues aside, failing to hire an applicant, or separating an employee, for religiously-motivated reasons always has the potential of causing a schism within the community. It can also generate negative publicity for a school and create an impression of unfair discrimination. Ultimately, ensuring a school can articulate a clear, reasonable basis for an employment decision may be the best defense of all.