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## *Civil Procedure and the Ministerial Exception*

(Forthcoming, 86 FORDHAM L. REV. \_\_\_\_ (2017))

Peter J. Smith\* and Robert W. Tuttle\*\*

*In Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, the Court recognized a ministerial exception to the ordinary rules of employer liability. The Court also concluded that the exception operates as an affirmative defense rather than a jurisdictional bar. This conclusion raises quite significant questions about how courts should address the exception in the course of litigation.*

*We argue that courts should approach these procedural questions in light of the underlying justification for the ministerial exception. The exception reflects a longstanding constitutional limitation on the competence of courts to resolve “strictly and purely ecclesiastical” questions. To conclude that the exception operates as an affirmative defense does not alter this fundamental limitation on the authority of secular courts.*

*As a practical matter, this means that in litigation between religious institutions and their employees, courts may be required to manage discovery to resolve threshold questions about the application of the ministerial exception before permitting broader discovery. Similarly, courts should consider permitting interlocutory appeals of trial court decisions that deny motions for summary judgment based on the exception. And courts not only should conclude that religious institutions do not waive the defense by failing to raise it, but also ought to raise it sua sponte when the facts indicate that the exception may apply. These departures from the ordinary treatment of affirmative defenses are necessary to respect the constitutional principles that the Court articulated in Hosanna-Tabor.*

### I. INTRODUCTION

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In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*,<sup>1</sup> the Court for the first time recognized the existence of a “ministerial exception” to the ordinary rules of liability arising out of the employment relationship between clergy and religious institutions. The Court concluded that the Religion Clauses of the First Amendment “bar the government from interfering with the decision of a religious group to fire one of its ministers.”<sup>2</sup> As a consequence, a minister generally cannot recover from her religious employer for employment discrimination or related claims. Although the Court in *Hosanna-Tabor* declined to articulate a clear test for determining when an employee is a minister, it concluded that the plaintiff in the suit was a minister for purposes of the exception.<sup>3</sup>

Before the Court’s decision in *Hosanna-Tabor*, the lower courts had divided over whether the ministerial exception deprived courts of subject matter jurisdiction to consider a ministerial employee’s claims or instead operated as a defense to liability.<sup>4</sup> The Court resolved this debate in a footnote in its opinion in *Hosanna-Tabor*.<sup>5</sup> The Court declared that the exception operates as an affirmative defense, rather than as a jurisdictional bar.<sup>6</sup> In this paper, we address both the underlying justification for this conclusion and its practical consequences.

To understand the significance of these questions, it is useful to consider a hypothetical suit. Imagine that an African-American, female minister served a congregation for several years without any complaints. With virtually no notice, the church council, composed exclusively of white men, recently voted to fire her, pursuant to their authority under the church’s governing documents. They explained to the minister that they were terminating her because of the poor quality of her sermons and their perception that her prayers increasingly departed from settled doctrines of the faith tradition. The discharged minister responded by filing a claim with the local office of the Equal Employment Opportunity Commission, alleging

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<sup>1</sup> 565 U.S. 171 (2012).

<sup>2</sup> *Id.* at 181.

<sup>3</sup> *Id.* at 190 (“We are reluctant [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.”).

<sup>4</sup> See *infra* at notes 39-48 and accompanying text.

<sup>5</sup> 565 U.S. at 195 n.4.

<sup>6</sup> *Id.*

discrimination on the basis of race and gender. The EEOC declined to become involved in the suit and granted the minister a “right-to-sue” letter. She then filed suit in federal district court seeking back pay, reinstatement, and attorney’s fees.

In a typical employment discrimination suit, where the plaintiff demonstrates a prima facie case of discrimination, the employer can respond by offering a non-discriminatory justification for the adverse employment action. The plaintiff can then argue that the employer’s proffered justification is pre-textual, and the finder of fact must determine the actual basis for the adverse employment decision.<sup>7</sup> Matters are more complicated when the defendant is a religious organization. Title VII, and comparable state-law protections against employment discrimination, provides that religious organizations are not bound by the prohibitions against discrimination on the basis of religion.<sup>8</sup> Accordingly, an avowed atheist cannot recover under Title VII for religious discrimination when a church refuses to hire him, even if the position is not one that involves leading worship, religious education, or any other religious activity.<sup>9</sup>

In our hypothetical suit, the plaintiff does not allege that she was fired for religious reasons, nor could she successfully maintain such an action against the church. But Title VII, like comparable state provisions, does not exempt religious organizations from the general prohibition against discrimination on the basis of race, gender, national origin, or the other protected characteristics under the statute.

If there were no ministerial exception to liability under Title VII of the Civil Rights Act, then the plaintiff could force the defendant to articulate a non-discriminatory basis for her termination. If the plaintiff could satisfy her initial burden of demonstrating a prima facie case of race or gender discrimination, the burden would shift to the church to articulate a non-discriminatory basis for the decision. In our example, the church likely would defend by citing the council’s conclusion that she was a poor preacher and deviated from settled church doctrine. The plaintiff would respond by arguing that those reasons were pre-textual, which she would seek to demonstrate by

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<sup>7</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>8</sup> 42 U.S.C. § 2000e-1 (“This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”)

<sup>9</sup> See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987).

offering evidence that her preaching was adequate and that her prayers and teaching conformed to church doctrine.

To resolve such a dispute, a court would inevitably be required to decide whether the plaintiff was an adequate preacher and whether her teaching and prayers were sufficiently orthodox. But even before *Hosanna-Tabor*, there was a long and unbroken constitutional tradition that prohibits courts from resolving “strictly ecclesiastical” questions,<sup>10</sup> and it is difficult to imagine a more purely ecclesiastical question than the quality or substance of a minister’s preaching and teaching. As we explain below, this is the strongest theoretical and constitutional justification for the ministerial exception.

But even assuming the existence of such an exception, important questions remain in suits by church employees against the church. As in *Hosanna-Tabor*, it may be unclear whether the employee should be treated as a minister for purposes of the exception. In addition, as we discuss below, some claims by employees properly considered ministers might nevertheless be the basis for recovery notwithstanding the exception.

This state of affairs raises several procedural questions in suits potentially implicating the ministerial exception. To return to our example, imagine that the plaintiff were not an ordained pastor, but instead was the publicist for a large church congregation, responsible for designing and editing the church’s many publications and for maintaining the church’s elaborate website.<sup>11</sup> It would not be immediately obvious whether she is a minister within the meaning of the exception. If she sued for race and gender discrimination after being terminated, and the church responded by raising the ministerial exception, what mechanism should the court use to decide whether the exception insulates the church from liability?

We focus in this paper on five important questions of procedure that can arise in a suit implicating the ministerial exception. First, does the religious organization properly assert the exception by way of a motion to dismiss, or may it only raise the defense in its answer and then seek to resolve the suit by way of a motion for summary judgment? Second, if the matter is not properly resolved at the motion to dismiss stage, should a defense based on the ministerial exception require the court to limit the scope of discovery to matters relevant to

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<sup>10</sup> *Watson v. Jones*, 80 U.S. 679, 733 (1871); *see also* *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-49 (1969).

<sup>11</sup> *Cf. Alicia-Hernandez v. Archdiocese of Chicago*, 2000 U.S. Dist. Lexis 6877 (involving similar facts).

the application of the exception prior to permitting discovery on other issues in the suit? Third, if the court denies a church's motion based on the exception, can the church take an immediate appeal, or must it defer any appeal until entry of final judgment? Fourth, if disputed questions of fact concerning the plaintiff's status as a minister cannot be resolved at the summary judgment stage—for example, if there is a genuine dispute about the actual responsibilities of the plaintiff's position—can those questions be submitted to and resolved by a jury, or must they be resolved by the judge? Fifth, if the defendant fails to raise the defense, either in the answer or later in the proceeding, may or should the court raise the ministerial exception *sua sponte*, or should the court instead treat the defense as waived?

These questions must be resolved in light of the underlying justification for the ministerial exception. We begin in Part II by considering the exception's origins in the lower federal courts. We then discuss the Court's decision in *Hosanna-Tabor* and seek to identify the ultimate constitutional basis for the ministerial exception. We then turn in Part III to the procedural questions raised by suits implicating the exception.

## II. THE SUBSTANCE OF THE MINISTERIAL EXCEPTION

### A. *Judicial Origins of the Ministerial Exception*

By the time the Court decided *Hosanna-Tabor*, every federal circuit and many state supreme courts had recognized the ministerial exception. In the first decision to apply the exception, *McClure v. Salvation Army*,<sup>12</sup> the United States Court of Appeals for the Fifth Circuit considered a gender discrimination claim by a female employee of the Salvation Army who had been terminated. Although Title VII of the Civil Rights Act protected the defendant against claims of religious discrimination, by its terms it did not offer immunity from claims of discrimination based on membership in other protected classes. The Salvation Army argued, however, that Billie McClure was not an ordinary employee of the organization; instead, she was an ordained minister of that faith group. The Salvation Army argued that the court should read the term “employee” in Title VII to exclude ministerial employees. The court agreed, construing the statute in light of

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<sup>12</sup> 460 F.2d 553 (5<sup>th</sup> Cir. 1972).

constitutional concerns that would arise from extending the statute to these circumstances.<sup>13</sup> The court reasoned:

“The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister’s salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.”<sup>14</sup>

The Court’s holding was based on the “nonspecific wording”<sup>15</sup> of the statute, but in identifying the relevant constitutional concerns, the Court cited both Religion Clauses.<sup>16</sup> The bulk of its analysis, however, focused on a series of cases that we discuss below and that, we contend, sound primarily in Establishment Clause themes.<sup>17</sup>

Although the Fifth Circuit addressed several issues related to the exception in the decade after *McClure*, no other federal circuit expressly adopted the ministerial exception during that time period. This is undoubtedly due at least in part to the fact that very few Protestant denominations permitted the ordination of women before the mid-1970s, and it took some number of years for women to complete seminary before entering the workplace as ministers. Once

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<sup>13</sup> *Id.* at 560-61.

<sup>14</sup> *Id.* at 558-59.

<sup>15</sup> *Id.* at 560.

<sup>16</sup> *Id.* at 558 (describing question presented as, “Does the application of the provisions of Title VII to the relationship between The Salvation Army and Mrs. McClure (a church and its minister) violate either of the Religion Clauses of the First Amendment?”); *id.* (noting the “‘wall of separation’ between church and State” and citing *Everson v. Board of Education*, 330 U.S. 1 (1947), an Establishment Clause case); *id.* (noting that “Restrictions on the free exercise of religion are allowed only when it is necessary ‘to prevent grave and immediate danger to interests which the state may lawfully protect’ (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)) and citing *Sherbert v. Verner*, 374 U.S. 398 (1963), a Free Exercise Clause case).

<sup>17</sup> *Id.* at 559-60 (discussing *Watson v. Jones*, 80 U.S. 679 (1871), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), *United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, (1969)). *See infra* at notes 58-93 and accompanying text.

this development took hold, the courts were confronted with more claims of employment discrimination by religious employers.<sup>18</sup>

In 1986, the Fourth Circuit recognized the ministerial exception in *Rayburn v. General Conf. of Seventh Day Adventists*.<sup>19</sup> As in *McClure*, the court relied on both Religion Clauses in concluding that the exception limits liability under Title VII.<sup>20</sup> In addition, the case involved a complicating factor not present in *McClure*: the plaintiff was not an ordained minister. Instead, she was a “associate in pastoral care” at a church.<sup>21</sup> The court held, however, that the ministerial exception “does not depend upon ordination but upon the function of the position.”<sup>22</sup> Because the plaintiff’s position was “important to the spiritual and pastoral mission of the church,” the court concluded that Rayburn performed the functions of a ministerial employee for purposes of the exception.<sup>23</sup> The court emphasized the limited character of judicial inquiry in this context: “While it is our duty to determine whether the position of associate in pastoral care is important to the spiritual mission of the Seventh-day Adventist Church, we may not then inquire whether the reason for Rayburn’s rejection had some explicit grounding in theological belief.”<sup>24</sup>

*Rayburn* applied the ministerial exception to an employee who had not been ordained, but whose functions were substantially similar to those performed by ordained ministers. Subsequent decisions expanded even further the category of employees subject to the exception. For example, in *EEOC v. Roman Catholic Diocese of Raleigh, North Carolina*,<sup>25</sup> the court held that a director of music ministry at Sacred Hearth Cathedral was a ministerial employee. The

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<sup>18</sup> Several commentators criticized the ministerial exception, in large part because of its effect on women’s rights in the workplace. See, e.g., Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Anti-Discrimination Law*, 75 FORDHAM L. REV. 1965 (2007); Joanne C. Brant, “*Our Shield Belongs to the Lord*”: *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275 (1994).

<sup>19</sup> 772 F.2d 1164 (4<sup>th</sup> Cir. 1986).

<sup>20</sup> *Id.* at 1168 (“Any attempt by government to restrict a church’s free choice of its leaders thus constitutes a burden on the church’s free exercise rights.”); *id.* at 1169-70 (“To subject church employment decisions of the nature we consider today to Title VII scrutiny would also give rise to “excessive government entanglement” with religious institutions prohibited by the establishment clause of the First Amendment” (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

<sup>21</sup> *Id.* at 1168-69.

<sup>22</sup> *Id.* at 1168.

<sup>23</sup> *Id.* at 1169.

<sup>24</sup> *Id.* at 1169.

<sup>25</sup> 213 F.3d 795 (4<sup>th</sup> Cir. 2000).

plaintiff's "primary duties at the Cathedral and its school consisted of the selection, presentation, and teaching of music, which is integral to the spiritual and pastoral mission of the Catholic Church and many other religious traditions ...."<sup>26</sup> Similarly, in *Alicia-Hernandez v. Archdiocese of Chicago*,<sup>27</sup> the court applied the exception to a claim by the Archdiocese's communications manager. The court reasoned that the plaintiff was responsible "for promoting the church and spreading its message within the Hispanic community" and for acting "as a liaison between the church and [those] it [seeks] to reach."<sup>28</sup>

At the same time, courts expanded the ministerial exception to reach all class-based protections under Title VII (except those related to sexual harassment)<sup>29</sup> and other federal employment discrimination statutes.<sup>30</sup> Courts have also applied the exception to bar certain state-law claims, including defamation claims arising out of a minister's employment by a church<sup>31</sup> and breach of contract claims by terminated ministers.<sup>32</sup> The courts in these cases reasoned that the exception applies to all claims by ministerial employees that would require the court to resolve specifically religious questions about the employee's performance in or fitness for the position.<sup>33</sup>

In the wake of the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Or. v. Smith*,<sup>34</sup> which strictly limited

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<sup>26</sup> *Id.* at 797.

<sup>27</sup> 2000 U.S. Dist. Lexis 6877.

<sup>28</sup> *Id.* at \*13 (quoting *Bryce v. Episcopal Church*, 121 F.Supp.2d 1327, 1340 (D.Col. 2000), *aff'd* 289 F.3d 648 (10<sup>th</sup> Cir. 2002)).

<sup>29</sup> See Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J. L. & PUB. POL'Y 119, 160-63 (2009) (arguing that courts can adjudicate sexual harassment claims by ministers if "the injury attributable to sexual harassment can be separated from the defendants' evaluation of her performance and termination of her position"); *infra* at notes 99-102 and accompanying text.

<sup>30</sup> *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7<sup>th</sup> Cir. 2006) (applying ministerial exception to claim by church music director under Age Discrimination in Employment Act); *Hutchinson v. Thomas*, 789 F.2d 392 (6<sup>th</sup> Cir. 1986) (applying exception to claim by ordained minister under Age Discrimination in Employment Act).

<sup>31</sup> *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1<sup>st</sup> Cir. 1989) (applying ministerial exception to bar defamation seeking damages for injury to reputation arising from discharge from a ministerial position).

<sup>32</sup> *Heard v. Johnson*, 810 A.2d 871, D.C. App. Lexis 656 (2002) (applying ministerial exception to breach of contract and defamation claims by ordained minister who was terminated by the congregation).

<sup>33</sup> See Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 29, at 152-54 (breach of contract cases); 160-63 (sexual harassment cases).

<sup>34</sup> 485 U.S. 660 (1990).

claims of religious exemptions under the Free Exercise Clause, some commentators questioned whether the ministerial exception should survive.<sup>35</sup> The D.C. Circuit, however, squarely held that *Smith* had no impact on the availability of the exception. Indeed, in *EEOC v. Catholic University of America*,<sup>36</sup> the court raised the ministerial exception *sua sponte* after the defendant failed to raise it as a defense to gender discrimination claims arising out of a tenure denial by a professor of canon law.<sup>37</sup>

When the Supreme Court granted certiorari in *Hosanna-Tabor*, there was no circuit split about the existence of the ministerial exception.<sup>38</sup> There was, however, a split among the federal circuit courts, and among state courts, about the correct procedures for resolving cases involving the exception. Specifically, the lower courts had divided over how to raise and resolve a defense based on the exception. Some courts had concluded that the exception operated as a jurisdictional bar.<sup>39</sup> On this view, the conclusion that the ministerial exception applied required dismissal of the suit for lack of subject matter jurisdiction. Courts that followed this approach reasoned that because courts lack competence to decide ecclesiastical questions, they must lack power to decide cases implicating the ministerial exception.<sup>40</sup> In those courts, the proper means of raising a defense based on the exception, like any other defense of lack of subject matter jurisdiction, was generally by motion to dismiss.<sup>41</sup>

Other courts had held that the ministerial exception did not operate as a jurisdictional bar, because federal district courts clearly have “authority to review claims arising under federal law.”<sup>42</sup> These courts treated the exception as an affirmative defense to liability

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<sup>35</sup> See, e.g., Brant, *supra* note 18, at 309-10.

<sup>36</sup> 83 F.3d 455 (D.C. Cir. 1996).

<sup>37</sup> *Id.* at 459-60.

<sup>38</sup> *Hosanna-Tabor*, 565 U.S. at 188.

<sup>39</sup> See *Young v. N. Ill. Conf. of the United Methodist Church*, 21 F.3d 184, 188 (7th Cir. 1994) (affirming dismissal for lack of subject matter jurisdiction of suit by a ministerial employee against a church). For the theoretical underpinnings of this view, see Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43 (2008) (arguing that the exception operates as a jurisdictional bar to preserve church autonomy).

<sup>40</sup> See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038–1039 (7th Cir. 2006).

<sup>41</sup> See *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) (“[T]his Circuit has treated the “ministerial exception” as jurisdictional in nature and an appropriate ground for a motion to dismiss pursuant to Rule 12(b)(1).”); *Tomic*, 442 F.3d at 1038.

<sup>42</sup> *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006).

rather than as a bar to jurisdiction.<sup>43</sup> But even these courts were divided over the correct procedure for raising and resolving the defense. Some courts held that religious organizations could raise the exception in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).<sup>44</sup> Because the question whether the exception applied in a given case often turned on disputed factual issues, courts that treated the exception as an affirmative defense often permitted discovery before resolving the defendant's motion. But those courts disagreed further over the appropriate scope of discovery in such cases. Some invited the parties to engage in limited discovery focused exclusively on the application of the ministerial exception.<sup>45</sup> In those courts, the parties typically followed this limited discovery by submitting affidavits about the employee's responsibilities. The court would then entertain a motion for summary judgment by the defendant based on the exception.<sup>46</sup> Other courts treated the defense like any other affirmative defense and declined to limit discovery at the threshold to the question whether the employee was properly considered a minister.<sup>47</sup> In these courts, general discovery, including discovery on the application of the exception, would proceed, and the exception would be simply one of many possible grounds for an eventual motion for summary judgment.<sup>48</sup>

### *B. The Court's Decision in Hosanna-Tabor*

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<sup>43</sup> *Bollard v. California Province of Soc. of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999).

<sup>44</sup> *See Petruska*, 462 F.3d at 302 (“[W]e conclude that the exception does not act as a jurisdictional bar, but rather, is best viewed as a challenge to the sufficiency of [the plaintiff’s] claim under Rule 12(b)(6).”); *accord Bryce v. Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989).

<sup>45</sup> *See, e.g., Schmoll v. Chapman University*, 70 Cal. App. 4th 1434, 1437-39, 83 Cal. Rptr. 2d 426, 428-29 (1999).

<sup>46</sup> *Id.* at 428 (“In light of this uncontroverted evidence, the court granted summary judgment to Chapman, finding the university constitutionally protected against state interference with its employment decision affecting Schmoll.”).

<sup>47</sup> *See, e.g., Temple Emanuel of Newton v. Massachusetts Comm’n Against Discrimination*, 463 Mass. 472, 975 N.E.2d 433 (2012) (reversing pre-*Hosanna-Tabor* trial court decision that enjoined state equal employment commission investigation of age discrimination claim by religious school teacher).

<sup>48</sup> 975 N.E.2d at 441 (rejecting view that “the First Amendment requires all discovery to be stayed until the affirmative defense of ministerial exception is fully adjudicated”).

In *Hosanna-Tabor*, the Court considered both the substance and the procedure of the ministerial exception. We consider them in turn.

### 1. Finding a Ministerial Exception

In *Hosanna-Tabor*, the Court for the first time embraced the ministerial exception. The Court noted that the lower courts had “uniformly recognized the existence” of the exception to preclude adjudication of most discrimination claims arising out of “the employment relationship between a religious institution and its ministers.”<sup>49</sup> The Court agreed that with those courts that its prior decisions “confirm that it is impermissible for the government to contradict a church’s determination of who can act as its ministers.”<sup>50</sup>

After an extensive review of the historical and doctrinal basis for the exception, the Court turned to whether the plaintiff was properly considered a minister. Even though she was a teacher of predominantly secular subjects, and had only limited religious duties, the Court concluded that she counted as a minister for purposes of the exception.<sup>51</sup> Although the Court expressly declined to announce a specific test for defining ministers,<sup>52</sup> the Court’s conclusion that the plaintiff was a minister suggests that it applied a rather capacious definition of the role.<sup>53</sup> In addition, eight members of the Court agreed that defining ministers for purposes of the exception is a task properly

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<sup>49</sup> 565 U.S. at 188.

<sup>50</sup> *Id.* at 185.

<sup>51</sup> *Id.* at 190-95.

<sup>52</sup> *Id.* at 190 (“We are reluctant [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.”).

<sup>53</sup> The Court described Cheryl Perich’s responsibilities as follows:

“Respondent Cheryl Perich was first employed by Hosanna–Tabor as a lay teacher in 1999. After Perich completed her colloquy later that school year, Hosanna–Tabor asked her to become a called teacher. Perich accepted the call and received a “diploma of vocation” designating her a commissioned minister. Perich taught kindergarten during her first four years at Hosanna–Tabor and fourth grade during the 2003–2004 school year. She taught math, language arts, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.”

*Id.* at 178. The Court relied on several features of Perich’s position in concluding that she was a minister: “the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church.” *Id.* at 192.

performed by courts reviewing claims within the reach of the exception.<sup>54</sup> Those eight Justices implicitly rejected Justice Thomas’s suggestion that the mere invocation of the exception by a religious organization precludes further judicial inquiry.<sup>55</sup>

The Court based its recognition of the ministerial exception on both the Free Exercise and Establishment Clauses. The Court explained: “By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. Granting the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.”<sup>56</sup> Accordingly, the Court repeatedly stated that the ministerial exception is “grounded in the Religion Clauses of the First Amendment.”<sup>57</sup>

A close reading of the case reveals, however, that Establishment Clause concerns predominate.<sup>58</sup> Although the Court certainly

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<sup>54</sup> 565 U.S. at 190-95 (opinion for a unanimous Court) (considering the employee’s responsibilities and determining whether she was properly considered a minister for purposes of the exception); *id.* at 204-05 (Alito, J., concurring, joined by Kagan, J.) (concluding that the employee was a minister for purposes of the exception because she “played an important role as an instrument of her church’s religious message and as a leader of its worship activities”). The Court concluded, however, that courts should not consider whether the religious institution’s justification for the adverse employment action was sincerely religious or instead pretextual. For an explanation of this conclusion, see Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1279-80 (2017).

<sup>55</sup> *Id.* at 196 (Thomas, J., concurring) (“[I]n my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization’s good-faith understanding of who qualifies as its minister.”). Justice Thomas reasoned that “the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith. A religious organization’s right to choose its ministers would be hollow, however, if secular courts could second-guess the organization’s sincere determination that a given employee is a ‘minister’ under the organization’s theological tenets.” *Id.* at 196-97.

<sup>56</sup> *Id.* at 188-89.

<sup>57</sup> *Id.* at 189; see *id.* at 181 (“Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”); *id.* at 189 (“We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.”); *id.* at 194 (“The EEOC and Perich originally sought an order reinstating Perich to her former position as a called teacher. By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church’s freedom under the Religion Clauses to select its own ministers.”).

<sup>58</sup> See Lupu & Tuttle, *Unanimity*, *supra* note 54, at 1280-1287.

identified religious liberty as one reason for finding a ministerial exception, the case law on which the decision rests, as well as the Court's reasoning, makes clear its focus on the problem of governmental resolution of quintessentially religious questions. The line of cases on which the Court relied stretches back to *Watson v. Jones*,<sup>59</sup> a federal common-law decision in which the Court required judicial deference to decisions made by the highest body within the Presbyterian Church. The dispute concerned the ownership of property of the Presbyterian Church in Kentucky. The Court, invoking a "broad and sound view of the relations of church and state under our system of laws," deferred to the decision of the General Assembly of the Presbyterian Church awarding ownership to one of the competing factions.<sup>60</sup>

In *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*,<sup>61</sup> the Court adopted *Watson*'s reasoning as a matter of constitutional doctrine under the First Amendment's Religion Clauses.<sup>62</sup> *Kedroff* involved a dispute between a local Russian Orthodox congregation in New York and the church hierarchy in Moscow over control of the Russian Orthodox Cathedral in New York and the appointment of church leaders in the United States.<sup>63</sup> The state legislature had enacted a law that required every Russian Orthodox church in New York to recognize the determination of the governing body of the North American churches as authoritative.<sup>64</sup> The New York Court of Appeals relied on the law in ruling against the

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<sup>59</sup> 80 U.S. 679, 733 (1871).

<sup>60</sup> *Id.* at 727.

<sup>61</sup> 344 U.S. 94 (1952).

<sup>62</sup> *Id.* at 115-16 (noting that the Court decided *Watson* "before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action," but that "[f]reedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection ...").

<sup>63</sup> *Id.* at 95-97.

<sup>64</sup> *Id.* at 97-99. The law at issue was Article 5-C of the Religious Corporations Law of New York. "The purpose of the article was to bring all the New York churches, formerly subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow or the Patriarch of Moscow, into an administratively autonomous metropolitan district. That district was North American in area, created pursuant to resolutions adopted at a sobor held at Detroit in 1924. This declared autonomy was made effective by a further legislative requirement that all the churches formerly administratively subject to the Moscow synod and patriarchate should for the future be governed by the ecclesiastical body and hierarchy of the American metropolitan district." *Id.* at 98.

Russian Orthodox hierarchy in Moscow,<sup>65</sup> but the Supreme Court reversed. The Court held that civil government must not usurp church authority to decide “strictly ecclesiastical” matters.<sup>66</sup> Because of the structure of the Russian Orthodox Church, the Court ruled, such decisions belong to the Supreme Church Authority of the Russian Orthodox Church.<sup>67</sup> The Court thus invalidated the state law that purported to resolve the intra-church dispute.<sup>68</sup>

The Court reaffirmed this approach, albeit in a quite different denominational context, in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.<sup>69</sup> *Blue Hull* involved the effort of a majority of a congregation to split from the denominational body, because of the denominational body’s liberal stances on school prayer, the role of women in the church, and the Vietnam War.<sup>70</sup> At root, the conflict was over ownership of church property.<sup>71</sup> The Georgia trial court held that the denomination had departed from traditional Presbyterian doctrine, and therefore that the congregation had the right to claim the property upon its departure from the denomination.<sup>72</sup> The Supreme Court of Georgia affirmed,<sup>73</sup> but U.S. Supreme Court reversed, reasoning that courts are not competent to decide what constitutes fidelity to the doctrines of a particular faith.<sup>74</sup> The Court explained that “First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.”<sup>75</sup> Accordingly, “the First Amendment enjoins the employment of organs of government for essentially religious purposes”

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<sup>65</sup> See *St. Nicholas Cathedral of Russian Orthodox Church in North America v. Kedroff*, 302 N.Y. 1, 33, 96 N.E.2d 56, 74 (1950).

<sup>66</sup> *Id.* at 119.

<sup>67</sup> *Id.* at 115.

<sup>68</sup> *Id.* at 119.

<sup>69</sup> 393 U.S. 440 (1969).

<sup>70</sup> *Id.* at 442 & n.1.

<sup>71</sup> *Id.* at 441-43.

<sup>72</sup> *Id.* at 443-44 (“[T]he jury was instructed to determine whether the actions of the general church ‘amount to a fundamental or substantial abandonment of the original tenets and doctrines of the (general church), so that the new tenets and doctrines are utterly variant from the purposes for which the (general church) was founded.’”).

<sup>73</sup> *Presbyterian Church in the United States v. Eastern Heights Presbyterian Church*, 224 Ga. 61, 159 S.E.2d 690 (1968).

<sup>74</sup> *Id.* at 445-56 (stating that it is “wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions”).

<sup>75</sup> *Id.* at 449.

and “commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.”<sup>76</sup>

The Court returned to this principle in *Serbian Eastern Orthodox Diocese of North America v. Milivojevich*,<sup>77</sup> which involved the efforts of U.S.-based bishop Milivojevich to resist the authority of the Belgrade-based church hierarchy. The hierarchy had restricted the size of Milivojevich’s jurisdiction. When he vehemently resisted, the hierarchy removed him from his position.<sup>78</sup> Milivojevich filed suit in Illinois state court, claiming (among other things) that the church had failed to follow its internal procedures for removal of a bishop. The Illinois Supreme Court agreed with Milivojevich and ordered him restored to his diocese and the diocese restored to its original size.<sup>79</sup> The U.S. Supreme Court reversed, holding that courts lack authority to resolve “quintessentially religious controversies.”<sup>80</sup> The Court stated that when “hierarchical religious organizations” adjudicate disputes over internal discipline and church governance, “the Constitution requires that civil courts accept their decisions as binding upon them.”<sup>81</sup>

*Jones v. Wolf* also involved a dispute between competing factions over church property.<sup>82</sup> The Court clarified that state and federal courts are not always bound to defer to the hierarchy of a particular denomination in resolving a dispute within a religious body. Instead, the Court said that “a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.”<sup>83</sup> By neutral principles, the Court meant “objective, well-established concepts of trust and property law familiar to lawyers and judges.”<sup>84</sup> But the Court also imposed an important limit on the use of “neutral principles” to resolve intra-church disputes: “If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer

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<sup>76</sup> *Id.*

<sup>77</sup> 426 U.S. 696 (1976).

<sup>78</sup> *Id.* at 702-06.

<sup>79</sup> *Id.* at 708; *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 60 Ill.2d 477, 328 N.E.2d 268 (1975).

<sup>80</sup> 426 U.S. at 720.

<sup>81</sup> *Id.* at 725.

<sup>82</sup> 443 U.S. 595 (1979).

<sup>83</sup> *Id.* at 604.

<sup>84</sup> *Id.* at 603.

to the resolution of the doctrinal issue by the authoritative ecclesiastical body.”<sup>85</sup>

Although these cases cited the First Amendment in general, rather than relying separately on the Establishment Clause or the Free Exercise Clause,<sup>86</sup> the Court’s core argument in each case must be based on the Establishment Clause. First, in none of these cases did the Court suggest that a balancing of interests would be appropriate in resolving the disputes.<sup>87</sup> In the middle of the twentieth century, when the Court decided *Blue Hull* and *Milivojevich*, such balancing was a hallmark of decision under the Free Exercise Clause.<sup>88</sup> In Free Exercise cases in that era, the Court measured the interference with religious liberty against the state’s interest in regulating the matter in question.<sup>89</sup> But the Court made clear in *Blue Hull* and *Milivojevich* that the prohibition on adjudication of religious questions is categorical and not contingent on the relative strength of the government’s reason for intervention.<sup>90</sup> In Establishment Clause cases, by contrast, the Court never considers whether an alleged violation of the Clause is outweighed by some governmental interest advanced by the challenged

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<sup>85</sup> *Id.* at 604; *accord* at 602 (“As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.”).

<sup>86</sup> *See, e.g., Kedroff*, 344 U.S. at 100 n.5; *Blue Hull*, 393 U.S. at 450; *Milivojevich*, 426 U.S. at 698, 709-10.

<sup>87</sup> *See Lupu & Tuttle, Unanimity, supra* note 54, at 1276.

<sup>88</sup> *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (“The freedom to act [under the Free Exercise Clause] must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.”); *id.* at 308 (noting that the “state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders” and inquiring “whether the alleged protection of the State’s interest, means to which end would, in the absence of limitation by the federal Constitution, lie wholly within the State’s discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact”); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (determining “whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant’s First Amendment right” under the Free Exercise Clause).

<sup>89</sup> *See Sherbert*, 374 U.S. at 406.

<sup>90</sup> *See Blue Hull*, 393 U.S. at 449 (“[T]he First Amendment enjoins the employment of organs of government for essentially religious purposes.”); *Milivojevich*, 426 U.S. at 713 (“[T]his is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.”).

action. Instead, the Court simply asks whether the challenged action is one subject to categorical prohibition.

For example, the Court's cases addressing prayer or religious exercises in public schools do not consider the state's interest in fostering such piety.<sup>91</sup> The mere fact of state-sponsored religious indoctrination renders such conduct impermissible. Similarly, state funding of worship or religious indoctrination—such as the purchase of Bibles for distribution to Christian congregations—would violate the Establishment Clause regardless of the state's purported interest in promoting morality in the citizenry through Bible study.<sup>92</sup> The same is true when the government displays quintessentially religious symbols with the purpose of endorsing religion.<sup>93</sup>

Second, all of the cases cited above focused narrowly on the religious character of the questions presented to the lower courts. In each of the decisions from *Watson* through *Jones*, the Supreme Court held that governmental bodies, including courts, lack the competence to resolve strictly and purely ecclesiastical questions. Although the indirect consequence of this approach is a zone of freedom for churches in their decision-making, the Court's primary focus was on the secular character of civil government and its lack of authority and capacity to resolve quintessentially religious disputes. The assertion of such jurisdiction had been a hallmark of many colonial courts in the pre-Revolutionary era, and particularly in states with established churches.<sup>94</sup> But this relationship between religious organizations and the state has been soundly rejected by courts and other institutions of civil government since the founding era.

The Court in *Hosanna-Tabor* relied squarely on the line of cases starting with *Watson* in concluding that the ministerial exception

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<sup>91</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (agreeing with the petitioners' argument that "the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State" because "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government").

<sup>92</sup> Cf. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that laws that provided direct public funds for religious education violated the Establishment Clause).

<sup>93</sup> *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.").

<sup>94</sup> James H. Hutson, *CHURCH AND STATE IN THE AMERICA: THE FIRST TWO CENTURIES* (2007).

exists.<sup>95</sup> Those cases stand for the proposition that certain questions are simply beyond the authority of secular civil government to decide. The ministerial exception should be understood and applied in light of that proposition. In other words, the exception does not recognize a broad autonomy for religious institutions; instead, it reflects only a specific limitation on the power of government to resolve certain ecclesiastical matters. In this sense, the limitation is primarily imposed by the Establishment Clause, even if it also promotes interests within the scope of the Free Exercise Clause.

Some commentators have invoked *Jones v. Wolf* to suggest that the Establishment Clause principle does not impose a categorical limit on adjudication of religious questions, and specifically of employment discrimination claims by ministers.<sup>96</sup> We think this is mistaken. First, the Court in *Hosanna-Tabor* squarely rejected this view, and in any event did not even cite *Jones*. Second, the Court's focus in *Jones* on neutral principles confirms that the government lacks competence to resolve certain types of religious questions. As the Court stated in *Jones*, "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice."<sup>97</sup> Indeed, courts may decline to defer to church hierarchies when neutral principles are available only because such principles enable courts to resolve controversies without reference to church doctrine.

Third, the Court in *Jones* was primarily concerned about property disputes, which often involve documents (such as deeds) and state-law presumptions that judges can interpret and apply without reference to religious doctrine. Disputes arising out of the employment context, on the other hand, often require much more nuanced judicial assessment of the employee's conduct, which must be measured against the employer's standard of proper performance. That standard, when applied to a ministerial employee, virtually always involves some

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<sup>95</sup> The Court in *Hosanna-Tabor* cited and discussed *Watson*, *Kedroff*, and *Milivojevich*. See 565 U.S. at 185-87.

<sup>96</sup> Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 1001 (2013) (disagreeing with those who argue that judicial inquiry into pretext by a religious employer would require resolution of "a theological dispute"; arguing that such a view "ignores not only the courts' regular examination of religious motivation but also their authorized use of 'neutral principles of law' to resolve church property disputes" (citing *Jones v. Wolf*, 443 U.S. 595 (1979), for the proposition that "a court may review church deeds, charters, constitutional provisions, and other documents as long as it interprets them in purely secular terms"))).

<sup>97</sup> *Jones*, 443 U.S. at 602 (citing *Serbian Orthodox Diocese of North Am. v. Milivojevich*, 426 U.S. 696, 710 (1976)).

question of religious fitness for the position. As a consequence, there generally will not be any neutral—which is to say, secular—principles that courts can apply to resolve such questions. (This probably explains why the Court in *Hosanna-Tabor* did not bother to discuss *Jones*.)

The lower courts’ approach to the ministerial exception—both before and after *Hosanna-Tabor*—confirms that the exception derives principally from the Establishment Clause, rather than from notions of church autonomy implicit in most Free-Exercise-Clause-based claims. First, the courts that recognized the exception before the decision in *Hosanna-Tabor* uniformly relied on the line of cases holding that courts lack competence to adjudicate purely religious questions.<sup>98</sup> Second, the lower courts have concluded that the ministerial exception does not defeat certain types of claims by ministers against their religious employers. Courts can grant relief on those claims because their resolution does not require determination of any ecclesiastical questions.

For example, the lower courts that have addressed the issue have uniformly concluded that the ministerial exception does not bar sexual harassment claims under Title VII.<sup>99</sup> Those courts have reasoned that such claims do not require any inquiry into the minister’s fitness for the position, but instead turn on the workplace conduct of the minister’s co-workers.<sup>100</sup> Similarly, the lower courts have concluded that the ministerial exception does not bar certain breach of contract claims.<sup>101</sup> When ministers sue after termination seeking to recover unpaid wages, courts typically resolve the claims

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<sup>98</sup> See, e.g., *McClure*, 460 F.2d at 559-60 (citing *Watson*, *Kedroff*, and *Blue Hull*); *Rayburn*, 772 F.2d at 1167-68 (citing *Kedroff* and *Milivojevich*).

<sup>99</sup> See e.g., *Black v. Snyder*, 471 N.W.2d 715; 1991 Minn. App. Lexis 635; *McKelvey v. Pierce*, 173 N.J. 26, 800 A.2d 840 (2002); *Morgan v. Central Baptist Church of Oak Ridge*, 2013 WL 12043468 (E.D. Tenn.).

<sup>100</sup> See *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 963 (9<sup>th</sup> Cir. 2004) (“[W]hat is left open ... is a restricted, secular inquiry: whether Elvig can carry her burden of proving she was sexually harassed and, if she can, whether the Church can prove its affirmative defense. ‘Nothing in the character of [the inquiry] will require ... evaluat[ion of] religious doctrine or the ‘reasonableness’ of the religious practices followed [by the church].’ The reasonableness component of the ... affirmative defense evaluates an employer’s actions in responding to sexual harassment rather than the motivations for that response.” (quoting *Bollard*, 196 F.3d at 950)); see also *Lupu & Tuttle, Courts, Clergy, and Congregations*, *supra* note 29, at 160-63.

<sup>101</sup> See, e.g., *Minker v. Baltimore Annual Conf. of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990); *Petruska*, 462 F.3d at 310-12.

and, when appropriate, award relief.<sup>102</sup> Such claims do not require any judicial determination of a minister's fitness for office, and accordingly are not barred by the exception.

If the ministerial exception derived principally from concerns about church autonomy, sexual harassment and breach of contract claims would likely be barred. After all, resolution of such claims requires judicial inquiry into the relationship between a religious organization and its employees. The cases concluding that the ministerial exception does not always defeat such claims flow naturally from the view that the exception effectuates the Establishment Clause principle that civil government lacks competence to resolve ecclesiastical questions.

## 2. Characterizing the Ministerial Exception

Whereas the Court in *Hosanna-Tabor* dedicated significant attention to the arguments in favor of recognition of a ministerial exception, it addressed the procedural issues implicated by the exception briefly and only in a footnote. Acknowledging the divide among the lower courts, the Supreme Court announced that the exception does not function as a jurisdictional bar. Instead, the Court concluded that the ministerial exception is an affirmative defense. The Court explained that “the issue presented by the exception is ‘whether the allegations the plaintiff makes entitle him to relief,’ not whether the court has ‘power to hear [the] case.’”<sup>103</sup> The Court added that federal district courts “have power to consider ADA claims in cases of this sort, and to decide whether the claim can proceed or is instead barred by the ministerial exception.”<sup>104</sup> Although the footnote is quite significant, it is remarkably terse, given the potentially significant consequences of the conclusion that the exception operates as an affirmative defense.

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<sup>102</sup> See Minker, 894 F.2d at 1359 (“[A]ppellant argues that the first amendment cannot bar his action for breach of an oral employment contract. We find this contention compelling.... A church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court.”) (citing *Jones v. Wolf*, 419 U.S. 595, 606 (1979)); see also Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 29, at 152-54.

<sup>103</sup> *Id.* at 194 n.4 (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (internal quotation marks omitted)).

<sup>104</sup> 565 U.S. at 194 n.4.

Some commentators have read the *Hosanna-Tabor* footnote implicitly to reinforce a broad doctrine of church autonomy,<sup>105</sup> which they find embodied elsewhere in the opinion. For example, Michael Helfand has argued that “the Supreme Court’s decision in *Hosanna-Tabor* lays the groundwork for reconceptualizing church autonomy as a constitutionalized version of arbitration.”<sup>106</sup> As we discuss in greater detail below, defendants ordinarily waive affirmative defenses by failing (or choosing not) to raise them.<sup>107</sup> Helfand relies on this characteristic of affirmative defenses to argue that they confirm and enhance the autonomy of religious institutions. On this view, the religious organization’s choice to waive the ministerial exception (by declining to raise it) amounts to consent to a secular court’s binding resolution of a dispute with a ministerial employee.<sup>108</sup>

Helfand understands the church property cases that we described above to mean that the members and employees of religious organizations impliedly consent to church adjudication of their disputes.<sup>109</sup> Helfand does not read those cases to stand for a principle of limited competence of secular courts to decide such disputes.<sup>110</sup> Instead, in his view, they reflect a judgment that disputes between religious organizations and their members or employees will be resolved by secular courts only if the religious organization elects that forum for adjudication.<sup>111</sup> He uses *Hosanna-Tabor*’s footnote four to ground this understanding of church autonomy:

“[O]nce we unmoor church autonomy from judicial incompetence and instead hitch church autonomy to the consent of the parties, *Hosanna-Tabor*’s footnote four comes into focus. If religious institutional authority is grounded in an implied agreement between the institution and its members, then surely those

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<sup>105</sup> For an example of an article that advances a broad view of church autonomy, see Christopher Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183 (2013).

<sup>106</sup> Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1901 (2013).

<sup>107</sup> See *infra* at notes 190-194 and accompanying text.

<sup>108</sup> Helfand, *supra* note 106, at 1921-23.

<sup>109</sup> *Id.* at 1921.

<sup>110</sup> *Id.* at 1902 (“[T]he deference and authority granted arbitrators has nothing to do with the incompetence of courts or an attempt to emphasize the limited nature of state power; arbitrators have authority because parties jointly choose to place their disputes within the jurisdiction of an alternative forum for resolution.”).

<sup>111</sup> *Id.* at 1923-24.

very same parties can employ that same consent mechanism to authorize courts to resolve intractable religious disputes.”<sup>112</sup>

In Helfand’s view, the choice whether to raise the ministerial exception both reflects and reinforces the religious institution’s autonomy.

As explained above, we disagree with the suggestion that the ministerial exception is primarily rooted in a doctrine of church autonomy under the Free Exercise Clause.<sup>113</sup> In part, this is because we thoroughly disagree with his interpretation of the church property and personnel cases that the Court relied on in *Hosanna-Tabor*. In none of those decisions did the Court suggest that religious communities could confer authority or competence on secular courts to decide purely ecclesiastical questions. Indeed, as we explained above, those cases stand for precisely the opposite proposition. Secular courts lack authority to decide religious questions regardless of whether the parties to the disputes raising those questions want courts to resolve them.<sup>114</sup>

In addition, we think that Helfand’s argument ultimately leads to constitutional difficulties in the procedures for adjudicating cases involving the ministerial exception. On Helfand’s view, a religious institution can waive the exception and voluntarily submit a religious dispute to the civil courts. As we explain below, the underlying justification for the ministerial exception is simply inconsistent with this view.<sup>115</sup>

It is not surprising that the *Hosanna-Tabor* footnote has prompted such arguments. The Court’s analysis of the proper procedure for resolving assertions of the ministerial exception was not only brief but also circular. The Court’s justification for treating the exception as an affirmative defense instead of a jurisdictional bar was that the exception did not raise a question of the court’s “power to hear the case.”<sup>116</sup> But this simply states the conclusion. After all, when we say that a court lacks subject matter jurisdiction over a particular case, what we mean is that the court lacks power to hear it.

Despite its circularity, we agree with the Court’s ultimate conclusion that the ministerial exception operates as an affirmative defense rather than as a jurisdictional bar. First, as a straightforward matter of civil procedure, federal courts have subject matter

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<sup>112</sup> *Id.* at 1923.

<sup>113</sup> See *supra* at notes 58-102 and accompanying text; see also Lupu & Tuttle, *Unanimity*, *supra* note 54, at 1296-1303.

<sup>114</sup> See Lupu & Tuttle, *Unanimity*, *supra* note 54, at 1299-1301.

<sup>115</sup> See *infra* at notes 195-209 and accompanying text.

<sup>116</sup> 565 U.S. at 194 n.4.

jurisdiction over cases arising under federal law.<sup>117</sup> Claims asserted in federal court under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, or the Americans with Disabilities Act are claims arising under federal law even when asserted by employees of religious organizations. To be sure, when the ministerial exception applies, such claims will ordinarily fail. But the inability of the plaintiff to recover does not retroactively deprive the court of subject matter jurisdiction over the claims.

Second, determining the applicability of the ministerial exception will usually require the resolution of threshold questions of fact. As we explain in more detail below, to decide whether the exception applies, a court must first conclude that the employee in question is in fact properly deemed a minister. As in *Hosanna-Tabor*, this inquiry will often require the resolution of disputed questions of fact, such as what the employee's actual responsibilities entail.<sup>118</sup> The court also has to determine whether the plaintiff's specific claims are of the sort that implicate the exception, a decision that also might turn on facts not apparent on the face of the complaint.<sup>119</sup>

Questions of subject matter jurisdiction, however, should be susceptible to resolution at the threshold of a case. This is true both for formal and prudential reasons. Subject matter jurisdiction is the power of a court to proceed. If the court lacks subject matter jurisdiction, it should not entertain the case. In addition, it wastes judicial resources for courts to defer resolution of the question of their subject matter jurisdiction until after the parties have spent time on discovery and other pre-trial matters. In other words, a court should be able to decide whether it has subject matter jurisdiction based on the allegations in the complaint. To be sure, there are times when a court has to resolve disputed questions of fact in order to decide whether it has subject

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<sup>117</sup> The Court in *Hosanna-Tabor* appears to have been concerned with suits filed in federal court rather than in state court. After all, the Supreme Court does not determine the subject matter jurisdiction of the state courts. As such, there is nothing to stop a state, either by legislative action or judicial decision, from concluding that its courts lack subject matter jurisdiction over cases implicating the ministerial exception. But states lack authority to depart from *Hosanna-Tabor* in the opposite direction. Because the ministerial exception implements the Religion Clauses of the federal Constitution, state courts cannot decide cases in which the exception applies.

<sup>118</sup> See *Hosanna-Tabor*, 565 U.S. at 191-94 (discussing whether Cheryl Perich was properly considered a minister, in light of her responsibilities).

<sup>119</sup> A breach-of-contract claim by a minister against her employer seeking unpaid wages, for example, is not barred by the exception. See *supra* at notes 101-102 and accompanying text.

matter jurisdiction, such as when, in a suit not arising under federal law, there is a conflict over where a party is domiciled.<sup>120</sup> But cases involving the ministerial exception will virtually always raise questions of fact.

For these reasons, we agree with the Court that the ministerial exception operates as an affirmative defense. Our agreement largely reflects the technical understanding of “jurisdictional” in matters of civil procedure. This conclusion, however, does not contradict the entire body of scholarly work that has characterized the relationship between civil government and religious institutions as “jurisdictional.”<sup>121</sup> The central premise of that work reflects the fundamental claim that institutions of civil government—because of their secular character—lack *competence* to decide religious questions. A matter can be conceptually jurisdictional, in the sense of competence, without it necessarily depriving the court of subject matter jurisdiction.

Accordingly, it does not follow from *Hosanna-Tabor*’s footnote four that courts should treat the ministerial exception the same way that they treat other, conventional affirmative defenses. As the Court explained in *Hosanna-Tabor*, the exception applies as a matter of constitutional imperative, not simply as a prudential matter. Put more starkly, the *Hosanna-Tabor* footnote must be read in light of the fundamental justification for the ministerial exception. And that exception, as we have argued above, imposes a disability on civil government with respect to specific religious questions. Thus, the affirmative defense must take into account this constitutional disability.

For this reason, we agree only in part with Professor Wasserman’s analysis of *Hosanna-Tabor*’s footnote 4.<sup>122</sup> Wasserman argues that the Court properly concluded that the ministerial exception is an affirmative defense rather than a jurisdictional bar because the exception reflects Congress’s lack of “prescriptive

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<sup>120</sup> See, e.g., *Boustead v. Barancid*, 151 F.R.D. 102, 105 (E.D. Wis. 1993) (permitting the plaintiffs to conduct limited discovery “on the jurisdictional issue”); S. I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 Wash. & Lee L. Rev. 489, 555-57 (2010); see also Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exception*, 160 U. PA. L. REV. PENNUMBRA 289, 314 (2012) (discussing “jurisdictional discovery”).

<sup>121</sup> See, e.g., IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 3-39 (2014).

<sup>122</sup> Wasserman, *supra* note 120.

jurisdiction”<sup>123</sup> over religious questions.<sup>124</sup> When the government lacks this form of authority, it cannot prescribe any rule to govern the conduct at issue. But “the nonexistence of a legal rule does not deprive a court of judicial jurisdiction to adjudicate a claim under appropriate law.”<sup>125</sup> Instead, in Wasserman’s view, a “claim of right fails because there is no legal rule ... to be enforced, which results in the failure on the merits of any claim brought under that purported rule.”<sup>126</sup>

In other words, Wasserman argues that the ministerial exception exists because Congress lacks power to regulate certain church affairs. In his view, however, courts do not lack “adjudicative jurisdiction”<sup>127</sup> over such matters.<sup>128</sup> Instead, courts must rule against the plaintiff in cases in which the exception applies because Congress lacked power to impose a duty on the church in the first place. This is simply another way of saying that courts do not lack subject matter jurisdiction to decide cases implicating the ministerial exception. On this view, the problem “is not that courts are barred from evaluating a priest’s job performance or from ordering his reinstatement; it is that secular lawmaking institutions are barred from enacting rules that provide a legal basis for evaluation and reinstatement.”<sup>129</sup>

As noted above, we agree with Wasserman that the ministerial exception does not deprive federal courts of subject matter jurisdiction over cases implicating the exception. But we disagree with his further

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<sup>123</sup> *Id.* at 298 (“Prescriptive jurisdiction is the power of secular rulemakers to prescribe legal rules and to regulate real-world behavior.”).

<sup>124</sup> *Id.* at 300-301 (“The ministerial exemption limits the right/duty combinations that Congress can create between religious organizations and their ministerial employees, as well as the conduct that Congress, exercising its prescriptive jurisdiction, can prohibit in that relationship. In other words, it is accurate to say that the First Amendment erects a ‘jurisdictional bar,’ so long as we understand that the jurisdiction barred is Congress’s prescriptive or legislative jurisdiction to enact legal rules regulating some real-world conduct.”).

<sup>125</sup> *Id.* at 299.

<sup>126</sup> *Id.* at 299-300.

<sup>127</sup> *Id.* at 302 (“[A]djudicative jurisdiction ... is a court’s root power to adjudicate—to hear and resolve legal and factual issues under substantive legal rules, and to provide the adjudicative and remedial forum to resolve claims of right. Adjudicative jurisdiction has nothing to do with the ultimate success of a claim on its merits, but rather focuses solely on whether the court has the power to provide a forum for considering and resolving the legal and factual disputes under those rules in either direction.”).

<sup>128</sup> *Id.* at 303 (“The ministerial exemption is indeed a constitutional bar on civil jurisdiction. But the bar is not on the court’s civil jurisdiction to decide the case before it, but on Congress’s civil jurisdiction to enact legal rules regulating churches’ conduct toward ministerial employees.”).

<sup>129</sup> *Id.* at 304.

suggestion that any disability the courts face in resolving such questions is solely the consequence of Congress's lack of authority to prescribe the governing rule.<sup>130</sup> In our view, courts face a limitation—what Wasserman calls an “adjudicative disability”<sup>131</sup>—for the same reason that Congress lacks the power to prescribe a substantive rule: civil government is simply not competent to adjudicate strictly and purely ecclesiastical questions.<sup>132</sup> When courts seek to resolve such matters, they impermissibly inject civil government into church affairs.<sup>133</sup>

To take an example drawn from a slightly different context, a state legislature has prescriptive authority to regulate property, and even to regulate church ownership of property. But courts nevertheless lack authority to resolve certain types of disputes that can arise over the ownership of that property, such as when competing claims to the property can be decided only by resolving a disputed question of church doctrine.

Indeed, the *Kedroff* case, on which the Court relied in *Hosanna-Tabor*, was in fact the culmination of an ongoing dispute over how to resolve a question about church property. In 1945, the New York legislature enacted a law providing “both for the incorporation and administration of Russian Orthodox churches.”<sup>134</sup> The purpose of the law was to make all Russian Orthodox churches in New York autonomous from the Patriarch of Moscow.<sup>135</sup> “This declared autonomy was made effective by a further legislative requirement that all the

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<sup>130</sup> *Id.* at 304 (“[T]he limitation on judicial decisionmaking [when the ministerial exception applies] is incidental to the broader limitation on legislative power and on the reach and scope of the substantive law Congress can enact.... [T]he judicial limitation arises not from an absence of core adjudicative power, but from an absence of existing legal rules to be applied and enforced, which in turn arises from an absence of prescriptive authority to enact those rules.”).

<sup>131</sup> *Id.* at 303-04.

<sup>132</sup> See LUPU & TUTTLE, *supra* note 121, at 54-61; see also Helfand, *supra* note 106, at 1897-98 n.34.

<sup>133</sup> Wasserman concedes that “[t]he First Amendment disables *all* secular law and all secular institutions from regulating the church’s actions on matters of faith, structure, and membership, placing these matters entirely beyond the authority of the state.” *Id.* at 304. But he argues that the “judiciary is implicated only because that is the forum in which secular legal rules are enforced.” *Id.* In his view, “the problem ... is not that courts are barred from evaluating a priest’s job performance or from ordering his reinstatement,” but rather “it is that secular lawmaking institutions are barred from enacting rules that provide a legal basis for evaluation or reinstatement.” *Id.*

<sup>134</sup> *Kedroff*, 344 U.S. at 97.

<sup>135</sup> *Id.* at 98.

churches formerly administratively subject to the Moscow synod and patriarchate should for the future be governed by the ecclesiastical body and hierarchy of the American metropolitan district.”<sup>136</sup> The Court invalidated this law in *Kedroff*, reasoning that a “a transfer by statute of control over churches” was inconsistent with both the “separation of church and state” and the Free Exercise Clause.<sup>137</sup> On remand from the Supreme Court’s decision, the New York Court of Appeals ordered a retrial on an issue the New York court believed was left open.<sup>138</sup> Relying on a state common-law rule, the court held that control of church property and authority to appoint the church leadership was contingent on the legitimacy of those who claim to exercise that power.<sup>139</sup> In the case of the Russian Orthodox Church, the court determined that control by Soviet authorities in Moscow deprived the Patriarch of Moscow of the deference ordinarily due to church hierarchy.<sup>140</sup> Instead, the court concluded that the powers at issue must be vested in the local members of the denomination.<sup>141</sup>

The United States Supreme Court reversed in a *per curiam* decision. In *Kreshik v. St. Nicholas Cathedral*,<sup>142</sup> the Court explained that the New York decision rested “on the same premises which were found to have underlain the enactment of the statute struck down” in *Kedroff*.<sup>143</sup> The Court declared that it was of no moment “that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.”<sup>144</sup> *Kreshik* stands for the proposition that neither legislatures nor courts have authority to resolve strictly and

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<sup>136</sup> *Id.* at 98-99.

<sup>137</sup> *Id.* at 110, 121.

<sup>138</sup> *St. Nicholas Cathedral of the Russian Orthodox Church of North America v. Kedroff*, 306 N.Y. 38, 55, 114 N.E.2d 197, 207 (1953).

<sup>139</sup> 114 N.E.2d at 204 (“[T]here is one basic qualification to [the application of the rule of *Watson v. Jones*]. That is that the highest church authority or tribunal, whose decision is to be accorded final and conclusive effect, must in truth and fact be capable of functioning freely with its activities directed by churchmen in the interests of the church and in accordance with the organic law of the church.”).

<sup>140</sup> *Id.* at 205 (“Uncritical acceptance of the principle of *Watson v. Jones* [would require] the communicants of the metropolitan district to acknowledge the administrative rule of persons whom they believe are mere puppets of a monolithic and atheistic secular power, if such communicants wish to continue to use the religious temporalities they have so long enjoyed.”).

<sup>141</sup> *Id.*

<sup>142</sup> 363 U.S. 190 (1960).

<sup>143</sup> *Id.* at 190.

<sup>144</sup> *Id.* (quoting *N.A.A.C.P. v. State of Alabama*, 357 U.S. 449, 463 (1958)).

purely ecclesiastical questions. As a consequence, courts face an adjudicative disability when confronted with these sorts of questions.

The ministerial exception must be understood in light of these principles. Although it is an affirmative defense, the underlying justification for the exception requires courts to treat it differently from ordinary affirmative defenses. In a typical case, after a defendant raises its affirmative defenses in the answer, the parties begin discovery. Normally, the parties can seek discovery of any information that is relevant to the claims or defenses of any party;<sup>145</sup> discovery is rarely limited to material relevant solely to a particular affirmative defense. After the parties complete discovery, it is common for one or both of the parties to move for summary judgment. If the court denies a motion for summary judgment, the decision ordinarily is not subject to immediate appeal;<sup>146</sup> instead, the matter proceeds to trial, which (depending on the claims) might involve a jury as fact-finder.

The Court's characterization of the ministerial exception as an affirmative defense, however, does not require lower courts to follow these ordinary procedures in cases involving the exception. Instead, fidelity to the constitutional norms reflected in *Hosanna-Tabor* requires courts to recognize the distinctive status of this particular defense. As we explain below, Establishment Clause limitations on the authority of courts to resolve religious questions requires courts to treat the ministerial exception quite differently from ordinary affirmative defenses.

The Court has followed a similar approach with qualified immunity.<sup>147</sup> Government officials enjoy a qualified immunity from suit for their official conduct, provided that their conduct did not violate clearly established law.<sup>148</sup> The Court has described the defense

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<sup>145</sup> See Fed. R. Civ. Proc. 26(b)(1) (“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense ...”); Fed. R. Civ. Proc. 26(d)(3)(B) (“Unless the parties stipulate or the court orders otherwise for the parties’ and witnesses’ convenience and in the interests of justice ... discovery by one party does not require any other party to delay its discovery.”).

<sup>146</sup> See 28 U.S.C. 1291 (“The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ....”).

<sup>147</sup> See *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir.2002) (comparing ministerial exception to qualified immunity).

<sup>148</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (stating that qualified immunity protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

as “an immunity from suit rather than a mere defense to liability”<sup>149</sup> that courts should seek to resolve “at the earliest possible stage in litigation.”<sup>150</sup> The Court nevertheless has held that qualified immunity is an affirmative defense that must be pleaded by the government official, rather than a jurisdictional bar.<sup>151</sup> Because of the distinctive character of the defense, however, the Court has made clear that the ordinary rules governing the assertion and adjudication of affirmative defenses do not always apply to qualified immunity. For example, although a government official can waive the defense by failing to raise it, courts often allow defendants to raise the defense at stages of the litigation later than an ordinary affirmative defense must be asserted.<sup>152</sup> In addition, denials of motions for summary judgment by government officials on grounds of qualified immunity are immediately appealable, notwithstanding the ordinary rule against interlocutory appeals.<sup>153</sup>

The Court has made clear that these special rules apply because of the underlying justification for the defense, which is to ensure that government officials are not unduly inhibited in carrying out their duties by fear of civil liability.<sup>154</sup> In this respect, it closely resembles the ministerial exception. Both are affirmative defenses in the formal sense, yet they owe their existence to more fundamental legal principles that themselves reflect limits—prudential or constitutional—on the power of courts.

### III. THE PROCEDURE OF THE MINISTERIAL EXCEPTION

In our view, courts should be similarly sensitive in overseeing litigation that potentially involves the ministerial exception. Because

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<sup>149</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

<sup>150</sup> *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *accord Harlow*, 457 U.S. at 818.

<sup>151</sup> *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (“[T]his Court has never indicated that qualified immunity is relevant to the existence of the plaintiff’s cause of action; instead we have described it as a defense available to the official in question. Since qualified immunity is a defense, the burden of pleading it rests with the defendant.”) (internal citations omitted).

<sup>152</sup> *See, e.g., Hernandez v. Cook County Sheriff’s Office*, 634 F.3d 906, 913-14 (7th Cir. 2011); *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993); *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991).

<sup>153</sup> *See Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Behrens v. Pelletier*, 516 U.S. 299 (1996).

<sup>154</sup> *See Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (explaining that qualified immunity protects against “the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service”).

the Court in *Hosanna-Tabor* gave only cursory treatment of the procedural issues raised by the exception, lower courts lack guidance about how to proceed. In particular, the Court failed to address the questions most likely to arise in suits implicating the ministerial exception. First, should the religious organization assert the exception by way of a motion to dismiss, or may it only raise the defense in its answer and then seek to resolve the suit by way of a motion for summary judgment? Second, if the matter is not properly resolved at the motion to dismiss stage, should the court limit the scope and order of discovery in order to resolve the application of the exception prior to discovery on other issues in the suit? Third, if the court denies a church's motion based on the exception, can the church take an immediate appeal? Fourth, if disputed questions of fact concerning the plaintiff's status as a minister cannot be resolved at the summary judgment stage, can those questions be submitted to and resolved by a jury? Fifth, if the defendant fails to raise the defense, may or should the court raise the ministerial *sua sponte*, or should the court instead treat the defense as waived? We address these questions in turn.

#### A. *Raising the Defense*

First, does the religious organization properly assert the ministerial exception by way of a motion to dismiss, or may it only raise the defense in its answer and then seek to resolve the suit by way of a motion for summary judgment? If nothing else, it is clear from footnote 4 in *Hosanna-Tabor* that a court should not grant a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction based on the ministerial exception. This follows from the Court's conclusion that the exception does not operate as a jurisdictional bar. A court is not deprived of subject matter jurisdiction simply because the case involves a claim asserted by a ministerial employee against that person's religious employer. Indeed, even in cases in which the court concludes that the exception is a complete defense against the claim, the court, as a technical matter, does not lack subject matter jurisdiction. Instead, in such a case, the appropriate disposition is a judgment on the merits in favor of the religious organization.<sup>155</sup>

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<sup>155</sup> See Wasserman, *supra* note 120, at 307 ("The point is that no statutory rule exists as law subjecting the church-operated school for this employment decision affecting this employee. [A] civil action to enforce such a nonexistent rule fails, a failure on the merits under any of our definitions.").

Ordinarily, affirmative defenses are pleaded in the answer and then resolved by a motion for summary judgment after discovery.<sup>156</sup> That said, in some rare cases, a court may be able to grant a religious organization's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim because of the application of the ministerial exception. For example, if the plaintiff sues for age discrimination and specifically alleges in the complaint that he is a minister with pastoral responsibilities in the church, a court likely can grant a motion to dismiss for failure to state a claim. Even assuming that all of the plaintiff's allegations about discrimination are true, the plaintiff cannot recover because of the ministerial exception. To be sure, as a technical matter the proper approach might be for the defendant to file an answer raising the exception and then to move for judgment on the pleadings under Rule 12(c),<sup>157</sup> but for present purposes the point is that the court may resolve such a case at the threshold without the need for discovery.<sup>158</sup>

In the ordinary run of cases, however, the ministerial exception will be resolved by a motion for summary judgment. The Court in *Hosanna-Tabor* made clear that the exception does not apply to all employees of religious organizations; instead, it applies only in cases in

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<sup>156</sup> See Fed. R. Civ. Proc. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense ...."); Fed. R. Civ. Proc. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.").

<sup>157</sup> See Fed. R. Civ. Proc. 12(c) ("After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."). At least one court has addressed (but denied) a motion for judgment on the pleadings based on the ministerial exception since *Hosanna-Tabor*. See *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 48 F.Supp.3d 1168, 1173 (N.D. Ind. 2014).

<sup>158</sup> The ministerial exception is not unique in this regard. Similar questions arise in cases in which the allegations in the complaint make clear that the statute of limitations has run. Courts often grant motions to dismiss under Rule 12(b)(6) in such cases, even though, strictly speaking, they probably ought to be resolved by motions for judgment on the pleadings under Rule 12(c). This is because the statute of limitations is an affirmative defense that a defendant waives by failing to raise it. (We address the question of waiver in the context of the ministerial exception *infra* at 190-209.) As such, the defendant must assert the defense in order to rely on it as a basis for judgment. Accordingly, courts should grant motions resolving cases on the ground that they are barred by the statute of limitations only once the defendant has had an opportunity to assert the defense in the answer. See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir.2010) (concluding that a court may dismiss a claim under Rule 12(b)(6) on the ground that it is barred by a statute of limitations only when "the running of the statute is apparent on the face of the complaint"); *Young v. Spokane County*, 2014 WL 2893260 (E. Dist. Wash.) (considering a motion for judgment on the pleadings based on statute of limitations).

which the plaintiff is properly considered a minister.<sup>159</sup> In addition, although the Court in *Hosanna-Tabor* did not address the question whether all claims by ministerial employees are subject to the exception, many lower courts have held that the exception does not apply to certain claims by ministerial employees—including some arising under employment discrimination laws. As noted above, courts have regularly concluded that they may resolve claims by ministerial employees of sexual harassment against their religious employers, notwithstanding the exception.<sup>160</sup> Other types of claims—including those for breach of contract for unpaid wages—are also outside the scope of the ministerial exception.<sup>161</sup>

As a consequence, any case in which a religious organization raises the ministerial exception requires a court to resolve at least two questions: first, is the plaintiff a ministerial employee; and second, is the plaintiff's claim one that is within the scope of the exception. The resolution of these questions almost invariably requires assessment of the facts at issue in the dispute. To determine whether the plaintiff is a ministerial employee, the court must consider at least the employee's "formal title," "the substance reflected in that title," the employee's "own use of that title," and "the important religious functions" that the employee performed for the religious organization.<sup>162</sup> The parties in these controversies, as in *Hosanna-Tabor* itself, often offer conflicting evidence about these matters.

Similarly, whether the plaintiff's claim is the type to which the ministerial exception applies will sometimes require the resolution of disputed factual questions. For example, imagine that the plaintiff enters a two-year contract to perform ministerial services for a religious organization. After the organization fires him within that two-year period, he files suit for breach of contract. The religious organization defends by relying on a clause in the contract that allowed termination for "good cause." On a motion for summary judgment, the court must resolve whether the good cause defense in this case implicates an ecclesiastical question. If the defendant claims that good cause existed because the plaintiff's sermons deviated from

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<sup>159</sup> *Hosanna-Tabor*, 565 U.S. at 190 ("Having concluded that there is a ministerial exception grounded in the Religion Clauses of the First Amendment, we consider whether the exception applies in this case."); *id.* at 191-95 (determining whether the plaintiff, an employee of a religious organization, was properly considered a minister).

<sup>160</sup> *See supra* at notes 99-100 and accompanying text.

<sup>161</sup> *See supra* at notes 101-102 and accompanying text.

<sup>162</sup> 565 U.S. at 192.

church doctrine, the ministerial exception will apply; if the defendant claims that good cause existed for other reasons, the exception might not apply.

The Court in *Hosanna-Tabor* made clear, at a minimum, that courts must resolve the threshold question whether the plaintiff is a minister. The Court rejected Justice Thomas's view, which he expressed in a concurring opinion, that courts must accept, without further inquiry, a sincere assertion of the defense by a religious organization.<sup>163</sup> Accordingly, the Court in *Hosanna-Tabor* recognized that cases implicating the ministerial exception will often involve disputed questions of fact.<sup>164</sup> As a consequence, a motion for summary judgment will ordinarily be the appropriate mechanism for resolving an assertion of the ministerial exception.

There are two ways that the defendant might present a motion for summary judgment based on the exception. First, a religious organization might file a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and support the motion by appending additional materials to demonstrate the application of the exception. In such cases, the court should convert the motion to a motion for summary judgment under Rule 12(d).<sup>165</sup> Second, the parties might conduct discovery, and the defendant then files motion for summary judgment under Rule 56(a). After *Hosanna-Tabor*, because the application of the exception is not a jurisdictional bar, summary judgment will almost invariably be the appropriate mechanism for deciding whether the exception applies.

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<sup>163</sup> *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) (“[I]n my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister.”).

<sup>164</sup> Because the plaintiff in *Hosanna-Tabor* asserted the type of claim that plainly is covered by the exception, the Court had no occasion to address the application of the ministerial exception to other types of claims, such as breach of contract. *See Hosanna-Tabor*, 565 U.S. at 196 (“The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”). As noted above, however, resolving this question of scope will often require courts to decide factual disputes.

<sup>165</sup> Fed. R. Civ. Proc. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”). Some courts have taken this approach since *Hosanna-Tabor*. *See, e.g., Davis v. Baltimore Hebrew Congregation*, 985 F.Supp.2d 701, 711 (D.MD 2013).

## B. *The Scope of Discovery*

This conclusion raises our second question. If a case implicating the ministerial exception is not resolved by a motion to dismiss, should courts limit the scope and order of discovery to the application of the exception before permitting discovery on other issues in the suit? Ordinarily, once discovery begins, the parties presumptively are free to conduct discovery on anything within the scope of discovery—that is, any matter that is “relevant to any party’s claim or defense.”<sup>166</sup> In cases involving the ministerial exception, however, courts should invoke their discretion to manage the proceedings to limit discovery to the matters relevant to the application of the exception.<sup>167</sup>

Those who defend the ministerial exception often argue for quick resolution of the issue in order to avoid burdening religious organizations with the cost of discovery. They note that the practical implications for a religious organization of having to litigate a ministerial exception claim all the way through full discovery are significant. Not only must churches bear the ordinary costs of defending the suit, but in ordinary discovery their leaders can be examined on questions of church doctrine and their congregations’ consistency with church doctrine, and countless other matters that might chill a religious institution’s articulation of its own faith if it knows that it might face discovery.<sup>168</sup>

We do not find this justification for narrowing the scope of discovery, standing alone, to be particularly persuasive. To be sure, discovery can be costly, intrusive, and time consuming; but this is true for all defendants in civil litigation who seek to resolve the suit on the basis of some threshold defense. Instead, any argument in favor of

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<sup>166</sup> Fed. R. Civ. Proc. 26(b). This is confirmed by Rule 16, which states that the court may issue a scheduling order to “modify the extent of discovery.” Fed. R. Civ. Proc. 16(b)(3)(B)(ii). Absent such an order, the parties presumptively may seek discovery on any relevant issue in the suit.

<sup>167</sup> See Fed. R. Civ. Proc. 16(b)(3)(B)(ii). Matters relevant to the application of the ministerial exception include both information about whether the plaintiff is a ministerial employee and information about whether the claim is the type subject to the exception.

<sup>168</sup> See, e.g., Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233, 298 n. 330 (2012) (“[T]he Court’s decision to treat the ministerial exception as an affirmative defense still leaves defendants at a risk of the increased time and expense associated with summary judgment.”).

limiting preliminary discovery to matters relevant to one particular defense must arise out of the ultimate justification for that defense.

Other defenders of the ministerial exception have argued that courts should limit discovery to the application of the exception because any broader discovery threatens the principle of church autonomy.<sup>169</sup> This argument relies primarily on the Free Exercise Clause and specifically on the claim that the Clause insulates religious organizations from government interference in their internal decision-making.<sup>170</sup> But this argument proves too much. Not every “internal” decision made by a religious institution is protected from scrutiny by courts or other organs of civil government. For example, a court may intervene if a congregation decides not to pay a minister after the minister has performed her required duties under a contract with the church.<sup>171</sup>

As we explained above, the Court in *Hosanna-Tabor* ultimately recognized a ministerial exception because of Establishment Clause concerns about the impropriety of civil government intruding into or resolving questions about the fitness of a person for employment as a minister.<sup>172</sup> If courts do not impose limits on the scope of discovery in a suit in which the defendant religious organization has asserted the ministerial exception, then the plaintiff will be free to seek discovery of information that proves her fitness for the position. For example, a plaintiff unconstrained by an order narrowing the scope of discovery might seek to depose congregants about the quality of her sermons, or the orthodoxy of her teaching. But the mere discovery of such information could well provoke disputes or discord within the congregation, and the “facts” discovered are certainly ones that no court could properly find. In other words, the disruption of life within

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<sup>169</sup> See, e.g., Chopko & Parker, *supra* note **Error! Bookmark not defined.**, at 235 (“This article advocates that the application of the ministerial exception as a threshold legal determination is necessary to preserve foundational religious rights ...”); *id.* at 293 (“[D]iscovery should be directed towards answering questions that would highlight the clash of principles present in these cases, and should not encompass the entire merits of the claim or all of the other various issues that might be implicated in the case. Discovery, like other litigation expenses, compounds the injury that attends the invasion of this constitutionally protected turf.”).

<sup>170</sup> See *id.* at 250-69; Kalscheur, *supra* note 39, at 55-63; Lund, *supra* note 105, at 1196-1201.

<sup>171</sup> See, e.g., *Heard v. Johnson*, 810 A.2d 871, D.C. App. Lexis 656 (2002) (applying ministerial exception to breach of contract and defamation claims by ordained minister who was terminated by the congregation); Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 29, at 152-54.

<sup>172</sup> See *supra* at notes 58-102 and accompanying text.

the religious community would promote no legitimate governmental interests.

To be sure, if the court concludes that the ministerial exception does not apply—either because the plaintiff is not a minister within the meaning of the exception or because the claim is not one to which the exception applies—then it may permit discovery on other issues implicated by the claims in the suit. At that point, the religious organization cannot simply rely on a claim of autonomy or the need to avoid internal discord as a way of resisting discovery. But courts should not unnecessarily authorize discovery that might turn out to be moot because of the application of the ministerial exception.

Accordingly, if a religious organization is a defendant and raises the ministerial exception in a motion for summary judgment, trial courts should exercise their discretion to “modify the extent of discovery” by initially limiting discovery only to facts relevant to the ministerial exception.<sup>173</sup> This approach is typical in cases involving qualified immunity,<sup>174</sup> which (we noted above) is an atypical affirmative defense similar in many ways to the ministerial exception.

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<sup>173</sup> Fed. R. Civ. Proc. 16(b)(3)(B)(ii). At least three federal district courts have taken this approach since *Hosanna-Tabor*. See *Fratello v. Roman Catholic Archdiocese of N.Y.*, 175 F.Supp.3d 152, 161 (S.D.N.Y. 2016) (“In a bench ruling, I found that I could not determine whether the ministerial exception applied at the motion to dismiss stage because of the necessarily fact-intensive inquiry that exception necessitates, and because Plaintiff had plausibly alleged that she was not a minister, and had no religious training, duties or functions; that others handled all religiously related activities; and that she was simply a secular administrator doing what a public-school principal would do. I therefore directed the parties to engage in limited discovery on the issue.”); *Herzog v. St. Peter Lutheran Church*, 884 F.Supp.2d 668, 670 (N.D. Ill. 2012) (“The Court allowed limited discovery to determine whether the ministerial exception applies.”); *Collette v. Archdiocese of Chicago*, 2016 U.S. Dist. Lexis 99886, at \*10 (N.D.Ill.) (“To help focus the discovery to be taken in this phase, the Court notes that the scope of the issue subject to discovery is narrow. As there is no dispute that Defendants are religious institutions, the only remaining question is whether Collette's employment with them was ministerial.”).

<sup>174</sup> *Crawford-El v. Britton*, 523 U.S. 574, 599-600 (1998) (Of course, the judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible.”); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (“[Q]ualified immunity questions should be resolved at the earliest possible stage of a litigation. [If the defendant] claims he took are different from those the [plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [the defendant's] motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of [the defendant's] qualified immunity.”).

### C. Interlocutory Appeals

Another question likely to arise in this sort of litigation is whether a religious organization can take an immediate appeal from a court's denial of its motion for summary judgment based on the ministerial exception. The ordinary rule in federal court is that denials of motions for summary judgment are not subject to interlocutory appeal; instead, parties must wait for a final judgment before filing a notice of appeal.<sup>175</sup> (The rules governing interlocutory appeals vary from state to state, with some jurisdictions following the federal approach and others authorizing immediate appeals for certain types of issues or trial court decisions.<sup>176</sup>)

There are several exceptions to the final judgment rule in federal court, but the Supreme Court has construed them very narrowly.<sup>177</sup> The exception most likely to apply to the denial of motions for summary judgment in disputes over ministerial employment is the collateral order doctrine.<sup>178</sup> Under that doctrine, appeal before a final judgment is available for “district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action.”<sup>179</sup>

The mere fact that a trial court order resolves a matter that is jurisdictional in character is not sufficient to warrant immediate appeal under the doctrine. For example, district court decisions denying motions to dismiss for lack of personal jurisdiction do not fall within the scope of the collateral order doctrine.<sup>180</sup> Nor does the fact

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<sup>175</sup> See 28 U.S.C. § 1291.

<sup>176</sup> Compare N.Y. C.P.L.R. 5701 (permitting interlocutory appeals as of right for some non-final orders), with N.J. Rule 2:5-6 (interlocutory appeals only on application to the court of appeals, and granted only in court of appeals' discretion).

<sup>177</sup> See, e.g., *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976).

<sup>178</sup> See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

<sup>179</sup> *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).

<sup>180</sup> *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 501 (1989) (holding that a claimed right to be sued in a particular forum based on a forum-selection clause is “surely as effectively vindicable as a claim that the trial court lacked personal jurisdiction over the defendant—and hence does not fall within the third prong of the collateral order doctrine”); *Turi v. Main Street Adoption Serv., LLP*, 633 F.3d 496, 502 (6<sup>th</sup> Cir. 2011) (“A claim that the trial court lacks personal jurisdiction over the defendant can be vindicated on appeal after trial, and thus does not satisfy the third prong of the collateral-order doctrine.”).

that an order requires the disclosure of especially sensitive information render it amenable to immediate appeal. The most prominent example of this is the Court’s conclusion that orders rejecting claims of attorney-client privilege are not immediately appealable collateral orders.<sup>181</sup> The Court’s reasoning in concluding that such orders are not subject to immediate appeal almost certainly applies to orders rejecting claims of priest-penitent privilege, as well.<sup>182</sup>

At first blush, denials of motions for summary judgment based on the ministerial exception seem like poor candidates for immediate appeal. First, the Court expressly concluded in *Hosanna-Tabor* that the doctrine does not serve as a jurisdictional bar, and not even determinations adverse to jurisdictional defenses ordinarily are immediately appealable. Second, the mere fact that litigation of claims in such suits might implicate sensitive church matters alone is not sufficient to qualify.<sup>183</sup>

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<sup>181</sup> See *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (holding that “disclosure orders adverse to the attorney-client privilege” do not “qualify for immediate appeal under the collateral order doctrine”).

<sup>182</sup> The Court acknowledged that the attorney-client privilege serves “broader public interests,” *id.* at 108, but it explained that courts “routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system,” *id.* at 109. The Court reasoned that “postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege” because “appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.” *Id.* at 109. The Court also recognized that “an order to disclose privileged information intrudes on the confidentiality of attorney-client communications,” but it asserted that “deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel.” *Id.* Finally, the Court explained that “established mechanisms for appellate review”—such as certification pursuant to 28 U.S.C. § 1292(b) or defying a discovery order and appealing a contempt determination—“not only provide assurances to clients and counsel about the security of their confidential communications; they also go a long way toward addressing [the] concern that, absent collateral order appeals of adverse attorney-client privilege rulings, some litigants may experience severe hardship.” *Id.* at 112. Even though “an order to disclose privileged material may, in some situations, have implications beyond the case at hand,” “the same can be said about many categories of pretrial discovery orders for which collateral order appeals are unavailable.” *Id.*

<sup>183</sup> At least one federal court of appeals has taken this approach since *Hosanna-Tabor*. See *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085, 1090 (7<sup>th</sup> Cir. 2014) (“[A]lthough the statutory and constitutional rights asserted in defense of this suit are undoubtedly important, the Diocese has not established that the Title VII exemptions or the First Amendment more generally provides an immunity from

To be sure, religious organizations have contended that denials of motions based on the ministerial exception should be immediately appealable because of the force of the Free Exercise Clause. Proponents of this view have argued that, in cases in which the trial court errs in rejecting the ministerial exception, forcing the church to litigate impermissibly intrudes on church autonomy, by exposing internal church decision-making to public scrutiny.<sup>184</sup> But such claims, like claims about the sensitivity of attorney-client communications, are likely insufficient for immediate appeal.

A stronger argument for immediate appeal of denials of motions for summary judgment based on the ministerial exception can be grounded in an analogy to the doctrine of qualified immunity. Qualified immunity shields government officials from liability for acts within the scope of their employment, if those acts were not inconsistent with clearly established law at the time of the violation. The Court has held that denials of motions for summary judgment based on qualified immunity are immediately appealable under the collateral order doctrine.<sup>185</sup> The Court has reasoned that qualified immunity is “an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.” Accordingly, a decision denying qualified immunity is “effectively unreviewable on appeal from a final judgment.”<sup>186</sup>

As we explained above, although the Court concluded in *Hosanna-Tabor* that the ministerial exception is an affirmative defense rather than a jurisdictional bar, it nevertheless made clear that the exception is best understood as an effectuation of the Establishment Clause’s limits on governmental authority to decide strictly and purely ecclesiastical matters. On this view, civil courts lack competence to resolve questions about a person’s fitness to serve as a ministerial

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trial, as opposed to an ordinary defense to liability.”). As explained below, we think this approach is mistaken. *But see* *McCarthy v. Fuller*, 714 F.3d 971 (7<sup>th</sup> Cir. 2013) (permitting interlocutory appeal to prevent adjudication of nun’s standing within the church).

<sup>184</sup> See *Chopko & Parker*, *supra* note **Error! Bookmark not defined.**, at 295 (“[T]he judicial process employed to resolve this threshold legal question should focus on: (1) producing a narrow decision as to whether the ministerial exception applies or not, and (2) allowing a prompt appeal of a negative decision so as not to force the religious body through years of expensive litigation, simultaneously wearing down its resources and its will to stand on principle.”).

<sup>185</sup> See *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *supra* notes 147-154 and accompanying text.

<sup>186</sup> *Mitchell*, 472 U.S. at 526-27.

employee. So understood, the exception is an affirmative defense only because not all assertions by churches that the plaintiff is a ministerial employee must be accepted by a court, and because courts can entertain some of types claims asserted by ministers against their religious employers. But the practical necessity of resolving these factual predicates does not change the exception's essential character as an Establishment Clause limitation on the competence of governmental bodies to resolve certain religious questions.

As such, the ministerial exception closely resembles qualified immunity for purposes of the collateral order doctrine. If a trial court denies a motion for summary judgment invoking the ministerial exception, but the trial court turns out to have erred in that conclusion, the absence of an avenue for immediate appeal will require the court not only to permit discovery about, but to resolve, quintessentially religious questions. But the Establishment Clause limits the power of the government not only to issue and enforce a binding judgment on such matters, but also merely to entertain such questions.

Unlike qualified immunity, however, the fundamental value of the ministerial exception would not be entirely lost by waiting for a final judgment before permitting an appeal. An appellate court can reverse a judgment that is inconsistent with a proper understanding of the ministerial exception, and thus relieve the religious organization of improperly assigned liability. In this sense, a decision denying summary judgment based on the ministerial exception is not effectively unreviewable after a final judgment. That is, the ministerial exception, at bottom, is still a "defense to liability," rather than a comprehensive immunity from suit. But nonetheless, application of the collateral order doctrine in this context would better guard against Establishment Clause violations by trials courts than would the standard requirement of a final judgment before appeal.

#### *D. The Appropriate Finder of Disputed Facts*

Although it is unusual, sometimes disputed questions of fact concerning the plaintiff's status as a minister cannot be resolved at the summary judgment stage. For example, imagine that the plaintiff, who was a church organist, sues the church alleging that he was fired because of his age and replaced with a younger musician.<sup>187</sup> The church raises the ministerial exception and offers deposition testimony

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<sup>187</sup> *Cf.* *Archdiocese of Washington v. Moersen*, 399 Md. 637, 925 A.2d 659 (2007) (holding that ministerial exception did not apply to church organist).

stating that the plaintiff often selected music that was used during worship. The plaintiff responds with evidence that the pastor always selected the hymns and other liturgical music, and that the plaintiff's responsibilities were limited to simply performing the music selected for him. In light of the other undisputed evidence about the plaintiff's responsibilities, the ministerial exception would apply only if the plaintiff had a role in selecting hymns, and therefore in planning or leading worship. If there is a genuine dispute about this material fact, a court cannot resolve the church's motion for summary judgment based on the ministerial exception.

This does not mean, however, that the exception cannot apply; it simply means that the facts necessary to determining its application are in dispute. Ordinarily, when a court denies a motion for summary judgment on the ground that the facts remain in dispute, the matter proceeds to trial. The same is true in cases implicating the ministerial exception.

There is little doubt that juries are competent to resolve disputed facts in employment discrimination cases. The question remains, however, whether a jury is competent to resolve the disputed facts necessary to establish whether the plaintiff is a ministerial employee. We do not believe that there is a clear or categorical answer to this question. Given the conventional role of juries in resolving disputed factual matters,<sup>188</sup> courts should prevent juries from resolving factual predicates to the ministerial exception only on a showing that jury participation would be inconsistent with the underlying justification for the exception. We do not perceive any reason why this should be categorically true. Instead, withdrawal of the question from a jury should occur only in extraordinary circumstances. For example, if the defendant is a house of worship of a minority faith in the surrounding community, it is possible that jury bias will affect the jury's resolution of the disputed factual questions.<sup>189</sup> In addition, courts can use carefully constructed jury instructions or special verdict

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<sup>188</sup> Of course, there will be a jury trial only in those cases in which at least one of the parties has demanded a jury. *See* Fed. R. Civ. Proc. 38(b) (“On any issue triable of right by a jury, a party may demand a jury trial by ... serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served ....”). In employment discrimination cases, however, plaintiffs often request a jury because of a widely shared perception that juries are more favorable to individual litigants suing institutional defendants.

<sup>189</sup> *Cf.* Chopko & Parker, *supra* note **Error! Bookmark not defined.**, at 248 (arguing that a juror's “preconceived notions of religion and religious issues may obscure the resolution of a case.”).

forms to alleviate any lingering concerns about jury competence to resolve such questions.

### *E. Waivability*

The final procedural issue that could arise in litigation between a religious institution and its employee is whether the ministerial exception is waivable. If the defendant fails to raise the defense, either in the answer or later in the proceeding, may or should the court raise the ministerial exception *sua sponte*, or should the court instead treat the defense as waived? The ordinary rule is that a defendant waives an affirmative defense if it fails to raise it at a sufficiently early point in the litigation.<sup>190</sup> In our adversarial system, it typically is not the role or province of the court to raise defenses or arguments on behalf of the parties.

There are exceptions to this general rule. For example, a party who fails to object to a federal court's subject matter jurisdiction at the threshold of the suit does not waive it. Federal Rule of Civil Procedure 12(h)(3) specifically provides that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."<sup>191</sup> But subject matter jurisdiction is unusual in this respect. Most defenses are waived by the failure to raise them at the earliest possible opportunity. Threshold defenses, such as lack of personal jurisdiction or improper venue, must be asserted in a pre-answer motion to dismiss or in the answer, with minimal opportunity for amendment.<sup>192</sup> Other affirmative defenses must be raised in the answer, and although courts are more generous in permitting

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<sup>190</sup> See Fed. R. Civ. Pro. 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense ...."); *Dole v. Williams Enterprises, Inc.*, 876 F.2d 186, 189 (D.C.Cir.1989) ("A party's failure to plead an affirmative defense ... generally results in the waiver of that defense and its exclusion from the case." (internal quotations omitted)); *Ingraham v. United States*, 808 F.2d 1075, 1079 (5<sup>th</sup> Cir. 1987) (holding that a statutory limit on damages was "an affirmative defense which must be pleaded timely and that in the cases at bar the defense has been waived").

<sup>191</sup> Fed. R. Civ. Proc. 12(h)(3).

<sup>192</sup> See Fed. R. Civ. Proc. 12(h)(1) ("A party waives any defense listed in Rule 12(b)(2)-(5) by: (A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or (B) failing to either: (i) make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.").

amendment at later stages of the proceeding,<sup>193</sup> they ordinarily will not raise them *sua sponte*.<sup>194</sup>

Given this set of background rules, there is a strong argument that courts should raise *sua sponte* only those defenses that are similar in character to the lack of subject matter jurisdiction. A defendant's failure to raise all other defenses, on this view, should result in waiver. As we explained above, the Court in *Hosanna-Tabor* explicitly concluded that the ministerial exception is an affirmative defense, rather than a jurisdictional bar. Accordingly, there is a surface appeal to the view that a party's failure to raise the exception should result in waiver, and a court should not raise it *sua sponte*.

We believe, however, that the ministerial exception should be deemed non-waivable, and that courts in fact have an obligation to raise it *sua sponte* when a defendant religious organization fails to do so. Although the exception does not formally operate as a jurisdictional bar, in the sense that courts do not lack subject matter jurisdiction over cases implicating the exception, the underlying justification for the exception weighs strongly in favor of non-waivability.

The ministerial exception is a necessary corollary of the Establishment Clause principle that prevents courts from resolving strictly and purely ecclesiastical questions. The exception applies not just to protect the liberty of religious organizations, but because civil government lacks competence to resolve religious questions. If a religious institution waived the ministerial exception by failing to raise it in a suit in which it applies, the court would be forced to resolve such questions, in violation of the Establishment Clause. In other words, government not only lacks prescriptive jurisdiction to regulate the qualifications for ministerial employment, but the courts also face an adjudicative disability to deciding them.<sup>195</sup>

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<sup>193</sup> See, e.g., *Lucas v. United States*, 807 F.2d 414, 417-18 (5th Cir.1986) (holding that unpled affirmative defense was not waived when raised at trial at "pragmatically sufficient time").

<sup>194</sup> See, e.g., *Warnock v. Pecos County, Tex.*, 116 F.3d 776, 778 (5th Cir.1997) ("[A]n affirmative defense ... generally should not [be] raise[d] *sua sponte*."); *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 655 (4<sup>th</sup> Cir. 2006) (concluding that, ordinarily, a court should not raise a statute of limitations defense *sua sponte*). There are exceptions to this approach. See *Arizona v. California*, 530 U.S. 392, 412-13 (2000) (concluding that the affirmative defense of res judicata may, in "special circumstances," be raised *sua sponte*); *Day v. McDonough*, 547 U.S. 198, 202 (2006) (holding that court may *sua sponte* raise affirmative defense of timeliness of habeas petition under 28 U.S.C. § 2244(d)(1)(A)).

<sup>195</sup> Cf. *Wasserman*, *supra* note 120, at 303-05.

At least one federal court of appeals has recognized this implication of *Hosanna-Tabor*. In *Conlon v. Intervarsity Christian Fellowship/USA*,<sup>196</sup> a female employee was terminated for violating her employer’s rule against divorce. The court determined that she was a ministerial employee—a finding that she did not dispute—but she argued that the employer had waived the defense. The court categorically rejected the argument that a religious institution may waive the ministerial exception where applicable.<sup>197</sup> The court relied on the *Hosanna-Tabor* Court’s justification for the existence of the exception, reasoning that the “constitutional protection is not only a personal one; it is a structural one that categorically prohibits federal and state governments from becoming involved in religious leadership disputes.”<sup>198</sup>

As a consequence, courts not only should refuse to deem the ministerial exception waived by a party’s failure to raise it or by estoppel, but also should raise it *sua sponte* in cases in which the facts disclose that it clearly applies. Consider the facts of *EEOC v. Catholic University of America*.<sup>199</sup> The dispute involved the denial of tenure to a professor in the Canon Law Department at the university. The professor sued, asserting gender discrimination in the tenure denial.<sup>200</sup> The university argued that the professor’s canon law scholarship failed to meet the required standards of quality for tenure. For unknown reasons, the university did not raise the ministerial exception, even though litigation of her claim necessarily involved the question whether her scholarship reflected an orthodox understanding of church teaching. Indeed, the parties conducted extensive discovery, including

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<sup>196</sup> 777 F.3d 829 (6<sup>th</sup> Cir. 2015). Prior to *Hosanna-Tabor*, the Seventh Circuit reached the same conclusion. See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7<sup>th</sup> Cir.2006) (“The ministerial exception ... is not subject to waiver or estoppel.”), abrogated on other grounds by *Hosanna-Tabor*, 565 U.S. at 195 n.4. See also Carl H. Esbeck, *The Establishment Clause as a Structural Constraint: Validations and Ramifications*, 18 J.L. & POL. 445, 454-55 (2002) (arguing that a consequence of treating the Establishment Clause as a structural provision is that its limitations “cannot be waived” the way that personal rights can be waived).

<sup>197</sup> *Id.* at 836 (“The ministerial exception is a structural limitation imposed on the government by the Religion Clauses, a limitation that can never be waived.”).

<sup>198</sup> *Id.* The Eleventh Circuit, in contrast, has held post-*Hosanna-Tabor* that a religious organization may waive the defense on appeal by failing to raise it in its brief. See *Hamilton v. Southland Christian School, Inc.*, 680 F.3d 1316, 1318 (11<sup>th</sup> Cir. 2012). The court failed to consider the particular character of the ministerial exception in reaching this conclusion. For the reasons explained above, we think that this is incorrect.

<sup>199</sup> 83 F.3d 455 (D.C. Cir. 1996).

<sup>200</sup> *Id.* at 457-59.

about the substance of her scholarship, and then litigated the questions at trial. As the district court explained, “The parties called eighteen witnesses, fourteen of whom were priests or members of a religious order, and several were subjected to very vigorous cross-examination.”<sup>201</sup>

Immediately after the trial but before judgment, Judge Oberdorfer asked the parties to brief the question whether the resolution of the dispute would violate the First Amendment.<sup>202</sup> After briefing, Judge Oberdorfer concluded that the Religion Clauses precluded him from resolving the core issue in the suit, which was whether the plaintiff’s scholarship met the standards of the university.<sup>203</sup> In explaining this conclusion, Judge Oberdorfer noted that any grant of tenure to the plaintiff would require Vatican consent, which would inevitably be based upon the consistency of her scholarship with core teachings of the church.<sup>204</sup>

In our view, the court properly raised the ministerial exception *sua sponte* when it became clear that the dispute would turn on the substance of the plaintiff’s writing and its consistency with church teachings. It is not clear why the university failed to raise the ministerial exception, but if the court had treated the defense as waived and resolved the substance of the dispute, the court inevitably would have violated the Establishment Clause. To resolve the plaintiff’s claims, the court necessarily would have been required to adjudicate the quality of the plaintiff’s scholarship about canon law, a subject that, at least at this university, was a strictly ecclesiastical matter.<sup>205</sup>

In this respect, we think that Michael Helfand’s approach is entirely wrong. Helfand contends that the ministerial exception is

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<sup>201</sup> EEOC v. Catholic University of America, 856 F.Supp. 1, 2 (D.D.C. 1994).

<sup>202</sup> 83 F.3d at 459.

<sup>203</sup> *Id.* at 460.

<sup>204</sup> 856 F.Supp. at 9 (“It is possible for a court to compare the quantity of published articles and, to some extent, the teaching evaluations. The issue decided by the Canon Law Department, the School of Religious Studies, the Faculty Senate and, ultimately, the Church authorities, necessarily involves the quality, and hence the substance, of her work. That substance is materially religious. In reviewing actions on most complex and technical subjects, a trier of fact chooses between competing expert opinions. There are such competing expert opinions as to the quality and, necessarily, the religious substance of Sister McDonough’s writings in this record. I find and conclude that it is neither reasonably possible nor legally permissible for a lay trier of fact to evaluate these competing opinions on religious subjects.”).

<sup>205</sup> See Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 29, at 134-39.

designed solely to protect church autonomy.<sup>206</sup> On this view, there should be no bar to adjudication of a strictly and purely ecclesiastical question if both parties consent to its adjudication by a civil court.<sup>207</sup> As we have explained, we think that this view is inconsistent with both longstanding Establishment Clause norms and the Court’s decision in *Hosanna-Tabor*, which rests on those norms.<sup>208</sup> Establishment Clause problems cannot be cured by the consent of the parties involved. For example, it would violate the Clause to open a class at a public school with prayer even if the teacher and every student present, as well as their parents, consented to the practice.<sup>209</sup> Similarly, individual litigants cannot consent to adjudication of a matter that the Establishment Clause withdraws from the competence of a civil court.

### III. CONCLUSION

As a matter of substantive constitutional law, *Hosanna-Tabor* does not create the broad sphere of church autonomy that its biggest proponents or opponents would suggest. Instead, it is a decision that focuses solely on a specific set of questions that courts lack competence to resolve. That statement of substantive law, however, masks a potentially complicated set of procedural questions. The Court’s conclusion that the ministerial exception is an affirmative defense rather than a jurisdictional bar is only the start of an appropriate analysis about how to answer those questions.

As we have explained, courts should approach those procedural questions in light of the underlying justification for the ministerial exception. The exception reflects a longstanding constitutional limitation on the competence of courts to resolve “strictly and purely

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<sup>206</sup> See Helfand, *supra* note 106, at 1923; *supra* at notes 106-112 and accompanying text.

<sup>207</sup> *Id.*

<sup>208</sup> See *supra* at notes 58-102 and accompanying text.

<sup>209</sup> See *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”); see also LUPU & TUTTLE, *supra* note 121, at 121-22.

ecclesiastical” questions.<sup>210</sup> To conclude that the exception operates as an affirmative defense does not alter this fundamental limitation on the authority of secular courts. Any other approach would be unfaithful to this limitation.

As a practical matter, this means that in litigation between religious institutions and their employees, courts may be required to manage discovery to resolve threshold questions about the application of the ministerial exception before permitting broader discovery. Similarly, courts should consider permitting interlocutory appeals of trial court decisions that deny motions for summary judgment based on the exception. And courts not only should conclude that religious institutions do not waive the defense by failing to raise it, but also ought to raise it *sua sponte* when the facts indicate that the exception may apply. These departures from the ordinary treatment of affirmative defenses are necessary to respect the constitutional principles that the Court articulated in *Hosanna-Tabor*.

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<sup>210</sup> *Watson v. Jones*, 80 U.S. at 733.