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# GORDON COLLEGE AND THE FUTURE OF THE MINISTERIAL EXCEPTION

PETER J. SMITH\* AND ROBERT W. TUTTLE\*\*

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## *Abstract*

*In Gordon College v. DeWeese-Boyd, a social work professor at a religious college sued after she was denied promotion. The college asserted the “ministerial exception,” a judicially crafted and constitutionally grounded exception to the ordinary rules of liability arising out of the employment relationship between religious institutions and their ministers. Although the plaintiff had no distinctively religious duties, the college expected her (and all other faculty) to integrate the faith into her teaching and scholarship. The Massachusetts Supreme Judicial Court (SJC) held that this obligation, standing alone, was insufficient to qualify the plaintiff as a minister within the meaning of the exception. The U.S. Supreme Court denied the college’s petition for certiorari, but Justice Alito, joined by three other Justices, issued a statement respecting the denial. He criticized the SJC’s view of religious education, suggested that the mere duty to infuse the faith into teaching and scholarship was sufficient to qualify a professor as a minister, and expressed willingness to review the SJC’s decision after a final judgment. Nonetheless, DeWeese-Boyd’s claims may proceed to litigation.*

*Justice Alito’s statement is significant both for the scope of the ministerial exception—as applied to religious colleges and other employers—and for the future of the relationship between the Constitution’s Religion Clauses. Justice Alito’s capacious understanding of the ministerial exception—and his view that it is grounded primarily in the Free Exercise Clause, rather than the Establishment Clause—will likely leave little room for civil courts to adjudicate claims that assert wrongful treatment by religious institutions of ministerial employees. Equally important, Justice Alito’s view suggests a continued marginalization of the Establishment Clause in ways that will have effects far beyond the world of higher education.*

## TABLE OF CONTENTS

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INTRODUCTION..... 2

I. THE MINISTERIAL EXCEPTION ..... 6

II. THE GORDON COLLEGE CASE ..... 12

III. THE FUTURE OF THE MINISTERIAL EXCEPTION..... 20

IV. FURTHER IMPLICATIONS OF THE BROAD MINISTERIAL EXCEPTION..... 39

V. CONCLUSION ..... 45

**INTRODUCTION**

In February 2022, the U.S. Supreme Court denied certiorari in *Gordon College v. DeWeese-Boyd*,<sup>1</sup> a case litigated in the Massachusetts state courts that involved the scope of the “ministerial exception.” The ministerial exception is a judicially crafted, constitutionally grounded exception to the ordinary rules of liability arising out of the employment relationship between religious institutions and their ministers.<sup>2</sup> The ministerial exception clearly applies to clergy<sup>3</sup> and other employees of religious organizations who have distinctively religious duties such as the obligation to lead worship or indoctrinate students in the faith.<sup>4</sup> The Gordon College case, however, involved a claim by a professor of social work who had no such duties but who was expected to infuse faith into her teaching and scholarship. The Massachusetts Supreme Judicial Court (SJC) held that such a responsibility, standing alone, was insufficient to render the plaintiff a minister within the meaning of the ministerial exception.<sup>5</sup> As a consequence, the plaintiff could continue to litigate her claims against the College.<sup>6</sup>

Although the Supreme Court denied certiorari, it appears that the Court came as close as possible to granting the petition. Justice Alito, joined by

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<sup>1</sup> 142 S. Ct. 952 (2022).

<sup>2</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n v. EEOC*, 565 U.S. 171 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); see generally Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847 (2018); 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 (2017); Caroline Mala Corbin, *The Irony of Hosanna-Tabor*, 106 NW. U. L. REV. 951 (2012); Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821 (2012); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011).

<sup>3</sup> See, e.g., *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

<sup>4</sup> See, e.g., *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (applying ministerial exception in suit by “associate in pastoral care” at a church); *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F. 3d 795 (4th Cir. 2000) (applying ministerial exception in suit by director music ministry at a church).

<sup>5</sup> *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1002–03, 1018 (Mass. 2021).

<sup>6</sup> *DeWeese-Boyd* alleged that the College denied her application for promotion because of her support for LGBTQ+ rights at the College. She claimed that, in doing so, the College discriminated against her based on gender and then unlawfully retaliated against her after she filed a complaint. 163 N.E.3d at 1003.

three other Justices, issued a statement respecting the denial of certiorari.<sup>7</sup> His statement noted procedural issues that made immediate review imprudent,<sup>8</sup> but suggested that the failure to afford broad protection to the College would invite sympathetic review by the Supreme Court.<sup>9</sup> Justice Alito asserted that the Massachusetts SJC had advanced a “troubling and narrow view of religious education,”<sup>10</sup> and he strongly suggested that the mere obligation to integrate faith into teaching and scholarship is sufficient to bring a teacher within the reach of the ministerial exception.<sup>11</sup> This understanding of the ministerial exception goes beyond the Court’s two prior decisions on the topic and would have broad practical and jurisprudential implications.

As the SJC noted, such an approach could bring all teachers at religious schools within the scope of the ministerial exception, thus depriving them of significant employment protections imposed by neutral and generally applicable laws.<sup>12</sup> To be sure, religious schools already enjoy protection from antidiscrimination claims through express statutory exemptions for religious institutions from prohibitions on religious discrimination.<sup>13</sup> As a consequence, religious schools can lawfully select, supervise, and retain employees using religious criteria. These statutory religious exemptions, however, differ substantially from the ministerial exception. To avoid liability for claims asserting discrimination based on protected, nonreligious characteristics, a school must show that its action was instead based on the employer’s religious norms.<sup>14</sup> Under the ministerial exception, in contrast, a

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<sup>7</sup> *Gordon College v. DeWeese-Boyd*, 142 S. Ct. 952 (2022) (Alito, J., respecting the denial of certiorari) (joined by Justices Thomas, Kavanaugh, and Barrett).

<sup>8</sup> *Id.* at 952 (“I concur in the denial of the petition for a writ of certiorari because the preliminary posture of the litigation would complicate our review.”); *id.* at 955 (stating that the “interlocutory posture” of the case “would complicate our review”).

<sup>9</sup> *Id.* at 954-55 (stating that “the state court’s understanding of religious education is troubling”).

<sup>10</sup> *Id.* at 954.

<sup>11</sup> *Id.* at 955 (expressing “doubts about the state court’s understanding of religious education and, accordingly, its application of the ministerial exception”).

<sup>12</sup> *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1002–03, 1017 (Mass. 2021). (“The integration of religious faith and belief with daily life and work is a common requirement in many, if not all, religious institutions. As a result, the breadth of this expansion of the ministerial exception and its eclipsing and elimination of civil law protection against discrimination would be enormous.”).

<sup>13</sup> *See, e.g.*, 42 U.S.C. § 2000e-1 (2012) (“This subchapter [Title VII] 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>14</sup> In the context of a nonministerial employee, the employee would assert a claim of adverse employment action based on a protected class (such as race), the employer might offer a religious justification for the employment action, and the employee would then argue that the offered justification is a pretext for unlawful discrimination. *See, e.g.*, *Cline v. Catholic Diocese*, 206 F.3d 651 (6th Cir. 1999) (addressing claim by teacher at religious school who was terminated for premarital pregnancy, which violated moral code prohibiting nonmarital sex, and granting trial on question whether the policy was applied equally to male and female

school merely needs to demonstrate that the employee's duties render her a minister; upon such a showing, a court will conduct no further scrutiny of the specific reasons for any adverse job action.<sup>15</sup>

The broader jurisprudential implications of an expanded ministerial exception would be equally significant. As the Court explained in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission v. EEOC*,<sup>16</sup> the first Supreme Court decision to recognize the ministerial exception, the exception has deep historical roots and is grounded in both Religion Clauses. A prohibition on state intervention in the choice of clergy implicates the Establishment Clause because a hallmark of an established church is state control over church leadership. In addition, Establishment Clause doctrine recognizes that civil courts are not competent to resolve strictly religious questions, and the question whether a minister should continue to serve a religious institution is (or risks implicating) such a question. The exception also implicates the Free Exercise Clause; the freedom to choose a faith community is inseparable from the freedom to choose who will serve as the community's minister.

*Hosanna-Tabor* involved a religious schoolteacher with specifically religious responsibilities: teaching religious doctrine and leading students in worship. It is not difficult to see both the Establishment and Free Exercise concerns with a court's adjudicating claims by such teachers that they were impermissibly terminated. Such claims inevitably will raise the question whether the teachers properly fulfilled their responsibilities; but under the Establishment Clause, civil courts are not competent to determine whether the teacher properly taught religious doctrine. The resulting interference with the school's relationship with those people it has selected to impart its doctrine, moreover, would interfere with the school's freedom to define and share its faith.

It matters that the ministerial exception sounds in both Religion Clauses. Grounding the exception in both clauses gives constitutional weight to the exception but also, crucially, imposes a limit on its scope. Because a primary justification for the exception is that civil courts lack authority to adjudicate strictly religious questions, the exception ought to apply only in those cases that actually involve religious activity. As a consequence, whether an employee is a "minister" should be determined by inquiring whether the person is responsible for engaging in specifically religious activity. To make

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employees); *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 211 (E.D.N.Y. 2006) (same, and rejecting employer's argument that employee was a minister within the ministerial exception).

<sup>15</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n v. EEOC*, 565 U.S. 171, 190 (2012); *see id.* at 195 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,'—is the church's alone." (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119 (1952))).

<sup>16</sup> 565 U.S. 171.

this limit meaningful, secular courts must have authority to determine what constitutes religious activity within the meaning of the Establishment Clause.

Yet Justice Alito’s opinion for the Court in *Our Lady of Guadalupe School v. Morrissey-Berru*,<sup>17</sup> the Supreme Court’s other case applying the ministerial exception, hints at a more expansive ministerial exception, one that slips its tether in Establishment Clause doctrine and instead is anchored solely to the Free Exercise Clause. Justice Alito asserted that the ministerial exception derives from a doctrine of church autonomy, which guarantees the “independence of religious institutions in matters of ‘faith and doctrine’” and “matters of church government.”<sup>18</sup> On this view, “[j]udicial review of the way in which religious schools” select and supervise teachers who educate students impermissibly “undermine[s] the independence of religious institutions.”<sup>19</sup> Justice Alito’s statement respecting the denial of certiorari in the Gordon College case builds on this view and sends a strong signal that, in cases involving the relationship between secular courts and religious institutions, the Free Exercise Clause now dominates an increasingly irrelevant Establishment Clause.<sup>20</sup>

In suits by employees of religious organizations, the likely consequence is that there will be little room for civil courts to adjudicate claims that assert wrongful treatment by their employers. Whereas an Establishment Clause–based ministerial exception would permit secular courts to determine, in the first instance, the boundaries of the category of minister for purposes of adjudicating employment-based claims, a Free Exercise Clause–based doctrine leaves the boundaries of the category principally to the religious employer and its assertion about who counts as a minister. To be sure, Justice Alito’s position does not appear to be as deferential as Justice Thomas’s approach in *Hosanna-Tabor*, which would “require civil courts ... to defer to a religious organization’s good-faith understanding of who qualifies as its minister.”<sup>21</sup> But in practice, the difference is modest at best. Under Justice Thomas’s view, a religious school or organization’s sincere claim that an employee is a minister must be accepted by a reviewing court; under Justice Alito’s view, a sincere claim that an employee is a minister is entitled to substantial (yet undefined) deference.

If the ministerial exception rests entirely on the Free Exercise Clause, then the limits imposed by the Establishment Clause on its scope are beside the point. In this sense, ministerial exception doctrine appears to be following the same trend as other apparent conflicts between the Religion Clauses in recent decisions. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,<sup>22</sup>

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<sup>17</sup> 140 S. Ct. 2049 (2020).

<sup>18</sup> *Id.* at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186 (internal quotations omitted)).

<sup>19</sup> 140 S. Ct. at 2055.

<sup>20</sup> See *infra* notes 171–209 and accompanying text.

<sup>21</sup> 565 U.S. at 197 (Thomas, J., concurring).

<sup>22</sup> 137 S. Ct. 2012 (2017) (holding that Missouri’s exclusion of churches from a funding program for playground resurfacing violated the Free Exercise Clause).

*Espinoza v. Montana Department of Revenue*,<sup>23</sup> *Carson as Next Friend of O.C. v. Makin*,<sup>24</sup> *Kennedy v. Bremerton School District*,<sup>25</sup> and other recent cases,<sup>26</sup> the Court looked only at Free Exercise Clause interests and either downplayed or ignored potential Establishment Clause concerns. Increasingly, Religion Clause doctrine focuses on the freedom of the religious from constraints imposed on secular actors while simultaneously demanding equal treatment of religious actors in the distribution of government benefits. Long-standing concerns about government monitoring of or support for religion have been subordinated to Free Exercise interests.

In Part I, we describe the origins and current status of the ministerial exception, focusing particularly on the definition of those considered ministers. Part II turns to *DeWeese-Boyd v. Gordon College*, which has justifiably received significant attention as it made its way through the Massachusetts courts to the U.S. Supreme Court on a petition for a writ of certiorari. Part III addresses the implications of the Gordon College case for religious institutions of higher education and the status of their faculty members, including the extent to which antidiscrimination and other employment protections will continue to apply to decisions at those institutions, especially at schools that require faculty to infuse the faith into their teaching and scholarship. In Part IV, we explore broader implications of the case, and especially the possibility that the ministerial exception will cease to have any meaningful connection to the Establishment Clause. In our view, this is a serious mistake. As with the Court's other decisions that ignore Establishment Clause values, an anchoring of the ministerial exception solely in the Free Exercise Clause will increase the immunity of religious organizations from general law, invite broader government funding of religion, and potentially disable courts from drawing any meaningful line between church and state.

## I. The Ministerial Exception

In the 1970s, the lower federal courts confronted a series of employment law claims by those who worked for religious institutions. In an increasing number of these cases, the institutions defended by asserting a “ministerial

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<sup>23</sup> 140 S. Ct. 2246 (2020) (holding that Montana's exclusion of religious schools from state scholarship program violated Free Exercise Clause).

<sup>24</sup> 142 S. Ct. 1987 (2022) (holding that Maine school voucher program in rural districts violated the rights of students and religious schools because it excluded “sectarian” schools from the program).

<sup>25</sup> 142 S. Ct. 2407 (2022) (holding that public high school coach has a right to engage in private prayer at conclusion of football games, notwithstanding school district's concern that it would be deemed responsible for the coach's religious activity in violation of the Establishment Clause).

<sup>26</sup> See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (holding that city's refusal to contract with Catholic adoption agency unless the agency placed children with same-sex couples violated the Free Exercise Clause notwithstanding Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), which held that neutral and generally applicable laws that incidentally burden religion are not subject to heightened scrutiny under the Free Exercise Clause).

exception” to antidiscrimination and other laws that protect employees. Title VII and other workplace protections exempt religious organizations from claims of religious discrimination in employment, but they do not exempt religious organizations from other types of discrimination claims such as those based on race or sex.<sup>27</sup>

In *McClure v. Salvation Army*,<sup>28</sup> however, the U.S. Court of Appeals for the Fifth Circuit held that Title VII should be construed to exempt from the protections of the Act ministers employed by religious organizations.<sup>29</sup> Accordingly, the court rejected the claim of the plaintiff, who was an officer and ordained minister of the Salvation Army, that she had been terminated because of her sex.<sup>30</sup> The court construed Title VII in light of constitutional concerns about government intrusion into religious organizations’ decisions about their leaders.<sup>31</sup> In particular, the Fifth Circuit relied on a series of decisions in which the Supreme Court held that the Religion Clauses require the government to limit its involvement in disputes over the control of religious entities.<sup>32</sup>

In the decades that followed, other courts recognized and elaborated on the scope of this “ministerial exception.”<sup>33</sup> Those courts applied the exception to all the class-based protections under Title VII,<sup>34</sup> to claims under

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<sup>27</sup> See 42 U.S.C. § 2000e-1 (2012) (“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.”); see also, e.g., D.C. CODE § 2-1402.11 (2017) (defining unlawful discriminatory employment practices); MD CODE ANN., STATE GOV’T § 20-606 (West 2017) (same). 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. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

<sup>28</sup> 460 F.2d 553 (5th Cir. 1972).

<sup>29</sup> *Id.* at 560–61

<sup>30</sup> *Id.* at 555.

<sup>31</sup> *Id.* at 558–61.

<sup>32</sup> See *id.* at 559–60 (citing *Watson v. Jones*, 80 U.S. 679 (1971), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969)); see *infra* notes 131–161 and accompanying text.

<sup>33</sup> See, e.g., *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000).

<sup>34</sup> See, e.g., *Rweyemamu v. Cote*, 520 F.3d 198, 204–09 (2d Cir. 2008) (applying ministerial exception in case asserting race discrimination claim); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–07 (3d Cir. 2006) (sex discrimination); *Lishu Yin v. Columbia Int’l Univ.*, 335 F. Supp. 3d 803 (D.S.C. 2018) (national origin). *But cf.* *Ira C. Lupu & Robert W. Tuttle, #MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment’s Religion Clauses*, 25 WM. & MARY J. RACE, GENDER, AND SOCIAL JUSTICE 259 (2019) (arguing that ministerial exception should not apply in cases involving sexual harassment claims, and citing federal and state court decisions that have adopted that rule); *Rachel Casper, When Harassment at Work Is Harassment at Church: Hostile Work Environments and the Ministerial Exception*, 25 U. PA. J.L. SOC. & CHANGE 11 (2021) (hostile work environment claims).

other federal antidiscrimination statutes,<sup>35</sup> and to some state law claims.<sup>36</sup> In addition, they applied the exception in cases involving employees who were not ordained as ministers but whose duties entailed specifically religious activities.<sup>37</sup>

The Supreme Court first recognized the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.<sup>38</sup> The Court concluded 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>39</sup>

The specific question in *Hosanna-Tabor* was whether the plaintiff, who taught predominantly secular subjects at a religious school and had only limited religious duties, was properly considered a minister.<sup>40</sup> The Court concluded that she counted as a minister for purposes of the exception.<sup>41</sup> Although the Court expressly declined to announce a specific test for defining ministers,<sup>42</sup> its conclusion identified a mix of characteristics and factors.<sup>43</sup>

Cheryl Perich served as a “commissioned” teacher, which meant that she received special religious training and was “called” to her position by the

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<sup>35</sup> See, e.g., *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1039–40 (7th Cir. 2006) (applying the ministerial exception to a claim by a church music director under the Age Discrimination in Employment Act).

<sup>36</sup> See, e.g., *Natal v. Christian and Missionary All.*, 878 F.2d 1575, 1578 (1st Cir. 1989) (applying ministerial exception in case involving breach of contract claim).

<sup>37</sup> *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (applying ministerial exception to employee who was not an ordained minister but who was an “associate in pastoral care” at a church); *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000) (holding that director of music ministry at a church was a minister within the meaning of the ministerial exception).

<sup>38</sup> 565 U.S. 171 (2012).

<sup>39</sup> *Id.* at 185 (citing *Watson v. Jones*, 80 U.S. 679 (1971), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696 (1976)); see *infra* notes 131–161 and accompanying text.

<sup>40</sup> 565 U.S. at 177–78, 190–92.

<sup>41</sup> *Id.* at 190–95.

<sup>42</sup> *Id.* at 190.

<sup>43</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.

congregation.<sup>44</sup> Perich identified herself as a minister for purposes of the “parsonage exemption” under the Federal Income Tax Code.<sup>45</sup> As the Court noted, part of her role as a fourth-grade teacher included specifically religious activities: “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.”<sup>46</sup>

Eight members of the Court agreed that defining ministers for purposes of the exception is a task properly performed by courts reviewing claims within the reach of the exception.<sup>47</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>48</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. According 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>49</sup>

The Court repeatedly stated that the ministerial exception is “grounded in the Religion Clauses of the First Amendment.”<sup>50</sup>

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<sup>44</sup> *Id.* at 177–78.

<sup>45</sup> *Id.* at 191–92.

<sup>46</sup> *Id.* at 192.

<sup>47</sup> *Id.* at 190–95 (considering the employee’s responsibilities and determining whether she was properly considered a minister for purposes of the exception); *id.* at 204 (Alito, J., concurring) (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. *Id.* at 194–95 (majority opinion). For an explanation of this conclusion, see Lupu & Tuttle, *supra* note 2, at 1279–80.

<sup>48</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.”). Justice Thomas reasoned “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>49</sup> *Id.* at 188–89 (majority opinion).

<sup>50</sup> *Id.* at 190; *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.”).

The Court elaborated on the scope of the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*.<sup>51</sup> The case involved a parochial school teacher who alleged that her termination was based on her age in violation of the Age Discrimination of Employment Act.<sup>52</sup> Although the school asserted that it had a legitimate, nondiscriminatory reason for terminating the plaintiff, it invoked the ministerial exception to dispose of the case on an expedited motion for summary judgment.<sup>53</sup> The district court granted the school’s motion, but the court of appeals reversed, reasoning that “Morrissey-Berru did not have the formal title of ‘minister,’ had limited formal religious training, and ‘did not hold herself out to the public as a religious leader or minister.’”<sup>54</sup> The Supreme Court granted the school’s petition for certiorari and reversed.<sup>55</sup>

Justice Alito wrote the opinion for the Court and was joined by six other Justices. The Court began by holding that an employee need not satisfy all the factors identified in *Hosanna-Tabor* to fall within the ministerial exception.<sup>56</sup> Instead, the Court reasoned, the inquiry should be functional, and thus does not depend on any one factor.<sup>57</sup> Although Morrissey-Berru did not carry the title “minister,” she nonetheless performed specifically religious activities.<sup>58</sup> As the Court explained, she was responsible for teaching the basic doctrines of the faith and testing the students on their understanding of those doctrines.<sup>59</sup> In addition, she was responsible for preparing the students to participate in the liturgy of the church and “was expected to take her students to Mass once a week and on certain feast days . . . , and to take them to confession and to pray the Stations of the Cross.”<sup>60</sup> In light of Morrissey-Berru’s responsibility to teach and lead students in the practice of religion, she more clearly performed specifically religious activities than did Perich in *Hosanna-Tabor*.

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<sup>51</sup> 140 S. Ct. 2049 (2020).

<sup>52</sup> *Id.* at 2058. The Supreme Court consolidated Morrissey-Berru’s case with a similar case filed by the estate of Kristen Biel, a Catholic school teacher who claimed that she had been fired in violation of the Americans with Disabilities Act when the school denied her request for a leave of absence to obtain treatment for breast cancer. *Id.* at 2059.

<sup>53</sup> *Id.* at 2058.

<sup>54</sup> *Id.* (quoting *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App’x 460, 461 (9th Cir. 2019)).

<sup>55</sup> *Our Lady of Guadalupe*, 140 S. Ct. at 2060, 2069.

<sup>56</sup> *Id.* at 2063 (“[O]ur recognition of the significance of those factors in [*Hosanna-Tabor*] did not mean that they must be met—or even that they are necessarily important—in all other cases.”).

<sup>57</sup> *Id.* at 2064 (“What matters, at bottom, is what an employee does.”).

<sup>58</sup> *Id.* at 2066 (“There is abundant record evidence that they both performed vital religious duties.”).

<sup>59</sup> *Id.* (“Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility.”).

<sup>60</sup> *Id.* at 2057; *see also id.* at 2066.

These duties were more than sufficient for the Court to conclude that the court of appeals erred and to reinstate the district court’s grant of summary judgment in favor of the school. The Court, however, did not end its inquiry with the judgment that the plaintiff performed specifically and unambiguously religious activities. Instead, the Court also noted that the plaintiff was evaluated based on whether “Catholic values were infused through all subject areas” of her teaching.<sup>61</sup> We find it less obvious that a requirement to infuse elements of the faith into ordinary teaching would constitute specifically religious activity in the same way that teaching doctrine or leading worship would. Indeed, the Court did not say whether this requirement alone would be a sufficient basis for a finding that the employee falls within the scope of the ministerial exception.<sup>62</sup>

As in *Hosanna-Tabor*, the Court’s opinion in *Our Lady of Guadalupe* anchored the ministerial exception in both Religion Clauses.<sup>63</sup> As we read Justice Alito’s opinion, however, it subtly shifts the focus from traditional Establishment Clause concerns to Free Exercise concerns. An approach dominated by Establishment Clause concerns would focus on a teacher’s required involvement in specifically religious activities. Such an understanding of the ministerial exception rests on secular courts’ limited competence to determine who is qualified to perform specifically religious activities. An approach anchored primarily in the Free Exercise Clause, in contrast, will focus on the freedom of religious schools to integrate faith into all aspects of their educational mission.

Justice Alito’s opinion stated that the relevant religious duties of teachers extended beyond instruction in doctrine and leading students in worship. He observed that the plaintiffs “not only [were] obligated to provide instruction about the Catholic faith,” but also were “expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.”<sup>64</sup> Justice Alito suggested that such duties matter in determining whether a teacher is a minister because of the importance of preserving the autonomy of religious schools.<sup>65</sup> Such autonomy, on this view,

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<sup>61</sup> *Id.* at 2057.

<sup>62</sup> Instead, the Court viewed the plaintiff’s duties as a whole, noting that she was responsible both for “[e]ducating *and forming* students in the Catholic faith . . .” *Id.* at 2066; *accord id.* (“[N]ot only [were the plaintiffs] obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.”).

<sup>63</sup> *Id.* at 2060 (“[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters “of faith and doctrine” without government intrusion. State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion.”) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n v. EEOC*, *Hosanna-Tabor*, 565 U.S. 171, 186 (2012), in turn quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (internal quotations omitted)).

<sup>64</sup> *Id.* at 2066.

<sup>65</sup> *Id.* at 2069 (“When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes

requires courts to defer to religious entities' characterization of the role at issue. And indeed, Justice Alito emphasized that the school "expressly saw [the teacher] as a vital part in carrying out the mission of the Church," and that the school's "definition and explanation of [her role] in the life of the religion ... is important."<sup>66</sup>

## II. The Gordon College Case

Margaret DeWeese-Boyd was a tenured associate professor of social work at Gordon College, an "evangelical Christian undergraduate and graduate college" in Massachusetts.<sup>67</sup> The College's current governing documents state that the mission of the College is to "provide a college education in the liberal arts and sciences to qualified persons; to provide training for the professions; to provide instruction in the Bible and other subjects; [and] to prepare men and women for the work of foreign and home missions, for the duties of the Christian ministry and other special forms of Christian work[.]"<sup>68</sup>

The faculty handbook establishes criteria for teachers, which include adherence to the College's religious mission: "Gordon College approaches its educational task from within the fixed reference points of biblical theism, which provides a coherent perspective on life in the world."<sup>69</sup> All faculty members "are expected to be fully prepared in all facets of their tasks as Christian teachers and advisors, both inside and outside the classroom," and "[t]hey are expected to strive to engage students in their respective disciplines from the perspectives of the Christian faith and to teach with accuracy and integrity."<sup>70</sup> In addition, all applicants for employment at the College must affirm "personal agreement with the Statement of Faith" and "the Statement of Life and Conduct at Gordon College."<sup>71</sup>

The Statement of Faith is characteristically evangelical Protestant in its commitment to biblical inerrancy and salvation from damnation only by personal experience of God's saving grace.<sup>72</sup> The Statement of Life and

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between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.").

<sup>66</sup> *Id.* at 2066.

<sup>67</sup> *DeWeese-Boyd v. Gordon College*, 2020 Mass. Super. LEXIS 73, at \*4 (2020).

<sup>68</sup> *Id.* at \*5 (citation omitted). The original Mission Statement stated that the College strives "to graduate men and women distinguished by intellectual maturity and Christian character, committed to lives of services and prepared for leadership worldwide." *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1004 (Mass. 2021). More recent statements of the College's purpose tend to highlight the evangelical Christian aspects of the College's educational program. *Id.* (noting that the Colleges revised By-Laws state that the College is dedicated to the "historic, evangelical, biblical faith ...." *Id.*

<sup>69</sup> *De-Weese-Boyd*, 2020 Mass. Super. Lexis 73, at \*8.

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

<sup>71</sup> *Id.* at \*10–11.

<sup>72</sup> *Id.* at \*11 ("[The College's] Statement of Faith, with which faculty members must agree, provides, inter alia, that: (1) '[t]he 66 canonical books of the Bible as originally written were inspired by God'; (2) '[t]here is one God, the Creator and Preserver of all things, infinite in being and perfection'; (3) 'humankind can be saved only by the grace of God'; (4) 'it is the

Conduct requires commitment to the evangelical mission of the College, reflected in personal faith and conformity with “Behavioral Standards” based on “words and actions which are expressly forbidden in Scripture.”<sup>73</sup>

The handbook provides that faculty members are expected to “promote understanding of their disciplines from the perspectives of the Christian faith.”<sup>74</sup> Similarly, teaching is evaluated in part based on the faculty member’s “integration” of personal faith and Christian doctrine into the subject matter of the course in a way that “encourages students to develop morally responsible ways of living in the world informed by Biblical principles and Christian reflection.”<sup>75</sup> An additional component of this infusion of faith into all aspects of their work is the requirement that faculty members submit “an integration paper” at the end of their third year of appointment to “detail how they integrate faith and learning.”<sup>76</sup> The President of the College asserted that, at the institution, “there are no nonsacred disciplines .... Every subject matter that we pursue is informed by, shaped by the Christian tradition.”<sup>77</sup> Faculty members, however, do not have specifically religious responsibilities of participating in worship services or leading prayer.<sup>78</sup>

DeWeese-Boyd joined the Gordon College faculty in 1998, was promoted to Associate Professor in 2004, and was granted tenure in 2009.<sup>79</sup> In 2016, however, she was denied promotion to full Professor, even though the “Faculty Senate unanimously recommended her for promotion.”<sup>80</sup> The President and Provost disagreed with the recommendation and declined to forward her promotion application to the Board of Trustees. In their nonconurrence decision, they cited “a lack of scholarly productivity, professionalism, responsiveness, and engagement.”<sup>81</sup> They did not refer to any “religious or ministerial matters or theological disagreement.”<sup>82</sup>

DeWeese-Boyd filed suit against the College. She alleged that she had been denied promotion because of her vocal opposition to the College’s policies on LGBTQ+ rights and because of her gender.<sup>83</sup> She sought relief

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responsibility of the believer to contribute by word and deed to the universal spread of the gospel’; and (5) ‘[a]t the end of the age the bodies of the dead shall be raised[,] ... [t]he righteous shall enter into full possession of eternal bliss[,] ... [and] the wicked shall be condemned to eternal death.’”).

<sup>73</sup> *Id.* at \*12.

<sup>74</sup> DeWeese-Boyd v. Gordon College, 163 N.E.3d 1000, 1005 (Mass. 2021).

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

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

<sup>77</sup> *Id.* at 1004.

<sup>78</sup> *Id.* at 1005 (noting that “Gordon’s provost testified that faculty are not required to participate in leading prayers or to attend regular chapel services on campus, and that the handbook does not contain any specific reference to faculty responsibility for leading prayers”).

<sup>79</sup> *Id.* at 1007.

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

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

<sup>82</sup> *Id.* at 1008.

<sup>83</sup> DeWeese-Boyd v. Gordon College, 2020 Mass. Super. LEXIS 73, at \*21.

under Massachusetts antidiscrimination laws and state common law contract and tort doctrines.<sup>84</sup>

The College moved for summary judgment, asserting that the ministerial exception bars DeWeese-Boyd's claims.<sup>85</sup> DeWeese-Boyd filed a cross-motion for summary judgment, asserting that, as a matter of law, she was not a minister within the meaning of the exception.<sup>86</sup> The trial court denied the College's motion and granted DeWeese-Boyd's cross-motion. The court concluded that, although the College is a religious institution,<sup>87</sup> DeWeese-Boyd was not a minister for purposes of the exception. In its decision, which the court issued before the Supreme Court's decision in *Our Lady of Guadalupe*, the trial court applied a "functional approach."<sup>88</sup>

The trial court began by noting that, despite the many references to the College's Christian mission and identity, and the responsibility of faculty to infuse faith into their teaching, "the simple promotion of a religious institution's mission, alone, provides little insight into whether the duties or responsibilities undertaken by the employee carried substantial religious significance."<sup>89</sup> The court also noted that DeWeese-Boyd was not expected to proselytize or to hold herself out as "an employee authorized to speak on Church doctrine."<sup>90</sup> Finally, "DeWeese-Boyd did not perform any important religious functions for Gordon College." The court explained that "DeWeese-Boyd performed almost no liturgical or ecclesiastical functions for Gordon .... She was not responsible for leading students in prayer or devotional exercises; she did not lead chapel services or even select liturgy, hymns, or other content for chapel services; she did not teach religion or the Bible; [and] she did not play a particular role as a minister or spiritual leader."<sup>91</sup>

The trial court granted the College's motion to seek interlocutory appeal of the court's determination that the ministerial exception did not apply, and the SJC granted the application for immediate review.<sup>92</sup> The SJC affirmed, "conclud[ing] that Gordon College is a religious institution, but that

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<sup>84</sup> *Id.* at \*2.

<sup>85</sup> *Id.* at \*4.

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

<sup>87</sup> *Id.* at \*40–43.

<sup>88</sup> *Id.* at \*47–48. In applying this functional approach, the court closely followed the Kentucky Supreme Court's reasoning in *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 587 (Ky. 2014), which involved a suit by a tenured professor of Christian Social Ethics. The Kentucky Court focused primarily on the "important functions performed for the religious institution" and "whether those functions were essentially liturgical, closely related to the doctrine of the religious institution, resulted in a personification of the religious institution's beliefs, or were performed in the presence of the faith community." *Id.* at 613–14.

<sup>89</sup> *Gordon College*, Mass. Super. LEXIS, at \*68 (quoting *Kant v. Lexington Theological Seminary*, 426 S.W.3d 587, 594 (Ky. 2014)).

<sup>90</sup> *Id.* at \*70 (quoting *Kant*, 426 S.W.3d at 594–95).

<sup>91</sup> *Id.* at \*71.

<sup>92</sup> *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1004 (Mass. 2021). *Cf.* *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021 (10th Cir. 2022) (holding that order denying summary judgment on a school's ministerial exception defense is not immediately appealable).

[DeWeese-Boyd] is not a ministerial employee.”<sup>93</sup> The Court largely echoed the reasoning of the trial court and focused on the functions that the plaintiff served. Specifically, “she did not teach religion or religious texts, lead her students in prayer, take students to chapel services or other religious services, deliver sermons at chapel services, or select liturgy . . . .”<sup>94</sup>

As a consequence, the case turned on the significance of the plaintiff’s “responsibility to integrate her Christian faith into her teaching and scholarship as a professor of social work.”<sup>95</sup> The SJC concluded that, under current doctrine, the ministerial exception does not extend to faculty whose only religious responsibility is to integrate faith into their teaching and scholarship.<sup>96</sup>

At first glance, the basis for the Court’s conclusion appears to be entirely pragmatic. The Court reasoned that, if the ministerial exception extended to all such faculty, the exception would threaten to swallow the rule. The SJC noted that, if DeWeese-Boyd were considered a minister, then “the number of employees playing key ministerial roles would be greatly increased,” thus removing significant legal protections for those employees.<sup>97</sup>

The Court’s conclusion, however, also has a solid jurisprudential foundation. The SJC emphasized that the Court in *Hosanna-Tabor* and *Our Lady of Guadalupe* adopted a “functional analysis” for determining whether an employee is a minister within the meaning of the exception.<sup>98</sup> The SJC accordingly examined the plaintiff’s actual responsibilities. The Court stressed that the plaintiff “was, first and foremost, a professor of social work. She taught classes on sustainability and general social work practice and oversaw practicums.”<sup>99</sup> Unlike the plaintiffs in *Hosanna-Tabor* and *Our*

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<sup>93</sup> *DeWeese-Boyd*, 163 N.E.3d at 1002.

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

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* The SJC explained,

When the ministerial exception applies, the employee may not claim important protections of civil law prohibiting discrimination on the basis of any protected factor, such as race, religion, national origin, sex, or sexual orientation. Such exceptional treatment is deemed necessary to protect our religious institutions against interference by civil authorities in the selection of those who minister to their faithful. We are thus presented with a potential conflict between two fundamental American legal principles. The application of the ministerial exception could eclipse, and thereby eliminate, civil law protection against discrimination within a religious institution; in contrast, the decision not to apply the exception could allow civil authorities to interfere with who is chosen to propagate religious doctrine, a violation of our country’s historic understanding of the separation of church and State set out in the First Amendment to the United States Constitution.

*Id.* at 32; *see also id.* at 41–42 (noting that, if an employee is considered a minister, “the religious institution will be free to discriminate” on the basis of age, race, or national origin); Patrick Hornbeck, *A Nun, a Synagogue Janitor, and a Social Work Professor Walk Up to the Bar: The Expanding Ministerial Exception*, 70 *BUFF. L. REV.* 695 (2022).

<sup>98</sup> *Id.* at 46–47.

<sup>99</sup> *Id.* at 47.

*Lady of Guadalupe*, DeWeese-Boyd had no obligation to engage in specifically religious duties.

The SJC acknowledged that the plaintiff was required to “engage in teaching and scholarship from a Christian perspective and integrate her faith into her work.”<sup>100</sup> The College argued that this obligation alone rendered all faculty—and, for that matter, all employees of the College, including the janitorial and kitchen staffs—ministers within the meaning of the exception.<sup>101</sup> The SJC disagreed. The Court noted that the Supreme Court’s two ministerial exception decisions did not address whether an obligation to integrate or model faith in one’s work alone is sufficient to make the employee a minister.<sup>102</sup> The SJC accordingly examined the plaintiff’s duties, including her job description, even more closely.

The College relied on the faculty handbook and its description of the faculty’s role. When DeWeese-Boyd began her employment at Gordon College, the handbook described faculty as “educators.” In 2016, after the Supreme Court’s decision in *Hosanna-Tabor* (and eighteen years after DeWeese-Boyd was hired), the College’s legal counsel substantially revised the handbook. The revised provision stated, in relevant part:

One of the distinctives of Gordon College is that each member of faculty is expected to participate actively in the spiritual formation of our students into godly, biblically-faithful ambassadors for Christ. Faculty members should seek to engage our students in meaningful ways to strengthen them in their faith walks with Christ. In the Gordon College context, faculty members are both educators and ministers to our students.<sup>103</sup>

The SJC concluded, however, that “the label is uninformative, not only because it was added so late in DeWeese-Boyd’s tenure, but also because there is abundant evidence in the record of what was required and expected of Gordon faculty during her employment there and our focus, as the Supreme Court has directed, is on function.”<sup>104</sup>

Notwithstanding the College’s contention that a core faculty responsibility is to serve as a spiritual mentor to students, the SJC found no “formal requirement[.]”<sup>105</sup> of such an obligation. In the Court’s view, “a general exhortation for faculty ‘to be fully prepared in all facets of their tasks as Christian teachers and advisors, both inside and outside the classroom,’” did not alter the faculty’s primarily secular function.<sup>106</sup> The Court reasoned

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 48.

<sup>102</sup> *Id.* at 49.

<sup>103</sup> *Id.* at 37–38 (quoting faculty handbook).

<sup>104</sup> *Id.* at 50. In the SJC’s view, to accept uncritically the College’s post-hoc labeling of all faculty as ministers would have the practical effect of adopting the approach of the two concurring Justices in *Our Lady of Guadalupe*, who argued for almost complete deference to the religious employer’s defense. *Id.* at 49–50. Instead, the SJC concluded that it had an independent obligation to determine whether the plaintiff was in fact a minister.

<sup>105</sup> *Id.* at 48.

<sup>106</sup> *Id.*

that, if “all Christians teaching at all Christian schools and colleges are necessarily ministers,” then the Supreme Court “could have simply said so and not developed the two-prong test and functional analysis laid out in *Our Lady of Guadalupe*.”<sup>107</sup>

Applying that test, the SJC concluded that “a faculty member with DeWeese-Boyd’s responsibilities at Gordon is significantly different from the ordained ministers or teachers of religion at primary or secondary schools in the cases that have come before the Supreme Court.”<sup>108</sup> The Court stressed that she “was not ordained or commissioned; she was not held out as a minister and did not view herself as a minister; and she was not required to undergo formal religious training, pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum.”<sup>109</sup> Finally and crucially, the SJC concluded that DeWeese-Boyd’s “responsibility to integrate the Christian faith into her teaching, scholarship, and advising was different in kind, and not degree, from the religious instruction and guidance at issue in *Our Lady of Guadalupe* and *Hosanna-Tabor*.”<sup>110</sup>

The SJC acknowledged that “a case need not mirror *Hosanna-Tabor* and *Our Lady of Guadalupe* in order for the ministerial exception to apply.”<sup>111</sup> The Court concluded, however, that “the facts [in DeWeese-Boyd’s suit] are materially different.”<sup>112</sup> As a consequence, “the significant expansion of the ministerial exception doctrine requested by Gordon is not dictated nor, do we believe, directed by existing Supreme Court precedent. It is our understanding that the ministerial exception has been carefully circumscribed to avoid any unnecessary conflict with civil law.”<sup>113</sup>

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

<sup>108</sup> *Id.* at 51–52.

<sup>109</sup> *Id.* at 52–53.

<sup>110</sup> *Id.* at 53. In this analysis, the SJC closely followed the reasoning in *Richardson v. Northwest Christian University*, 242 F. Supp. 3d 1132 (D. Or. 2017). *Richardson* involved Northwest Christian University’s assertion that an employment discrimination claim brought by a professor of exercise science should be barred by the ministerial exception. Applying the “functional analysis” from *Hosanna-Tabor*, the federal district court held that a general duty to integrate faith into teaching is not, standing alone, sufficient to bring a professor within the scope of the ministerial exception. The district court reasoned,

[T]here is evidence plaintiff performed some important religious functions in her capacity as a professor. She was expected to integrate her Christianity into her teaching and demonstrate a maturing Christian faith. But any religious function was wholly secondary to her secular role: she was not tasked with performing any religious instruction and she was charged with no religious duties such as taking students to chapel or leading them in prayer.

*Richardson*, 242 F. Supp. 3d at 1145. The court reasoned that the College’s position “would permit the ministerial exception to swallow the rule that religious employers must follow federal and state employment laws.” *Id.* at 1146.

<sup>111</sup> *De-Weese-Boyd*, 163 N.E.3d at 1017.

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

<sup>113</sup> *Id.* at 1017-18.

Gordon College filed a petition for a writ of certiorari in August 2021. The Court appears to have considered the petition carefully; the petition was distributed for conference seven times.<sup>114</sup> Finally, on February 2, 2022, the Supreme Court denied certiorari. In a statement “respecting the denial of certiorari,” Justice Alito, joined by Justices Thomas, Kavanaugh, and Barrett, commented on the merits of the case. Justice Alito’s statement indicates marked concern with the SJC’s definition of “minister” and its attendant understanding of religious education, but he agreed with the “denial of the petition for a writ of certiorari because the preliminary posture of the litigation would complicate our review.”<sup>115</sup> He stressed, however, that “in an appropriate future case, this Court may be required to resolve this important question of religious liberty.”<sup>116</sup>

Justice Alito’s statement reflects a shift from a focus on the specific functions of the employee to the “autonomy” of the religious institution in defining the content and method of its religious instruction.<sup>117</sup> Most important, Justice Alito seemed to conclude that a teacher’s obligation to infuse faith into her teaching should be sufficient to bring the employee within the ministerial exception.<sup>118</sup> In his view, the approach of the Massachusetts SJC—which relied on the fact that DeWeese-Boyd did not “teach religion, the Bible, or religious doctrine”<sup>119</sup>—reflects “a troubling and narrow view of religious education.”<sup>120</sup> Justice Alito asserted that an institution that offers a faith-infused education often treats “nominally secular” material in a different fashion than would secular institutions, which might take a wide range of philosophical or political perspectives on the same material.<sup>121</sup> Justice Alito thus strongly suggested that a religious school’s requirement that teachers integrate faith into their teaching, standing alone, might be sufficient to bring those teachers within the scope of the ministerial exception.

Justice Alito’s statement makes clear that at least four Justices remain interested in reviewing the Massachusetts SJC’s decision in the Gordon

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<sup>114</sup> See <https://www.supremecourt.gov/docket/docketfiles/html/public/21-145.html> (case docket).

<sup>115</sup> *Gordon College v. DeWeese-Boyd*, 142 S. Ct. 952 (2022) (Alito, J., statement respecting denial of certiorari in *Gordon College v. DeWeese-Boyd*, Docket No. 21–145, *cert. denied*, February 2, 2022). Justice Alito noted that the parties disputed whether the Massachusetts SJC’s decision was final or instead interlocutory, and he acknowledged that “this threshold jurisdictional issue would complicate our review.” *Id.* at 955. He concurred in the denial of certiorari on the understanding that the College could seek review after a final judgment if DeWeese-Boyd prevails on the merits. *Id.*

<sup>116</sup> *Id.* at 952.

<sup>117</sup> *Id.* at 954 (“In *Our Lady of Guadalupe School*, we explained that the ‘ministerial exception’ protects the ‘autonomy’ of ‘churches and other religious institutions’ in the selection of the employees who ‘play certain key roles.’”) (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020)).

<sup>118</sup> *Id.* at 954–55.

<sup>119</sup> *Id.* at 954 (quoting *DeWeese-Boyd*, 163 N.E.3d at 1014) (internal quotation marks omitted).

<sup>120</sup> *Id.* at 954.

<sup>121</sup> *Id.* at 954–55.

College case—and, more important, in expanding the reach of the ministerial exception in cases that involve not only religious K-12 education, but religious higher education as well.<sup>122</sup>

Following the denial of certiorari, the litigation in the Gordon College case will continue in Massachusetts state court. Because the SJC affirmed the trial court’s holding that the plaintiff is not a minister, proceedings on remand will focus on DeWeese-Boyd’s substantive claims under Massachusetts law. The parties will litigate whether the College properly denied the plaintiff’s application for promotion.

It is entirely possible that the case will settle. The plaintiff’s damages will be limited by the fact that the College decided to eliminate the social work department two years after her claims arose.<sup>123</sup> But the prospect of a substantial attorneys’ fee award to the plaintiff’s lawyers, along with the encouragement Justice Alito’s statement likely offered to the College, may mean that the case will be fully litigated on the merits.<sup>124</sup>

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<sup>122</sup> Moreover, Chief Justice Roberts and Justices Gorsuch and Kagan might be amenable to such an expansion, given their approach in other ministerial exception cases. Chief Justice Roberts wrote the opinion in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission v. EEOC*, 565 U.S. 171, 176 (2012), and joined Justice Alito’s opinion in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049. Justice Gorsuch joined Justice Alito’s opinion in *Our Lady of Guadalupe*. *See id.* Justice Kagan joined Justice Alito’s separate concurring opinion in *Hosanna-Tabor*, *supra* at 198 (Alito, J., concurring), which emphasized the autonomy of a religious institution “to determine for itself who is qualified to serve as a teacher or a messenger of its faith,” *id.* at 202, and his opinion in *Our Lady of Guadalupe*, *supra* at 2054.

<sup>123</sup> *De-Weese-Boyd*, 163 N.E.3d at 1004 n.7 (noting that the College eliminated the social work department in 2019).

<sup>124</sup> If the College wins on the merits, then there would be no federal question for the Supreme Court to review. *See* 28 U.S.C. § 1257(a) (“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.”).

Even if DeWeese-Boyd is not a minister, litigation of her claims would not necessarily erase concerns about judicial intrusion into religious judgments by the College. Although the College explained its decision not to concur in the recommendation of DeWeese-Boyd’s promotion by citing her “lack of scholarly productivity, professionalism, responsiveness, and engagement,” *DeWeese-Boyd*, 163 N.E.3d at 1008, the trial court might still find that assessment of those standards is intertwined with religious judgments. (Although the question of scholarly productivity, which is largely a question of quantity, is unlikely to implicate religious judgments, the other characteristics might require assessment of her infusion of faith into the performance of her duties.) If so, the trial court cannot resolve those claims.

The trial court would not be permitted to resolve such claims for two reasons. First, the Massachusetts statutes that authorize DeWeese-Boyd’s discrimination claims provides that “nothing herein shall be construed to bar” religious organizations “from giving preference in hiring or employment to members of the same religion or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.” MASS. GEN. LAWS ch. 151B, § 1, ¶ 5 (2018). Second, under the principles announced in *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevic*, 426 U.S. 696 (1976), and *Jones v. Wolf*, 443 U.S. 595, 604 (1979), civil courts are not competent to adjudicate religious questions. *See infra* notes

In Massachusetts (and in any states that choose to follow the SJC’s reasoning), the SJC’s functional approach to the ministerial exception means that religious colleges will need to require more of teachers than integration of the school’s doctrine into their instruction and scholarship to classify them as ministerial employees. Nor is it likely sufficient to revise a faculty handbook and simply declare that all faculty are “ministers.”

It is only a matter of time, however, before the Supreme Court decides to review a case that involves facts similar to those in *Gordon College v. DeWeese-Boyd*. Justice Alito’s statement will be a looming omnipresence<sup>125</sup> over the litigation of all claims by teachers at religious colleges. In some cases, lower courts will follow Justice Alito’s signaling and more readily find that teachers at such colleges are ministers when they are required to infuse faith into their teaching and scholarship. In other cases, however, lower courts will follow the approach of the Massachusetts SJC, thereby providing the Supreme Court with a vehicle to address the scope of the ministerial exception at religious colleges.

### III. The Future of the Ministerial Exception

Whether a second petition for certiorari follows further litigation in the Gordon College case or instead a similar challenge comes in a case that applies the SJC’s approach, the U.S. Supreme Court will eventually decide whether a duty to infuse faith into teaching and scholarship alone brings teachers within the ministerial exception.

As a threshold matter, the Court will have to decide whether there is a meaningful distinction between K-12 schools, on the one hand, and colleges and universities, on the other. *Hosanna-Tabor* and *Our Lady of Guadalupe* addressed religious K-12 schools. As we explain below, we are skeptical that the mere duty to integrate the faith into all aspects of teaching should be sufficient to bring all teachers (even at K-12 schools) within the scope of the ministerial exception. But we recognize that K-12 teachers often are expected to serve as role models, and character education is an important function at such schools. Indeed, parents often choose to send their children to those schools precisely because of the moral and religious values that they expect will permeate their children’s education.

Higher education is different for several reasons. First, as a matter of traditional Establishment Clause law, the Court has recognized that institutions of higher education, unlike K-12 schools, segregate religious activity from other educational functions, and accordingly may receive direct

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132–150 and accompanying text. If, however, the College’s judgment about DeWeese-Boyd’s performance rested on facts that the trial court can assess without making religious judgments, then the case can proceed.

<sup>125</sup> Cf. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.”).

federal funding.<sup>126</sup> The Court has assumed that the religious component of a college's mission does not permeate the instruction of every course or even most of them. Second, teachers of secular subjects at religious colleges are typically accorded the same degree of academic freedom to which those at nonreligious colleges are entitled.<sup>127</sup> Those faculty, moreover, usually have advanced degrees and other training in their disciplines that is disconnected from the college's faith tradition. (Consider, for example, a math professor with a Ph.D. in data science.) Even if faculty profess the same faith as the

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<sup>126</sup> See *Tilton v Richardson*, 403 U.S. 672, 680–82, 685–87 (1971). In *Tilton*, the Court upheld a program that provided federal funds to construct buildings on college campuses. The program did not exclude religious colleges. The Court noted:

There is no evidence that religion seeps into any of these [federally funded] facilities. Indeed, the parties stipulated in the District Court that courses in these institutions are taught according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards. Although appellants introduced several institutional documents that stated certain religious restrictions on what could be taught, other evidence showed that these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination.

*Id.* at 681. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in contrast, the Court held that the religious and secular aspects of K-12 education could not be reliably separated; the Court thus held that direct funding was impermissible. *But see* *Mitchell v. Helms*, 530 U.S. 793 (1999) (plurality opinion); *see infra* note 254.

<sup>127</sup> Although the American Association of University Professors 1940 Statement of Principles on Academic Freedom and Tenure stated that “limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment,” the 1970 Interpretive Comments clarify that “[m]ost church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 *Statement*, and we do not now endorse such a departure.” See American Association of University Professors, Statement of Principles on Academic Freedom and Tenure (1940), <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure#5> (last visited July 22, 2022). Since that 1970 comment, however, the resurgence of conservative Evangelical Protestantism (in particular) has reinvigorated or created religious colleges and universities, giving them a “covenantal” character. See Tanner Bean & Robin Fretwell Wilson, When Academic Freedom Collides with Religious Liberty of Religious Universities, 15 U. ST. THOMAS L.J. 442, 443 (2019) (borrowing the term from Stephen L. Carter, *The Constitutional and the Religious University*, 47 DEPAUL L. REV. 479, 483 (1998)). See also Gary K. House, *Evangelical Higher Education: History, Mission, Identity, and Future*, 6 J. CATH. EDUC. 480, 480–83 (2003) (citing W. C. RINGENBERG, *THE CHRISTIAN COLLEGE: A HISTORY OF PROTESTANT HIGHER EDUCATION IN AMERICA* (1984)) (noting growth in evangelical colleges and universities after strong trends toward secularization of religious higher education). See generally, RELIGIOUS HIGHER EDUCATION IN THE UNITED STATES: A SOURCE BOOK (Thomas C. Hunt & James C. Carper eds., 2018).

Bean and Wilson describe a wide variety of conflicts between “covenantal” colleges and regulatory institutions. These include attempts by the U.S. Department of Education and the EEOC to require such colleges to prohibit discrimination based on gender identity or sexual orientation. Bean & Wilson, *supra* at 462–63 (describing Obama Administration's requirement that schools apply to the Department for a waiver of Title IX; Title IX exempts religious institutions from its ban on sex discrimination if the entity has a sincerely held religious objection to compliance). The Council for Christian Colleges & Universities, founded in 1976, has been a significant voice for such institutions, and continues to advocate for the place of higher education that is completely integrated with personal faith and religious practice. See generally <https://www.cccu.org/> (last visited July 22, 2022).

college, those teachers are more likely to instruct their students in accordance with the norms of their academic disciplines.

As a consequence, even if the mere obligation to infuse teaching with the faith is sufficient to render teachers at K-12 schools ministers, it is not obvious that the same must be true for faculty at colleges and universities. The SJC, however, did not grapple in its opinion in *Gordon College* with this distinction. Nor did Justice Alito’s statement acknowledge any difference between K-12 education and higher education.

Of course, the scope of the ministerial exception is important because it directly affects many religious colleges and their teachers (and perhaps other employees). The ultimate decision, though, will be even more significant because it has the potential to reshape the fundamental relationship between the Religion Clauses.

As we discussed above, the Supreme Court’s decision in *Hosanna-Tabor* expressly grounded the ministerial exception in both of the First Amendment’s Religion Clauses.<sup>128</sup> A close reading of the case reveals, however, that Establishment Clause concerns predominated.<sup>129</sup> The Court did not ignore Free Exercise concerns; it identified religious liberty as one reason for finding a ministerial exception.<sup>130</sup> But the Court rested its decision on a line of cases that addressed limits on governmental resolution of quintessentially religious questions.<sup>131</sup> As we explain below, such limits derive their force principally from the Establishment Clause.

The Court in *Hosanna-Tabor* reached back to *Watson v. Jones*,<sup>132</sup> a federal common law decision in which the Court required judicial deference to decisions about the ownership of congregational property made by the highest body within the Presbyterian Church.<sup>133</sup> The Court in *Watson*, 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

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<sup>128</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n v. EEOC*, 565 U.S. 171, 188–90 (2012) (stating that the ministerial exception is “grounded in the Religion Clauses of the First Amendment”); see also *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>129</sup> This discussion is drawn from our treatment of the same question in *Smith & Tuttle*, *supra* note 2, at 1856–62.

<sup>130</sup> *Hosanna-Tabor*, 565 U.S. at 188 (“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.”).

<sup>131</sup> See *id.* at 185–87.

<sup>132</sup> 80 U.S. 679 (1871).

<sup>133</sup> *Id.* at 733; see *Hosanna-Tabor*, 565 U.S. at 185–87 (citing *Watson*, 80 U.S. 679).

Presbyterian Church that awarded ownership to one of the competing factions.<sup>134</sup>

The Court in *Hosanna-Tabor* also relied on *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*.<sup>135</sup> In *Kedroff*, the Court adopted *Watson*'s reasoning as a matter of constitutional doctrine under the First Amendment's Religion Clauses.<sup>136</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>137</sup> The state legislature had enacted a law that required every Russian Orthodox church in New York to recognize as authoritative determinations of the North American-based governing body.<sup>138</sup> The New York Court of Appeals relied on the law in ruling against the Russian Orthodox hierarchy in Moscow,<sup>139</sup> but the U.S. Supreme Court reversed.<sup>140</sup> The Court held that civil government must not usurp church authority to decide "strictly ecclesiastical" matters.<sup>141</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>142</sup>

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<sup>134</sup> 80 U.S. at 733.

<sup>135</sup> 344 U.S. 94 (1952); see *Hosanna-Tabor*, 565 U.S. at 186–87 (citing *Kedroff*).

<sup>136</sup> 344 U.S. 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>137</sup> *Id.* at 95–97.

<sup>138</sup> *Id.* at 97–99. The Court described the law at issue, Article 5-C of the Religious Corporations Law of New York, as follows:

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 98–99.

<sup>139</sup> See *Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am. v. Kedroff*, 96 N.E.2d 56, 74 (N.Y. 1950).

<sup>140</sup> *Kedroff*, 344 U.S. at 119.

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

<sup>142</sup> *Id.* at 115. The Court reaffirmed this approach in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). *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 controversial political and social issues. *Id.* at 442 n.1. As in *Kedroff*, the conflict at issue was over ownership of church property. *Id.* at 441–43. The Georgia trial court held that the denomination had departed from traditional Presbyterian doctrine and, therefore, the congregation had the right to claim the property upon its departure from the denomination. *Id.* at 443–44. The Supreme Court of Georgia affirmed, *Presbyterian Church in the U.S. v. Eastern Heights Presbyterian Church*, 159 S.E.2d 690, 701 (Ga. 1968), but the U.S. Supreme Court reversed, reasoning that courts

The Court in *Hosanna-Tabor* also relied on *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevic*,<sup>143</sup> which reaffirmed the principle in *Kedroff*. *Milivojevic* involved the efforts of the U.S.-based Bishop Milivojevic to resist the authority of the Belgrade-based church hierarchy.<sup>144</sup> The hierarchy had restricted the size of Milivojevic's jurisdiction.<sup>145</sup> When he resisted, the hierarchy removed him from his position.<sup>146</sup> Milivojevic filed suit in Illinois state court, claiming that the church had failed to follow its internal procedures for removal of a bishop.<sup>147</sup> The Illinois Supreme Court agreed with Milivojevic and ordered him restored to his diocese and the diocese restored to its original size.<sup>148</sup> The U.S. Supreme Court reversed, holding that courts lack authority to resolve "quintessentially religious controversies."<sup>149</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>150</sup>

Although these cases cited the First Amendment in general rather than relying separately on the Establishment Clause or the Free Exercise Clause,<sup>151</sup> the Court's core reasoning in each case must be based on the

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are not competent to decide what constitutes fidelity to the doctrines of a particular faith. *Blue Hull*, 393 U.S. at 445–46 (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"). 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." *Id.* at 449. Accordingly, "the First Amendment enjoins the employment of organs of government for essentially religious purposes" and "commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." *Id.*

<sup>143</sup> 426 U.S. 696 (1976); see *Hosanna-Tabor*, 565 U.S. at 187 (citing *Milivojevic*).

<sup>144</sup> 426 U.S. at 704.

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

<sup>146</sup> *Id.* at 705.

<sup>147</sup> *Id.* at 706–07.

<sup>148</sup> *Id.* at 708; *Serbian E. Orthodox Diocese for the U.S. of Am. & Can. v. Milivojevic*, 328 N.E.2d 268, 284 (Ill. 1975).

<sup>149</sup> *Milivojevic*, 426 U.S. at 720.

<sup>150</sup> *Id.* at 724–25. In *Jones v. Wolf*, 443 U.S. 595 (1979), which involved a dispute between competing factions over church property, 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 held that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute," *id.* at 604, which the Court defined as "objective, well-established concepts of trust and property law familiar to lawyers and judges," *id.* at 603. But the Court also imposed an important limit on the use of "neutral principles" to resolve intrachurch 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 to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Id.* at 604; see also *id.* 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>151</sup> See, e.g., *Milivojevic*, 426 U.S. at 698, 709–10; *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 100 n.5 (1952); see also *United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969).

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>152</sup> In the middle of the twentieth century, when the Court decided *Milivojevich*, such balancing was a hallmark of decision under the Free Exercise Clause.<sup>153</sup> In Free Exercise Clause cases in that era, the Court measured interference with religious liberty against the state's interest in regulating the matter in question.<sup>154</sup> But the Court made clear in *Milivojevich* and other cases 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>155</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 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>156</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

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<sup>152</sup> See Lupu & Tuttle, *supra* note 2, at 1276–77.

<sup>153</sup> See, e.g., *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); *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 307 (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”).

<sup>154</sup> See *Sherbert*, 374 U.S. at 406.

<sup>155</sup> See *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.”); see also *Blue Hull*, 393 U.S. at 449 (“[T]he First Amendment enjoins the employment of organs of government for essentially religious purposes . . .”).

<sup>156</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”).

study.<sup>157</sup> The same is true when the government displays quintessentially religious symbols with the purpose of promoting religion.<sup>158</sup>

Second, the cases cited in *Hosanna-Tabor* focused narrowly on the religious character of the questions presented to the lower courts. In those decisions, the Supreme Court held that governmental bodies, including courts, lack the competence to resolve strictly and purely ecclesiastical questions.<sup>159</sup> 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>160</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.

As noted above, the *Hosanna-Tabor* Court relied squarely on the line of cases starting with *Watson* in concluding that the ministerial exception exists.<sup>161</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.<sup>162</sup>

As we explained above, Justice Alito's opinion in *Our Lady of Guadalupe* hinted at an alternative source for the ministerial exception, and his statement regarding the denial of certiorari in *Gordon College* brings that

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<sup>157</sup> See *Mitchell v. Helms*, 530 U.S. 793, 822 (1999) (plurality opinion) (recognizing the Establishment Clause's "prohibition against the government providing impermissible content"); *Lemon v. Kurtzman*, 403 U.S. 602, 602–03 (1971) (holding that laws that provided direct public funds for religious education violated the Establishment Clause).

<sup>158</sup> See, e.g., *McCreary County v. ACLU 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>159</sup> See, e.g., *Milivojevich*, 426 U.S.698; *Blue Hull*, 393 U.S. at 445–49; *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 95 (1952); *accord* *Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 363 U.S. 190, 190–91 (1960) (per curiam); *Gonzalez v. Roman Cath. Archbishop of Manila*, 280 U.S. 1, 17–19 (1929).

<sup>160</sup> See JAMES H. HUTSON, *CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES* 52 (2008).

<sup>161</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n v. EEOC*, 565 U.S. at 185–87 (citing and discussing *Watson*, *Kedroff*, and *Milivojevich*).

<sup>162</sup> Some scholars have argued that the creation of a ministerial exception is misguided. See, e.g., Corbin, *supra* note 2.

source to the forefront.<sup>163</sup> The question of the proper source for the ministerial exception is not merely academic. The argument based on ecclesiastical deference, reflected in the case law from *Watson* to *Milivojevich*, focuses on the limited competence of civil courts to decide “quintessentially religious questions.”<sup>164</sup> The argument based on church autonomy, in contrast, draws primarily from the Free Exercise Clause and focuses on the interest of religious organizations in controlling their own institutions and personnel, free from government regulation.

On the Establishment Clause view, the ministerial exception flows from the courts’ lack of capacity to decide religious questions. The contours of the exception, then, should reflect this core justification for the doctrine. At a minimum, courts have the capacity to determine what constitutes “religion” for purposes of interpreting the Establishment Clause.<sup>165</sup>

We believe that the Establishment Clause provides the proper grounding for the ministerial exception. We believe further that civil courts applying the exception should make the threshold determination of who is a minister for purposes of the exception. We reach this conclusion by starting from a basic premise: the First Amendment limits government authority to make laws “respecting an establishment of religion,”<sup>166</sup> and civil courts must have jurisdiction to determine what constitutes such an establishment. In other words, civil courts must determine the meaning of “religion” for Establishment Clause purposes. Courts exercise this responsibility in every Establishment Clause case. For example, to conclude that a speech at a high school graduation impermissibly promotes religion, the court must first decide that the speech was fundamentally religious in nature.<sup>167</sup>

Similarly, in a case that involves a ministerial exception defense to claims by an employee of a religious organization, the court must decide whether the employee falls within the definition of minister. That definition, in turn, depends on the court’s determination that the employee’s role is one that has sufficient hallmarks of those things that are religious for

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<sup>163</sup> See *supra* notes 115–121 and accompanying text.

<sup>164</sup> *Milivojevich*, 426 U.S. at 720.

<sup>165</sup> Civil courts retain the power and responsibility to decide the threshold question whether adjudication of a particular question falls outside their competence. For example, a civil court could not decide which of two factions of a divided church was more faithful to the historical confession of the church. See *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969); *Shannon v. Frost*, 42 Ky. 253 (Ct. of App. 1842). But the decision to abstain follows an initial determination that the matter in question is a quintessentially religious one. *Blue Hull*, *supra* at 445 (noting that case involved controversy “over religious doctrine and practice”). The Establishment Clause, like other provisions of the Constitution, operates against a background assumption that courts must adjudicate controversies properly brought before them.

<sup>166</sup> U.S. CONST., amend. I (“Congress shall make no law respecting an establishment of religion ....”).

<sup>167</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 586 (1992) (stating that the challenged practice of including benediction at graduation involved “the performance of a formal religious exercise”).

Establishment Clause purposes. Just as school-sponsored prayer in a public school implicates the Clause because courts recognize that prayer is a quintessentially religious activity, an employee who leads others in prayer and indoctrinates others in the faith engages in religious activity and would properly fall within the ministerial exception. Crucially, however, the court, and not the religious employer, must determine that the employee's role is sufficiently religious to bring her within the scope of the exception.<sup>168</sup>

The centrality of the Establishment Clause in ministerial exception cases rests on an even more fundamental principle of jurisprudence: the right to equal treatment under the law. It is uncontroversial to assert that courts should treat similarly situated parties the same. In some cases, however, the Establishment Clause requires departure from this principle. Ordinarily, an employee who has experienced an adverse employment decision can seek redress under antidiscrimination law or other civil employment protections. When an employee of a religious organization makes such a claim, the default assumption is that the employee enjoys the same rights as any other employee.

Courts should depart from this norm only when the Establishment Clause<sup>169</sup> requires them to do so. As we explained above, the Establishment Clause prohibits courts from resolving strictly religious questions, including the fitness of a particular person to serve in a role that includes religious functions. Once again, the court must evaluate the role to determine whether it includes such religious functions. If a court instead permits the religious employer to determine who is a minister within the meaning of the exception, then the court will have allowed the employer to become the judge in its own case.<sup>170</sup> At a minimum, courts have a responsibility to determine when departure from the norm of equal treatment is warranted.

Grounding the ministerial exception in the Establishment Clause has three principal doctrinal implications. First, as we have noted, courts, and not religious employers, must determine which employees are ministers for

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<sup>168</sup> See Lupu & Tuttle, *supra* note 2, at 1278 (“This question of role is functional, not ecclesiastical. Were the question of ministerial status ecclesiastical, employers would be free to answer it unilaterally, in a wholly self-interested way.”); *id.* (defending the “[r]etention of judicial control over the factual predicates of the ministerial exception”).

<sup>169</sup> Statutory provisions might also require departure from the norm of equal treatment. For example, Title VII permits religious entities to make employment decisions based on religion, notwithstanding the statute's general prohibition on such discrimination. See 42 U.S.C. § 2000e-1 (2012) (“This subchapter [Title VII] 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>170</sup> The Federalist Papers No. 10 (James Madison) (“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”); see also *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 890 (1990) (rejecting a rule that permits exceptions from neutral and generally applicable laws due to sincere religious objections because under such an approach “each conscience is a law unto itself”).

purposes of the exception. Second, to determine whether an employee is a minister, courts must define those functions that constitute quintessentially religious activity—principally, leading worship and providing instruction in the tenets of the faith—within the meaning of the Establishment Clause. Third, because courts, and not religious employers, will make the threshold determination, the ministerial exception will less frequently conflict with the norm of equal treatment.

The view that Justice Alito advanced in his statement in the Gordon College case, in contrast, treats the ministerial exception primarily as a corollary of the Free Exercise Clause. The Free Exercise Clause protects the liberty of individuals and institutions to engage in religious activity.<sup>171</sup> On Justice Alito’s view, those individuals and institutions effectively have the power to define what constitutes “religious activity” within their understanding of their faith.

Justice Alito’s view derives from the Court’s decision in *Thomas v. Review Board*.<sup>172</sup> In *Thomas*, the plaintiff, a Jehovah’s Witness, sought unemployment benefits after leaving his job at a foundry that made parts for military equipment.<sup>173</sup> Relying on *Sherbert v. Verner*, he claimed an entitlement to benefits because he could not continue, consistent with his religious conscience, to perform his job.<sup>174</sup> The benefits hearing officer allowed the introduction of evidence that another member of his faith community did not believe that the work was “unscriptural.”<sup>175</sup> The Indiana Supreme Court, relying on this evidence, concluded that Thomas lacked a religious basis for his claim, reasoning that he was motivated instead by a “personal philosophical choice.”<sup>176</sup> The U.S. Supreme Court reversed, holding that the government may not second-guess a person’s sincere assertion about a matter of religious conviction.<sup>177</sup> The Court explained,

[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. . . . [I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work

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<sup>171</sup> *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (“[T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions . . .”).

<sup>172</sup> 450 U.S. 707 (1981).

<sup>173</sup> *Id.* at 709–10. Thomas had previously worked in a different department, but when his employer closed the department, Thomas was transferred to a department that made armaments. *Id.*

<sup>174</sup> *Id.* at 710–11.

<sup>175</sup> *Id.* at 711.

<sup>176</sup> *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 391 N.E.2d 1127, 1130 (Ind. 1979); see *Thomas*, 450 U.S. at 713–15.

<sup>177</sup> *Thomas*, 450 U.S. at 716.

because of an honest conviction that such work was forbidden by his religion... [J]udicial review is confined to the facts as found and conclusions drawn.<sup>178</sup>

After the Court’s decision in *Employment Division v. Smith*,<sup>179</sup> there were far fewer opportunities for religious claimants to seek exemptions from neutral and generally applicable laws.<sup>180</sup> Indeed, the Court did not again address the sincerity and substantiality of a religious claim until *Burwell v. Hobby Lobby Stores, Inc.*,<sup>181</sup> which involved a commercial entity’s claim under the Religious Freedom Restoration Act (RFRA) that the Department of Health and Human Services had imposed a substantial burden on its religious exercise. The respondent asserted that the requirement that it provide insurance coverage for contraception to its employees conflicted with its faith.<sup>182</sup> The Court, in an opinion by Justice Alito, held that the requirement imposed a substantial burden in violation of RFRA.<sup>183</sup> The Court relied on *Thomas*, reasoning that “it is not for us to say that [the respondent’s] religious beliefs are mistaken or insubstantial.”<sup>184</sup> Although *Hobby Lobby* involved a claim under RFRA, Justice Alito has made clear his view that the same standard should apply to claims for exemptions under the Free Exercise Clause.<sup>185</sup>

This view of the Free Exercise Clause prioritizes the right of individuals and organizations to determine for themselves what counts as religious activity that deserves legal protection.<sup>186</sup> If the ministerial exception derives

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<sup>178</sup> *Id.* at 715–16; *cf.* *Wis. v. Yoder*, 406 U.S. 205 (1972) (concluding that “to have the protection of the Religion Clauses, the claims must be rooted in religious belief”).

<sup>179</sup> 494 U.S. 872 (1990).

<sup>180</sup> In response to *Smith*, Congress enacted the Religious Freedom Restoration Act in 1993 to require strict scrutiny for government actions that impose a substantial burden on religious exercise. Pub. L. No. 103-141, codified at 42 U.S.C. § 2000bb *et seq.*; *see* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

<sup>181</sup> 573 U.S. 682 (2014).

<sup>182</sup> *Id.* at 701–04.

<sup>183</sup> *Id.* at 736.

<sup>184</sup> *Id.* at 707 (stating that “our ‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction . . .’” (quoting *Thomas*, 450 U.S. at 716)).

<sup>185</sup> *See* *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring in the judgment). Justice Alito argued in *Fulton* that the Court should have overruled *Smith*, *id.* at 1894–1924, and adopted the model of Free Exercise analysis that he applied in *Hobby Lobby*, *id.* at 1924 (urging Court to adopt a rule under the Free Exercise that provides that a “law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest”).

<sup>186</sup> *See id.* at 1884 (“The city of Philadelphia [has] issued an ultimatum to an arm of the Catholic Church: Either engage in *conduct that the Church views as contrary to the traditional Christian understanding of marriage* or abandon a mission that dates back to the earliest days of the Church—providing for the care of orphaned and abandoned children” (emphasis added)); *see also* Helen M. Alvare, *Church Autonomy After Our Lady of Guadalupe School: Too Broad? Or Broad as It Needs to Be?*, 25 TEX. REV. L. & POL’Y 319 (2021); Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701 (2020); Richard W. Garnett, “*The Freedom of the Church*”: (Towards) an Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33 (2013); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); Douglas Laycock, “*The Things That Are Not Caesar’s: Religious Organizations as a Check on the Authoritarian*

from this view of the Free Exercise Clause, then religious employers, and not courts, have authority to determine what counts as religious activity within their faith tradition. It follows that the religious employer also determines who functions as a ministerial employee responsible for providing or leading such religious activity.

In our view, Justice Alito overreads the Court’s decision in *Thomas*. The Court in *Thomas* focused on the competence of civil courts to adjudicate disputed tenets of the faith as between members of that faith tradition.<sup>187</sup> The Court’s decision, however, did not deprive courts of the power or obligation to determine whether the plaintiff is actually claiming that the duty or prohibition in question imposes a substantial burden on sincere religious exercise.<sup>188</sup> In order to resolve that question, courts must determine what constitutes religious exercise within the meaning of the First Amendment.

For example, imagine that an employee at a large manufacturer refuses an assignment to the firearms division at the company. After he is terminated, he seeks unemployment benefits. He asserts that he is an atheist and that, as a matter of moral conviction, he cannot be complicit in the production of weapons. A court can properly determine that his claim does not fall within the Constitution’s definition of religion.<sup>189</sup> In contrast, imagine that a different employee is fired after refusing to work on Sunday, which is her faith’s day of rest. A court can properly determine that her claim involves religious exercise and that the denial of unemployment benefits substantially burdens that exercise.

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*Pretensions of the State*”: *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL’Y 253 (2009); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). *But see* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. REV. 1099, 1112 (“Church autonomy is not and should not be a doctrine recognized in the United States.”).

<sup>187</sup> To be sure, the Court’s decision in *Thomas* went beyond its prior (and subsequent) cases involving the denial of unemployment benefits. In the other cases, the claimants suffered adverse employment consequences because of their commitment to observe the Sabbath. Observance of the Sabbath fits squarely within any manageable definition of religious “exercise.” *See, e.g.*, *Frazee v. Ill. Dep’t of Emp. Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963); *cf. Emp. Div. v. Smith*, 494 U.S. 872 (1990)(sacramental use of peyote). In *Thomas*, however, the plaintiff asserted a religiously motivated justification for his refusal to work in an armaments factory. 450 U.S. at 709–10. There is a difference between worship, on the one hand, and a set of moral beliefs inspired by religious faith, on the other.

<sup>188</sup> *See, e.g.*, Frederick M. Gedicks, “*Substantial*” *Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA*, 85 GEO. WASH. L. REV. 94 (2015).

<sup>189</sup> *See Wis. v. Yoder*, 406 U.S. 205, 215–16 (1972) (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.”).

In other words, there is a fundamental difference between a court's deciding disputed theological questions, on the one hand, and determining whether a case involves religious exercise, or a substantial burden on such exercise, on the other. *Thomas* prohibits courts from engaging in the former, but not the latter. In Justice Alito's view, however, *Thomas* effectively disables courts from questioning (1) whether a claim is religious, (2) whether the claim involves religious exercise, and (3) whether the claim imposes a substantial burden.

To be sure, Justice Alito's view does not appear to be the most employer-favoring view on the Court. Justice Thomas would require courts to "defer to a religious organization's good-faith understanding of who qualifies as its minister."<sup>190</sup> Justice Alito appears to contemplate some greater degree of judicial scrutiny of employer claims that a position is ministerial. Just how much, however, is unclear. In *Hosanna-Tabor*, Justice Alito's concurring opinion focused on the function performed by the employee but concluded by emphasizing that the religious function must be viewed from the employer's perspective.<sup>191</sup> In his statement in the Gordon College case, he shifted his focus even more towards the employer's perspective. He summarized the basis of the ministerial exception by stressing the "the 'autonomy' of 'churches and other religious institutions' in the selection of the employees who 'play certain key roles.'"<sup>192</sup>

The practical consequences of Justice Alito's approach to the ministerial exception are significant. First, following *Thomas v. Review Board*, Justice Alito's approach will accord substantial deference to religious employers' assertions of what constitutes "religious activity" within their faith tradition.<sup>193</sup> This is at the heart of Justice Alito's statement in the Gordon College case. He chided the Massachusetts SJC for advancing a "troubling and narrow view of religious education" that ignored the College's own understanding of what religious education entails.<sup>194</sup> Justice Alito explained,

*What many faiths conceive of as 'religious education' includes much more than instruction in explicitly religious doctrine or theology.... [R]eligious education at Gordon College does not end as soon as a student passes [required courses in Bible, theology, and worship] and leaves the chapel. Instead, the college asks each member of the faculty to 'integrate' faith and learning, i.e., 'to help students make connections between course content, Christian thought and principles, and personal faith and practice.'*<sup>195</sup>

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<sup>190</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n v. EEOC*, 565 U.S. 171, 196 (2012)(Thomas, J., concurring).

<sup>191</sup> *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., concurring) ("What matters in the present case is that Hosanna-Tabor believes that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment.")

<sup>192</sup> *Gordon College v. DeWeese-Boyd*, 142 S. Ct. 952, 954 (2022) (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020)).

<sup>193</sup> See *supra* notes 171–186 and accompanying text.

<sup>194</sup> *Gordon College*, 142 S. Ct. at 954.

<sup>195</sup> *Id.* at 954–55 (emphasis added).

The first sentence of this assertion is telling. Justice Alito implied that the proper judicial inquiry should focus on the employer’s perception of what constitutes “religious activity,” not on some objective account of that category.

Second, by deferring to religious employers’ understanding of religious activity, Justice Alito’s approach necessarily leaves to religious employers the presumptive power to decide who counts as a minister. As Justice Alito stated in *Our Lady of Guadalupe*,

In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. *A religious institution’s explanation of the role of such employees in the life of the religion in question is important.*<sup>196</sup>

Religious organizations have considerable incentives to classify employees as ministers, because the ministerial exception functions to protect the organizations from liability for many workplace claims. It is therefore reasonable to expect employers to advance a capacious understanding of who functions as a minister.

For example, Gordon College argued not only that “the integrative function applies to all teachers at the college, whether they teach computer science, calculus, or comparative religion,” but also that it applies “to all its employees, as integrating the Christian faith into daily life and work is part of the college’s mission for everyone in the community, whether they be coaches, food service workers, or transportation providers.”<sup>197</sup> In other words, Gordon College effectively defined its entire workforce as ministers. Under Justice Alito’s approach, such understandings would be presumptively determinative.

Indeed, a Free Exercise–based ministerial exception, in conjunction with a different strain of Establishment Clause doctrine, might make it impossible in practice not to defer to religious employers’ definitions of religious activity and ministerial employees. Under Justice Alito’s approach, a teacher at a religious school can be a minister solely because she is required to integrate the faith into her teaching. Courts that follow Justice Alito’s approach and seek to determine whether teachers actually infuse the faith into their courses might face a different constitutional problem. Such scrutiny inevitably raises concerns about the state’s impermissible entanglement with religion.

Entanglement concerns were the basis for the Court’s decision in *Lemon v. Kurtzman*,<sup>198</sup> and more recently appeared in Judge McConnell’s opinion

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<sup>196</sup> *Our Lady of Guadalupe*, 140 S. Ct. at 2066 (emphasis added).

<sup>197</sup> *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1017 (Mass. 2021).

<sup>198</sup> 403 U.S. 602, 613–14, 619 (1971) (invalidating state program that provided funding to religious schools because a “comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First

for the Tenth Circuit in *Colorado Christian University v. Weaver*.<sup>199</sup> In *Colorado Christian University*, the court invalidated a state’s exclusion of students attending “pervasively secular” colleges and universities from eligibility for certain state scholarship funds. The court found especially objectionable the prospect of state officials examining the syllabi of courses to determine the extent to which religion is infused into the instruction.<sup>200</sup>

At first blush, such limits on state and judicial scrutiny seem inconsistent with an approach to the ministerial exception, such as the SJC’s in the Gordon College case, that requires courts to conduct a close inquiry of the religious nature of an employee’s duties. We believe, however, that the entanglement concern does not undermine the SJC’s approach, and in fact reinforces our understanding of the ministerial exception grounded firmly in the Establishment Clause. Under the SJC’s approach, a teacher is a minister within the exception if she performs specifically religious activities such as instruction in religious doctrine or scripture. Determining whether a teacher performs such functions is not likely to require excessive entanglement for the same reason that determining that a public high school graduation speech, steeped in explicitly religious language and offered by a minister, does not lead to excessive entanglement.

Consider how a court would address the ministerial exception in practice. Courts generally resolve disputes over an employee’s status under the ministerial exception at the summary judgment stage.<sup>201</sup> To support a motion for summary judgment, the school could seek to demonstrate that the teacher taught quintessentially religious content; in the SJC’s view, there would be no need to demonstrate a link between a “religious worldview” and the otherwise secular subject matter of a course, because an obligation to integrate the faith into teaching is not sufficient to qualify the employee as a minister.<sup>202</sup> A judicial determination that a teacher’s responsibilities are quintessentially religious does not require the kind of intrusive inquiry at issue in *Lemon* or *Colorado Christian University*. The faculty member can testify about her duties and what expectations the school communicated to

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Amendment otherwise respected,” which “will involve excessive and enduring entanglement between state and church”).

<sup>199</sup> 534 F.3d 1245, 1261–62 (10th Cir. 2008) (holding that denial of scholarship funds to students attending “pervasively religious” institutions violates the Religion Clauses).

<sup>200</sup> *Id.* at 1261–63, 1266 (concluding that administrative scrutiny of course content involves “excessive entanglement and intrusion” into the religious beliefs and practices of the religious institutions).

<sup>201</sup> See Smith & Tuttle, *supra* note 2, at 1874–76.

<sup>202</sup> See, e.g., *Palmer v. Liberty Univ.*, 2021 U.S. Dist. LEXIS 248963 (W.D. Va. 2021). In *Palmer*, a teacher at a religious college filed suit after she was terminated, alleging age discrimination. The university invoked the ministerial exception, but the judge denied the university’s motion for summary judgment on those grounds. The court granted the former teacher’s cross-motion for summary judgment, holding that she was not a minister for purposes of the exception. Although the university argued that all faculty had an obligation to “integrate a Christian worldview in their respective disciplines,” the court found that the professor had no duty to teach explicitly religious content and that she never included such content in her classes. *Id.* at \*16–20.

her about religious instruction. And the school can then show the specifically religious doctrines that it expects teachers to communicate. A court could then determine whether the teacher is actually expected to perform religious functions, such as worship or instruction in religious doctrine, without deciding whether religion “infuses” the curriculum.

Under Justice Alito’s approach, however, courts would have to determine whether religion or tenets of the faith are genuinely integrated into the curriculum. Because Justice Alito has a much more capacious understanding of “religion,” regulators’ inspection of course syllabi and materials would necessarily be more expansive and thus intrusive. To avoid the form of entanglement that courts have rightly eschewed, courts would have to give even more deference to the religious institution’s assertions about what constitutes religion and the employee’s status—to adopt, that is, Justice Thomas’s view, which would effectively leave religious organizations outside of the ordinary operation of employment law.

Third, because of this judicial deference both to what constitutes religious activity and to who counts as a minister, Justice Alito’s approach may have implications for a wide range of employers. *Hosanna-Tabor* and *Our Lady of Guadalupe* make clear that this deference applies to determinations by religious primary schools.<sup>203</sup> This deference would extend to religious secondary schools.<sup>204</sup> Justice Alito’s stern warning in his statement in the Gordon College case suggests that the same deference will apply in the context of religious higher education.

There is no reason in principle to believe, moreover, that this deference is limited to the context of religious schools. Religious social welfare organizations have many employees who work generally to advance their employers’ mission. For example, a nurse at a religiously affiliated hospital might be expected to integrate the teachings of the faith into the provision of care. A case worker for homeless families at a faith-based social services office might be instructed to infuse religious values into every aspect of the work with those families. A counselor at a drug treatment program might be obligated to invoke a specific higher power in carrying out the client’s treatment plan. In each of these examples, the employee has a general obligation to integrate faith into the day-to-day performance of the job. Given Justice Alito’s focus on the religious employer’s autonomy—and corresponding power to decide both what constitutes religious activity and who acts as a minister—we see no obvious principled basis to afford these employers less deference than the doctrine gives to religious schools.

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<sup>203</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n v. EEOC*, 565 U.S. 171, 177–78 (2012) (applying ministerial exception to teacher at religious K-8 school); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055–59 (2020) (applying ministerial exception to claims by teachers at religious elementary schools).

<sup>204</sup> See *Our Lady of Guadalupe*, 140 S. Ct. at 2064 (“Religious education is vital to many faiths practiced in the United States.”); *id.* at 2066 (noting that “[e]ducating and forming students in the Catholic faith lay at the core of the mission of the schools where [the plaintiffs] taught”).

If we are correct that Justice Alito’s approach would apply equally in the context of religious social welfare organizations, then the ministerial exception to employer liability begins to swallow the rule. More than one million people work for religious or religiously affiliated social welfare organizations.<sup>205</sup> This is a substantial number of potential “ministers” who would lose the protection of antidiscrimination and other basic employment laws.

In addition, Justice Alito’s approach might extend to for-profit commercial entities that claim a religious identity. In *Hobby Lobby*, for example, a closely held corporation asserted rights to protection of its religious liberty under RFRA.<sup>206</sup> Justice Alito’s opinion for the Court concluded that this corporation enjoyed the same right to religious liberty as any individual, and he explicitly tied these rights to those arising under the Free Exercise Clause.<sup>207</sup> If these entities count as religious employers, then they might have the power to designate at least some of their employees as ministers.<sup>208</sup> To be sure, it is difficult to perceive what religious activity an employee at a hobby store performs.<sup>209</sup> But under Justice Alito’s approach, the employer has substantial room to define what counts as religious activity and who serves as a minister performing that activity.

In sharp contrast to Justice Alito’s vision, courts originally created the ministerial exception as a prophylaxis, designed to ensure that courts did not decide fundamentally religious questions.<sup>210</sup> It is uncontroversial that a religious organization may terminate a minister who deviates in her sermons from the doctrines of the faith; it is equally uncontroversial that a court cannot adjudicate such a dispute, because a civil court cannot decide what is

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<sup>205</sup> Reliable estimates are scarce, but Catholic hospitals alone employ more than 700,000 workers. See Catholic Health Association of the United States, U.S. Catholic Health Care, <https://www.chausa.org/docs/default-source/default-document-library/the-strategic-profile.pdf> (last visited July 5, 2022).

<sup>206</sup> 573 U.S. 682, 702–03 (2014).; see *id.* at 703 (noting that “Hobby Lobby’s statement of purpose commits the [family that owns the company] to ‘[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles’”).

<sup>207</sup> *Id.* at 707 (“[P]rotecting the free-exercise rights of corporations protects the religious liberty of the humans who own and control those companies.”).

<sup>208</sup> See Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 373 (Chad Flanders, Zoe Robinson, & Micah Schwartzman eds., 2016).

<sup>209</sup> *Id.* at 375 (noting that the “distinctive religious character of these organizations is frequently quite thin”).

<sup>210</sup> In *McClure v. Salvation Army*, the first case to recognize a ministerial exception to claims under Title VII, the court explained,

Matters touching [the] relationship [between a religious organization and its ministers] 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.

460 F.2d 553, 559 (5th Cir. 1972).

orthodox within that (or any) faith tradition.<sup>211</sup> But no judicially created exception would be necessary in such a case today, because the principal statutory protections for employees include an explicit exemption for religious organizations from the prohibitions on religion-based discrimination.<sup>212</sup>

Courts devised the ministerial exception to address cases that involved claims other than facially apparent religion-based discrimination. Employment claims that assert other types of discrimination are outside of the reach of the religious exemption in antidiscrimination statutes. Imagine, for example, that a female minister is terminated from her position. The minister sues, asserting a claim of sex discrimination under Title VII or comparable state-law protections. The employer responds by asserting a nondiscriminatory justification for the adverse decision.<sup>213</sup> The plaintiff responds by asserting that the employer's justification is pretextual.

Adjudication of whether the defense is pretextual risks serious entanglement with religious decisions. This is obvious if the employer's justification is based on the minister's poor sermons or deficient pastoral care. But the ministerial exception is prophylactic in that it applies even if the employer's justification does not on its face question the employee's performance of a religious task. Even in such cases, there is a substantial risk that adjudication of whether the employer's defense is pretextual will require the court to decide whether religious tasks have been properly performed.<sup>214</sup>

In other words, the courts that originally recognized the ministerial exception assumed that the performance of certain jobs is so essential to the faith that an ecclesiastical question would be highly likely to arise in litigation over the employee's performance. This is why those courts, including the U.S. Supreme Court in *Hosanna-Tabor*, anchored the ministerial exception in decisions that addressed judicial competence to resolve certain intrafaith disputes.<sup>215</sup> As we explained above, the Court has long held that civil courts lack authority to adjudicate such disputes because civil authority does not reach into quintessentially religious matters.<sup>216</sup>

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<sup>211</sup> See, e.g., *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011 (N.D. Iowa 2007); *McDonnell v. Episcopal Diocese of Ga.*, 381 S.E.2d 126 (Ga. 1989); *Marsh v. Johnson*, 82 S.W.2d 345 (Ky. 1935).

<sup>212</sup> See, e.g., 42 U.S.C. § 2000e-1 (2012); D.C. CODE § 2-1402.11 (2017); MD CODE ANN., STATE GOV'T § 20-606 (West 2017).

<sup>213</sup> This is what happened in the Gordon College case. See *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1002–03, 1017–08 (Mass. 2021). (noting that the President and Provost asserted that the nonconcurrence decision was based on poor job performance rather than disagreement about theological matters).

<sup>214</sup> *Butler v. St. Stanislaus Kostka Cath. Acad.*, 2022 U.S. Dist. Lexis 113040 (E.D.N.Y. 2022), at \*35–41.

<sup>215</sup> See *McClure*, 460 F.2d at 559–60 (citing *Watson*, *Gonzalez*, *Kedroff*, and *Blue Hull*); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n v. EEOC*, 565 U.S. 171, 185–97 (2012)(citing *Watson*, *Kedroff*, and *Milivojevich*).

<sup>216</sup> See *supra* notes 131–161 and accompanying text.

These limits on judicial authority exist even when the parties willingly submit their dispute for resolution by a civil court. Although the ministerial exception is an affirmative defense,<sup>217</sup> the religious organization is not free to waive the limit on the court’s competence.<sup>218</sup> For example, in *Equal Employment Opportunity Commission v. Catholic University of America*, the plaintiff claimed that she had been denied tenure because of her sex.<sup>219</sup> The university did not assert the ministerial exception in its defense; instead, it argued, among other things, that the plaintiff’s scholarship lacked the quality required by the school’s tenure standards.<sup>220</sup> The court invoked the ministerial exception *sua sponte* to avoid judging the quality of the plaintiff’s Roman Catholic canon law scholarship.<sup>221</sup>

*EEOC v. Catholic University* underscores the root of the ministerial exception in the Establishment Clause. If the exception arose from the Free Exercise Clause and its protection for church autonomy, then the religious employer would be free to waive it.<sup>222</sup> Because the exception exists to limit the scope of judicial authority, the parties do not have ultimate control over its application.

Despite Justice Alito’s strong signals to the contrary, we continue to believe that the ministerial exception is best understood as a prophylaxis that guards the limits on civil court competence. On our account, the scope of the exception should be carefully circumscribed to advance that prophylactic function. The ministerial exception is not a generative norm that creates new powers for religious institutions. It simply ensures that courts will abstain from decisions that are closely bound up with quintessentially religious questions. The definition and recognition of such questions belongs to civil

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<sup>217</sup> See *Hosanna-Tabor*, 565 U.S. at 195 n.4 (“We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”); see generally Smith & Tuttle, *supra* note 2, at 1864–72.

<sup>218</sup> See Conlon v. Intersvarsity Christian Fellowship/USA, 777 F.3d 829, 836 (6th Cir. 2015) (holding that ministerial exception is not waivable); cf. Michael J. West, Note: *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861 (2017) (arguing that ministerial exception can be waived but that parties cannot confer on civil courts jurisdiction to decide religious questions); but see Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1901, 1921–23 (2013) (arguing that a religious organization can waive a ministerial exception defense).

<sup>219</sup> 83 F.3d 455, 457 (D.C. Cir. 1996).

<sup>220</sup> *Id.* at 459.

<sup>221</sup> *Id.* at 460.

<sup>222</sup> Similarly, religious organizations may invoke the ministerial exception even when their own explicit policies prohibit the type of discrimination claimed by the plaintiff. For example, imagine that a religious organization’s rules prohibit sex-based discrimination in all employment decisions. The plaintiff, a female ministerial employee, sues, asserting that she was terminated because of her sex. Even if the church’s own investigation determined that the plaintiff was terminated because of her sex, the ministerial exception would still bar her claim. If the ministerial exception derived from the Free Exercise Clause’s protection for church autonomy, then the church arguably would be estopped from raising the exception in such a case. *But cf.* Corbin, *supra* note 2, at 960–64 (arguing that the court could have adjudicated Perich’s retaliation and reinstatement claims without deciding ecclesiastical questions).

courts in light of broader theories about the government’s secular character. It cannot be left to the subjective beliefs of religious organizations.

#### IV. Further Implications of the Broad Ministerial Exception

The dispute in *Gordon College* involves only the relationship between the religious employer and its employees. A broad ministerial exception in the form contemplated by Justice Alito, however, is likely to have implications for the relationship between religious institutions and the government, as well. Specifically, it is plausible to argue that the theoretical underpinnings of a broad ministerial exception, grounded in church autonomy, require the government to exempt religious organizations from certain conditions on the receipt of public funds.

Imagine, for example, that some rural school districts in Oregon do not have a public secondary school. The state permits those school districts to contract with a nonpublic school to provide students with access to a high school education. Under state law, schools that enter contracts with a district to provide such opportunities must agree not to discriminate in hiring on the basis of race, sex, or sexual orientation.<sup>223</sup> Imagine further that the state denies a religious school’s contract bid because the school refused to sign a pledge to refrain from discrimination on the basis of sexual orientation. May the state exclude the school from participation in the program?<sup>224</sup>

The answer is surprisingly complicated. In *Carson as Next Friend of O.C. v. Makin*,<sup>225</sup> the Supreme Court held that Maine could not exclude religious schools from a closely related program for rural school districts. In that program, the state gave parents in such districts a choice among public schools in adjacent districts and private schools.<sup>226</sup> The statute, however, required eligible private schools to be “nonsectarian.”<sup>227</sup> The Supreme Court held that the exclusion of nonsectarian schools impermissibly denied parents and religious schools equal access to public funds, in violation of the Free Exercise Clause.<sup>228</sup>

There are two notable differences between our example and the program at issue in *Carson*. First, the program in *Carson* did not involve direct

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<sup>223</sup> We focus here on conditions that prohibit discrimination in the hiring of school employees, not on the admission of students. Because students obviously are not employees of the schools, the schools cannot rely on the protection of the ministerial exception to defend discriminatory admissions policies.

<sup>224</sup> This example is based on Maine’s statutory scheme for contracts for secondary education in rural districts. ME. REV. STAT. ANN. § 5204(3) (2022).

<sup>225</sup> 142 S. Ct. 1987 (2022).

<sup>226</sup> ME. REV. STAT. ANN. § 5204(4) (2022) (“A school administrative unit that neither maintains a secondary school nor contracts for secondary school privileges ... shall pay the tuition ... at the public school or the approved private school of the parent’s choice at which the student is accepted.”).

<sup>227</sup> *Id.* § 2951(2) (requiring that any school receiving tuition assistance payments must be “a nonsectarian school in accordance with the First Amendment of the United States Constitution”).

<sup>228</sup> *Carson*, 142 S. Ct. at 2002.

funding,<sup>229</sup> whereas our example does. The Supreme Court’s decision in *Carson*, however, appears to make the distinction between direct and indirect funding essentially irrelevant.<sup>230</sup> Second, whereas the program in *Carson* expressly prohibited the use of state funds at sectarian schools, in our example the state’s requirement does not explicitly exclude religious schools. The program accordingly does not “discriminate” on the basis of religious identity or character. Instead, some religious schools will claim that the nondiscrimination requirement will force them to choose between receiving government funds and adherence to their religious principles.<sup>231</sup>

A core element of the decision in *Carson* and the line of decisions that it follows is that religious organizations should not be forced to make such a choice.<sup>232</sup> But the Court held in *Employment Division v. Smith*<sup>233</sup> that the Free Exercise Clause does not require exemptions from neutral and generally applicable requirements for those with religious objections to compliance. In addition, the Court in *Fulton v. City of Philadelphia*<sup>234</sup> specifically declined

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<sup>229</sup> In this context, “indirect” funding refers to public money that flows to an institution because of the intervening choice of the program beneficiary, in this case the parents. “Direct” funding refers to the provision of government funds when the state selects the institution that will receive program funds. See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 201, 221–27 (2005).

<sup>230</sup> Although the Court noted that the public funds under the program flowed to religious schools because of the intervening choice of parents, see 142 S. Ct. at 1997–98 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002)), the Court also offered a more expansive reason why the program would not conflict with the Establishment Clause. The Court invoked a capacious understanding of “neutrality” as the determinative characteristic for both Establishment Clause and Free Exercise Clause analysis, reasoning that “there is nothing neutral about Maine’s program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion.” *Id.* at 1998. In addition, the Court suggested that there was no meaningful difference between the program at issue in *Carson*, which involved indirect funding, and the program at issue in *Trinity Lutheran*, which involved direct funding. See *id.* at 1996, 2000–02; see also Ira C. Lupu & Robert W. Tuttle, *Carson v. Makin and the Dwindling Twilight of the Establishment Clause*, AMERICAN CONSTITUTION SOCIETY EXPERT FORUM, <https://www.acslaw.org/expertforum/carson-v-makin-and-the-dwindling-twilight-of-the-establishment-clause/> (last visited July 5, 2002).

<sup>231</sup> For discussions of religious objections to neutral conditions, see Douglas NeJaime & Reva Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, in RELIGIOUS FREEDOM AND LGBT RIGHTS: POSSIBILITIES AND CHALLENGES FOR FINDING COMMON GROUND (Robin Fretwell Wilson & William N. Eskridge, Jr. eds., 2018); see generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

<sup>232</sup> See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (noting that although the church remained “free to continue operating as a church,” it could enjoy that freedom only “at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center [was] otherwise fully qualified”); *Carson as Next Friend of O.C. v. Makin*, 142 S. Ct. 1987, 1997 (2022) (“By ‘condition[ing] the availability of benefits’ in that manner, Maine’s tuition assistance program—like the program in *Trinity Lutheran*—‘effectively penalizes the free exercise’ of religion” (quoting *Trinity Lutheran*, 137 S. Ct. at 2021)).

<sup>233</sup> 494 U.S. 872 (1990).

<sup>234</sup> 141 S. Ct. 1868 (2021).

to overrule *Smith*,<sup>235</sup> notwithstanding Justice Alito’s extensive opinion concurring in the judgment, which urged the Court to do so.<sup>236</sup> The requirement in our example that participating schools refrain from discrimination based on sexual orientation is neutral and generally applicable.<sup>237</sup>

In other words, it is not clear under current Free Exercise doctrine whether the state would be compelled to fund a religious school that refuses to comply with the antidiscrimination requirement.<sup>238</sup> For the purpose of this article, we will assume that the rule in *Smith* would apply. In practice, however, a broad ministerial exception might nonetheless require the state to include the religious school in its funding program.

Return to the example above. A religious school in Oregon requires teachers to integrate the faith into all aspects of its curriculum. The school applies to participate in the funding program for rural districts but asserts that its religious doctrine precludes it from employing gay and lesbian teachers. The school explains that, for the reasons suggested by Justice Alito in his Gordon College statement, its teachers are ministerial employees. Finally, the school argues that the state’s eligibility requirement functions as a form of state control over its selection of ministers.

The school’s basic contention is similar to a conventional Free Exercise claim: the state’s condition impermissibly forces the school to choose between religious principle and access to public funds. But Justice Alito’s version of the ministerial exception provides a different, and potentially stronger, basis for the school’s objection.

Whereas the rule in *Smith* presents a significant obstacle to the school’s Free Exercise claim for an exemption from the antidiscrimination requirement, the Court in *Hosanna-Tabor* expressly held that the ministerial exception applies notwithstanding the Court’s decision in *Smith*.<sup>239</sup> The Court reasoned that *Smith* “involved government regulation of only outward

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<sup>235</sup> *Id.* at 1876–77 (stating that “we need not revisit [*Smith*] here” because “[t] his case falls outside *Smith* ...”).

<sup>236</sup> *Id.* at 1883–1926 (Alito, J., concurring in the judgment) (urging the Court to overrule *Smith*).

<sup>237</sup> “Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.” *Fulton*, 141 S. Ct. at 1877. “A law is not generally applicable if it ‘invite[s]’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions,’ ” *id.* (quoting *Smith*, 494 U.S. at 884), or if it “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way,” *Fulton*, 141 S. Ct. at 1877 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542–46 (1993)).

<sup>238</sup> *Cf. Fulton*, 141 S. Ct. at 1882 (holding that City violated religious organization’s Free Exercise rights by excluding it from foster-care program because of the organization’s refusal to comply with requirement that prohibited discrimination against families headed by same-sex couples).

<sup>239</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n v. EEOC*, 565 U.S. 171, 190 (2012).

physical acts,” whereas the teacher’s claim in *Hosanna-Tabor* “concern[ed] government interference with an internal church decision that affects the faith and mission of the church itself.”<sup>240</sup> The Court therefore concluded that the “contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.”<sup>241</sup>

Indeed, the school’s claim to be exempt from the nondiscrimination condition in the contract proves more potent than even a pre-*Smith* assertion of a “substantial burden” on religious exercise. For the three decades before the Court’s decision in *Smith*, courts purported to apply a test comparable to strict scrutiny to claims under the Free Exercise Clause for exemptions from neutral and generally applicable rules.<sup>242</sup> Under that approach (which the Court did not consistently follow), if the claimant could show a substantial burden on religious practice imposed by such a rule, then the state would be required to demonstrate that it had a compelling interest in denying the exemption.<sup>243</sup>

As noted above, the ministerial exception—because of its doctrinal roots in the Establishment Clause—does not permit courts to balance the state’s interest in promoting equality norms in the workplace against the religious institution’s interest in control over the selection of ministers.<sup>244</sup> When a religious employer successfully demonstrates that an employee falls within the ministerial exception, the court can reject the employee’s discrimination claim, no matter how strong on the merits—and no matter how important, as a matter of public policy, the antidiscrimination norm might be.<sup>245</sup> Even though Justice Alito seeks to ground the ministerial

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<sup>240</sup> *Id.* Indeed, the Court in *Smith* specifically excluded from the reach of its decision cases involving government attempts to “lend its power to one or the other side in controversies over religious authority or dogma.” *Smith*, 494 U.S. at 877.

<sup>241</sup> *Id.*

<sup>242</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>243</sup> See *Sherbert*, 374 U.S. at 406–07 (inquiring 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” and concluding that desire to prevent the “filing of fraudulent claims by unscrupulous claimants feigning religious objections” was insufficient); *Wis. v. Yoder*, 406 U.S. 205 (1972) (concluding that state’s interest in compulsory education did not justify refusal to exempt Amish families from requirement). In his separate opinion in *Fulton*, Justice Alito argued for a return to this approach under the Free Exercise Clause. See 141 S. Ct. at 1924 (Alito, J., concurring in the judgment) (“If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.”). Notwithstanding this apparently rigorous standard, the Court almost always found in favor of the government in cases involving claims for religious exemptions from general laws. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982); *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *O’Lone v. Est. of Shabazz*, 482 U.S. 342 (1987).

<sup>244</sup> See *supra* notes 152–158 and accompanying text.

<sup>245</sup> See, e.g., *Hosanna-Tabor*, 565 U.S. at 196 (holding that the ministerial exception barred the plaintiff’s suit for discrimination under the Americans with Disabilities Act).

exception in the Free Exercise Clause, there is no indication that he would abandon this Establishment-Clause-based aspect of the exception.<sup>246</sup> Because all of the teachers at our hypothetical religious school fall within Justice Alito’s understanding of the ministerial exception, the school would effectively be free of nondiscrimination obligations in its employment relations with them.

The question remains whether the state may exclude from participation in the program schools that refuse to comply with the antidiscrimination requirement. After all, if the state does not fund the school, the state will not interfere with the school’s selection or retention of teachers.

Prior to the Court’s decision in *Carson*, the state could have contended that its program did not discriminate against religious schools based on their religious identity. In *Trinity Lutheran*, the Court expressly distinguished between state discrimination on the basis of religious status, on the one hand, and religious use of government funds, on the other. The case involved funding for playground resurfacing, and the state program categorically excluded churches from eligibility.<sup>247</sup> The Court concluded that such discrimination on the basis of religious identity violated the Free Exercise Clause.<sup>248</sup> In a footnote, however, the Court stated, “We do not address religious uses of funding or other forms of discrimination.”<sup>249</sup>

In *Espinoza v. Montana Department of Revenue*,<sup>250</sup> the Court continued to rely on this distinction between status and use. In that case, the state sought to include religious schools in a program that provided tax deductions for donations to create scholarships at primary and secondary schools. The state Supreme Court held that the state constitution barred the use of state funds for religious schools and, as a remedy, ordered the state to end the program—for scholarships at all schools, religious and secular. The U.S. Supreme Court concluded that the state court’s interpretation of its constitution violated the Free Exercise Clause.<sup>251</sup> The Court reasoned that the interpretation reflected discrimination against religious schools because of their religious identity.<sup>252</sup>

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<sup>246</sup> See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020) (“When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow.”).

<sup>247</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017) (noting that the Missouri Department of Natural Resources “had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity”).

<sup>248</sup> *Id.* at 2021–25 (concluding that the program “expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character”).

<sup>249</sup> *Id.* at 2024 n.3.

<sup>250</sup> 140 S. Ct. 2246 (2020).

<sup>251</sup> *Id.* at 2254–63.

<sup>252</sup> *Id.* at 2261 (“A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”).

Before the decision in *Carson*, therefore, the state could have defended the hypothetical condition of nondiscrimination in employment by arguing that the condition does not exclude religious schools because of their religious identity. If a religious school agrees not to discriminate in hiring on prohibited grounds, then the school will be fully eligible to participate in the program.

In *Carson*, however, the Court rejected the distinction between religious identity and religious use. The court of appeals had concluded that Maine's exclusion of religious schools from the program to provide rural students with access to a high school did not violate the Free Exercise Clause because the program "impose[d] a use-based restriction," rather than a status-based one. The Supreme Court rejected the distinction. The Court acknowledged that *Trinity Lutheran* and *Espinoza* "held that the Free Exercise Clause forbids discrimination on the basis of religious status," but it asserted that "those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause."<sup>253</sup> After *Carson*, states may no longer deny funds to religious schools simply because religious schools might use the funds for religious purposes.<sup>254</sup>

In our example, the school could plausibly argue that the state's nondiscrimination requirement operates in practice as discrimination based on religious use of the funds precisely because its teachers are ministers. The argument would proceed in five steps. First, the school will note that the state effectively funds the operation of schools that participate in the program. Second, those funds necessarily would be used to support the hiring of teachers. Third, the function of the teachers at our hypothetical religious

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<sup>253</sup> *Carson as Next Friend of O.C. v. Makin*, 142 S. Ct. 1987, 2001 (2022).

<sup>254</sup> Although the Court in *Locke v. Davey*, 540 U.S. 712 (2004), upheld a state scholarship program that excluded students pursuing degrees in devotional theology, we assume that *Locke* is effectively no longer good law after the Court's decision in *Carson*. See *Carson*, 142 S. Ct. at 2002 ("*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."). In addition, the Court's reasoning in *Carson* strongly suggests that *Tilton v Richardson*, 403 U.S. 672 (1971), which the Court decided on the same day as *Lemon v. Kurtzman*, 403 U.S. 602 (1972), is no longer good law. In *Tilton*, the Court held that the government can directly fund higher education facilities but that such funding programs must include a ban on the use of funds for religious purposes. This limit is now presumably ineffective.

We also assume that the Court has not rejected the fundamental requirement of neutrality in government funding as a requirement of the Establishment Clause. As the plurality in *Mitchell v. Helms*, 530 U.S. 793 (1999), explained, the main question in deciding if an aid program violates the Establishment Clause is whether any "religious indoctrination" supported by the aid can be attributed to the government:

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and a religious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.

*Id.* at 809.

school will be to deliver the school's religious message and to mold students in the faith. Fourth, state requirements that limit the school's power to select and exercise control over those teachers prevent the school from using the state's funds for religious purposes. Fifth, the school would argue that, in practice, only schools that have religious beliefs that are compatible with the state's antidiscrimination norms (or schools that do not consider their teachers to be ministers) would be eligible to participate in the program. In this sense, the antidiscrimination condition operates as a restriction on the religious use of funds.

To be sure, we do not find this argument persuasive, even accepting *Carson's* rejection of the status-use distinction. The antidiscrimination condition does not inevitably control the religious content of classroom instruction. The school would still be free to require teachers to deliver that content in a manner consistent with the faith.

But Justice Alito's expansive account of the ministerial exception, and more broadly of the Free Exercise Clause, opens the door to arguments like those of our hypothetical school. In a world in which a religious school can define all of its teachers as ministers, and in which "pervasively sectarian" schools are constitutionally entitled to government funds on an equal basis with other nonpublic schools, the state risks losing its power to advance nondiscrimination norms in hiring. In our example, it is at least plausible that the school would be entitled to insist on participation in the state program without compliance with the nondiscrimination requirement.

## V. Conclusion

The *Gordon College* case returns to the state courts against the backdrop of an unsettled but diminishing account of the Establishment Clause. In *Hosanna-Tabor*, both Religion Clauses anchored the exception. After Justice Alito's statement respecting the denial of certiorari in *Gordon College*, we suspect that it will become increasingly difficult to locate in the doctrine any remaining traces of the Establishment Clause. As we argued above, an exception derived entirely from Free Exercise principles, at least on Justice Alito's account, deprives civil courts of nearly all capacity to control the scope of the exception. As with his general Free Exercise jurisprudence, based on his vast overreading of the Court's decision in *Thomas v. Review Board*, religious claimants alone determine the religious significance of an asserted exception.

We think that this approach is wrong as an interpretation of both Religion Clauses. As one of us has argued elsewhere, Justice Alito misreads the relevant constitutional history in his argument that *Smith* should be overruled.<sup>255</sup> At the time of the founding, state constitutions consistently

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<sup>255</sup> Ira C. Lupu & Robert W. Tuttle, "The Radical Uncertainty of Free Exercise Principles: Comment on *Fulton v. City of Philadelphia*," AM. CONST. SOC'Y SUP. CT. REV. 2020-21, <https://www.acslaw.org/analysis/acs-journal/2020-2021-acs-supreme-court-review/the-radical-uncertainty-of-free-exercise-principles-a-comment-on-fulton-v-city-of-philadelphia/>.

described the protected scope of religious exercise as worship, religious instruction, and proselytizing—provided that those practices did not disturb the public welfare. No state constitution included any protection for religiously motivated objections to otherwise secular civil laws.<sup>256</sup> We believe that the Court should focus on those same characteristics of religion in its interpretation of the Establishment Clause. The state impermissibly “establishes” religion when it engages in, sponsors, or attempts to control worship, religious education, or proselytizing.

We do not believe that this approach results in a secular “public square,” as many have argued.<sup>257</sup> This understanding of religion for purposes of the Religion Clauses is a legal, rather than a theological, construct. It does not claim to define the subjective experience of believers or religious communities. As a legal matter, religion involves actions that do not have clear secular analogs, such as worship, prayer, ritual, or indoctrination in matters of the faith that do not substantially overlap with matters of the secular world. The nonreligious or secular is not necessarily a space where God is absent.<sup>258</sup> It is simply a domain where religious motivations and actions are outwardly indistinguishable from those motivated by secular concerns.

Our approach recognizes a fundamental symmetry between the Religion Clauses,<sup>259</sup> whereas the current approach fully subordinates nonestablishment principles to free exercise interests. In the context of the ministerial exception, our approach would follow the functional analysis that the Court appeared to endorse in *Hosanna-Tabor* and *Our Lady of Guadalupe*. Civil courts are competent to decide when a position involves worship, religious instruction, or proselytizing—because those are the same features that courts must be competent to assess in order to interpret the Establishment Clause.

Does a religious college’s requirement that teachers “infuse” the faith into their teaching and scholarship make them religious educators? It depends on the facts—on whether, for example, the teacher is evaluated on that basis, or whether the teacher engages in “specifically religious instruction” (i.e., invoking religious doctrine or interpreting religious texts), or whether the teacher leads students in prayer or worship. If the instructor who is simply a religious role model for students is deemed a minister, however, then all mooring in the Establishment Clause, as well as the original meaning of the Free Exercise Clause, is lost.

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<sup>256</sup> For an overview of the historical background of the Free Exercise Clause, see JACK N. RAKOVE, *BEYOND BELIEF, BEYOND CONSCIENCE: THE RADICAL SIGNIFICANCE OF THE FREE EXERCISE OF RELIGION* (2020).

<sup>257</sup> See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984).

<sup>258</sup> Indeed, the state has nothing to say about where God is or is not present.

<sup>259</sup> See IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* (2014).