A MINISTERIAL EXCEPTION FOR ALL SEASONS: *OUR LADY OF GUADALUPE SCHOOL V. MORRISSEY-BERRU*, 140 S. CT. 2049 (2020)

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INTRODUCTION

The American polity has long been wary of federal involvement in the selection of religious personnel. This was not merely the result of abstract reasoning, but rather the felt experience from "Europe's long and bloody history of 'conflict[s] over the government's intervention in [religious] decisionmaking.'"[1] Declining to follow Europe down this same path, an early Congress rejected France's request to approve a Catholic Bishop for America,[2] calling it a "purely spiritual" decision beyond "the jurisdiction and powers of Congress."[3] This type of political entanglement with ecclesiastical

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1. Brief for Professors Douglas Laycock et al. as Amici Curiae Supporting Petitioner at 5, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (No. 19-267) (quoting Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 179 (2011)) [hereinafter Laycock et al.].

2. *See id.* at 8.

3. *See* EXTRACT FROM THE SECRET JOURNAL OF FOREIGN AFFAIRS (May 11, 1784), *in* 1 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA 83, 84 (1837), *quoted in* Laycock et al., *supra* note 1, at 8.

decisions directly influenced the structure and substance of the First Amendment's dual Religion Clauses.[4] The First Amendment charted a different relationship between government and religion: "the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices."[5]

The "ministerial exception" is one such manifestation of the First Amendment's protection for religious groups from government intrusion. The ministerial exception exempts religious entities from certain laws regulating their employment relationship with employees[6] who perform important religious functions. "This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission."[7]

The Supreme Court has now addressed the ministerial exception in two cases, and both times it has properly prevented the government from interfering with a religious group's decision over who can serve as teachers at parochial schools. Religious schools are important, but the ministerial exception extends well beyond the confines of a classroom. To date, the Supreme Court has offered no overarching "formula for deciding when an employee qualifies as a minister," and so far has only addressed "circumstances" relevant to teachers.[8] This leaves open questions about employees in a whole host of other contexts, all of which present unique and fact-specific circumstances to consider.

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4. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 183 (2012) ("It was against this background that the First Amendment was adopted.").

5. *See id.* at 184.

6. Despite often analyzing which *employees* are ministers, the ministerial exception extends beyond formal employment arrangements. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 n.1 (2020) (Thomas, J., concurring) ("As the Court acknowledges, the term 'ministerial exception' is somewhat of a misnomer. . . . Rather, as these cases demonstrate, such protection extends to the laity, provided they are entrusted with carrying out the religious mission of the organization.").

7. *Id.* at 2060 (majority opinion).

8. *See Hosanna-Tabor*, 565 U.S. at 190.

The principles articulated in *Our Lady of Guadalupe v. Morrissey-Berru*[9] lay the foundation for the best path forward. As the majority and concurring opinions demonstrate, faithfully and consistently applying the ministerial exception to a myriad of contexts can best be done by: (1) focusing on the employee's *functions* over other considerations like title and training; and (2) *deferring* to the religious entities on what religious functions are critical to the group's mission. An approach centered on these dual pillars honors the First Amendment's steadfast commitment to avoiding governmental entanglement in the internal matters of religious organizations and is applicable to all faiths, circumstances, and seasons.

I. *OUR LADY OF GUADALUPE* IN CONTEXT

A. Prior Caselaw

Despite the ministerial exception's relatively short history as a matter before the Supreme Court, it is a well-established doctrine among the lower courts. Beginning with the Fifth Circuit in 1972,[10] every circuit eventually came to recognize the ministerial exception,[11] as well as every state supreme court that addressed the ministerial exception's existence.[12] This means *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the first ministerial exception case before the Supreme Court, was a moment of recognition, not creation.[13] This case centered around a religious school and Cheryl Perich, a "called teacher,"[14] who taught fourth graders all the typical curriculum found in any fourth grade classroom. But she also

9. 140 S. Ct. 2049 (2020).

10. *See* McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972).

11. *See Hosanna-Tabor*, 565 U.S. at 188 n.2 (collecting cases). This excludes the Federal Circuit, which jurisdictionally cannot hear such claims.

12. *See* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 846 (2012).

13. *See Hosanna-Tabor*, 565 U.S. at 188 ("We agree [with the Courts of Appeals] that there is such a ministerial exception.").

14. Within the Lutheran Church—Missouri Synod, a "called teacher" is one who has satisfied certain academic requirements, is called by a local congregation, and accepts the vocation of teaching, thereby earning the formal title of "Minister of Religion, Commissioned." *See id.* at 177.

taught a religion class, led students in prayer, and occasionally spoke at chapel services.[15] After an employment dispute arose over Perich's ability to teach following a diagnosis of narcolepsy, Perich eventually claimed employment discrimination and sued.[16]

The Supreme Court unanimously sided with the school. In doing so, the Court relied on both the Establishment and Free Exercise Clauses to justify its holding. "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[17]

The Supreme Court recognized the ministerial exception's solid constitutional foundation, but declined to provide a clear formula for evaluating future cases.[18] Instead, the Court looked at four considerations to determine that Perich was a minister: (1) her title; (2) the substance of her title; (3) "her own use of that title[;]" and (4) "the important religious functions she performed . . . ."[19] These considerations were sufficient to resolve *Hosanna-Tabor*, but offer little guidance outside of this narrow fact-pattern. This lack of guidance did not go unnoticed. In a concurrence, Justice Thomas argued that to apply this protection consistently given religious organizations' wide variety of structures, courts should defer to the organization's views of who qualifies as a minister.[20] Justice Alito also wrote a concurrence, joined by Justice Kagan, which highlighted that given the disparity among religions regarding the use and understanding of titles, including "minister," "courts should focus on the function performed by persons who work for religious bodies."[21] These ideas, presented by the concurring justices in *Hosanna-Tabor*, took center stage in *Our Lady of Guadalupe*.

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15. *See id.* at 178.

16. *See id.* at 179–80.

17. *Id.* at 184.

18. *See id.* at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.").

19. *Id.* at 192.

20. *See id.* at 197 (Thomas, J., concurring).

21. *See id*. at 198 (Alito, J., concurring).

B. Our Lady of Guadalupe

Hosanna-Tabor clearly affirmed the ministerial exception, but left unresolved many questions about its exact scope and contours. Eight years later, the Court offered another data point. *Our Lady of Guadalupe* centered on two schoolteachers—Agnes Morrissey-Berru and Kristen Biel—who both taught at Catholic elementary schools.[22] The two teachers had similar employment agreements and job responsibilities. The employee agreement explained that the school's "overriding commitment" was "to develop and promote a Catholic School Faith Community."[23] A teacher's role in the faith community was to "'model and promote' Catholic 'faith and morals'" and ensure "faith formation of the students in their charge each day."[24] This included teaching religion, regularly praying with the students, and helping students learn about and participate in Mass and other religious activities.[25]

While those job duties may sound similar to Perich's role, these facts are no carbon-copy of *Hosanna-Tabor*. Perich held a title of "Minister of Religion, Commissioned," the two individuals here were "Teacher[s]" and "Lay Employees[;]"[26] Perich completed eight theology classes as part of her commissioning, the two here had far less formal theology training;[27] and while Perich held herself out to be a minister, the other two did not.[28] This distinguished Perich from the two teachers here on three of the considerations the Court used in *Hosanna-Tabor*: title, the substance reflected by the title, and the employee's use of that title.

However, these differences were not dispositive, and the Court ultimately found the teachers here also fell within the ministerial

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22. *Our Lady of Guadalupe* was consolidated with *St. James School v. Biel*. For simplicity's sake, I will refer to this as a single case.

23. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2056 (2020) (citation omitted).

24. *Id.* at 2056–57 (citation omitted).

25. *See id.* at 2066.

26. *Id.* at 2074, 2078 (Sotomayor, J., dissenting).

27. *Id.* at 2074.

28. *Id.* at 2074, 2079.

exception. Writing for a seven-Justice majority, Justice Alito explained that *Hosanna-Tabor*'s criteria were "not inflexible requirements,"[29] because "[w]hat matters, at bottom, is what an employee *does*."[30] The Court in *Hosanna-Tabor* admittedly centered much of its analysis on Perich's title, but only because titles were particularly important *in this particular context*. The title of "minister" has an established meaning within the Evangelical Lutheran Church in the educational context—a formally trained and ordained teacher.[31] This made "Perich's case an especially easy one,"[32] though such facts are not necessarily needed to show ministerial status.

In *Our Lady of Guadalupe*, the Court thought it was clear what these teachers *did*: guide their students towards a better understanding and embodiment of their faith.[33] Moreover, their duties and responsibilities were clearly vital to the religious schools' mission. To instead prioritize factors like formal education or title over function would raise serious issues. Since titles often offer little substance, any inquiry would quickly devolve into "looking behind the titles to what the positions actually entail" and would favor organized religion with more formalized roles and functions.[34] Looking into academic requirements brings similar peril, especially since every religion and denomination could require different amounts of education, or none at all.

Justice Thomas, joined by Justice Gorsuch, concurred. The concurrence expanded on many of the points Justice Thomas originally made in *Hosanna-Tabor*. Given the Religion Clauses of the First Amendment, courts "should defer to these groups' good-faith understandings of which individuals are charged with carrying out

29. *Id.* at 2064 (majority opinion).
30. *Id.* (emphasis added).
31. *Id.* at 2063.
32. *Id.* at 2067 (citation omitted).
33. *Id.* at 2066.
34. *Id.* at 2064.

the organizations' religious missions."[35] The schools clearly demonstrated sincerity regarding the teachers' designations as ministers, so the ministerial exception should apply.

Not everyone agreed. Justice Sotomayor, joined by Justice Ginsburg, dissented because she saw danger in extending the ministerial exception to employees in Morrissey-Berru and Biel's situation. They believed *Hosanna-Tabor* was correct because Perich was a religious leader.[36] Her title, training, reputation, and function all confirmed this. But, as mentioned above, many of those factors were missing here. Moreover, most of what the teachers taught was "secular," materials taught by "any public school teacher in California."[37] And even when the school has a "pervasively religious atmosphere," faculty are unlikely to be ministers when they are not required to be members of the same faith, as was the case here.[38]

II. *OUR LADY OF GUADALUPE* OUTSIDE THE CLASSROOM

A. Conceptual Considerations

Justice Sotomayor's dissent included substantive analysis comparing the religious and secular nature of the teacher's job duties. The dissent pitted the teaching of religion against "secular" subjects—reading, science, social studies, etc. Since most of any given school day was spent teaching secular subjects, so the argument goes, the label of minister was less appropriate. However, this approach is deeply flawed. First, any analysis, test, or doctrine that parses out religious from secular duties necessarily involves judicial inquiry into the religious meaning of those duties, which is

35. *Id.* at 2071 (Thomas, J., concurring).

36. *Id.* at 2074 (Sotomayor, J., dissenting).

37. *Id.* at 2080. Interestingly, this dynamic was equally present in *Hosanna-Tabor*, yet both dissenting justices extended the ministerial exception in that situation.

38. *Id.* at 2082 (citation omitted). And here, one teacher actually claimed (after the fact) not to be a practicing Catholic. *See id.* at 2056 n.2 (majority opinion).

plainly inconsistent with a core protection of the First Amendment.[39]

Second, even if such judicial inquiries were proper, the very question itself—if the functions of the employee's jobs are sufficiently religious—is unworkable. There simply *is no* unified standard, balancing test, or doctrinal formulation that a court could use to answer this question. Religious bodies may not define what is religious in ways readily apparent or persuasive to a secular institution—nor do they try to. "In the Abrahamic religious traditions, for instance, a stammering Moses was chosen to lead the people, and a scrawny David to slay a giant."[40] Thus, the judiciary is not adequately competent to analyze the religious claims underlying ministerial exception cases.

This is not to say the courts are never able to properly adjudicate ministerial exception claims. For many cases, a minister's functions are clearly and plainly religious. Few question that certain categories of conduct such as teaching and preaching, leadership, and administering sacraments are practices central to the mission of religious groups. But in less obvious cases, and frequently in the cases involving lesser-known religions, this will not be enough. In these cases, deference to the religious entity is especially important.

B. Practical Problems

The caselaw shows these conceptual concerns are very real. While the lower courts have adjudicated a multitude of ministerial exception disputes, a pair of cases is sufficient here to demonstrate that "courts are ill-equipped to assess whether, and to what extent, an employment dispute between a minister and his or her religious

39. *See, e.g.*, New York v. Cathedral Acad., 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.").

40. Fratello v. Archdiocese of N.Y., 863 F.3d 190, 203 (2d Cir. 2017); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990) ("[C]laimant's beliefs must be 'sincere,' but they need not necessarily be consistent, coherent, clearly articulated, or congruent with those of the claimant's religious denomination.").

group is premised on religious grounds."[41] This inadequacy is especially true when the activities of the employee in question do not appear facially religious to the outside observer.

In *Lukaszewski v. Nazareth Hospital*,[42] the court held that the ministerial exception[43] did not apply to a Roman Catholic hospital's decision to remove its director of plant operations. The court's opinion is riddled with religious analysis and conclusions that a court is wholly unsuited to make. For example, without explanation, the court concluded that "[r]eligious doctrine is a much less important factor in most hospital personnel decisions than it is in religious school decisions to hire and fire teachers."[44] Besides asserting an answer to an inherently religious question, this claim ignores *actual* Catholic teaching.[45] Built upon a flawed foundation, the court unsurprisingly concluded that "Lukaszewski was a secular employee" and that "his responsibilities did not include church administration or *religious matters*."[46]

This is not to say that courts *always* reach the wrong outcome in analyzing an employee's functions. In *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*,[47] the court held that an employee operating as a "mashgiach," or inspector who ensures compliance with Jewish kosher laws, qualified as a minister.[48] But the court reached this conclusion only after determining "his primary duties included supervision and participation in religious ritual and worship, and

41. *Fratello*, 863 F.3d at 203.

42. 764 F. Supp. 57 (E.D. Pa. 1991).

43. The court's opinion does not use the exact phrase "ministerial exception," but engages in essentially the same analysis.

44. *Lukaszewski*, 764 F. Supp. at 60.

45. *See* UNITED STATES CATH. CONF., HEALTH AND HEALTH CARE 3 (1981), http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/health-and-health-care-pastoral-letter-pdf-09-01-43.pdf [https://perma.cc/4KGC-QSZF] ("For the church, health and the healing apostolate take on special significance because of the church's long tradition of involvement in this area and because the church considers health care to be a basic human right which flows from the sanctity of human life.").

46. *Lukaszewski*, 764 F. Supp. at 60 (emphasis added).

47. 363 F.3d 299 (4th Cir. 2004).

48. *Id.* at 301.

his position is important to the spiritual mission of Judaism."[49] Little comfort should be taken when a court must first ascertain "the spiritual mission of Judaism" to reach its holding.

C. Defending Deference

These cases illustrate the need for judicial deference on religious questions. Justice Thomas understood this in both Supreme Court ministerial exception cases, arguing that "[w]hat qualifies as 'ministerial' is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis."[50] In this regard, the *Our Lady of Guadalupe* opinion was "a step in the right direction."[51] Justice Alito's opinion deferred to the schools at critical junctures in the analysis, including on the teachers' role in the organizations,[52] the level of theological training needed,[53] or who is a "practicing" member of the faith.[54] But many oppose such deference. The dissent argued that if courts assume religious groups are in the best position to determine who is a minister, "one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp."[55] A few responses disprove this claim.

First, as this brief survey of lower court rulings demonstrate, there is often *no* analysis when courts determine the underlying religious claims. Rather, these rulings simply turn on the inclinations of judges. While admittedly not a "rubber stamp," it also isn't the substantial "legal analysis" the dissent presumes. Second, such deference honors the First Amendment, which "commands civil courts to decide [legal] disputes without resolving underlying controversies over religious doctrine."[56] Avoiding religious disputes is not an

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49. *Id*. at 309 (emphasis added).

50. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2070 (2020) (Thomas, J., concurring).

51. *Id.*

52. *Id*. at 2066 (majority opinion).

53. *Id*. at 2064.

54. *Id*. at 2069.

55. *Id*. at 2076 (Sotomayor, J., dissenting).

56. *Id*. at 2070 (Thomas, J., concurring) (quoting Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969)).

abdication of judicial duty. It is an acknowledgement that there are areas of society outside the purview of governmental intrusion.[57]

Finally, many worry that this robust conception of the ministerial exception would authorize mass employment discrimination. One commentator speculated before the *Our Lady of Guadalupe* decision that a ruling for the schools "would be a windfall for religious employers, giving them a free pass to discriminate against workers whose jobs carry *any* kind of faith-related responsibilities."[58] The dissent echoed such concerns, claiming "[t]he Court's conclusion portends grave consequences" by subjecting "over a hundred thousand secular teachers" and "countless coaches, camp counselors, nurses, . . . and many others who work for religious institutions" to potential employment discrimination.[59]

Would removing this level of aggressive judicial oversight clear the path for this parade-of-horribles? There are plenty of reasons to think not. First, the long history of the ministerial exception shows no hint of this dystopia. Putting similar fears to rest in *Hosanna-Tabor*, the Chief Justice wrote that the ministerial exception has been recognized for 40 years among the lower courts, and yet has "not given rise to the dire consequences" that trouble skeptics.[60] These worries also rest upon an unsustainable assumption for crafting First Amendment doctrine. As explained in a different context:

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57. *See id.*; *see also* McConnell, *supra* note 40, at 1415 ("[E]xemptions [from generally applicable laws] were consonant with the popular American understanding of the interrelation between the claims of a limited government and a sovereign God.").

58. Mark Joseph Stern, *The Supreme Court May Exempt Religious Employers from Civil Rights Laws*, SLATE (Dec. 19, 2019, 2:29 PM) https://slate.com/news-and-politics/2019/12/supreme-court-religious-employers-discrimination.html [https://perma.cc/WB6M-QTYU].

59. *Our Lady of Guadalupe*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting). Of course, these externalities are reciprocal. Deciding to remove a minister harms that employee, but being forced to keep an unwanted minister also harms the religious group's ability to function in the manner it deems best. Therefore, the better question may be to ask, "Should A be allowed to harm B or should B be allowed to harm A?" *See* Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211, 1217 (2020) (citing Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960)).

60. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

> [D]eveloping rules with a view to improbable political scenarios is poor constitutional design. No engineer builds a house capable of resisting a meteor strike; the house would be a bunker unusable for its primary purpose. . . . Constitutional law should instead be tailored to the run of cases that might occur under plausible political circumstances; to tailor it to the most lurid and feverish of hypotheticals is to distort its function.[61]

Ominous warnings about the worst-case scenario are common in the religious freedom context,[62] but have no place in proper constitutional analysis.

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61. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1743 (2002) (footnote omitted).

62. *See, e.g.*, Ian Millhiser, *The Fight over Whether Religion Is a License to Discriminate is Back Before the Supreme Court*, VOX (Feb. 25, 2020, 8:00 AM), https://www.vox.com/2020/2/25/21150692/supreme-court-religion-discrimination-lgbtq-foster-fulton-philadelphia-first-amendment ("In other words, *Fulton* could be the next big blow in the fight between religious conservatives who seek broad legal exemptions, and laws seeking to ban conduct such as anti-LGBTQ discrimination without exception."); Jay Michaelson, *The Supreme Court 'Fulton' Case Is About Anti-LGBTQ Discrimination—Not 'Religious Freedom'*, DAILY BEAST (Feb. 24, 2020, 2:33 PM), https://www.thedailybeast.com/the-supreme-court-fulton-case-is-about-anti-lgbtq-discriminationnot-religious-freedom ("But of course, [religious freedom groups] . . . aren't really fighting for religious liberty. They're fighting for religious hegemony; they want LGBTQ and women's rights to be less equal than, say, civil rights."); Mark Joseph Stern, *SCOTUS May Give Foster Care Agencies a Right to Refuse Same Sex Couples*, SLATE (Feb. 24, 2020, 5:06 PM) https://slate.com/news-and-politics/2020/02/supreme-court-philadelphia-religious-foster-care-lgbt-discrimination.html [https://perma.cc/ES7G-XWDK] (noting that "[t]his argument has sweeping implications" and further explaining that "LGBTQ nondiscrimination laws like Philadelphia's would become optional for those whose faiths condemn same-sex relationships and gender transition. Small businesses and giant corporations alike could deny service to LGBTQ people and discriminate against LGBTQ employees. Hospitals, doctors, and pharmacy employees could refuse to provide contraception."); Katherine Stewart, *Don't Let Trump Pay Back Evangelicals Like This*, N.Y. TIMES (Mar. 6, 2020), https://www.nytimes.com/2020/03/06/opinion/sunday/trump-evangelicals.html [https://perma.cc/U9DE-SE4W] ("Many Americans know by now that when Christian nationalists talk about 'religious freedom' they are really asking for the privilege to impose their religion on other people.").

III. LOOKING AHEAD

The Chief Justice noted in *Hosanna-Tabor* that "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise."[63] That time has come. Far removed from teachers in classrooms, Seattle's Union Gospel Mission is a Christian non-profit that serves the community with a variety of services. One such service is its legal aid clinic, where attorneys not only help with legal issues, but also "talk about their faith, often pray with clients, and tell them about Jesus."[64] The Mission built the clinic to serve the "legal and certain spiritual needs of the poor, including evangelizing them, in a Christ honoring way."[65] To ensure this occurs, the Mission requires its employees to adhere to the Mission's statement of faith and religious lifestyle requirements (which excludes "homosexual behavior"), be an active church member, and be eager to share their faith with clients.[66] When Matthew Woods, who was in a same-sex relationship, not active in a church, and uneager to share the Gospel with clients applied for the position, the Mission declined to hire him. Woods then filed suit.

The case eventually reached the Washington Supreme Court, which unanimously ruled for Woods.[67] In returning the case to the lower court for further analysis, the Washington Supreme Court offered guidance on how to analyze the ministerial exception claim.

63. *Hosanna-Tabor*, 565 U.S. at 196.

64. Petition for Writ of Certiorari at 8, Seattle's Union Gospel Mission v. Matthew S. Woods, No. 21-144 (2021). This case also implicates the related but distinct coreligionist exemption, but the Washington Supreme Court analyzed the case in part under the ministerial exception.

65. *Id*. (citation omitted).

66. *Id*. at 9.

67. Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060 (Wash. 2021).

The analysis is—to put it charitably—*unpersuasive*.[68] In a concurrence that was explicitly endorsed by the majority,[69] Justice Yu argues the ministerial exception is inapplicable to the Mission's lawyers for multiple reasons, including the lack of need for theological training, their failure to claim the minister's housing allowance, and the fact that *all* of the Mission's employees are tasked with furthering the Mission's religious mission.[70] Justice Yu also includes in her analysis the somewhat puzzling statement that "unlike the teachers at issue in [the Supreme Court cases], the . . . attorneys practice law first and foremost."[71]

Each of these arguments defy proper ministerial exception analysis. As explained above, judicially imposed theological training requirements are inappropriate and impossible to do with any consistency.[72] Next, whether an individual chooses to claim the minister's housing allowance cannot possibly be as important a consideration as Justice Yu asserts. The minister's housing allowance is a statutorily authorized deduction from gross income for tax purposes if a minister's compensation package includes certain housing arrangements.[73] It is entirely optional, and unlike the ministerial exception, it is governed by detailed statutory and regulatory provisions.[74] *Hosanna-Tabor* did briefly mention that Perich claimed the housing allowance, but only to bolster the already-es-

68. This is unsurprising considering the Washington Supreme Court's history of mangling religious liberty cases. *See, e.g.*, Case Comment, State v. Arlene's Flowers, Inc., *441 P.3d 1203 (Wash. 2019)*, 133 HARV. L. REV. 731 (2019).

69. *See Woods*, 481 P.3d at 1070 ("Justice Yu's concurring opinion is helpful in this regard.").

70. *Id.* at 1072 (Yu, J., concurring).

71. *Id.*

72. This is especially true for a Protestant organization like Seattle's Union Gospel Mission. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020) ("[M]any Protestant groups have historically rejected any requirement of formal theological training.") (citation omitted).

73. *See* I.R.C. § 107.

74. *See* I.R.S. Publication 517 (2020).

tablished fact that she held herself out as a minister to the community.[75] Justice Yu treating this brief aside in *Hosanna-Tabor* as a substantive factor is an improper reading of the case and ignores the guiding principles set forth in *Our Lady of Guadalupe*. Finally, her statement that the "attorneys practice law first and foremost"[76] is both conclusory and incorrect. The Mission's articles of incorporation clearly state that the Mission's overarching purpose is "preaching of the gospel of Jesus Christ by conducting rescue mission work," with all other services being "kept entirely subordinate and only taken on so far as seems necessary or helpful to the [Mission's] spiritual work."[77] Moreover, exactly how a minister understands his or her vocation furthering an overarching religious duty is a *profoundly* theological question, and one well beyond the judiciary's authority to resolve.[78] Stepping back from the individual arguments, there is a common theme undergirding Justice Yu's analysis: a marked *lack* of deference on religious questions. It is abundantly clear that the Mission sees its lawyers as serving important spiritual functions, and yet the Washington Supreme Court engaged in contorted and selective analysis to hold otherwise.

This case study demonstrates the need for courts to respect the core principles of the ministerial exception when applying the doctrine to new facts. Only by looking at the functions of the employees and deferring to the organization on the religious significance of those functions will courts honor the First Amendment and ensure religious organizations are free to pursue their goals.

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75. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 191–92 (2012).

76. *Woods*, 481 P.3d at 1072 (Yu, J., concurring).

77. Petition for Writ of Certiorari, *supra* note 64, at 6 (citation omitted).

78. Justice Yu extends this argument even further, concluding that "it is simply not possible to simultaneously act as both an attorney and a minister while complying with the [Washington Rules of Professional Conduct]." *Woods*, 481 P.3d at 1073 (Yu, J., concurring). This hostility towards ministry in the legal context is deeply troubling, but a more substantive response is outside the scope of this case comment. For one persuasive critique of Justice Yu's argument, see Brief for the State of Montana et al. as Amici Curiae Supporting Petitioner at 7–16, Seattle's Union Gospel Mission v. Woods, No. 21-144 (2021).