
The First Amendment to the United States Constitution protects religious institutions from governmental control over their free exercise of religion but does not prevent the government from enacting and enforcing generally applicable laws that incidentally impact religion.¹ These include federal laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA), all designed to eradicate employment discrimination on the basis of race, color, national origin, religion, sex, disability, and age.² To further protect


² See Blair A. Crankan, Comment, New Wine in an Old Chalice: The Ministerial Exception’s Humble Roots, 73 La. L. Rev. 1081, 1084 (2013) (explaining purpose underlying Title VII, ADA, and ADEA). Congress passed Title VII’s protections against employment discrimination in response to legislative findings that revealed economic and social disparities among minorities and women, such as higher unemployment rates, lower occupational statuses, and lower income levels. See 29 C.F.R. § 1608.1(b) (2020) (stating purposes and legislative findings underlying Title VII). Likewise, Congress enacted the ADA to address the “serious and pervasive social problem” of isolating and segregating disabled individuals who traditionally lacked any legal recourse for such discrimination. See 42 U.S.C. § 12101 (explaining congressional findings and purpose); see also id. § 12112(a) (prohibiting adverse employment actions based on qualifying disability); id. § 12102(1) (defining “disability”). Similarly, Congress enacted the ADEA based on findings that older workers were arbitrarily discriminated against for their age and are thereby disadvantaged in employment, resulting in increased “deterioration of skill, morale, and employer acceptability.” See 29 U.S.C. § 623(a) (prohibiting age discrimination); id. § 621 (describing congressional findings and purpose). Antidiscrimination laws stem from the idea that discrimination harms the victim’s dignity: Discrimination based on immutable traits is unfair as they are unchangeable, and discrimination based on the exercise of fundamental rights is wrongful because it raises concerns about human autonomy. See Timothy P. Glynn et al., Employment Law: Private Ordering & Its Limitations 561 (Erwin Chemerinsky et al. eds., 3d ed. 2015) (noting moral concerns surrounding discrimination). Though it involved a different legal context, the seminal case of Brown v. Board of Education provides insight into how permitting racial segregation in public schools causes feelings of inferiority among minority schoolchildren, which ultimately diminishes their motivation to learn and “affect[s] their hearts and minds in a way unlikely to ever be
religious institutions’ autonomy in certain employment decisions, courts have expanded preexisting statutory exemptions by creating the “ministerial exception,” which operates as a constitutional bar on the adjudication of employment discrimination claims brought against religious employers. In Our Lady of Guadalupe School v. Morrissey-Berru, the Supreme Court of the United States considered whether the ministerial exception applies to lay teachers at religious schools who do not have religious titles or training and who primarily teach secular subjects. The Court held that the exception applied to two such teachers, drastically broadening its scope and discarding the Court’s previous totality-of-the-circumstances approach in deciding when the exception applies.

3. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188-89 (2012) (recognizing ministerial exception to employment discrimination claim); Crunk, supra note 2, at 1081-82 (describing judge-made ministerial exception’s operative effect); see also Crunk, supra note 2, at 1084-85, 1085 n.23 (noting ADA, ADEA, and Title VII’s religious exemptions). Congress created religious carve-outs from Title VII’s employee protections, including exceptions that permit religious organizations and religiously affiliated schools to discriminate on the basis of actual and prospective employees’ religious, as well as the broad bona fide occupational qualification (BFOQ) exception permitting discrimination based on religion, sex, and national origin, but not race or color. See Crunk, supra note 2, at 1085 & n.23 (discussing Title VII exemptions); 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(1) (allowing employment discrimination by religious institutions and schools); § 2000e-2(e)(1) (providing BFOQ exception allowing discrimination where reasonably necessary to normal operation of business). Likewise, the ADEA has a BFOQ exception permitting age discrimination “where age is a [BFOQ] reasonably necessary to the normal operation of the particular business.” 29 U.S.C. § 623(f)(1). The ADA also allows religious organizations to “give[e] preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [organization] of its activities,” and to “require that all applicants and employees conform to the religious tenets of such organization.” 42 U.S.C. § 12113(d)(1)-(2). Nevertheless, these statutory exemptions have their limitations—Title VII and the ADA only allow discrimination on religious grounds, and the BFOQ defense is not a guaranteed means of avoiding liability under antidiscrimination statutes. See Christopher C. Lund, In Defense of the Ministerial Exception, 90 N.C.L. REV. 1, 7-9 (2011) (describing limitations of statutory exemptions).


5. See id. at 2055, 2057-58 (stating issue before Court and identifying lay teacher claimants). In 2012, when the Court first decided that the ministerial exception applies to religious teachers, it considered all of the circumstances surrounding the parties’ employment relationship. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190-92 (2012) (reviewing case-specific circumstances deemed relevant to application of exception); id. at 177 (describing church’s distinction between “lay” and “called” teachers); see also Brief Amici Curiae of the American Civil Liberties Union et al. in Support of Neither Party at 4-5, 140 S. Ct. 2049 (Nos. 19-267, 19-348) [hereinafter ACLU Amicus Brief] (describing Hosanna-Tabor’s totality-of-the-circumstances approach). In the context of religious schools, a “lay” teacher is one without formal religious training. See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 177 (2012).

6. See 140 S. Ct. at 2055 (setting forth holding); id. at 2063 (discarding certain circumstances Court previously considered relevant to ministerial-exemption analysis); id. at 2072, 2075-76 (Sotomayor, J., dissenting) (noting drastic impact of Court’s holding and criticizing misapplication of Hosanna-Tabor’s factor-based approach). The ministerial exception does serve the important purpose of safeguarding religious institutions’
Our Lady consolidates two employment discrimination claims brought by lay fifth-grade teachers, Agnes Morrissey-Berru and Kristen Biel, against their respective Catholic school employers, Our Lady of Guadalupe School (OLG) and St. James School (St. James). Both teachers held degrees in secular subjects and lacked significant religious experience or training, and while OLG preferred Catholic teachers, St. James did not deem religious background a hiring prerequisite. Biel and Morrissey-Berru taught mostly secular subjects; per curriculum requirements, however, they also taught religion using the schools’ assigned workbooks. The schools also expected the teachers to pray with students, bring them to Catholic Mass, and teach them about Mass and other religious practices. Additionally, Morrissey-Berru’s and Biel’s employment contracts stated that their employers expected the teachers to perform their duties and responsibilities in accordance with the employers’ missions of developing and promoting Catholic faith-based communities and evaluated each teacher’s performance based on religious standards.

autonomy in employee governance and leadership decisions, but it also allows them “to discriminate against ministerial employees on any basis whatsoever, including race, disability, sex, and age,” even when the discrimination is “purely invidious” and wholly unrelated “to religious doctrine and practice.” See ACLU Amicus Brief, supra note 5, at 4 (warning exception affords “sweeping immunity from nondiscrimination laws”); see also Crunk, supra note 2, at 1081-82 (describing exception’s effect on applicable employees).

7. See 140 S. Ct. at 2055, 2060 (providing case overview and noting Court consolidated cases when granting review); see also id. at 2056, 2058 (discussing facts of each teacher’s case). Both Morrissey-Berru’s and Biel’s employment contracts referred to them as “Teacher[s]” and referenced benefits guides for “Lay Employees.” See id. at 2078 (Sotomayor, J., dissenting) (noting similarities between contracts).

8. See id. at 2056, 2058 (majority opinion) (describing teachers’ education and credentials); id. at 2077-78 (Sotomayor, J., dissenting) (noting schools lacked religious-experience requirement). During her employment, Biel attended a half-day conference covering a wide range of topics related to teaching at a religious school. See id. at 2077. Similarly, per OLG’s request, Morrissey-Berru attended a course for “catechists,” or teachers of religion, but it is unclear whether she ultimately completed the catechist certification program. See id. at 2078 (noting Morrissey-Berru attended religious education courses); id. at 2057 (majority opinion) (defining “catechist”); Brief for Respondents at 13, 140 S. Ct. 2049 (Nos. 19-267, 19-348) (observing nothing in record indicating Morrissey-Berru completed catechism courses).

9. See 140 S. Ct. at 2056-57, 2058-59 (discussing curriculum requirements); id. at 2077 (Sotomayor, J., dissenting) (focusing on assigned religion teacher workbook).

10. See id. at 2057, 2059 (majority opinion) (noting schools required teachers to pray with students each day and teach Catholic traditions). Morrissey-Berru led her students in prayers but did not lead devotional exercises. Id. at 2079 (Sotomayor, J., dissenting). Morrissey-Berru also prepared students for Mass, communion, and confession, and she occasionally selected Mass readings. See id. at 2057 (majority opinion) (describing duties related to Catholic practices). OLG also expected Morrissey-Berru to bring her students to Mass once a week and on certain religious feast days. Id. Biel, on the other hand, did not lead her students in and did not teach them prayers—the students had separate prayer leaders and, as fifth graders, already knew most of the prayers. Id. at 2077-78 (Sotomayor, J., dissenting). Additionally, St. James teachers were responsible for preparing students for Mass and teaching them about communion and confession. See id. at 2059 (majority opinion) (explaining St. James requirements). The record does not suggest that Biel taught her students what they were supposed to do at Mass, and Biel’s only responsibility during Mass was keeping her class quiet and orderly. See id. at 2078 (Sotomayor, J., dissenting) (presenting additional facts about Biel’s involvement in school Mass).

11. See id. at 2056-58 (majority opinion) (describing employment contracts and schools’ evaluation standards); see also Brief for Petitioners at 9-10, 16, 140 S. Ct. 2049 (Nos. 19-267, 19-348) (stating OLG’s and St. James’s missions). Also, St. James’s employee handbook required all faculty, “religion teachers or not,” to participate in the school’s religious mission. 140 S. Ct. at 2077 (Sotomayor, J., dissenting).
In 2014, shortly after Biel notified St. James’s principal that she was taking a leave of absence for breast cancer treatment, the school declined to renew her annual employment contract.12 The school justified this decision by alleging Biel failed to maintain an orderly classroom.13 Similarly, OLG demoted Morrissey-Berru, who was in her sixties at the time, and later declined to renew her contract, claiming she was not adequately implementing the school’s new academic program.14 Biel and Morrissey-Berru both filed discrimination charges with the Equal Employment Opportunity Commission (EEOC), received right-to-sue letters, and then filed suit against their former employers.15 In each case, the United States District Court for the Central District of California granted summary judgment in favor of the school, finding that the ministerial exception applied to the teachers because their job duties involved conveying and carrying out the schools’ Catholic missions, and, consequently, the teachers were barred from suing the schools for discrimination.16 Both teachers then appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court’s decisions in both cases.17

On review of St. James’s appeal, the Ninth Circuit determined that Biel did not qualify for the ministerial exception because she did not have adequate religious credentials, training, or background.18 Likewise, the Ninth Circuit held that the exception did not apply to Morrissey-Berru because, although she had some religious responsibilities, she lacked formal religious training and a religious title, and did not hold herself out as a minister or religious leader.19 OLG and St. James appealed to the Supreme Court, which granted certiorari and

12. See Brief for Petitioners, supra note 11, at 19-20 (outlining circumstances surrounding Biel’s termination); Brief for Respondents, supra note 8, at 10 (discussing same).
13. See Brief for Petitioners, supra note 11, at 19 (explaining school’s reason for terminating Biel).
14. See id. at 15 (discussing Morrissey-Berru’s demotion and termination); Brief for Respondents, supra note 8, at 13-14 (explaining principal’s dissatisfaction and adverse actions while noting no religious reason asserted for firing). Neither school asserted a religious reason for firing the teachers. Brief for Respondents, supra note 8, at 14.
15. See Brief for Respondents, supra note 8, at 10, 14 (describing cases’ administrative history). Biel asserted that St. James violated the ADA by firing her because of her leave of absence for breast cancer treatment, and Morrissey-Berru asserted that OLG violated the ADEA by replacing her with a younger teacher. See id. at 10 (noting basis of Biel’s claim); 140 S. Ct. at 2058 (setting forth basis of Morrissey-Berru’s claim); see also supra note 2 (explaining history of ADA and ADEA).
17. See 140 S. Ct. at 2058, 2059 (outlining cases’ procedural history).
18. See Biel v. St. James Sch., 911 F.3d 603, 608 (9th Cir. 2018) (setting forth reasoning), rev’d sub nom. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049. In his dissenting opinion, Judge D. Michael Fisher disagreed with the majority’s determination that the exception did not apply to Biel, emphasizing the importance of her position as a teacher and of her duties as a “stewar[d] of the Catholic faith” to her students. See id. at 621-22 (Fisher, J., dissenting) (setting forth dissent’s reasoning).
19. See 769 F. App’x 460, 461 (9th Cir. 2019) (holding exception not applicable), rev’d, 140 S. Ct. 2049.
consolidated the two cases.\textsuperscript{20} The Court held that the ministerial exception applies to employment discrimination claims against a school with a religious mission when brought by a lay teacher whose responsibilities include “educating and forming students in the faith.”\textsuperscript{21}

The First Amendment contains two separate but interrelated religious protections that are commonly referred to as the Free Exercise Clause and the Establishment Clause; the former protects the free practice of religion, and the latter prevents the government from actively involving itself in religious activities.\textsuperscript{22} There are two lines of Free Exercise Clause precedent, which separately address individual free exercise of religion and church autonomy.\textsuperscript{23} The individual-free-exercise precedent involves judicial review of laws that restrict religiously motivated conduct, and courts typically uphold such laws when their governmental purpose outweighs the burden on individuals’ free practice of religion.\textsuperscript{24} The

\textsuperscript{20} See 140 S. Ct. at 2060 (articulating cases’ procedural history). The schools asserted that, in determining whether the teachers qualify for the ministerial exception, the Court should only consider the important religious functions an employee performs and should conclude that both teachers meet this proposed standard. See Brief for Petitioners, supra note 11, at 26 (summarizing schools’ argument). In contrast, the teachers argued that the Court should uphold the Ninth Circuit’s application of the multi-factor test established in Hosanna-Tabor and that, under that test, neither of them would qualify as ministers subject to the ministerial exception. See Brief for Respondents, supra note 8, at 17 (summarizing teachers’ argument). An amicus brief in support of neither party asserted that the differences between the teachers’ cases illustrate the “critical importance” of rejecting the schools’ proposed “rigid, one-size-fits-all rule” and continuing to apply a flexible “totality-of-the-circumstances test,” under which Morrissey-Berru would likely qualify as a minister, but Biel would not. See ACLU Amicus Brief, supra note 5, at 5-6 (differentiating Morrissey-Berru’s and Biel’s cases). The amicus brief recognized that the ministerial exception properly “advances fundamental religious-freedom principles,” but stressed that, given its operative effect of “denying to ministerial employees the same legal protections that all other people enjoy,” the exception must remain “closely tied to its justification and [must] not extend beyond those who are, in fact, ministers.” Id. at 9.

21. See 140 S. Ct. at 2069 (setting forth Court’s holding). Justice Sotomayor filed a dissenting opinion arguing that the majority’s focus on whether religious employers think their employees play important religious roles is a “simplistic approach [that] has no basis in law and strips thousands of schoolteachers of their legal protections.” See id. at 2072 (Sotomayor, J., dissenting).

22. See U.S. Const. amend. 1 (setting forth religion clauses); Feldman & Sullivan, supra note 1, at 1557 (discussing relationship between religion clauses); see also Walz v. Tax Comm’n, 397 U.S. 664, 674 (1970) (delineating test under which “excessive government entanglement with religion” violates Establishment Clause).


24. See id. at 655 (explaining individual-free-exercise precedent); id. at 656 n.79 (noting interest-balancing approach Court uses for individual-free-exercise challenges). This line of precedent traditionally employed strict scrutiny review, which requires a compelling government interest to justify the action that burdens the individual’s right to free exercise of religion. See id. at 656-67, 656 n.79 (explaining strict scrutiny); see also, e.g., Sherbert v. Verner, 374 U.S. 398, 403 (1963) (requiring “compelling state interest” to justify unemployment law’s incidental burdens on free exercise); supra note 1 (cataloguing free-exercise precedent applying strict scrutiny). In 1990, however, the Court declined to use strict scrutiny and held that states could constitutionally enact generally applicable laws prohibiting drug use and deny individuals unemployment benefits when they violate such laws, even if such drug use is part of their religious practices. See Emp. Div. v. Smith, 494 U.S. 872, 884-85 (1990) (rejecting use of strict scrutiny to determine constitutionality of generally applicable criminal law); id. at 890 (setting forth Court’s holding); see also id. at 886-87 (rejecting strict scrutiny for conduct “central” to religion because courts cannot question centrality of beliefs). In determining that the government’s interest
church autonomy doctrine prohibits governmental—including judicial—interference in a church’s decisions concerning certain internal affairs, such as control over church property.\textsuperscript{25} The constitutional justifications for the ministerial exception are rooted in both the Free Exercise Clause and the Establishment Clause; nevertheless, most courts focus on the Free Exercise Clause—specifically the church autonomy doctrine—as the Supreme Court did in its landmark \textit{Hosanna-Tabor} decision.\textsuperscript{26} \textit{Hosanna-Tabor} also clarified that “[w]hen a minister who has been fired sues her church alleging that her termination was discriminatory,” the burden on free exercise categorically outweighs the government’s “undoubtedly important” interest in enforcing employment discrimination laws.\textsuperscript{27}

\textsuperscript{25} See Allen, \textit{supra} note 23, at 657 n.79 (introducing church autonomy doctrine and noting concept rooted in Establishment Clause). This line of precedent involved “intra-church disputes” in which “the interests colliding were those of two competing religious factions.” Benton C. Martin, Comment, Protecting Preachers from Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII, 59 EMORY L.J. 1297, 1307-08 (2010). Through these cases, the Court consistently held that requiring religious organizations to justify decisions about internal religious matters in civil court would unconstitutionally burden their free exercise; in essence, the Court has “already applied strict scrutiny to [the] issue, and free exercise won—the result is the church autonomy doctrine.” See Allen, \textit{supra} note 23, at 657 n.79 (noting relationship between church autonomy and strict scrutiny); see also, e.g., Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871) (holding secular courts bound by church’s decision in ecclesiastical matters); Kidron v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952) (expanding church autonomy to matters of church governance, and faith and doctrine); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976) (holding autonomy principle includes internal disputes over church organization and administration).

\textsuperscript{26} See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 181 (2012) (clarifying both clauses bar government interference into church-minister relations); \textit{id.} at 185, 188 (discussing church autonomy doctrine and recognizing ministerial exception); McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (providing rationale for recognizing exception); see also Lauren N. Woieszlagle, Comment, \textit{The United States Supreme Court Sanctifies the Ministerial Exception in Hosanna-Tabor v. EEOC Without Addressing Who Is a Minister: A Blessing for Religious Freedom or Is the Line Between Church and State Still Blurred?}, 50 Duq. L. REV. 895, 900-01 (2012) (outlining federal circuits’ adoption of exception). The \textit{Hosanna-Tabor} Court also relied heavily on the background against which the founding generation adopted and enforced the First Amendment’s religion clauses, focusing primarily on English control over religious appointments. See 565 U.S. 171, 182-83 (2012) (detailing historical backdrop of religion clauses’ adoption); \textit{see also id.} at 184-85 (describing instances when religion clauses’ “leading architect,” James Madison, rejected government’s ministerial appointments). Some \textit{Hosanna-Tabor} critics point to alternative English and American history, suggesting that ministers did not traditionally fall outside the law’s protection, that religious institutions’ power should be limited in the same manner as other institutions, and that “courts should not select a legal rule that automatically favors powerful institutions over individuals.” See Leslie C. Griffin, \textit{The Sins of Hosanna-Tabor}, 88 Ind. L.J. 981, 989-90 (2013) (describing “early American tradition” of enforcing contract claims by ministers against employers); \textit{id.} at 984-89 (noting James Madison warned against “potential abuse of ecclesiastical corporate power”); \textit{id.} at 989 (explaining Bill of Rights protects individual freedom against institutional power).

\textsuperscript{27} See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012) (concluding religious groups’ interest in selecting ministers outweighs society’s antidiscrimination interests). The Court also distinguished government interference in “a church’s selection of its ministers” from the regulation of “outward physical acts” at issue in recent individual-free-exercise cases, such as the use of peyote in \textit{Smith}, and rejected the argument that this precedent precludes recognition of the ministerial exception. See \textit{id.} at 190 (recognizing individual-free-exercise precedent). Some commentators criticize the distinction between precedents, arguing that if individuals have to abide by generally applicable laws restricting their sincere religious practices,
Although courts universally agree on the ministerial exception’s existence, they disagree on how to apply it.  

Procedurally, the Court’s dismissal of the claim in Hosanna-Tabor implicitly clarified that the exception operates as an affirmative defense against alleged discrimination, meaning courts can dismiss a case on summary judgment even when a defendant religious institution admits to engaging in discrimination.  

When deciding to which employment relationships the exception should apply, the courts in the foundational ministerial exception cases expressly limited the exception to the “church-minister relationship,” but other circuit courts later expanded its coverage to the relationship between religious institutions and non-minister employees.  

To determine the exception’s scope, a number of circuits adopted the “primary duties test,” which focuses on the degree to which the employee’s role serves religious functions.  

Some circuits opted for a case-by-case analysis, while others used a judicial balancing test similar to those in the individual-free-exercise cases, through which courts emphasized the importance of enforcing employment discrimination laws.

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
in the education sector to promote diversity in schools’ teaching staff and discourage the perpetuation of discriminatory attitudes among students.\textsuperscript{32} In \textit{Hosanna-Tabor}, the Court declined to set a “rigid formula” and instead used a factor-based approach that focused on the teacher’s formal title, their substantive religious training, the teacher’s own use of their title, and the religious functions they performed for the church-employer.\textsuperscript{33}

After \textit{Hosanna-Tabor’s} narrow holding, courts were left without conclusive guidance on how and to whom the ministerial exception should apply.\textsuperscript{34} The Court’s frequent use of “church” and “minister” in the opinion suggests the majority was leaning toward adopting the original church-minister relationship.

\textsuperscript{32} See Woleslage, \textit{supra} note 26, at 905 (highlighting circuit split on primary duties test); Allen, \textit{supra} note 23, at 675-78 (cataloguing other circuit approaches to applying ministerial exception to non-minister employees); Allen, \textit{supra} note 23, at 680-81, 681 n.255 (noting Ninth Circuit’s application of \textit{Sherbert} balancing test); Sherbert v. Vernier, 374 U.S. 398, 403 (1963) (setting forth strict scrutiny balancing). Generally, courts that have used strict scrutiny within the judicial balancing test have done so on the grounds that the religious interests underlying the church autonomy doctrine are not as strong when “lay employees” are involved. See, e.g., Bollard v. Cal. Province of the Soci’y of Jesus, 196 F.3d 940, 947-48 (9th Cir. 1999) (declaring reasons for applying \textit{Sherbert} balancing test); Sherbert v. Vernier, 374 U.S. 398, 403 (1963) (requiring “compelling state interest” to justify burdens on free exercise). Notably, one of the courts applying strict scrutiny stressed that, although there are far fewer religious schools than other types of employers subject to discrimination laws, the impact of religious schools on society is far greater. EEOC v. Miss. Coll., 626 F.2d 477, 489 (5th Cir. 1980) (explaining burden on free exercise slight compared to society’s compelling interest in eradicating discrimination). Accordingly, the court in \textit{Mississippi College} declined to expand the exception’s scope to college faculty, emphasizing the role of religious education “in educating society’s young,” and warning that “[i]f the environment in which such institutions seek to achieve their religious and educational goals reflects unlawful discrimination, those discriminatory attitudes will be perpetuated with an influential segment of society.” \textit{Id.} at 488-89 (applying strict scrutiny in context of religious college’s faculty); see \textit{id.} at 485 (distinguishing church-minister relationship from relationship between religious college and its faculty). Some scholars criticize the use of strict scrutiny as violating the Establishment Clause’s prohibition on “excessive government entanglement.” \textit{See} Allen, \textit{supra} note 23, at 682-85 (discussing entanglement concerns); Walz v. Tax Comm’n, 397 U.S. 664, 674 (1970) (prohibiting excessive entanglement). But see Crunk, \textit{supra} note 2, at 1106 (arguing antidiscrimination laws’ application outside church-minister relationship not considered excessive entanglement); \textit{id.} at 1107 (observing Establishment Clause tolerates some entanglement in certain contexts).

\textsuperscript{33} See \textit{Hosanna-Tabor} Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190, 192 (2012) (emphasizing Court’s reluctance to adopt “rigid formula” and listing factors); see also \textit{id.} at 177 (discussing church’s distinction between called and lay teachers). The Court noted that the employer held the teacher out as a minister, emphasizing that the employer gave her the title of “Minister of Religion, Commissioned,” and periodically reviewed her ministerial skills and responsibilities. \textit{See} \textit{id.} at 191. Moreover, the Court stressed that the teacher’s title “reflected a significant degree of religious training followed by a formal process of commissioning,” and that she “held herself out as a minister . . . by accepting the formal call to religious service” and by claiming tax benefits afforded to ministers. \textit{Id.} at 191-92. The Court also discussed how the teacher’s “job duties reflected a role in conveying [her employer’s] message and carrying out its mission.” \textit{Id.} at 192. Specifically, the Court noted that the teacher was responsible for teaching religion in accordance with the church’s religious doctrine; leading students in prayer three times per day and devotional exercises once per day; and bringing students to—and occasionally leading—school-wide chapel services. \textit{See} \textit{id.} (listing circumstances evidencing teacher’s religious duties). Finally, although the Court did not expressly apply strict scrutiny, it did recognize the “undoubtedly important” societal interest of enforcing antidiscrimination laws and noted that this interest is outweighed “[w]hen a minister . . . sues her church alleging her termination was discriminatory.” \textit{Id.} at 196 (balancing church autonomy and interests of preventing employment discrimination).

\textsuperscript{34} See Crunk, \textit{supra} note 2, at 1116 (opining “appropriate inquiry or proper test . . . remains clearly unsettled”).
standard and rejecting the primary duties test, but based on Justice Alito’s two-Justice concurrence focusing on religious functions, it is unlikely that all Justices agreed. Various circuit courts, district courts, and commentators have followed Justice Alito’s lead and argued for broader application of the exception that embraces and expands the primary duties test. Others have called for a narrower ministerial exception limited exclusively to the church-minister relationship, or an ad hoc approach that examines the religious nature of the employee’s position. Most commentators agree that the test should yield consistent results, which is particularly important in light of both the harsh outcome when the exception applies, and the potential societal impacts of an overbroad or inconsistent application of the exception. In Our Lady, the Court first discussed the facts of each case, focusing on the teachers’ job duties and the schools’ religious missions and expectations of their

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35 See id. at 1114 (emphasizing Hosanna-Tabor’s repeated use of “church” and “minister”); id. (noting majority’s refusal to adopt primary duties test); see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 198-99, 202 (2012) (Alito, J., concurring) (arguing for primary duties test and discounting importance of employee’s title); Crunk, supra note 2, at 1115-16 (discussing Justice Alito’s concurrence). One commentator noted that “[t]he only possible direction the circuits can take from the Supreme Court’s decision—though not ironclad—is that it seems that the Court does not agree with the primary duties test.” Allen, supra note 23, at 693.

36 See J. Gregory Grisham & Daniel Blumberg, The Ministerial Exception After Hosanna-Tabor: Firmly Founded, Increasingly Refined, 20 Federalist Soc’y Rev. 80, 83-86 (2019) (discussing courts’ application of ministerial exception after Hosanna-Tabor); Mark Steiner, Note, Who Is a Minister? Broadening the Scope of the Ministerial Exception After Hosanna-Tabor, 60 Wayne L. Rev. 261, 261-62 (2014) (arguing post-Hosanna-Tabor courts must construe “minister” broadly); Steiner, supra, at 262 (proposing looking beyond employees’ primary duties to their ability to influence religious institutions’ members). But see Crunk, supra note 2, at 1109 (arguing expansive ministerial exception preventing discrimination claims conflicts with Framers’ intent).

37 See Crunk, supra note 2, at 1109 (arguing limiting exception to church-minister relationship fairly balances interests of religion and social welfare); Allen, supra note 23, at 694 (arguing ad hoc test most accurately reflects ministerial exception’s purpose); Allen, supra note 23, at 693-94 (noting rigid test leads to inconsistently applying exception).

38 See Allen, supra note 23, at 694 (emphasizing importance of fundamental rights and necessity of consistency); Crunk, supra note 2, at 1087 (stressing significant impact of ministerial exception); see also EEOC v. Miss. Coll., 626 F.2d 477, 489 (5th Cir. 1980) (observing unique effect of discrimination in educational setting); supra note 2 (discussing societal impact of allowing discrimination in school settings). Notably, a broad application of the exception could implicate the rights of hundreds of thousands of full-time teachers employed by, and millions of students enrolled in, religiously oriented private schools in the United States. See Stephen P. Broughman et al., U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STAT., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2015-16 PRIVATE SCHOOL UNIVERSE SURVEY 2 (2017), https://nces.ed.gov/pubs2017/20170773.pdf [https://perma.cc/QN3U-ERMB] (noting 70% of 481,500 private-school teachers worked at religious schools); id. (highlighting 75% of nearly 5 million private-school students enrolled in religious schools in 2015). The number of students enrolled in private schools has only increased during the COVID-19 pandemic, as parents seek to avoid remote learning at public schools. See Katie Reilly, Public Schools Will Struggle Even More as Parents Move Kids to Private Ones During the Pandemic, TIME (Aug. 31, 2020, 3:32 PM), https://time.com/5885106/school-reopening-coronavirus/ [https://perma.cc/Q6NE-PCN5] (noting private-school teachers “have less leverage to object to” reopening plans than public-school teachers); see also id. (highlighting potential negative impact of increased private-school enrollment on low-income and minority students).
employees. The majority then began its legal analysis by reaffirming the ministerial exception’s constitutional basis and stressing that the exception’s scope is not limited to ministers. When examining the Hosanna-Tabor decision, the Court noted that Hosanna-Tabor’s historical discussion focused primarily on government control over ministerial appointments, and broadened this discussion to include colonial restrictions on religious teachings. The majority then discussed the four factors the Hosanna-Tabor Court deemed relevant to applying the ministerial exception in that particular case, and it reaffirmed the Court’s rejection of a rigid test for deciding when the exception applies. When deciding how and to whom the exception applies, the Court noted that “a variety of factors may be important” and stressed that the factors considered in Hosanna-Tabor are not necessarily relevant or significant in other cases.

Next, the majority concluded that an employee’s religious background and title of “minister” should be accorded less weight than other factors, emphasizing concerns about potential discrimination toward other religions that use different

39. See 140 S. Ct. at 2056-57, 2058-59 (discussing Morrissey-Berru’s and Biel’s teaching roles and schools’ expectations of their employees). In her dissenting opinion, Justice Sotomayor criticized the majority’s treatment of the facts of each case and analyzed them in her own discussion. See id. at 2072, 2077-79 (Sotomayor, J., dissenting) (stating majority “skew[ed]” facts and presenting factual backgrounds); see also id. at 2076 (arguing Court required to view facts in light most favorable to teachers); id. at 2079 (noting majority applied irrelevant and disputed testimony).

40. See id. at 2060 (majority opinion) (explaining ministerial exception based in religion clauses and church autonomy principle); id. (noting not all pre-Hosanna-Tabor cases involved ministers or members of clergy). The majority explained that the concept of church autonomy gave rise to the exception, which requires courts “to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.” See id. at 2060-61 (noting exception recognized to preserve “church’s independent authority” in selection and removal of ministers). The dissent, on the other hand, first outlined the line of precedent requiring religious institutions to comply with generally applicable laws, and then emphasized the potency of the exception as the basis for its narrow application. See id. at 2072 (Sotomayor, J., dissenting) (reviewing Court’s decisions rejecting religious challenges to generally applicable laws); id. (explaining ministerial exception allows employers to freely discriminate and “even concedes animus”); id. at 2072-73 (noting Hosanna-Tabor only applied exception to religious leadership role).

41. See id. at 2061 (majority opinion) (describing Hosanna-Tabor’s concentration on government’s historical control over religious appointments); id. (emphasizing historical abuses not limited to control over appointments); see also id. (discussing sixteenth-, seventeenth-, and eighteenth-century English laws dictating substance of ministers’ teachings); id. at 2061-62 (discussing restrictions on religious teaching after adoption of First Amendment); id. at 2062 (describing British colonies in North America’s control over clerical appointments and requirements for religious teaching).

42. See id. at 2062-63 (discussing four factors considered in Hosanna-Tabor and noting rejection of “rigid formula”); see also supra note 33 and accompanying text (listing four Hosanna-Tabor factors). The majority also briefly discussed the two concurrences in Hosanna-Tabor, noting Justice Alito’s focus on religious functions. See 140 S. Ct. at 2063 (acknowledging Hosanna-Tabor concurrences).

43. 140 S. Ct. at 2063. The majority further explained that the Hosanna-Tabor Court relied on the religious teacher’s title and background because of the religious denomination’s use of the term “minister” and the teacher’s responsibility for furthering the church’s religious message and mission. See id. (providing justifications for concluding Hosanna-Tabor factors not relevant in other cases). In her dissent, Justice Sotomayor pointed out that the majority failed to consider the third Hosanna-Tabor factor—whether the employee holds themselves out as being a religious leader—and emphasized that in Our Lady, this third factor “seriously undermines the schools’ cases.” See id. at 2080 (Sotomayor, J., dissenting).
or less-defined terms to describe ministerial roles, and those that require teachers to have less formal religious training. Relying on Justice Alito’s concurrence in *Hosanna-Tabor*, which concluded that the exception should apply to “any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith,” the majority explained that “[w]hat matters, at bottom, is what an employee does.” The majority also stressed the importance of religious education to a number of religions in the United States, including Catholicism, Protestantism, Judaism, Islam, Mormonism, and Seventh-day Adventism. Applying its new understanding of the ministerial exception to the cases before it, the majority focused on the schools’ religious missions and expectations, as well as the teachers’ core religious duties, including teaching religion in addition to a variety of other subjects, praying and attending Mass with students, and preparing them for other religious activities. Ultimately, the Court held that the exception

44. See id. at 2063-64 (majority opinion) (rejecting importance of title in deciding whether to apply exception); id. at 2064 (examining use of “minister” in Catholicism and Judaism, while term inapplicable in Islam); see also id. (setting forth same argument with respect to academic requirements for position); id. (warning attaching significance to titles and backgrounds benefits formal religions more than less-structured religions). Justice Sotomayor criticized the majority’s arguments about titles and background, noting that the risk of prejudice to less-structured religions is irrelevant in this case because the Catholic Church uses formal titles and its organizational structure is both formal and widely publicized. See id. at 2079 (Sotomayor, J., dissenting) (explaining Catholic Church has formal titles and structure like church in *Hosanna-Tabor*). Additionally, the dissent emphasized that the Court’s holistic analysis of “objective and easily discernable markers like titles, training, and public-facing conduct” in *Hosanna-Tabor* provided a way to distinguish leaders from individuals who merely relay religious doctrines. Id. at 2075 (criticizing majority for rewriting *Hosanna-Tabor*). The *Hosanna-Tabor* approach balanced church-state entanglement concerns and avoided overbroad immunity from employment discrimination laws. See id.

45. See id. at 2064 (majority opinion) (setting new standard for determining applicability of ministerial exception); *Hosanna-Tabor* Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 199 (2012) (Alito, J., concurring) (explaining to whom exception should apply). The majority also noted *Hosanna-Tabor*’s “implicit recognition that” responsibilities closely related to religious schools’ missions include inculcating religious teachings and training schoolchildren to live according to faith. See 140 S. Ct. at 2064 (justifying adoption of primary duties approach); see also Allen, supra note 23, at 671 (explaining primary duties test). Justice Sotomayor criticized the majority for adopting the concurrence’s approach in *Hosanna-Tabor*, which focused on religious functions, and argued that, while some duties may be important, “a person’s performance of some of those functions does not mechanically trigger a categorical exemption from generally applicable antidiscrimination laws.” See 140 S. Ct. at 2075-76 (Sotomayor, J., dissenting) (noting majority “recasts *Hosanna-Tabor*” by adopting concurrence’s approach).

46. See 140 S. Ct. at 2064-66 (surveying several religious institutions’ connections between central purpose and faith education of youth members). The majority explains that Catholicism intimately binds religious education with Catholic Church life and notes that, under canon law, Catholic bishops must determine that instructors who teach religion have sufficient skills to do so. See id. at 2065 (explaining importance Catholicism places on religious education).

47. See id. at 2066 (emphasizing teachers performed “vital religious duties” related to schools’ faith-based missions); see also id. (noting teachers’ core responsibilities similar to religious teacher in *Hosanna-Tabor*); supra notes 9-10 and accompanying text (discussing teachers’ duties and schools’ missions and expectations). The majority did address titles to some degree, explaining that, as “Catholic elementary school teachers,” Morrisey-Berru and Biel “were their students’ primary teachers of religion.” See 140 S. Ct. at 2067 (discussing role and meaning of “teacher” in religious school context compared to “rabbi”). The majority also explained that “[t]he significance of formal religious training must be evaluated in light of the age of the students taught and the
prevented both teachers from bringing discrimination claims against their employers because the schools entrusted them with “the responsibility of educating and forming the students in the faith.”

Our Lady correctly reaffirmed the importance of the ministerial exception in protecting religious freedom. Nevertheless, the majority’s reliance on the church autonomy doctrine to expand the ministerial exception’s scope to lay teachers is improper because it flies in the face of earlier ministerial exception case law, which only relied on this doctrine in scenarios involving the clearly defined church-minister relationship. Specifically, outside of circumstances where “a minister . . . sues her church,” Hosanna-Tabor suggested that society’s “undoubtedly important” interest in eradicating employment discrimination outweighs the religious interests implicated when secular courts adjudicate disputes between religious schools and their lay teachers. Yet here, the majority

judgment of a religious institution regarding the need for formal training,” and such significance is diminished when the employers think their teachers have sufficient understanding of the faith. Id. at 2067-68. The majority also criticized the Ninth Circuit’s reliance on titles and background and for undermining the teachers’ religious functions. See id. (criticizing Ninth Circuit’s “rigid test”). Justice Sotomayor, on the other hand, criticized the majority for comparing the title “teacher” and its translation to the Jewish term “rabbi,” noting that the majority’s “wordplay unravels when one imagines [its] logic as applied to a math or gym or computer ‘teacher,’” and that “[t]he title ‘teacher’ does not convey ministerial status.” Id. at 2079 (Sotomayor, J., dissenting). Justice Sotomayor denounced the majority’s discussion about formal religious training, warning that “because the Court’s new standard prizes a functional importance that it appears to deem churches in the best position to explain, one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp.” Id. at 2076.

48. See 140 S. Ct. at 2069 (setting forth Court’s holding). Justice Sotomayor also criticized the majority’s discussion about Morrissey-Berru’s and Biel’s purported religious functions, noting that it is not “dispositive that both teachers prayed with their students” and that infrequent tasks such as bringing students to Mass should not automatically invoke the ministerial exception. Id. at 2081 (Sotomayor, J., dissenting). Likewise, she emphasized that the teachers “had almost exclusively secular duties, making it especially improper to deprive them of all legal protection when their employers have not offered any religious reason for the alleged discrimination.” Id. Finally, Justice Sotomayor argued that, by “expanding the ministerial exception far beyond its historic narrowness” and “over[do[ing] Congress’ carefully tailored exceptions for religious employers,” the majority reaches a “profoundly unfair” result. Id. at 2082. In particular, she warned that the majority’s holding presents serious consequences for employees of religious institutions, all of whom could “be subject to discrimination for reasons completely irrelevant to their employers’ religious tenets.” Id.

49. See ACLU Amicus Brief, supra note 5, at 4 (emphasizing exception serves important purpose of protecting church autonomy); see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012) (concluding church autonomy in selecting ministers always outweighs interests underlying antidis-

crimination laws).

50. See supra notes 5-6 and accompanying text (explaining Our Lady’s application of exception to lay teachers); supra note 40 and accompanying text (examining Our Lady’s reliance on church autonomy doctrine); supra note 32 and accompanying text (discussing circuit courts’ rejection of church autonomy doctrine in lay-employee context); see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188, 196 (2012) (relying on church autonomy doctrine to recognize exception in church-minister context); McClure v. Salvation Army, 460 F.2d 553, 555, 560-61 (5th Cir. 1972) (stressing court’s express limitation of exception to church-minister relationship).

51. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012) (concluding churches’ interest in selection of ministers outweighs society’s antidiscrimination interests); Crunk, supra note 2, at 1114 (highlighting Hosanna-Tabor’s repeated use of “church” and “minister”); see also supra notes 25, 27 and accompanying text (explaining strict scrutiny in church-minister context results in church autonomy principle). The church autonomy doctrine involves “intra-church disputes” rather than employer-employee
considered neither the countervailing interests in enforcing antidiscrimination statutes nor the exemptions those statutes already provide to religious institutions.\textsuperscript{52} Instead, it merely expanded \textit{Hosanna-Tabor}'s historical discussion of the First Amendment's protections for the free exercise of religion and ignored relevant American and English history suggesting that the First Amendment was not designed to shield religious institutions from judicial review of their alleged mistreatment of employees; rather, it was designed to protect the individual from the power of religious institutions.\textsuperscript{53}

Likewise, the majority contradicted itself when it claimed that a variety of factors may be relevant to the ministerial exception analysis but then discarded three of the four factors deemed relevant in \textit{Hosanna-Tabor}—despite the significance of those factors to Morrissey-Berru's and Biel's cases.\textsuperscript{54} An employee's title, religious background, and whether the employee holds themselves out as a minister are all relevant and objective indicators of ministerial status.\textsuperscript{55} The majority also contradicted itself when explaining why an employee's title and background are not relevant because it relied on comparisons to other religions besides Catholicism; Catholicism's formal structure, however, is what makes an employee's title and background especially relevant in determining ministerial status.\textsuperscript{56} By focusing exclusively on the teachers' religious functions, the majority applied the exact kind of "rigid formula" that \textit{Hosanna-Tabor} refused to adopt; this functional approach mimics the primary duties test that courts and

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\item disputes, suggesting that the individual-free-exercise precedent's balancing of competing interests would be the more appropriate justification for expanding the exception in the event that religious institutions' interest outweighs society's interest in enforcing discrimination claims. See Martin, supra note 25, at 1307-08 (noting individual-free-exercise cases more analogous to "neutral federal employment law" situation).
\item See 140 S. Ct. at 2082 (Sotomayor, J., dissenting) (criticizing majority for "overrid[ing] Congress' carefully tailored exceptions for religious employers"); \textit{supra} note 2 and accompanying text (describing statutory exemptions); \textit{see also} Crunk, \textit{supra} note 2, at 1116-17 (arguing expansion beyond church-minister relationship should come from legislature). See \textit{generally supra} notes 40-41, 43 and accompanying text (explaining Court's reasoning).
\item See \textit{supra} note 41 (outlining Court's expansion of \textit{Hosanna-Tabor}'s historical discussion); \textit{see also} \textit{supra} note 26 (discussing alternative historical conclusions not considered in \textit{Hosanna-Tabor}); Griffin, \textit{supra} note 26, at 989-90 (suggesting alternate conclusion for \textit{Hosanna-Tabor} based on American and English history).
\item See \textit{supra} notes 43-44 and accompanying text (explaining Court's discussion of factors relevant to ministerial exception analysis); \textit{see also} 140 S. Ct. at 2080 (Sotomayor, J., dissenting) (noting Court ignored third \textit{Hosanna-Tabor} factor despite relevance to Morrissey-Berru's and Biel's cases).
\item See 140 S. Ct. at 2075 (Sotomayor, J., dissenting) (identifying "objective and easily discernable markers" of ministerial status, including "titles, training, and public-facing conduct").
\item See \textit{supra} notes 44, 46 and accompanying text (noting majority's discussion of other religions); \textit{see also} 140 S. Ct. at 2079 (Sotomayor, J., dissenting) (emphasizing irrelevance of majority's comparisons to other religions). For example, the majority suggested that relying on a ministerial title would prejudice other religions that do not have the same formal structure as more well-known faiths like Catholicism. See \textit{supra} note 44 and accompanying text (describing majority's discussion of religious discrimination concerns). At the same time, however, the majority discussed the term "teacher" and its Judaism equivalent, "rabbi," to suggest that the title "Catholic school teacher[']" has some religious significance indicating a ministerial role, seemingly setting aside its previous concern about titles in less-structured religions. See 140 S. Ct. at 2067 (discussing teachers' titles).
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commentators have criticized for its rigidity, inconsistency, and overbreadth.57 The Court had an opportunity to set clear boundaries for the ministerial exception in light of the differences between the teachers’ cases, particularly with respect to the teachers’ duties related to Mass and other Catholic practices; nevertheless, the majority opted to focus on the irrelevant and disputed facts of each case.58 Instead, the better approach would have been to continue applying Hosanna-Tabor’s totality-of-the-circumstances approach, as this allows courts to rely on objective indicia of ministerial status, avoids inconsistent results, fairly considers all the relevant circumstances, and balances the parties’ important rights and interests in each case.59

By holding that the ministerial exception applies to lay faculty responsible for educating students in religious schools’ faith tradition, the majority unfairly expanded the ministerial exception’s scope.60 Such a broad holding has significant and far-reaching implications, particularly given that the ministerial exception allows religious institutions to intentionally and invidiously discriminate on the basis of race, sex, disability, age, and other protected characteristics.61 Expanding the exception to encompass these two lay teachers puts hundreds of thousands of religious-school teachers in the United States at risk of losing all protection against discrimination from their religious employers.62 Not only does

57. See supra note 45 and accompanying text (discussing Court’s new test for applying ministerial exception); supra note 31 (describing primary duties test and its criticisms); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (declining to employ rigid test in determining minister status of employees).

58. See supra note 10 and accompanying text (discussing each teachers’ religious duties); ACLU Amicus Brief, supra note 5, at 6 (suggesting differences between teachers’ cases underscore importance of circumstance-based test); see also supra note 39 (noting Justice Sotomayor’s criticism of majority’s treatment of facts).

59. See 140 S. Ct. at 2075 (Sotomayor, J., dissenting) (arguing Hosanna-Tabor approach appropriately balanced competing interests); ACLU Amicus Brief, supra note 5, at 4 (providing reasons why Court should continue applying Hosanna-Tabor approach); see also supra note 37 and accompanying text (discussing arguments favoring narrow and ad hoc applications of ministerial exception). The primary duties test has already led to inconsistent results, whereas a totality-of-the-circumstances approach allows the court to look at all the factors that are relevant in a particular case addressing a particular religion. See Allen, supra note 23, at 693-94 (discussing benefits of case-by-case approach over primary duties test). Indeed, if the majority was concerned about prejudicing less-formal religious structures, it should not have adopted a rule that limits courts’ consideration to a single factor that may not be relevant in every case. See 140 S. Ct. at 2064 (expressing concerns about prejudicing less-structured religions); see also id. at 2076 (Sotomayor, J., dissenting) (alleging majority traded legal analysis for rubber stamp in focusing on religious functions).

60. See 140 S. Ct. at 2069 (setting forth holding); id. at 2082 (Sotomayor, J., dissenting) (emphasizing unfair result of broad holding).

61. See ACLU Amicus Brief, supra note 5, at 4 (warning ministerial exception allows intentional, invidious discrimination); supra note 29 and accompanying text (noting procedural effect of exception); see also supra note 2 (discussing purposes and beneficiaries of employment discrimination laws).

62. See 140 S. Ct. at 2072 (Sotomayor, J., dissenting) (noting impact of broad holding on teachers in United States); Crank, supra note 2, at 1081-82, 1102, 1114 (discussing exception’s operative effect); see also BROUGHAMAN ET AL., supra note 38, at 2 (quantifying teachers and students at religious schools); Reilly, supra note 38 (discussing problems presented by increase in religious school attendance due to COVID-19 pandemic). The lack of a diverse teaching staff negatively impacts students’ ability to learn and succeed, particularly diverse students. See Figlio, supra note 2 (explaining importance of diversity in teaching staff). The rise in private-
this allow for discriminatory employment decisions that damage the dignity of employees, it also could perpetuate discriminatory attitudes, setting a concerning example for millions of students throughout the United States who will eventually become an influential segment of society.63

In sum, the broad expansion of the ministerial exception in Our Lady ignores both relevant precedent limiting the church autonomy rationale to the church-minister relationship and pertinent historical arguments suggesting that the First Amendment religion clauses are designed to protect individuals from the power of religious institutions. Moreover, the Court misapplied, ignored, and improperly discarded important factors from Hosanna-Tabor that were relevant in the present case. As a result, the overbroad application of the ministerial exception may not only deprive many teachers of discrimination protections, but also deny many students the benefits of a diverse teaching staff. Therefore, the Court should take the next opportunity to correct Our Lady’s unjust holding before more courts allow religious institutions to engage in invidious and otherwise illegal discrimination against lay employees under the veil of the ministerial exception.

Kelsie A. Ferris

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63. See EEOC v. Miss. Coll., 626 F.2d 477, 489 (5th Cir. 1980) (emphasizing potential impact of allowing religious schools to discriminate against employees); Glynne et al., supra note 2, at 561 (noting impact of discrimination on employees’ dignity); Crank, supra note 2, at 1102 (warning expansion of exception risks depriving unwary employees of legal protection or recourse); see also Figlio, supra note 2 (explaining benefits of diverse teaching staff); Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (stressing negative effects of racial segregation in schools).