# DISENTANGLING RELIGION AND PUBLIC REASON: AN ALTERNATIVE TO THE MINISTERIAL EXCEPTION

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*According to the U.S. Supreme Court, the First Amendment bars application of antidiscrimination law to the employment relationship between a religious organization and its "ministers." Under this "ministerial exception," religious organizations can lawfully fire employees for being Polish, reporting sexual harassment, having breast cancer, and many other reasons bearing no discernible connection to religion. Proponents of the exception focus on the private and voluntary aspects of ministerial employment, arguing that the state should not interfere in intimate matters such as who ministers to the faithful. But this focus overlooks how antidiscrimination law insulates employees' exercise of basic liberties—such as marital freedom, sexual autonomy, and religious freedom itself—from employer control and helps secure equal membership in society. By granting religious employers free rein to discriminate, the ministerial exception treats employers' liberty interests as more important than the liberty and equality interests of ministerial employees. The exception thus conflicts with liberal democracy's basic commitments to equal liberty and social equality.*

*To offer a way forward, this Article develops a theory of meaningful work to support an alternative to the ministerial exception that would permit religious organizations to hire like-minded employees, but only when doing so would not subvert the purposes of employment discrimination law. Such an "authenticity exception" can be implemented without state entanglement in religion by distinguishing the inherently religious issue of what makes work religious from the public issue*

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*of whether a limitation on someone's rights is supported by public reasons—reasons that we could all accept as free and equal members of society. It then illustrates the authenticity exception through a similar exception in Canadian law and revisits ministerial exception cases to show how the authenticity exception better closes the gap between religious liberty and exempted discrimination.*



## INTRODUCTION

According to the U.S. Supreme Court, the First Amendment bars application of antidiscrimination law to the employment relationship between a religious organization and its

"ministers."[1] Under this "ministerial exception," religious organizations can lawfully fire covered employees for being Polish,[2] resisting sexual harassment,[3] developing narcolepsy,[4] being Black,[5] developing a brain tumor,[6] taking time off for breast cancer treatment,[7] and a bevy of other reasons bearing no discernible connection to the organizations' religious beliefs or practices. What, if anything, justifies such a capacious religious exemption?

Proponents of the ministerial exception typically characterize ministerial employment relationships as private and voluntary, arguing that the state should accordingly not interfere.[8]

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1 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020) (holding that the Religion Clauses of the First Amendment barred age discrimination and disability discrimination suits brought by two lay teachers at Catholic elementary schools because the teachers performed "vital religious duties" of "[e]ducating and forming students in the Catholic faith"); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188, 196 (2012) (holding that the Religion Clauses of the First Amendment barred a teacher's claim of disability discrimination against a Lutheran school).

2 Sterlinski v. Catholic Bishop of Chi., 934 F.3d 568, 570–72 (7th Cir. 2019).

3 Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004).

4 *Hosanna-Tabor*, 565 U.S. at 178, 188, 196.

5 Rweyemamu v. Cote, 520 F.3d 198, 204–09 (2d Cir. 2008).

6 Grussgrott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 657, 661–62 (7th Cir. 2018).

7 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2059, 2069 (2020).

8 *See, e.g.*, *id.* at 2060 (describing ministerial employment decisions as "internal" matters of religious governance); *Hosanna-Tabor*, 565 U.S. at 188, 190 (describing employment discrimination law as a form of "interference" in the "internal" affairs of the church); *id.* at 199 (Alito, J., concurring) ("Throughout our Nation's history, religious bodies have been the preeminent example of private associations . . . ."); Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 849, 855 (2012) (arguing that a religious organization's selection of its ministers is an "internal church decision" that the state may not interfere with, in contrast to a church's "outward physical acts," which may be proscribed by law (citations and quotation marks omitted)). As I discuss in Part II, some liberal theorists also endorse a ministerial exception on grounds of associational freedom, but one that is more circumscribed than the extant exception. *See, e.g.*, NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 92, 148 (2017) (arguing in support of a religious exemption to antidiscrimination law for the employment of religious leaders); Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 87 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) (arguing that the right of close association can morally justify some form of the ministerial exemption for religious leaders, but that the right extends to secular groups under some limited circumstances as well, and that such groups should be exempt from antidiscrimination law under those circumstances); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 974–79 (2013) (arguing that the ministerial exception protects "the freedom of conscience and the social conditions for its development"). For critical views, see generally Sonu Bedi, *The Horizontal Effect of*

Such arguments miss their target because their characterization of ministerial employment neglects the highly regulated, nonvoluntary, and quasi-public context in which ministerial employment actually takes place. Proponents' characterization of ministerial employment accordingly obscures how employment discrimination law is needed to protect employees from losing their livelihood for exercising a variety of basic liberties—such as marital, reproductive, and sexual autonomy, associational and expressive liberties, and religious liberty itself—and to safeguard employees' equal status in society.[9] Congruent with this scholarly neglect of the liberty and equality values of employment discrimination law, the Supreme Court only mentions the value of employment discrimination law once in its two ministerial exception cases, simply noting, in passing, that "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important."[10]

The overwhelming priority that the exception grants to the religious liberty of employers over the fundamental rights of employees is thus hard to reconcile with the liberal principle of the *priority of liberty*—the principle that liberty may only be restricted for the sake of a more meaningful, equal liberty for all[11]—and liberal democracy's basic commitment to social

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*a Right to Non-Discrimination in Employment: Religious Autonomy Under the U.S. Constitution and the Constitution of South Africa*, 95 B.U. L. REV. 1181 (2015) (arguing that ministerial exception jurisprudence gives inadequate weight to the equality rights of employees in contrast to South African jurisprudence seeking to balance the religious liberty of employers with the right of nondiscrimination in employment); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981 (2013) (arguing that neither the history of the First Amendment nor the Court's free exercise jurisprudence supports the ministerial exception).

9 *See infra* subparts III.A and B. *Cf.* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 37–74 (2017) (describing workplaces as "communist dictatorships" in which employers exercise unaccountable power of their employees); ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 11 (2015) (describing how the employment relationship permits employers to dominate their employees); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 256 (2013) (arguing that employer control over employees' off-duty political speech is morally objectionable because it results in "a skewed political discourse" where "employers' voices are amplified and workers' are squelched").

10 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 196 (2012). The Court did not even mention the importance of antidiscrimination law in its most recent ministerial case, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

11 JOHN RAWLS, A THEORY OF JUSTICE 204 (1971) ("[A] basic liberty . . . can be limited only for the sake of liberty itself, that is, only to insure that the same liberty or a different basic liberty is properly protected and to adjust the one system of liberties in the best way.").

equality. These shortcomings are nevertheless instructive, for they reveal important desiderata of a liberal theory of religious exemptions to antidiscrimination law: they must be *domain sensitive*—that is, they must be responsive to the particular legal and social context within which the relationships they target operate—and they must be supported by justifications that are responsive to the weighty liberty and equality interests protected by antidiscrimination law.

The ministerial exception is inherently unable to respond to these challenges. The Supreme Court recently specified that the exception applies broadly to employees who perform "important" religious functions.[12] To determine whether a religious function is sufficiently important, a court must examine the surrounding circumstances, including a religious organization's own "explanation of the role of such employees in the life of the religion in question."[13] The Court has left it ambiguous how much weight should be given to that explanation.[14] If the important functions standard is ultimately interpreted to require deference to religious organizations' own views about whether a given employee performs important religious work, the exception would be unjustifiably broad, giving practically no weight to the liberty and equality interests of ministerial employees. But if the important functions standard is interpreted to require courts to make an independent determination of what counts as an important religious activity, applying the ministerial exception would be entangling, requiring courts to pass judgment on the religious significance of, for instance, playing music during worship or constructing a sweat lodge.

To offer a way forward, this Article proposes a methodological reorientation toward the question of why employment should be an arena for religious liberty to begin with. Guided by this question, it develops a novel theory of the associational value of meaningful work to defend an alternative exception that permits a religious organization to hire like-minded people in furtherance of its ends when doing so would not subvert the broader purposes of antidiscrimination law. Such an *authenticity exception* can be implemented to avoid state entanglement in religion by distinguishing the inherently religious issue of what makes work religious from the public issue of whether a limitation on someone's fundamental rights is justified by

12 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064–66.

13 *Id.* at 2066–67.

14 *See id.*; *infra* subpart IV.B.

*public reasons*—reasons that we could all accept as free and equal members of society.[15]

Many adults spend most of their waking hours performing paid work, leaving little time for participating in a variety of civil, political, moral, and religious associations. To prevent our productive activity and pursuit of economic growth from impoverishing associational life, a society should permit people to associate around moral values in paid workplaces. Unlike typical for-profit work, realizing the ends of morally animated work often requires that the person performing the work be authentic—that they sincerely support the values of their work. Religious work offers a paradigm illustration. But without an exemption, employment discrimination law's prohibition on religious discrimination would bar hiring for religious authenticity.[16] In order to avoid impairing certain forms of moral association on account of their religious foundations, religious organizations require an exemption to hire for authenticity in furtherance of their religious ends.

To implement such an *authenticity exception*, courts should defer to a religious organization's sincere beliefs about whether the work in question is religious. Such a subjective test is needed to avoid an entangling inquiry into what kinds of work have religious significance—a problem that confronts the U.S. ministerial exception—and to give effect to a religious organization's associational liberty to define how it practices its religion. But that should not end the inquiry. When a religious organization seeks the protection of such an exception, the organization is asking for the state to limit its employees' civil rights, fundamental right of religious freedom, and, depending on the nature of the religious job requirement, possibly also fundamental rights of marital and sexual autonomy, gender

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15 JOHN RAWLS, POLITICAL LIBERALISM 226 (expanded ed., 2005).

16 *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (making it an unlawful employment practice to discriminate in employment on the basis of "race, color, religion, sex, or national origin"). Section 702(a) of Title VII exempts religious organizations from prohibitions on religious discrimination when employing people engaged in religious activities. *See* 42 U.S.C. § 2000e-1(a); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338–40 (1987) (holding that it would not violate the establishment clause to exempt all of the nonprofit activities of a religious organization from Title VII's prohibition on religious discrimination, even if the employee in question may be engaged in a secular activity); *infra* text accompanying notes 238–241. Although the scope of discrimination permitted under § 702(a) is narrower than under the ministerial exception, § 702(a) suffers from some of the same defects as the ministerial exception, such as having an unjustifiably broad scope of application and giving insufficient weight to the liberty and equality interests of covered employees. *See infra* subpart V.B.

equality, and the like. For such a limitation to be compatible with the requirement of public reason, the organization must show that the discriminatory job qualification falls within the scope of the public purpose of the exception and, hence, that religious adherence (or belief or affiliation) is reasonably necessary for the performance of the employee's job duties. This objective fit requirement satisfies the requirement of public reason by asking religious organizations to offer types of considerations for discriminating in employment that we all have reason to accept—namely, reasons to hire for authenticity.

To avoid taking a stand on controversial matters of faith, courts should, in turn, refrain from evaluating the truth of the religious organization's substantive reasons for making religious adherence a condition of employment. Instead, courts should restrict their analysis to whether the discriminatory job requirement is intelligible as a means to advancing the organization's ends. An authenticity exception thus avoids the entanglement quandary faced by the ministerial exception by distinguishing the inherently religious issue of what kinds of jobs are religious—and deferring to religious organizations on that issue—from the public and legal issue of what could justify limiting people's fundamental rights.

There is, however, an important substantive limitation contained in the liberal concept of hiring for authenticity. Understood as a public reason for application of the exception, the need to hire for authenticity could not justify religiously motivated job requirements that aim at instituting white supremacy, patriarchy, and other forms of subordinating structures in our working lives that would subvert the central purposes of employment discrimination law. While applying this limitation would engage courts in a substantive inquiry into the purposes of the job requirement at issue, it would not be entangling because it would not require courts to determine whether the purposes are religious, but rather whether lending state support to those purposes—as defined by the religious organization—is compatible with treating equal liberty and social equality as fundamental values.

Canadian human rights law contains religious exemptions that similarly seek to harmonize the associational rights of religious organizations and the imperative of justifying limitations on the fundamental rights of employees.[17] This Article

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[17] *See, e.g.*, Ont. Human Rights Comm'n v. Christian Horizons (2010), 102 O.R. 3d 267, para. 89 (Can. Ont. Sup. Ct. J.) (available at http://canlii.ca/t/29sf6 [http://perma.cc/4EXS-S4G9]) (holding that a religious organization could

accordingly uses Canadian jurisprudence to illustrate the authenticity exception and to discuss how various ambiguities in the exception might be settled in light of social context. It then closes by applying the authenticity exception to the facts of several U.S. ministerial exception cases to illustrate how the exception would not, for instance, permit a religious school to fire one of its teachers for needing breast cancer treatment or developing narcolepsy merely because the teacher performs important religious work. The authenticity exception thus not only avoids the entanglement quandary that confronts the ministerial exception, but is also better tailored to the legitimate liberty interests that underpin freedom of religious association.

Given the precedential stability of the ministerial exception,[18] courts are unlikely to adopt an alternative exception any time soon. But the Court in *Our Lady of Guadalupe School* did not address how much weight to give a religious organization's own views about the importance of an employee's work. When courts are asked for clarification, they will have an opportunity to refine the exception's scope and grounds. Reflecting on the flaws of the current approach and considering alternatives can also inform dissenting opinions. In light of the current composition of the Court,[19] dissents may come to play a central role

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not benefit from an exception to a provincial human rights code's prohibition on religious discrimination because the organization failed to show that not being in a "same sex relationship" was reasonably necessary for cooking, cleaning, and other like tasks). Canada does not have an explicit constitutional exception analogous to the ministerial exception, but provincial human rights codes are interpreted in light of the values enshrined in the Canadian Charter of Rights and Freedoms. *See id.* paras. 68–73 (explaining how Charter jurisprudence on religious liberty requires applying a subjective test for determining whether a religious organization is engaged in a religious activity).

18 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188 (2012) (explaining that the U.S. "Courts of Appeals have uniformly recognized" the ministerial exception); Rweyemamu v. Cote, 520 F.3d 198, 204–09 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 303–07 (3d Cir. 2006); Equal Emp't Opportunity Comm'n v. Roman Catholic Diocese, 213 F.3d 795, 800–01 (4th Cir. 2000); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 345–50 (5th Cir. 1999); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225–27 (6th Cir. 2007); Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362–63 (8th Cir. 1991); Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099, 1100–04 (9th Cir. 2004) (per curiam); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655–57 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1301–04 (11th Cir. 2000); Equal Emp't Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455, 460–63 (D.C. Cir. 1996).

19 For a discussion of the current Court's likely increasing inclination to interpret the First Amendment as permitting—even requiring—courts and legislatures to favor religion, see Micah Schwartzman & Nelson Tebbe, *Establishment*

in laying groundwork for later developing a more liberal egalitarian First Amendment jurisprudence.

Part I describes the breadth of discrimination permitted by the ministerial exception. Part II offers the main legal and philosophical arguments for the exception. Part III shows how these arguments neglect the social and economic significance of employment and thereby fail to account for the liberty and equality values of employment discrimination law. Part IV argues that the ministerial exception is inherently unable to respond to the challenges raised in Part III. Part V advances an alternative authenticity exception grounded in the associational significance of work.

## I
## THE MINISTERIAL EXCEPTION

According to the Supreme Court, regulating the employment relationship between a "church" and its "ministers" would unconstitutionally burden the free exercise of religion and entangle the state in "matters of . . . faith and doctrine."[20] Requiring compliance with employment discrimination law would interfere with a church's ability to determine who will lead its members and embody and develop its values.[21] And by regulating the conditions under which someone can or cannot be employed as a minister, the state would risk substituting its own judgment for that of the church on such paradigmatically religious matters.[22] The First Amendment thus requires a "ministerial exception" to employment discrimination law to insulate religious employment decisions from improper state interference and control.[23]

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*Clause Appeasement*, 2019 SUP. CT. REV. 271, 276–301; Michelle Boorstein, *Religious Conservatives Hopeful New Supreme Court Majority Will Redefine Religious Liberty Precedents*, WASH. POST (Nov. 3, 2020, 6:31 PM), https://www.washingtonpost.com/religion/2020/11/03/supreme-court-religious-liberty-fulton-catholic-philadelphia-amy-coney-barrettt/ [https://perma.cc/8WSY-YLUL]; Leah Litman, *How the Court Inverted Constitutional Protections Against Discrimination*, THE ATLANTIC (Oct. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/10/how-court-inverted-constitutional-protections-against-discrimination/616911/ [https://perma.cc/Z4A9-JHTC].

20 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (quoting Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)); *see also Hosanna-Tabor*, 565 U.S. at 189; U.S. CONST. amend. I (prohibiting the state "establishment" of religion).

21 *Hosanna-Tabor*, 565 U.S. at 188.

22 *Id.* at 188–89.

23 *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060; *Hosanna-Tabor*, 565 U.S. at 188–89.

For purposes of the exception, "church" and "minister" are legal terms of art. "Churches" are not only self-described churches and traditional places of worship, but also include religiously affiliated organizations, such as university campus fellowships,[24] and even secular organizations performing religious functions, such as a secular hospital with a pastoral care department.[25] Who counts as a "minister" is similarly a matter of function. Titles and credentials are not dispositive, and there is no "rigid formula" for determining who counts as a minister under the exception.[26] "What matters . . . is what an employee does,"[27] in particular, whether the employee holds an "important position of trust,"[28] such as someone "who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[29] Consequently, while janitors and receptionists have tended to fall outside of the ambit of "minister,"[30]

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24 *See, e.g.*, Conlon v. InterVarsity Christian Fellowship/USA, 777 F.3d 829, 834 (6th Cir. 2015) (holding that a Christian organization "whose purpose is to advance the understanding and practice of Christianity in colleges in universities" is considered a religious group under *Hosanna-Tabor*).

25 *See* Penn v. N. Y. Methodist Hosp., 884 F.3d 416, 424–26 (2d Cir. 2018) (holding that secular hospital previously affiliated with the United Methodist Church was a "church" with respect to its employment of chaplains in its pastoral care department).

26 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2062; *Hosanna-Tabor*, 565 U.S. at 190.

27 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2063–64; *see Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring) ("What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities. . . . Hosanna-Tabor [thus] had the right to decide for itself whether respondent was religiously qualified to remain in her office.").

28 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2063. As I discuss in Part IV, the Court left open how much deference is owed to religious organizations' own determination of whether the work in question is sufficiently important.

29 *Id.* at 2063 (quoting *Hosanna-Tabor*, 565 U.S. at 199).

30 *See, e.g.*, Davis v. Balt. Hebrew Congregation, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (holding that a former facilities manager at a synagogue was not a minister because his "primary duties—maintenance, custodial, and janitorial work—were entirely secular" and he had "no religious training or title, and had no decision-making authority with regard to religious matters"); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975) (holding that a "typist-receptionist" was a not a minister for purposes of the constitutional ministerial exception to Title VII). *But see infra* note 77 and text accompanying notes 238–241.

schoolteachers,[31] principals,[32] theology professors,[33] choir directors,[34] organists,[35] press secretaries,[36] and perhaps even high school football coaches,[37] can all perform important religious functions and can therefore all be ministers.

### A. The Divergence Between Religious Association and Exempted Discrimination

To illustrate the potential breadth of discretion granted to religious organizations under the ministerial exception, consider the facts of the case in which the Supreme Court first upheld the exception. In *Hosanna-Tabor Evangelical Lutheran*

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31 *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 192; Stately v. Indian Cmty. Sch. of Milwaukee, Inc., 351 F. Supp. 2d 858, 869 (E.D. Wis. 2004) (holding that a teacher at a religiously affiliated elementary and middle school was a minister for purposes of the ministerial exception because she participated in "religious ceremonies and cultural activities" and served as a mentor for students' "spiritual health"); *see also infra* note 77.

32 *See, e.g.*, Fratello v. Roman Catholic Archdiocese of N.Y., 175 F. Supp. 3d 152, 166–67 (S.D.N.Y. 2016) (holding that a Catholic school principal was a minister because her job duties included religious matters such as leading daily prayer and she was charged with the "vocation" of Catholic education).

33 *Compare* Equal Emp't Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455, 463–65 (D.C. Cir. 1996) (holding that a university professor's Title VII claim that she was denied tenure on the basis of her sex was barred by the First Amendment because the canon law courses she taught were "designed to prepare the student for the professional practice of canon law" and that the role she performed was "vital to the spiritual and pastoral mission of the Catholic Church"), *with* Equal Emp't Opportunity Comm'n v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980) ("The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine."), *and* Richardson v. Nw. Christian Univ., 242 F. Supp.3d 1132, 1145–46 (D. Or. 2017) (finding that a faculty member at a religious university was not a minister because her title and primary duties were secular, and she did not undergo any "specialized religious training"). *See supra* note 32.

34 Miller v. Bay View United Methodist Church, Inc., 141 F. Supp. 2d 1174, 1181–83 (E.D. Wis. 2001) (finding that a choir director for a church was a minister because of the religious significance of the music she arranged for services).

35 Sterlinski v. Catholic Bishop of Chi., 934 F.3d 568, 572 (7th Cir. 2019) (holding that an organist's national origin discrimination suit was barred by the ministerial exception because the "record show[ed] that organ playing serve[d] a religious function").

36 Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 703–04 (7th Cir. 2003) (holding that a "Hispanic Communications Manager" for a church was a minister because she acted as a "press secretary" by writing and posting articles on behalf of the church, and thus was responsible for communicating the church's values).

37 Whether high school football coaches could be ministers under the important religious functions standard was discussed throughout Oral Argument for *Our Lady of Guadalupe School*. *See* Transcript of Oral Argument at 26, 58, 69, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (No. 19-267).

*Church & School v. EEOC*,[38] the religious organization was a private Lutheran school that offered a "Christ-centered" yet "core secular curriculum to the general public for a fee."[39] The "minister" was Cheryl Perich, a Lutheran fourth-grade teacher who, although "called to [her] vocation by God through a congregation,"[40] taught exactly the same subjects as non-Lutheran teachers.[41] And the activity that purportedly threatened the "faith and mission" of the church was Perich's suit to enforce a provision of the Americans with Disabilities Act (ADA),[42] an Act whose antidiscrimination objectives the school openly supported.[43]

Perich was diagnosed with narcolepsy during her tenure at Hosanna-Tabor.[44] After taking disability leave, Perich's physician said she was fit to return to work.[45] But Hosanna-Tabor refused to let Perich return because they had already hired a replacement and were concerned that her condition had left her otherwise unfit to teach.[46] The school instead offered to pay Perich a portion of her health insurance costs in exchange for her resignation.[47] Perich refused and indicated that she might sue for disability discrimination.[48] The school subsequently fired Perich for her "insubordination and disruptive behavior" in attempting to return to work and for the "damage she had done to her working relationship with the school by threatening to take legal action."[49]

Perich sued Hosanna-Tabor for disability discrimination under the ADA.[50] The main legal issue in Perich's case, however, was not the merits of her discrimination claim, but whether Hosanna-Tabor could be liable for firing her at all,

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38 565 U.S. 171 (2012).

39 Brief for Respondent Cheryl Perich at 36, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553); *see Hosanna-Tabor*, 565 U.S. at 177.

40 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 177 (2012).

41 *See* Brief for Respondent Cheryl Perich, *supra* note 39, at 6–7.

42 *Hosanna-Tabor*, 565 U.S. at 180, 190.

43 *See* Brief for Respondent Cheryl Perich, *supra* note 39, at 6.

44 *See Hosanna-Tabor*, 565 U.S. at 178.

45 *See* Brief for Respondent Cheryl Perich, *supra* note 39, at 9.

46 *Hosanna-Tabor*, 565 U.S. at 178; Brief for Respondent Cheryl Perich, *supra* note 39, at 11.

47 *See Hosanna-Tabor*, 565 U.S. at 178.

48 *See id.* at 178–79.

49 *Id.* at 179 (internal quotation marks and citations omitted).

50 *See id.* at 179. The ADA not only establishes substantive rights against disability discrimination in employment, but also protects employees in exercising those rights by prohibiting employer retaliation against employees (such as by firing or demoting them) for bringing or even planning to bring an ADA disability discrimination suit. *See* 42 U.S.C. §§ 12112(a), 12203(a).

even if doing so was discriminatory. Although Perich taught exactly the same subjects as the school's non-Lutheran teachers,[51] Perich was hired as a teacher "called" to her vocation by God after formal theological coursework and a vote of support by her congregation.[52] She also acted as a minister, claiming tax benefits for employees paid to perform activities "in the exercise of the ministry," and led several liturgical services per year at the school.[53] Because of her job title, training, self-representation, and the religious aspects of her work, the Supreme Court ultimately held that Perich was covered by the ministerial exception and thus could not hold Hosanna-Tabor liable for disability discrimination.[54]

Notably, it was of no importance to the Court that the church with which the school was affiliated, the Lutheran Church–Missouri Synod (LCMS), explicitly condemned employment discrimination, including disability discrimination.[55] Consider, for example, a section from the LCMS's employee handbook in effect at the time of Perich's employment:

> There are many rules and regulations in the ADA. Churches need to understand the legal restrictions about discriminating against disabled individuals. Even when these rules are not technically applicable to a church, as a Christian organization the church should not discriminate against persons with disabilities and should, where reasonably possible without undue hardship, take the lead in making reasonable accommodations for disabled workers.[56]

It was similarly irrelevant that Hosanna-Tabor had allegedly told Perich that part of why they wanted her to resign was to enable the school to "fill the position responsibly," and that the school hoped to amend its employee handbook to state that "anyone who has a disability extending for longer than six

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51 *See* Brief for Respondent Cheryl Perich, *supra* note 39, at 6–7.

52 *See Hosanna-Tabor*, 565 U.S. at 191.

53 *See id.* at 191–92 (quoting Equal Emp't Opportunity Comm'n v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 772 (6th Cir. 2010)).

54 *See Hosanna-Tabor*, 565 U.S. at 192, 196.

55 Brief for Respondent Cheryl Perich, *supra* note 39, at 5–6 (quoting LUTHERAN CHURCH–MISSOURI SYNOD, PERSONNEL MANUAL PROTOTYPE FOR CONGREGATIONS AND DISTRICTS, § 2.200 (2003), https://static1.squarespace.com/static/5122917ce4b08a7615958803/t/5195a2abe4b05e9de60eb33a/1368761003168/Cong+Personnel+Manual.pdf [https://perma.cc/UME5-G8VZ]).

56 *See id.* at 6 (quoting LUTHERAN CHURCH–MISSOURI SYNOD, EMPLOYMENT RESOURCE MANUAL FOR CONGREGATIONS AND DISTRICTS 6 (2003), http://classic.lcms.org/graphics/assets/media/LCMS/EmploymentResourceManual2003.pdf [https://perma.cc/3AXY-9U3A]).

months would be encouraged to resign their call" so as to make it easier to stably fill teaching positions.[57]

In sum, although there was evidence that Hosanna-Tabor fired Perich out of bias disconnected from the school's religious values and for administrative convenience, the Court held that the ministerial exception barred Perich and the EEOC's suit. As applied in *Hosanna-Tabor*, the ministerial exception—an exception designed to protect the free exercise of religion—thus permitted Perich's religious employer to fire her for non-religious discriminatory reasons, including reasons that were contrary to its own express values.

To be sure, Hosanna-Tabor did offer, after the fact, a religious basis for dismissing Perich. The school contended that Perich was fired because she failed to resolve her dispute with the school in accordance with "the Synod's belief that Christians should resolve their disputes internally."[58] But before she threated to sue, Perich had already been told that she could either resign and take the health insurance money offered or that the school would "take [her] Call away."[59] Hosanna-Tabor may have therefore already decided to end her employment for non-religious reasons by the time it cited its religious dispute resolution principle.

The divergence between religiosity and discrimination permitted under the ministerial exception in *Hosanna-Tabor* is not anomalous, as the Court's most recent ministerial exception case, *Our Lady of Guadalupe School v. Morrissey-Berru*,[60] makes clear. One of the plaintiffs, Agnes Morrissey-Berru, taught fifth and sixth grade at Our Lady of Guadalupe School (OLG), a Catholic elementary school, for many years.[61] When she was in her sixties,[62] OLG proposed that she retire.[63] She declined, was demoted, and then OLG stopped renewing her teaching contract.[64] In response, Morrissey-Berru brought an age employment discrimination suit against OLG.[65] OLG sought protection of the ministerial exception and was ulti-

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57 Brief for Respondent Cheryl Perich, *supra* note 39, at 8–9.

58 *Hosanna-Tabor*, 565 U.S. at 180.

59 See *Hosanna-Tabor*, 565 U.S. at 178; Brief for Respondent Cheryl Perich, *supra* note 39, at 9.

60 140 S. Ct. 2049 (2020).

61 *Id.* at 2056.

62 Brief for Respondent Darryl Biel at 13, Our Lady of Guadalupe Sch. v. Agnes Morrissey-Berru, 140 S. Ct. 2049 (2020) (No. 19-267), St. James Sch. v. Biel, 140 S. Ct. 680 (2019) (No. 19-348).

63 *Id.* at 13.

64 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2057–58.

65 *Id.* at 2058.

mately successful.[66] Unlike Hosanna-Tabor, OLG never gave—and indeed did not need to give—any religious reasons for its decision to demote and end her employment.[67] Even Justice Sotomayor, joined in her dissent by Justice Ginsburg, agreed with the Court that the school's reasons for discriminating were legally irrelevant, explaining that the ministerial exception "gives an employer free rein to discriminate" and "even condones animus."[68]

Accordingly, in *St. James School v. Biel*,[69] consolidated with *Our Lady of Guadalupe School*, another Catholic elementary school did not need to offer any reasons—let alone religious reasons—for firing one of its teachers because she developed breast cancer. The late Kristen Biel, a former Catholic school teacher, was fired after she requested time off to undergo treatment for breast cancer.[70] The school explained that they thought it would be too disruptive for students to have two teachers in the same year.[71] Yet the school had previously made precisely such arrangements to accommodate maternity leave for other teachers, thus suggesting that the school's proffered reasons masked animus.[72] Biel subsequently sued for disability discrimination and, like OLG, the school responded by seeking protection of the ministerial exception.[73] So for the sake of being able to determine who will "personify" its beliefs,[74] the school had to be free to fire Biel because she needed breast cancer treatment, and the Supreme Court ultimately agreed.[75] *Our Lady of Guadalupe School* thus reinforces the principle in *Hosanna-Tabor* that discrimination does not need to be religiously motivated in order to be permitted under the ministerial exception.

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66 *See id.* at 2058, 2069.

67 OLG claimed that Morrisey-Berru was demoted because she had "difficulty . . . administering a new reading and writing program" connected to the school's accreditation and that her position was eliminated for budgetary reasons. *Id.* at 2058; Brief for Respondent Darryl Biel, as Personal Representative of the Estate of Kristen Biel, *supra* note 62, at 14 (quoting Principal Beuder, OLG.App. 30a).

68 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072 (Sotomayor J., dissenting) (citations omitted).

69 911 F.3d 603 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 680 (2019).

70 *Biel*, 911 F.3d at 606.

71 Brief for Respondent Darryl Biel, *supra* note 62, at 10.

72 *See id.*

73 *Biel*, 911 F.3d at 606.

74 *Id.* at 611 (citations and internal quotation marks omitted).

75 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2059, 2069.

*Our Lady of Guadalupe School* is, of course, in some respects, novel. Morrisey-Berru and Biel had little religious training and taught primarily secular subjects,[76] much like the teachers in a long line of prior cases in which lower courts declined to extend the ministerial exception to lay teachers.[77] It was enough for the Supreme Court that the teachers were involved in "[e]ducating and forming students in the Catholic faith"—such as by embodying Catholic values and "infus[ing]" their teaching with a Catholic ethos—religious duties that were "vital" for the mission of their respective schools.[78]

But while the Court's standard for determining who counts as a minister may be novel, the breadth of discrimination it permits is not. It is a well-established legal principle that the ministerial exception permits religious organizations to engage in discrimination for any reason. This principle predates both *Our Lady of Guadalupe School* and *Hosanna-Tabor*,[79] and was even embraced by the Ninth Circuit, whose later attempt to cabin the ministerial exception was reversed by the Court in *Our Lady of Guadalupe School.*

For example, in *Elvig v. Calvin Presbyterian Church*,[80] the plaintiff, an Associate Pastor, claimed that her supervisor, a more senior pastor, had sexually harassed her.[81] After complaining to her employer and the EEOC, her supervisor alleg-

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76 *Id.* at 2056, 2058 (describing how Morrisey-Berru's and Biel's formal religious training consisted, respectively, in "religious education courses" and attending a religious conference on teaching methods).

77 Prior to *Our Lady of Guadalupe School*, courts often declined to apply the ministerial exception to teachers who performed primarily secular functions at religious schools. *See, e.g.*, Geary v. Visitation of the Blessed Virgin Mary Par. Sch., 7 F.3d 324, 331 (3d Cir. 1993) (holding that the ministerial exception did not apply to a lay teacher even though her school believed that she played a "unique and important role" at the school); Redhead v. Conference of Seventh-day Adventists, 566 F. Supp. 2d 125, 132 (E.D.N.Y. 2008) (finding that a teacher's Title VII claim for being fired for being pregnant and unmarried was not barred by the ministerial exception because teacher's primary duties were secular). As Justice Sotomayor explained in her dissent to *Our Lady of Guadalupe School*, it is now no longer clear whether these earlier cases are still good law. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2073 (Sotomayor, J., dissenting) (describing the traditional jurisprudential "consensus" that the ministerial exception did not apply to lay teachers).

78 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066.

79 *See, e.g.*, Equal Emp't Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455, 465 (D.C. Cir. 1996) ("That the University did not assert any religious basis for denying Sister McDonough tenure does not affect our conclusion . . . ."); Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008) (explaining that the ministerial exception precluded consideration of the plaintiff's claim that his employer's reasons for denying him an employment opportunity masked racial animus).

80 375 F.3d 951 (9th Cir. 2004).

81 *See id.* at 953–54.

edly subjected her to verbal abuse and intimidation, reduced her job duties, and ultimately suspended and dismissed her.[82] The Ninth Circuit held that the ministerial exception protected the Church from liability for firing Elvig in retaliation for seeking legal protection against sexual harassment because firing someone is a type of "protected ministerial decision[ ]"[83] concerning "whom to employ as a minister."[84] The applicability of the ministerial exception thus entailed that the Church could avoid liability under antidiscrimination law for any ministerial employment decision, regardless of its reasons for the decision.[85]

The ministerial exception has similarly protected employers from liability for firing employees out of racial animus,[86] hostility to disability,[87] and national origin discrimination[88]—all for reasons ostensibly unmotivated by religion.

## II
## WHAT DO NARCOLEPSY, SEXUAL HARASSMENT, AND BREAST CANCER HAVE TO DO WITH RELIGIOUS FREEDOM?

The First Amendment ministerial exception to employment discrimination law thus permits churches to discriminate in their employment of ministers not only in the service of relig-

82 *See id.*

83 *Id.* at 969.

84 *Id.* at 953. The Ninth Circuit did, however, find that the plaintiff could still recover damages for emotional distress and reputational harm arising from the harassment itself, as well as for retaliatory verbal abuse and intimidation, because such actions did not "implicate" the Church's "decisions about whom to employ as a minister." *Id.* at 953, 960. *But see* Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 703 (7th Cir.2003) (explaining that "the 'ministerial exception' applies without regard to the type of claims being brought").

85 *See Elvig*, 375 F.3d at 953, 969; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. V. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 194–95.

86 *See* Ross v. Metro. Church of God, 471 F. Supp. 2d 1306, 1308, 1311 (N.D. Ga. 2007) (holding that the ministerial exception insulated a church from liability for firing a Black pastor after a more senior pastor made a variety of racist statements to him, such as "more blacks will probably join the Church now that you are here, I guess we'll get some more 'rims'").

87 *See* Grussgott v. Milwaukee Jewish Day Sch., Inc., 260 F. Supp. 3d 1052, 1054 (E.D. Wis. 2017), *aff'd*, 882 F.3d 655 (7th Cir. 2018) (holding that the ministerial exception barred a Hebrew schoolteacher's antidiscrimination suit for being fired after a student's parent "mocked" the "mental limitations" she suffered as a result of developing a brain tumor).

88 *See supra* note 35.

ious values, but for any reason whatsoever. What, if anything, justifies this capacious permission to discriminate?[89]

### A. From the Magna Carta to Madison

The answer, according to the Supreme Court, lies in history. In *Our Lady of Guadalupe School* and *Hosanna-Tabor*, the Court recounted how, since as far back as the Magna Carta, the English predecessors of the "founding generation" in America consistently sought to resist monarchal control over the church.[90] Those efforts were unsuccessful, as the Crown ultimately founded and made itself the head of the Church of England.[91] The Crown controlled religious life thereafter by appointing and removing members of the clergy and religious teachers, and by controlling the subject matter of religious education.[92]

It was precisely to escape this kind of religious control that many people fled from England to come to America.[93] This

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89 In contrast, the European Union permits religious organizations to impose discriminatory job requirements for religious reasons when there is an "objectively verifiable" and "direct link between the occupational requirement imposed by the employer and the activity concerned." Case C-68/17, IR v. JQ, Case C-68/17, IR v. JQ, EU:C:2018:696 paras. 50, 58 (holding that "adherence to [a Catholic] notion of marriage" was not a genuine occupational requirement for a physician at a religiously affiliated hospital); *see also* Obst v. Germany, App. No. 425/03, paras. 51–52 (Eur. Ct. H.R. 2010) (finding that the EU director of public relations for the Church of Jesus Christ of Latter-day Saints could lawfully be fired for having an extramarital affair in order to maintain its credibility). Canada similarly permits religious organizations to demand religious adherence from some of its employees when the religious organization is engaged in a religious activity and the requirement is "reasonably necessary" for performance of the employee's job duties. Ont. Human Rights Comm'n v. Christian Horizons (2010), 102 O.R. 3d 267, para. 89 (Can. Ont. Sup. Ct. J.) (holding that a religious organization ministering to persons with developmental disabilities failed to show that refraining from having same-sex relationships was reasonably necessary for employment as a support worker); *see also* Ontario Human Rights Code (OHRC), R.S.A. 1990, c. H.19, s.24(1)(a) (Can.) (holding that the right to freedom from discrimination is not infringed where a religious organization "primarily engaged in serving the interests of persons identified by [a protected characteristic] . . . employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment" (italics in original)); *infra* subpart V.C.

90 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2061 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 182–83 (2012).

91 *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061 (quoting *Hosanna-Tabor*, 565 U.S. at 182)).

92 *See id.* at 2061–62; *Hosanna-Tabor*, 565 U.S. at 182.

93 *See Hosanna-Tabor*, 565 U.S. at 182–83.

history of religious oppression in turn provided the "'background' against which 'the First Amendment was adopted'":[94]

> Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. 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.[95]

The First Amendment thus grants religious organizations "independence in . . . 'matters of church government'" in order to preserve the "independence of religious institutions in matters of 'faith and doctrine'" that the founding generation sought to create.[96] While it does not follow "that religious institutions enjoy a general immunity from secular laws," religious organizations must be given "autonomy with respect to internal management decisions that are essential to [their] central mission."[97]

According to the Court, employment discrimination law would impermissibly interfere with that "sphere" of "internal government."[98] Employment discrimination law prohibits employers from hiring, firing, promoting, and otherwise structuring employment in ways that exclude or otherwise disadvantage people on the basis of their race, gender, disability, religion, and other socially-salient statuses and identities.[99] In *Hosanna-Tabor*,[100] the Court explained that applying employment discrimination law to ministerial employment

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94 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061 (quoting *Hosanna-Tabor*, 565 U.S. at 183).

95 *Hosanna-Tabor*, 565 U.S. at 183–84 (internal citations omitted); *see also* Brief of Professors Douglas Laycock et al. as Amici Curiae in Support of Petitioner at 8–10, St. James Sch. v. Biel, 140 S. Ct. 680 (2019), (No. 19-348) (quoting the same passage from *Hosanna-Tabor*).

96 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186).

97 *Id.* at 2060.

98 *Id.* at 2060–61; *see also Hosanna-Tabor*, 565 U.S at 188–89 (stating that requiring a church to retain a minister that it does not want would interfere with the church's internal governance).

99 *See supra* note 16.

100 The Court in *Our Lady of Guadalupe School* did not explain why employment discrimination law would amount to impermissible interference in religious life. Instead, it simply asserted that employment discrimination law would interfere with ministerial employment. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061.

would thus risk imposing unwanted ministers on churches and would "depriv[e] the church of control over the selection of those who will personify its beliefs," thereby violating the Free Exercise Clause.[101]

Of course, a person who was wrongfully dismissed in violation of employment discrimination law need not be reinstated;[102] monetary relief could also be awarded.[103] Nevertheless, the Court reasoned that offering plaintiffs monetary relief in lieu of reinstatement would "operate as a penalty . . . for terminating an unwanted minister," effectively punishing churches (and religious adherents) for exercising their constitutionally protected rights to select their own ministers.[104] Indeed, the very act of adjudicating whether a minister was wrongfully terminated would involve the state in precisely the kind of activity that James Madison and others hoped the Establishment Clause would prevent: namely, state interference in the "election and removal" of church ministers.[105]

So while the Court has acknowledged that the state's interest in "the enforcement of employment discrimination statutes is undoubtedly important," a religious organization's freedom to appoint its own ministers—understood broadly to include religious teachers—lies at the heart of the protections and purposes of the Religion Clauses.[106] Thus, "[w]hen a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."[107]

### B. General Liberty Arguments

There is something disconcerting about relying, almost exclusively,[108] on the experiences and intentions of white settlers

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101 *Hosanna-Tabor*, 565 U.S. at 188.

102 *See, e.g.*, 42 U.S.C. § 2000e-5(g) (describing a court's discretion to order injunctive relief, such as an order of reinstatement, as a remedy for employment discrimination).

103 *See, e.g.*, 42 U.S.C § 1981a (outlining the different forms of monetary damages that may be awarded for employment discrimination and other civil rights violations).

104 *Hosanna-Tabor*, 565 U.S. at 194.

105 *Id.* at 185 (quoting James Madison, 22 ANNALS OF CONG. 983 (1811)).

106 *Id.* at 196.

107 *Id.*

108 The Court also locates its historically grounded principle of state noninterference in "matters of faith and doctrine and . . . closely linked matters of internal government" in church property cases. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055, 2061 (2020). *See also* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116, 120–21 (holding that a statute that con-

to justify a broad permission to discriminate.[109] No doubt history can make a moral and legal difference. But even if one were to embrace a historical "understanding of the Religion Clauses," the relevant history extends beyond 1811.[110] As I will discuss in Part III, the Reconstruction Amendments were part of a legal and political revolution that enshrined equality as a constitutional value. Antidiscrimination law can be understood as a legislative effort to implement that commitment to equality, particularly in the case of employment discrimination law, given that employment is legally constituted and has historically been a site of state-sanctioned discrimination. Our interpretation of the First Amendment should be responsive to the constitutional value of equality and the constitutional underpinnings of antidiscrimination law.

Historical arguments are not, however, the only kinds of arguments for the ministerial exception, and so one may not need to accept the Court's historical methodology to support the ministerial exception. A number of scholars have also drawn on liberal philosophical accounts of associational freedom to justify a narrower version of the ministerial exception for certain religious leaders, as opposed to an exception that covers potentially any employee who performs important religious functions. Following Christopher Eisgruber and Lawrence Sager, I will refer to arguments that rest the liberty claims of religious associations and individuals on more general First Amendment grounds as *general liberty* arguments.[111]

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trolled who could worship and reside in a cathedral as an archbishop of the Russian Orthodox Church was unconstitutional because it interfered with the "freedom to select the clergy"). Such precedent served primarily to confirm, rather than substantively justify, the Court's originalist interpretation of the First Amendment.

109 *Cf.* Dred Scott v. Sandford, 60 U.S. 393, 410 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (holding that Dred Scott was not a citizen because the framers did not contemplate "the enslaved African race" as being within the meaning of "men" in "all men are created equal," and thus did not intend that Black people be eligible to be citizens of the United States).

110 *Hosanna-Tabor*, 565 U.S. at 185 (concluding a historical analysis of the "understanding of the Religion Clauses" that has animated First Amendment doctrine with a discussion of then-President Madison's veto of a bill incorporating the Protestant Episcopal Church in what was, at the time, the District of Columbia).

111 *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 52, 94 (2007) (explaining that "we have no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities" and that the principle of "general liberty . . . insists on a robust set of constitutional rights available to all persons and groups, without any reference to their religious, nonreligious, or antireligious commitments").

For example, Sager and others argue that ministers and other religious leaders often form "close associations" with their members.[112] Such relationships are based on "ties of trust, friendship, communality, and comfort that . . . are typically sustained by the common values and purposes of their members."[113] Sager explains that "[g]roups of this sort nurture the development and well-being of their members, offering an environment in which the individual can find her own way with the benefit of her chosen 'family' of fellow way-seekers."[114]

Although religious organizations are not unique in instantiating close association—clubs might do this[115]—they are "paradigm instances of groups that depend . . . on close association."[116] Collective worship and community ties are often "at the heart" of religious practice.[117] As Justice Brennan explains in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, "[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."[118]

Given this focus on the relationship between religious persons and their teachers and leaders, it is not surprising that general liberty arguments tend to focus on the private aspects of ministerial work and the voluntary associations within which it is often performed. Richard Schragger and Micah Schwartzman, drawing on Seana Shiffrin's theory of associational freedom,[119] accordingly characterize legal regulation of

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112 Sager, *supra* note 8, at 87; Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 793 (2018).

113 Sager, *supra* note 8, at 86.

114 *Id.* Nelson Tebbe similarly argues that the form of association in which the employee participates can justify and guide the scope of religious exemptions from civil rights laws. *See* TEBBE, *supra* note 8, at 80, 88, 146–47. Although Tebbe argues religious organizations' rights to discriminate should be circumscribed by the "principle of avoiding harm to others"—and that such harm can occur when religious organizations shape their employment policies in discriminatory ways disconnected from their views—Tebbe holds that this principle is not engaged by the ministerial exception, at least not when the exception is cabined to religious organizations' leadership decisions. *See id.* at 92, 148.

115 *See id.* at 88.

116 *See id.*

117 *Id.*

118 483 U.S. 327, 342 (Brennan, J., concurring).

119 *See* Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 862–70 (2005) (arguing that expressive associations are not simply "amplification devices" for individual free speech rights, but "sites where ideas are [cooperatively] developed and take root" through discussion, mutual influence, and shared projects).

ministerial employment as a form of interference with a deeply personal, moral relationship:

> When the state regulates the internal affairs of those groups, it disrupts the process by which people come together in various ways to shape the content of their moral and religious views—which is to say it interferes with the formation of their consciences. In some cases, the state may have sufficient reason to justify such interference. But . . . in a liberal society our presumption is generally against such intrusions, at least when associations are premised on voluntary participation.[120]

According to general liberty arguments, religious liberty, if perfectly implemented, would therefore likely not permit religious organizations to discriminate for any reasons whatsoever, as the arguments rest on being able to associate with like-minded people for shared religious purposes. But given the nature of adjudication, a perfect fit between the scope of the liberty and the right needed to protect it is not possible. The ministerial exception, as broad as it is, operates as a needed prophylactic to illiberal attempts by the state to opine on religious matters.[121]

## III
## LIBERAL RELIGIOUS LIBERTY

Historical and general liberty arguments differ with respect to which employees should fall within the reach of a ministerial exception. But they share a common premise: both conceptualize ministerial employment relationships as largely private and voluntary, undertaken within a sphere internal to religious life in which the state has little business meddling. This commonality helps to explain why the ministerial exception, whether in its current form or its historically narrower form, has garnered such broad support across the political spectrum. In this Part, I argue that this commonality has unfortunately obscured the justificatory burden that any ministerial exception would need to meet and that historical and general liberty arguments have fallen short of meeting.

By conceptualizing ministerial employment as private and voluntary, the arguments treat ministerial employment as if it were socially and morally on a par with membership in a voluntary association. Such a conceptualization neglects the highly

120 Schragger & Schwartzman, *supra* note 8, at 978.
121 *Id.* at 978–79.

regulated, nonvoluntary, quasi-public context in which ministerial employment actually takes place. In turn, historical and general liberty arguments overlook how the paid workplace is not an ideal home for religious liberty, as well as how employment discrimination law itself protects employees' fundamental and constitutionally grounded liberty and equality interests, interests that must be harmonized with—not subordinated to—the liberty interests of religious organizations.

These shortcomings are nevertheless instructive, for they reveal important desiderata of a liberal theory of religious exemptions to antidiscrimination law: they must be domain sensitive—that is, they must be targeted at the specific domain of social activity governed by the antidiscrimination law at issue—and they must be supported by a justification that is responsive to the weighty liberty and equality interests protected by antidiscrimination law.

### A. Domain Sensitivity

First, I do not disagree with historical and general liberty arguments that relationships between religious leaders, teachers, and representatives, on the one hand, and religious adherents, on the other, are often close, intimate, and profoundly private. But it does not follow that these features of religious association carry over into ministerial employment relationships. Employment discrimination law regulates a different relationship than the one between religious adherents and their religious and moral guides. It regulates the relationship between ministers and religious organizations and, more generally, between employees and employers.

It may, of course, still be true that the associational values that underpin legal protection of religious adherents' relationship to their "ministers" similarly requires protecting ministerial employment from state regulation. But to infer that ministerial employment relationships deserve the same kind of constitutional protection as my relationship to my priest requires additional argument. After all, I do not pay my priest wages, nor do I hold his livelihood in my hands. Indeed, I am not in any kind of distinctively legal, or even contractual, relationship with my priest (nor are my fellow churchgoers), in contrast to the legally constituted employment relationship my priest is in with my church.

These relational differences are morally significant. As Samuel Bangenstos, Elizabeth Anderson, and others have ar-

gued,[122] employers have the legal power to use their control over the social and economic benefits of employment to shape many aspects of how employees live and labor, including employees' off-duty political activity,[123] what they post on Twitter,[124] who they date, when they get pregnant, and the like. That is particularly true in the United States, where employment is presumed to be at will and thus terminable for any lawful reason, even an arbitrary or malicious reason.[125] As Elizabeth Anderson explains,

> [A]t-will employment . . . grants the employer sweeping legal authority not only over workers' lives at work but also over their off-duty conduct. Under the employment-at-will baseline, workers, in effect, cede all of their rights to their employers, except those specifically guaranteed to them by law, for the duration of the employment relationship. Employers' authority over workers, outside of collective bargaining and a few other contexts, . . . is sweeping, arbitrary, and unaccountable—not subject to notice, process, or appeal.[126]

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122 *See supra* note 9.

123 *See, e.g.*, Edmondson v. Shearer Lumber Prods., 75 P.3d 733, 739 (Idaho 2003) (holding that an employee could not state a claim for wrongful termination for being fired for opposing a national forest development project supported by his employer).

124 *See, e.g.*, Chipotle Servs., L.L.C., 364 N.L.R.B. 72 (2016), *appeal denied*, Chipotle Servs., L.L.C. v. Nat'l Labor Relations Bd., 690 F. App'x 277 (5th Cir. 2017) (finding that a Chipotle employees' tweet of "nothing is free, only cheap #labor. Crew members only make $8.50hr how much is that steak bowl really?" in response to a customer's post stating, "Free chipotle is the best thanks," was not "concerted activity" protected by the National Labor Relations Act and thus that Chipotle could lawfully require the employee to remove the tweets).

125 *See* 27 AM. JUR. 2D *Employment Relationship* § 34 (2014). In contrast to the United States, Canada requires reasonable notice of termination. *See* Machtinger v. HOJ Indus. Ltd., [1992] 1 S.C.R. 986, 1012 (Can.) (holding that the duty to give reasonable notice of termination is a contractual duty implied in law that may be more demanding than statutory minimums requiring reasonable notice). In order to terminate an employee without notice, the employee must commit a breach of the employment contract that is so serious as to bring about a "breakdown in the employment relationship." McKinley v. B.C. Tel, [2001] 2 S.C.R. 161, 163 (Can.) (holding that an employee can be dismissed for dishonesty without notice only when "the employee's dishonesty [gives] rise to a breakdown in the employment relationship"). The United Kingdom similarly requires such a serious breach in order to warrant summary dismissal. *See, e.g.*, Wilson v. Racher [1974] ICR 428 (CA) (holding that the owner of an estate wrongfully dismissed his head gardener when he summarily fired the gardener when the gardener told the owner to "Go and shit yourself" in response to a barrage of abusive and unreasonable criticism by the owner and noting that a "Czar-serf" relationship no longer animates service contracts).

126 ANDERSON, *supra* note 9, at 53–54. For an argument that Anderson has overstated the extent of employer control over workers' lives, see Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795, 802–06 (2018) (reviewing ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017)).

The power employers can wield when employment is at will calls into question the assumption in historical and general liberty arguments that ministerial employment relationships are voluntary. As the transition from welfare to "workfare" underscores,[127] that power is made possible by a broader public policy in favor of getting people to perform paid work. In the United States as with other modern democracies, whether to participate in the workforce is typically not a voluntary decision analogous to, for instance, whether to join the Tarpon Bay Women's Club.[128] Rather, the decision to seek out employment is normally motivated by economic need and arguably mandated by a public refusal to provide alternatives to performing paid work to secure the means for living.[129]

As a consequence, employment is not an ideal home for religious association, or any morally animated association for that matter.[130] Religious organizations already have the poten-

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127 *See* Temporary Assistance for Needy Families (TANF), 42 U.S.C. § 601 (2018); *cf.* Noah D. Zatz, *What Welfare Requires From Work*, 54 UCLA L. Rev. 373, 448–49 (2006) (critiquing the legitimacy of workfare policies and their underlying conception of work).

128 *Cf.* Sager, *supra* note 8, at 87–88 (explaining that membership in secular clubs could also instantiate forms of "close association" warranting the same kind of exemption from employment discrimination law as the ministerial exception).

129 Or we need to form an economic unit with someone who performs paid work, such as through marriage. For a discussion of how welfare could give single women opportunities to take care of family members similar to those of married women, see, for example, Carole Pateman, *Another Way Forward: Welfare, Social Reproduction, and a Basic Income*, *in* DEMOCRACY, FEMINISM, WELFARE 48 (Terrell Carver & Samuel A. Chambers eds., 2011). See generally Noah D. Zatz, *Revisiting the Class Parity Analysis of Welfare Work Requirements*, 83 SOC. SERV. REV. 313 (2009), for an argument that more recent welfare work requirements tend to require single women recipients to work more than women married to wage earners. For a discussion of how the state "privatizes" financial support through regulation of the family, see, for example, Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985, 1990 (2015) (explaining that a "traditional function of the marital family [is] the privatization of support"); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2266–67, 2292 (2017) (noting that, historically, fathers were treated as financially responsible for their "illegitimate" children in part to "privatize support," and that legal recognition of the husband of a mother who conceived with donor sperm as the resulting child's father similarly "assure[d] the child's support from private sources").

130 It does not follow that employment could not be a better home for moral life, and I ultimately argue here, as well as elsewhere, that it should be. *See infra* Part V; Sabine Tsuruda, *Volunteer Work, Inclusivity, and Social Equality*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 309–12 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018) [hereinafter Tsuruda, *Volunteer Work*] (arguing that it would impoverish associational life and be discriminatory on the basis of class if moral work were to be performed exclusively by volunteers); Sabine Tsuruda, *Working as Equal Moral Agents*, 26 LEGAL THEORY 305 (2020) [hereinafter Tsuruda, *Working as Equal Moral Agents*] (arguing that employment law must accommodate a wide range of employee expression in order to treat employees as

tial to exert a lot of influence over the lives of their members. A person is often born into and raised within her religion. Should her values ultimately converge with the values of fellow adherents, she may find that religious association offers a morally rich and supportive spiritual home. But, perhaps because of the potential for religious association to be so personally and morally significant, religious organizations can wield much power over what members do and say.[131] Fear of being shunned, shamed, or otherwise jeopardizing such an important set of relationships may lead a person to ignore her own disagreement with religious doctrine (or keep it to herself), and to suppress aspects of her personality (such as her sexual orientation, or the race of the person she is dating) that do not cohere with the morals of her congregation.

Associating for religious values through employment can exacerbate the ways in which religious organizations can already compromise members' abilities to exercise meaningful agency over their own beliefs and relationships. When your spiritual leader is also your boss, you may be particularly reluctant to candidly express your religious views. Not only can you be at risk of being shunned by an important moral community in your life, even your authentic respectful communications, if ill-received, can compromise your access to material goods and your future career prospects.[132]

Further, given the role that religions often play in regulating all aspects of a person's life, a person's off-duty and personal decisions can result in the loss of a livelihood when those decisions conflict with the moral judgment of the religious group. When religious employment is covered by the ministerial exception, the desire for divorce may put one's job at risk,[133] and so may increase any religious or social pressures to remain in unhealthy partnerships. Expressing one's gender

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moral agents). The point is rather that we cannot assume that it already is a supportive site for moral life.

131 For an argument that the absence of state compulsion to remain in a religious association may be insufficient to protect the voluntary choice of its members, see generally Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165 (1998).

132 *See supra* notes 125–126 and accompanying text (describing at-will employment).

133 Conlon v. InterVarsity Christian Fellowship, 13 F. Supp. 3d 782 (W.D. Mich. 2014), *aff'd sub nom.*, 777 F.3d 829 (6th Cir. 2015) (holding that the ministerial exception barred an employment discrimination claim brought by a "spiritual director" at a non-profit corporation for allegedly being fired for "failing to reconcile her marriage").

or sexual orientation,[134] or having an interracial friendship condemned by one's religious leaders can similarly leave one jobless.[135] The totalizing character of many religions, when coupled with the ministerial exception, can therefore exert a corrosive influence over myriad forms of constitutionally protected voluntary association, such as friendships and marriages, in addition to compromising communicative conditions for the meaningful exercise of freedom of thought and conscience.

### B. The Liberty Values of Workplace Equality

By helping to insulate people's decisions about what to believe and whom to associate with from the distorting influences of economic need and employer power, employment discrimination law's prohibition on religious discrimination—as well as discrimination on the basis of a variety of other protected grounds, such as marital status, gender, and race—serves religious and other First Amendment liberties.[136] The links between antidiscrimination law and First Amendment liberties are, hence, importantly different when examined in the particular context of employment as opposed to unpaid voluntary relationships.

In response, it might be argued that the liberty interests protected by employment discrimination law are of less constitutional significance than those protected by the ministerial exception. The latter are interests against certain forms of *state*, as opposed to *private*, interference, and the Constitution protects against state action,[137] whereas "employment discrim-

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134 *See generally* Matthew Junker, *Ending LGBTQ Employment Discrimination by Catholic Institutions*, 40 BERKELEY J. EMP. & LAB. L. 403, 412–31 (2019) (documenting how constitutional and statutory religious exemptions render LGBTQ employees vulnerable to discrimination).

135 In *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, the plaintiff, a white woman, was fired (and evicted) by her church-employer (and landlord) for maintaining a "casual social relationship" with a Black man, and the court sustained her Title VII claim in part because she was not a minister, but rather, a "typist-receptionist." 401 F. Supp. 1363, 1366, 1368 (S.D.N.Y. 1975). Under *Hosanna-Tabor*, had she been in the same position as Cheryl Perich—a religious schoolteacher—the court would have dismissed her Title VII claim.

136 *Cf.* Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 LAW & PHIL. 171, 192 (2018) (arguing that a liberal commitment to "substantive equality and freedom" requires holding private individuals "responsible for its realization").

137 *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883); *cf.* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 37 (1873) (holding that the Privileges or Immunities Clause only extends to those rights guaranteed by federal citizenship).

ination statutes"[138] protect largely against private action, particularly in the case of religious employment.[139] And, one might argue, the Religion Clauses reflect that understanding of the scope of constitutional protections by specifying that "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[140] So even if employment discrimination law protects employees in their exercise of certain First Amendment liberties, it is state interference—not private interference—with the exercise of such liberties that triggers constitutional scrutiny.

I take no issue with the legal claim that one generally cannot bring a constitutional challenge against a private employer's employment decisions.[141] But even if, say, the spiritual director of a Christian university campus mission cannot bring a substantive due process challenge against the mission for firing her for getting a divorce,[142] it does not follow that marital freedom's status as a basic liberty depends on what kind of party seeks to restrict it. Presumably, part what justifies and explains constitutional prohibitions on unjustified state interference with basic liberties is the fundamental value of those liberties themselves. As historical and general liberty arguments for the ministerial exception both illustrate, part of what seems potentially so illiberal about state interference with ministerial appointments is that making ministerial appointments—deciding who will lead, represent, and teach the faith—is itself a central exercise of liberties of religion, conscience, and association.[143] Thus, the liberties of employees to engage in conscience formation, to exercise autonomy over the content of their religious and moral beliefs, and to decide with whom to associate are no less basic and fundamental merely because they are, under the circumstances, threatened by a private organization. Consequently, legislative efforts to ensure that

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138 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 196 (2012).

139 *See, e.g.*, 42 U.S.C. § 2000e-2 (prohibiting employers from refusing to hire someone because of that person's "race, color, religion, sex, or national origin").

140 U.S. CONST. amend. I (emphasis added).

141 *But see generally* JEAN THOMAS, PUBLIC RIGHTS, PRIVATE RELATIONS (2015) (arguing that human rights and constitutional rights should sometimes be applied to protect individuals from private forms of domination).

142 *See supra* note 133.

143 *Cf.* RAWLS, *supra* note 15, at 309–23 (arguing that basic liberties, such as liberty of conscience and freedom of association, are necessary social conditions for exercising meaningful agency over our lives and that public affirmation of such liberties, such as through constitutional protection, is an essential part of how the members of a democratic society express mutual respect for one another).

the social and economic conditions of working life leave ample room for the exercise of basic liberties should not be so easily set aside.

This is not to say that if legislation protects some people's basic liberties it can never give way to the like liberties of others. It just does not follow that state-imposed limits on basic liberties are always a greater evil than like privately imposed limits. For example, in *Bob Jones University v. United States*,[144] the Court rejected free exercise and establishment challenges to the Internal Revenue Service's (IRS) decision to withdraw tax-exempt status from universities with discriminatory admissions standards.[145] Bob Jones University had implemented its religious beliefs against white people marrying or otherwise romantically associating with Black people by, among other things, barring admission to people who acted or believed otherwise, and expelling students who spoke and acted in a way inconsistent with these religious beliefs about racial purity.[146] The university thus limited people's freedom of intimate association by withholding the benefits of education and membership in its broader community. By withdrawing tax-exempt status from such a university on account of its racist admissions standards, the IRS consequently imposed a state restriction on the university's (and other religious organizations') freedom to exercise its religious liberties by means of seeking to control the private lives of others.

To be sure, the Court did not explicitly rest its holding on the principle that the liberty of some could be restricted in order to implement a more meaningful, equal liberty for all.[147] But it would be an impoverished state of affairs if the legislature did not have such power to limit the private exercise of basic liberties and if state action were the only actionable limit to the exercise of basic liberties. As the case of employment illustrates, state interference is not the only threat to having a robust free speech and associational culture. The way we order our economic and contractual lives may be of even greater practical and daily significance for the extent to which we are able to actually exercise basic liberties.[148] Legislative efforts to determine "how the various liberties are to be specified so as to

144 461 U.S. 574 (1983).

145 *Id.* at 604.

146 *Id.* at 580–81. The University had also previously denied admission to Black applicants altogether, and later amended their policy to admit either single Black people or Black people who "married within their race." *Id.* at 580.

147 *See* RAWLS, *supra* note 11, at 203.

148 *Cf. supra* note 9.

yield the best total system of equal liberty"[149] are therefore not mere statutes that can be easily trumped by the liberty interests of some. A liberal argument for a religious exemption to employment discrimination law should provide a justification for why the liberty interests of religious organizations in ministerial appointments have complete priority over the liberty interests of ministerial employees.[150]

Of course, the teachers, leaders, and other "ministers" of many institutionalized religions are employees. Without some kind of exemption to employment discrimination law, such organizations would be forced to either conform, pay damages, or rely on only part-time, unpaid volunteers beyond the technical reach of employment discrimination law.[151] Application of antidiscrimination law would demand much change from such religions. But as *Bob Jones University* illustrates, past practice is not itself a complete justification for staying the course. Confronted with the threat of losing its tax-exempt status, the university was faced with the dilemma of having to comply or suffer financial consequences. Yet the Court found that withdrawal of tax-exempt status did not prohibit the university from continuing to act on its beliefs about race and marriage.[152] And while it would, of course, be costly for the university to continue to implement those beliefs through admissions, those costs were justified by the state's longstanding and compelling interest in eradicating racial segregation in education.[153]

As with segregated schools, the past practice of mixing religion with employment may have been problematic to begin with and the costliness of change does not necessitate that people have to wait to enforce their rights against discrimination. So if we choose to continue that practice, we should still be ready to offer a principled reason for why a church should be able to, for instance, racially discriminate against and sexually harass its paid pastors, music directors, and religious school

149 RAWLS, *supra* note 11, at 203.

150 *See* Griffin, *supra* note 8, at 983.

151 *See, e.g.*, O'Connor v. Davis, 126 F.3d 112, 113–16 (2d Cir. 1997), (holding that the plaintiff, who performed unpaid part-time work at a psychiatric hospital to complete her social work degree, was a volunteer and not an employee for purposes of employment discrimination law). For an argument that antidiscrimination law should nevertheless sometimes apply to volunteers, see generally Tsuruda, *Volunteer Work*, *supra* note 130.

152 Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983).

153 *Id.* at 592–93, 605.

teachers.[154] We should be ready to say more than "It would be costly to change" to justify to people like Kristen Biel why a historical practice of ministerial *employment* requires that we permit St. James School to fire her because she got breast cancer.[155] And to do that requires engaging in a domain-sensitive argument, one that both justifies why religious liberty ought to be exercised through employment and explains how the scope of that liberty can be harmonized with the liberty interests of ministerial employees in not, for instance, losing their job for getting divorced.

### C. Equality as a Fundamental Liberal Value

Abandoning the fiction that ministerial employment relationships are largely within the private and internal concern of voluntary associations therefore reveals a real need to offer a justification for the ministerial exception that addresses the liberty values of antidiscrimination law. It also, as I will now argue, reveals a need to move beyond a narrow focus on the First Amendment to address the fundamental equality values that underpin employment discrimination law.

The very same features of employment that make it less than an ideal home for religious liberty have also historically made the paid workplace a locus of structural injustice. That is not just because employment is often our main source of economic security and wellbeing (although that cannot be underemphasized). Although employment can be liberating,[156] and even a source of social belonging and meaning in our lives,[157] our work can also be demeaning and stigmatizing.[158] For example, as Patricia Hill Collins and others have shown, the workplace can (and does) reproduce modes of interaction

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154 *See, e.g.*, Ryeyemamu v. Cote, 520 F.3d 198, 209–10 (2d Cir. 2008) (holding that the ministerial exception barred a Roman Catholic Priest's race discrimination claim against the Roman Catholic Diocese); *supra* subpart II.A.

155 Sadly, Biel passed away shortly after the Ninth Circuit held in her favor. *See* Brief for Respondent Darryl Biel, *supra* note 62, at 15 n.5.

156 *See* DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS 23–25 (2010) (explaining how labor markets liberated workers from the "degrading servility" of feudalism); HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 179–209 (2020) (arguing that markets can be autonomy enhancing).

157 *See* Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 530–38 (1997) (arguing that, in the United States, people's jobs influence their self-esteem, sense of community belonging, and social status); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886–92 (2000) (discussing how employment is inextricably linked to how one identifies as a citizen, as a part of a community, and as an individual).

158 *See* DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 13–57 (2008) (arguing that discrimination is wrong when and because it is demeaning).

reminiscent of slavery and other forms of racialized and gendered servility.[159]

Because of employment's animating legal doctrines (such as at-will employment),[160] its social and community significance, and its nonvoluntary character, employment is structurally susceptible to reflecting and exacerbating status inequality. The paid workplace is one of the primary sites of access to material resources and positions of social power, and we attach substantial personal, moral, and cultural value to performing paid work.[161] Prestige (or stigma) in the paid workplace hence readily translates into social status. Accessing paid work is also often a matter of a person's social network and qualifications to compete in the labor market, both of which may be a function of larger class and status-based inequality.[162] Disparate access to education, exposure to violence and endemic poverty, and being subject to regular civil rights violations (such as excessive police force and public accommodations discrimination), are just a few examples of social inequalities that can produce differences in people's qualifications, leaving people with compromised chances to compete for jobs with even seemingly neutral and reasonable hiring criteria.[163]

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159 PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 48–64 (2d ed., 2000, 2014) (describing how Black women's work after the Civil War has repeatedly recreated relationships of "interpersonal domination" and domestic service reminiscent of slavery and American apartheid); *see also* CATHARINE A. MACKINNON, BUTTERFLY POLITICS 110–25 (2018) (describing the law's role in supporting and obscuring subordination in employment); TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 199 (2016) (explaining that the work available to poor Black women is often "domestic service in the homes of affluent white families" that reinforces the "ideological image of the 'mammy' . . . used to justify the exploitation and subordination of Black women under slavery"); *cf.* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1185–88 (2015) (linking the U.S. post-Civil War history of prison labor to attempts to reproduce slavery-like labor conditions).

160 *See also* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 144–45 (1989) (discussing how employment discrimination jurisprudence fails to capture the intersectionality of race and gender).

161 *See supra* note 157.

162 *See, e.g.*, ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION (2010) (arguing that ongoing de facto racial segregation has disadvantaged Black Americans along practically all dimensions of wellbeing, and that this provides the United States with reasons to adopt integrative policies). For an argument that the United States lacks the moral standing to adopt policies for neighborhood integration, see, for example, SHELBY, *supra* note 159, at ch. 2.

163 *See* MACKINNON, *supra* note 159, at 117 (arguing that "the standards we live under—merit, excellence, qualifications, abilities—are coded versions of white,

When we look to the real conditions of social life, how a society structures and regulates employment is therefore one of the most important determinants of whether, and to what extent, people are able to advance their ends as equals. And the social significance of employment is reflected in the fact that employment is one of the most heavily regulated types of contractual relationships.[164] How we draw the boundaries of employment, what kinds of duties and rights are constitutive of the employment relationship, and how employment shapes social statuses and hierarchies, are accordingly paradigmatic concerns of liberal justice.[165]

Of course, it may be that some religious employment does not implicate these broad social justice concerns. But surely Kristen Biel and Cheryl Perich reasonably believed that their dismissal by their respective schools implicated their economic, physical, and emotional wellbeing. And surely Monica Elvig's sexual harassment,[166] Dennis Ross's termination for playing insufficiently "white" church music,[167] and Stanislaw Sterlinski's experience of being treated as unfit to play music at a church because he was Polish,[168] could all have been reasonably felt as matters of public concern and as incompatible with liberal justice.[169]

In fact, employment discrimination in a religious setting is of particular public concern because of the risk that such dis-

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upper class, able-bodied, male, of a particular age and sexuality, qualities, or values").

164 For a discussion of contract types and their role in managing power imbalances and autonomy, see HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 109–12 (2017).

165 Liberal principles of distributive justice traditionally include a principle guaranteeing individuals equal basic liberties—such as religious liberty, liberty of conscience, freedom of speech, and associational freedom—and principles guaranteeing fair access to socially generated goods—such as income and offices of social power—for making effective use of those rights and liberties. *See, e.g.*, RAWLS, *supra* note 11, at 302. While principles of distributive justice affect how individuals interact with one another, as John Rawls explains, principles of distributive justice are principles for the design and regulation of a society's basic structure, which typically includes a society's political constitution, legal system, economy, and the like. *See id.* at 7. And what makes a social institution part of the basic structure is its influence over people's prospects for advancing their ends as equals, of which employment is a paradigmatic illustration. *See id.*; A. J. Julius, *Basic Structure and the Value of Equality*, 31 PHIL. & PUB. AFF. 321, 331–32 (2003).

166 *See supra* subpart I.A.

167 Ross v. Metro. Church of God, 471 F. Supp. 2d 1306, 1308 (N.D. Ga. 2007).

168 Sterlinski v. Catholic Bishop of Chi., 934 F.3d 568, 569 (7th Cir. 2019).

169 *See supra* subpart I.A.

crimination will perpetuate subordinating ideologies.[170] An unmarried teacher may be let go because of the supposedly immoral character of her pregnancy; a religious staff supervisor may be fired because her failing marriage is believed to show she is morally defective.[171] Unrestricted ministerial employment discrimination thus has the potential to infuse religious workplace cultures, and social life more broadly, with patriarchal—or white supremacist,[172] homophobic,[173] disablist, and anti-Semitic—ideologies.

Consequently, ministerial employment discrimination implicates any responsibility the state has to remedy and prevent structural injustice. And there is good reason to believe that the state has such a responsibility. As Lawrence Sager has argued in a related context, the Fourteenth Amendment lends support to the idea that such a duty exists and that it should be executed in part through equality legislation.[174] The Fourteenth Amendment guarantees people the "equal protection of the laws" and authorizes Congress to legislate to enforce the substantive provisions of the Amendment.[175] To the extent that the law has played a historical and continuing role in reflecting and exacerbating status inequality through work—and, as I have been arguing, the law in fact has played and continues to play such a role—the equal protection clause requires that we take public steps to remedy and prevent social inequality from continuing to pervade working life.

A significant way in which legislatures can be understood to have aimed at executing such a duty is by constraining the at-will employment doctrine with employment discrimination

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170 For a philosophical and moral analysis of how subordination operates as one among several dimensions of discrimination, see SOPHIA MOREAU, FACES OF INEQUALITY: A THEORY OF WRONGFUL DISCRIMINATION 39–75 (2020).

171 *See, e.g.*, Conlon v. InterVarsity Christian Fellowship/USA, 777 F.3d 829, 833–34 (6th Cir. 2015) (holding that the ministerial exception applied when a faith-based employer fired a "Spiritual Formation Specialist" because of her failing marriage); *cf.* Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d 211, 214, 221 (E.D.N.Y. 2006) (declining to apply the ministerial exception when a school operated by Northeastern Conference of Seventh-day Adventists fired a teacher for being pregnant while unmarried).

172 *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 580–81 (1983) (describing how a religious university taught religiously-motivated anti-miscegenation).

173 *Cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640, 650–52 (2000) (describing how a private employer maintained a policy against employing homosexual people).

174 *See* Lawrence G. Sager, *Congress's Authority to Enact the Violence Against Women Act: One More Pass at the Missing Argument*, 121 YALE L.J. ONLINE 629, 630–31 (2012).

175 U.S. CONST. amend. XIV, §§ 1, 5.

law.[176] Employment discrimination law helps to ensure fair access to material resources and positions of power while combatting ideologies that serve to moralize the subordinate status of women, people of color, and other historically oppressed and marginalized groups.[177] For example, legal prohibition of gender discrimination in the workplace helps to ensure that women do not face barriers to accessing positions of power merely because they are women. Employment discrimination law can thereby counteract assumptions that women are principally homemakers (or objects of male sexual desire) who are supposed to be financially cared for by (and dependent on) a man.[178] Legal prohibition of sexual harassment in particular can also lessen and publicly repudiate relations of gender-based subordination in the workplace.[179] Employment dis-

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176 There is no common law prohibition on employment discrimination, not even in jurisdictions, such as Canada, that do not have at-will employment. *See* Seneca Coll. v. Bhadauria, [1981] 2 S.C.R. 181, 194–95 (Can.) (holding that there is no general common law duty not to discriminate in employment notwithstanding the strong public policy against such discrimination).

177 Fair equality of opportunity should be distinguished from "anticlassification theory" (also known as "equal treatment" theory). According to anticlassification theory, antidiscrimination law requires formal equality of treatment and accordingly condemns (or mark out as suspect) any race, gender, or other status-based classifications, even when those classifications aim at eradicating a status-based barrier to success. For a discussion of the role of anticlassification principles in US antidiscrimination jurisprudence, see, for example, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10–19 (2003). For a critical view of anticlassification theory, see, for example, MACKINNON, *supra* note 159, at 109–24.

178 *Cf.* Schultz, *supra* note 157, at 1928–63 (arguing that women's liberation requires more than subsidizing parental leave and, in particular, requires supporting the exercise of a positive right to participate in the workforce). This is not to suggest that women's liberation *requires* that women sell their labor. As Patricia Hill Collins has argued, refusing to participate in the labor market can be a way for Black women (and men) to resist ongoing labor exploitation by white and wealthy individuals. It can also be a way to reassert control over the family and the home—a form of control which was systematically denied to Black people during slavery and the era of Southern Apartheid that followed. COLLINS, *supra* note 159, at 69–96; *see* SHELBY, *supra* note 159, at ch. 6 (arguing that many people of color may reasonably choose to engage in grey market labor—or to not sell their labor at all—when standard market labor requires people of color occupy roles that compromise their social bases of self-respect).

179 For a seminal discussion of sexual harassment as a form of subordination, see generally CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (arguing that sexual harassment is a form of discrimination that mutually reinforces women's sexual and economic subordination to men). In suggesting that employment discrimination can be a form of group-based subordination, I am not claiming that the wrong of employment discrimination is best understood as a form of group disadvantage. For such a view, see, for example, Owen Fiss, *Another Equality*,2(1) ISSUES LEGAL SCHOLARSHIP art. 20 at [i], 1–25 (2004). For a critical perspective, see generally Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357 (2017)

crimination law can thus ensure fair access to essential social conditions of equal liberty and diminish the influence of subordinating ideologies on those conditions.

This is not to say that employment discrimination law is a perfect attempt by legislatures to discharge a constitutional duty to undo structural injustice.[180] Rather, in seeking to uncover the constitutional "balance" between religious liberty and antidiscrimination, a liberal argument for a religious exemption should address the morally urgent, possibly constitutionally-grounded role of employment discrimination law in remedying and preventing structural injustice.

For purposes of interpreting the Religion Clauses, history therefore does not stop in 1811, as the Supreme Court suggested in *Hosanna-Tabor*.[181] As Justice Marshall reflected,

> I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.[182]

Employment discrimination statutes, such as Title VII of the Civil Rights Act of 1964, were part of that "social transformation," and so should not so easily be set aside,[183] let alone on the basis of historical arguments that ignore the fundamental legal change effectuated by the Reconstruction Amendments.

It is therefore remarkable—and unwarranted—that the Supreme Court only mentions the value of employment discrimi-

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(arguing that employment discrimination law protects individuals from suffering from workplace harm on the basis of a protected status, such as race or gender).

180 As Kimberlé Crenshaw argues, antidiscrimination law can (and often has) deployed a single-axis view of protected statuses that requires plaintiffs to frame their experiences of discrimination reductively in terms of only one protected status, such as gender. *See* Crenshaw, *supra* note 160, at 141–52. Such a single-axis analysis wrongly assumes that there is nothing distinctive about the discrimination faced by, for instance, women of color. A single-axis analysis thus tends to result in both the theoretical erasure of such plaintiffs and has even at times precluded such plaintiffs from bringing discrimination claims against employers. *See id.*

181 Or in 1833 for that matter, as Douglas Laycock and other amici in *Biel* suggest. *See* Brief for Professors Douglas Laycock et al. as Amici Curiae in Support of Petitioner, *supra* note 95, at 11.

182 Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987).

183 *See supra* note 10 and accompanying text.

nation once in *Hosanna-Tabor*, when it first upheld the exception, by simply noting, in passing, that "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important."[184] The Court did not even mention the importance of antidiscrimination law in *Our Lady of Guadalupe School*, when it likely stripped thousands of employees of their rights against discrimination.[185]

## IV
## BUT WHO ARE WE TO JUDGE?

In Part III, I argued that justifying a religious exemption to employment discrimination law requires a *domain-sensitive argument*, one that directly addresses the fundamental liberty and equality interests of employees and that provides a principled basis for harmonizing those interests with the liberty interests of religious organizations. Because the Supreme Court's historical arguments and legal theorists' general liberty arguments are targeted at the private and voluntary aspects of ministerial employment, these arguments fail to be domain sensitive and thus cannot justify the ministerial exception.

In response, it may be tempting to hold that these justificatory challenges would be easier to meet, or at least minimized, if the ministerial exception were narrower in its scope. Along these lines, Justice Sotomayor, in her dissent to *Our Lady of Guadalupe School* (joined by Justice Ginsburg), supported a ministerial exception that applied primarily to religious leaders and that she argued was embodied in the Court's analysis in *Hosanna-Tabor*:[186]

> By analyzing objective and easily discernable markers like titles, training, and public-facing conduct, *Hosanna-Tabor* charted a way to separate leaders who "personify" a church's "beliefs" or who "minister to the faithful" from individuals who may simply relay religions tenets. This balanced First Amendment concerns of state-church entanglement while avoiding an overbroad carve-out from employment protections.[187]

Justice Sotomayor thus concluded that the Court in *Our Lady of Guadalupe School* "upset" this careful balance by holding that two lay teachers at Catholic schools who "taught primarily

184 *Hosanna-Tabor*, 565 U.S. at 196.
185 140 S. Ct. 2049 (2020).
186 *Id.* at 2072–73 (Sotomayor, J., dissenting); *see supra* subpart I.A.
187 *Id.* at 2073 (citations omitted).

secular subjects" could be ministers, even if their employers did not require them to be Catholic.[188]

In this Part, I argue the ministerial exception cannot be rescued by a return to *Hosanna-Tabor*. If the exception is interpreted objectively, as Sotomayor suggests it should be, it is entangling, requiring courts to take a stand on what gives an activity religious significance, or else it is discriminatory, excluding and marginalizing forms of religious association that do not fit easily into a Christian paradigm. But if the exception is interpreted subjectively to require complete deference to religious organizations' own views about who counts as a minister, the exception will become unaccountably broad, giving the liberty interests of religious organizations in appointments almost total priority over the equally weighty liberty and equality interests of employees. Whether narrow or capacious, and whether objectively or subjectively understood, the ministerial exception is thus inherently unable to respond to the justificatory challenges posed by the demands of domain sensitivity.

### A. *Biel v. St. James School* and an Objective Test for "Minister"

The Ninth Circuit's reasoning in *Biel v. St. James School* offers a recent illustration of the equality reasons that support an objective interpretation of the ministerial exception as well as the flaws of such an interpretation.[189]

In *Biel*, the Ninth Circuit extracted the following "four major considerations" from *Hosanna-Tabor* to determine whether Kristen Biel was a minister while she was employed by St. James School as a fifth-grade teacher:[190]

> (1) [W]hether the employer held the employee out as a minister,
>
> (2) [W]hether the employee's title reflected ministerial substance and training,
>
> (3) [W]hether the employee held herself out as a minister, and
>
> (4) [W]hether the employee's job duties included "important religious functions."[191]

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188 *Id.* at 2072.

189 911 F.3d 603, 607–09 (9th Cir. 2018), *rev'd* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); *see supra* text accompanying notes 69–75 (describing the conditions under which the plaintiff in *Biel* was fired).

190 *Id.* at 607 (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 192 (2012)).

191 *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 192).

The Ninth Circuit explained that the Court in *Hosanna-Tabor* concluded that the plaintiff-employee, Cheryl Perich, was covered by the ministerial exception only after describing how she possessed all of these features.[192] Biel's employment, however, was only relevantly similar to Perich's with respect to the fourth factor, and tenuously so at that. Unlike Perich, Biel possessed no formal religious credentials.[193] It also appeared that Biel took on "teaching work wherever she could find it: tutoring companies, multiple public schools, another Catholic school, and even a Lutheran school."[194] Thus, unlike Perich, there was no evidence that the formation of her employment relationship with St. James reflected an effort to appoint her to a ministerial role.[195] On the contrary, Perich's title was as a "called" teacher,[196] and Biel's title was, at least on its face, secular: "Grade 5 Teacher."[197] And Perich's employment could only be terminated by a supermajority of her congregation, whereas Biel's employment was at will.[198] The Ninth Circuit thus concluded that St. James did not "hold Biel out as a minister by suggesting to its community that she had special expertise in Church doctrine, values, or pedagogy beyond that of any practicing Catholic."[199] Biel also did not hold herself out as a minister. She "described herself as a teacher and claimed no benefits available only to ministers," such as the tax benefits claimed by Perich.[200] Finally, while Biel regularly "taught lessons on the Catholic faith," she never led or planned prayers, religious services, or other religious devotions at the school.[201] The court thus held that Biel was not a "minister" for purposes of the exception.[202]

In some respects, the Ninth Circuit's reasoning, as the Supreme Court and legal theorists have pointed out, seems more restrictive than called for by *Hosanna-Tabor*.[203] The Court in *Hosanna-Tabor* cautioned that it was not adopting "a rigid

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192 *Id.* at 608 (citing *Hosanna-Tabor*, 565 U.S. at 192).
193 *See id.*
194 *Id.*
195 *Id.* at 609.
196 *Hosanna-Tabor*, 565 U.S. at 177–78.
197 *Biel*, 911 F.3d at 608.
198 *Id.*
199 *Id.*
200 *Id.* at 609.
201 *Id.*
202 *Id.*
203 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2067–68 (2020); Brief of Professors Douglas Laycock et al. as Amici Curiae in Support of Petitioner, *supra* note 95, at 19 (describing the Ninth Circuit's approach as "wooden" and "contrary to *Hosanna-Tabor*").

formula for deciding when an employee qualifies as a minister."[204] And yet in *Biel*, the Ninth Circuit seems to do just that by appearing to treat the various considerations that counted in favor of treating Perich as a minister as factors in a multifactor test, declining to find that she was a minister in part because only one consideration from *Hosanna-Tabor* was present in Biel's situation.

Even so, the Ninth Circuit's reliance on the factual considerations present in *Hosanna-Tabor* is unremarkable. Analogical reasoning is an ordinary form of legal reasoning. And here, such reasoning was particularly apt as Biel was, like Perich, an elementary school teacher at a religious school. It is therefore somewhat of an overstatement to say, as Douglas Laycock and others do, that the Ninth Circuit "confined *Hosanna-Tabor* to its facts."[205] To focus on the form of the Ninth's Circuit's reasoning overlooks how, in substance, the Ninth Circuit sought to explain how Biel's situation diverges significantly from other situations in which courts found that teachers at religious schools were ministers.[206] The fact that the Ninth Circuit identified the various axes of its analogical reasoning explicitly does not entail that the Ninth Circuit always thought all or most of those considerations had to be present, or that the relevant considerations were even restricted to those four, in every case where the ministerial exception might be applied.

What is remarkable about *Biel* is that the Ninth Circuit drew a hard line, and that line reflects the Ninth Circuit's attempt to do more than pay lip service to the importance of employment discrimination law.[207] The Ninth Circuit did not decline to find that Biel was a minister merely on the basis that an insufficient number of considerations present in *Hosanna-Tabor* were present in her case. Rather, the Ninth Circuit also and importantly noted that finding that Biel was a minister would permit "any school employee who teaches religion [to] fall within the ministerial exception."[208] Such a "rule" would "provide carte blanche to disregard antidiscrimination laws when it

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204 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 190 (2012).

205 Brief of Professors Douglas Laycock et al. as Amici Curiae in Support of Petitioner, *supra* note 95, at 18; *see also Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2067.

206 *See Biel*, 911 F.3d at 609–10 (explaining that the Ninth Circuit "decline[s] . . . to be the first" to apply the ministerial exception "in a case that bears so little resemblance to *Hosanna-Tabor*").

207 *Cf. supra* note 183.

208 *Biel*, 911 F.3d at 610.

comes to other employees who do not serve a leadership role in the faith."[209] The Ninth Circuit suggested that such an outcome would be unacceptable as a policy and constitutional matter. As Acts of Congress, employment discrimination statutes, such as the ADA and Title VII, are to be treated with a "strong presumption of constitutionality."[210] In enacting the ADA and Title VII, Congress legislated exceptions for religious organizations to discriminate on the basis of religion,[211] but not on other grounds, such as disability and race.[212] Holding that teaching religion is enough to bring someone within the scope of the exception would therefore "invalidate unnecessarily vast swaths of federal law as applied to many employees of religious organizations"[213]—"unnecessarily" because, according to the Court in *Hosanna-Tabor*, the ministerial exception was adopted to protect against the historically-situated wrong of state appointment of "high-level religious leaders."[214] And, by implication, according to the Ninth Circuit, merely teaching religion is not enough to count as a "high-level" religious leader.

To be sure, the Ninth Circuit only explicitly framed the value of antidiscrimination legislation in terms of its value *qua* legislation generally, and not in terms of its substance. But there is a long line of cases holding that the state has compelling interests in eradicating discrimination in the social areas covered by antidiscrimination legislation, such as housing,[215] education,[216] and contracts.[217] Consequently, the Ninth Circuit's willingness to interpret the rights of religious organizations to hire their ministers to avoid invalidating "vast swaths" of employment discrimination law may well have been an attempt to make its interpretation of the ministerial exception responsive to the constitutional and social significance of antidiscrimination law.[218]

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209 *Id.* at 610–11.

210 *Id.* at 611, n. 5.

211 *See* 42 U.S.C. § 12113(d)(1); 42 U.S.C. § 2000e-1(a).

212 *See* 42 U.S.C. § 2000e-2(a).

213 *Biel*, 911 F.3d at 611 n.5.

214 *Id.* at 610; *cf. supra* subpart II.A (explaining the Supreme Court's historical rationale for adopting the ministerial exception).

215 *E.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421–22 (1968).

216 *E.g.*, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954); Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983).

217 Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948).

218 Justice Sotomayor shares this interpretation of the Ninth Circuit's application of *Hosanna-Tabor*. *See supra* text accompanying notes 186–188.

The Ninth Circuit's reasoning in *Biel* is therefore not remarkable, as critics suggest, because it deploys a rigid multifactor test—indeed it does not. Rather, if the reasoning is remarkable, it is in its attempt to draw a more principled boundary around the ministerial exception, one that is explicitly tailored to the exception's historical purposes and that grants some of the constitutionally grounded deference that ought to be given to antidiscrimination legislation.

### B. The Liberal Limits of the Court's Important Functions Standard

While I am sympathetic to the Ninth Circuit's efforts to make do with *Hosanna-Tabor*, the approach inherits and magnifies many of the flaws in *Hosanna-Tabor*. First, the Ninth Circuit's restriction of the ministerial exception to only "high-level" leaders is, in some respects, discriminatory.[219] Such a limit seems to give traditional and institutionalized religions greater power to shape and spread their faith than more egalitarian, less institutionalized religions, who will lack free rein to discriminate under the Ninth Circuit's interpretation of the Religion Clauses (although such organizations can, of course, still discriminate on the basis of religion under statutory exemptions[220]). Indeed, the very name of the legal category of "minister" is morally suspect. Although the Court has stressed that the concept of a minister for purposes of the exception is not confined to the traditional Christian category, language can matter, particularly in a domains of social life, such as employment and state regulation of religion, that have been marked by religious strife, colonialism, and often legal and political preferences for Christianity.[221]

Moreover, by limiting the exception to a doctrinally driven notion of high-level leadership, the Ninth Circuit

> invites courts to second-guess the religious schools' judgement about what types of religious training are essential to

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219 *See* Brief of Professors Douglas Laycock et al. as Amici Curiae in Support of Petitioner, *supra* note 95, at 17.

220 *See, e.g.*, 42 U.S.C. § 12113(d)(1) (ADA exemption permitting religious entities to "giv[e] preference in employment to individuals of a particular religion to perform work connected with" their activities); 42 U.S.C. § 2000e-1(a) (providing a similar exemption for Title VII).

221 Partially out of recognition of these concerns, the Court in *Our Lady of Guadalupe School* subsequently distanced itself from using the concept of a minister to pick out individuals covered by the exception, repudiating the idea that covered employees had to be traditional leaders or even members of the faith. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063–64 (2020).

> the school's religious mission. This entangles courts in one of the very religious questions that the ministerial exception is designed to avoid—*i.e.*, what is the "proper" way to train and certify a religious teacher?[222]

But it is not surprising that the Ninth Circuit would reach such a result, given the focus on hierarchical and traditional Christian religions in *Hosanna-Tabor*'s historical argument for the ministerial exception,[223] as the name of the exception itself reflects. The historical argument is potentially quite restrictive, as it locates the purpose of the exception in the founding, and the framers may have lacked a more egalitarian understanding of the many ways of life the Religion Clauses ought to protect. To generalize from a desire to avoid having an American version of the Church of England, we need an argument for the moral purposes of freedom of religion, and that argument was absent in *Hosanna-Tabor*.[224] The Ninth Circuit's narrow test for who counts as a minister thus reflects a defect in the exception's legal and normative foundations.

Nor are these flaws remedied by the alternative that was put forward by St. James School and amici curiae before the Court. Douglas Laycock, Michael McConnell, and others argued that the Ninth Circuit should have inquired whether Biel performed "significant religious responsibilities"[225] or "function[s],"[226] and thus, whether her job functions were such that she led "a religious organization, conduct[ed] worship services or important religious ceremonies or rituals, *or serve[d] as a messenger or teacher of its faith*."[227] But who are we to judge? What counts as a "significant religious responsibility," let alone a worship service, an "important ceremony or ritual," or whether someone is a mere teacher of religion or a voice for the organization's "faith?" In Biel's case, are courts to look to the Vatican for guidance? And why treat Biel as any less competent than her school to determine the religious character of her work? In deferring to St. James School's own views about the significance of Biel's role, amici thus took a stand in a pro-

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222 Brief of Professors Douglas Laycock et al. as Amici Curiae in Support of Petitioner, *supra* note 95, at 22 (citations omitted).

223 *See supra* subpart II.A.

224 Nor does the Court's addition of British control over religious education during the colonial era supply such an argument, for it is likewise focused on the struggles of early American Christians. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061–62; *supra* subpart II.A.

225 Brief of Professors Douglas Laycock et al. as Amici Curiae in Support of Petitioner, *supra* note 95, at 19.

226 *Id.* at 15.

227 *Id.* (citing *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)).

foundly religious dispute as to whether a religious adherent's own understanding of her religion should give way to that of her employer and Church. The alternative functional approach thus engages courts in the very sort of entangling inquiry that amici and others criticize the Ninth Circuit for engaging in.

Regrettably, this functional approach seems to be exactly the approach that the Court adopted upon reviewing *Biel*. In *Our Lady of Guadalupe School*, the Court rejected the Ninth's Circuit's disanalogy to *Hosanna-Tabor*, and instead held that Biel did indeed perform "vital religious duties."[228] In reaching this conclusion, the Court did not consider Biel's views on the religious character of her work. Instead, it based its findings on its own review of statements in St. James School's employee handbooks and employment agreements, and statements made by St. James School representatives.[229] The Court went as far as to support its assessment of the religious importance of Biel's work by citing and discussing canon law and the Catechism of the Catholic Church,[230] as well as making a variety of sweeping statements about the centrality of religious instruction to "the Catholic tradition," as well as to Protestantism, Judaism, the Church of Jesus Christ of Latter-day Saints, and Seventh-day Adventists.[231] In doing so, the Court both implicitly and explicitly opined on a variety of paradigmatically religious issues, ranging from the issue of which individuals and organizations can make authoritative pronouncements about religious doctrine and values, to the aims of religious education itself.

To be sure, the Court at times suggested that it was deferring to OLG and St. James School in reaching its conclusion. The Court, for example, noted that "[a] religious institution's explanation of the role of such employees in the life of the religion in question is important," and relied heavily on the schools' own views about the religious significance of the employment in question.[232] But it is unclear whether the Court's test is wholly subjective. The Court explained that when apply-

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228 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066.

229 *See id.*

230 "Under canon law, local bishops must satisfy themselves that "those who are designated teachers of religious instruction in schools . . . are outstanding in correct doctrine, the witness of a Christian life, and teaching skill.'" *Id.* at 2065 (quoting Code of Canon Law, Canon 804, § 2 (Eng. transl. 1998)).

231 *Id.* at 2064–65. The Court relied in part on briefs provided by organizations affiliated with these religions, but it still presented these statements about the religious value of education as its own conclusions about the positions advanced in those briefs. *See id.*

232 *Id.* at 2066.

ing the exception, "courts [must] take all relevant circumstances into account . . . to determine whether each particular position implicate[s] the fundamental purpose of the exception."[233] This suggests that a school's view on the matter is just one factor among possibly many. And in fact, the Court engaged in its own analysis of Biel's employment, rather than simply deferring to St. James School.

Similar concerns have motivated some judges' and courts' insistence that the test for application of the ministerial exception should be subjective, deferring to the employer's own sincere beliefs as to whether the employee is engaged in religious work.[234] As Justice Thomas explained in his concurrences in *Our Lady of Guadalupe School* and *Hosanna-Tabor*, such

> deference is necessary because . . . judges lack the requisite "understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." What qualifies as "ministerial" is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis.[235]

I am sympathetic to Thomas's concerns about an objective test for "minister," but not because of the limited expertise of courts. Part of what it is to be a liberal society is to secure social conditions for each member of society to form, revise, and pursue their own conception of the good. Such social conditions include leaving ample room for individuals to decide for themselves what counts as living well. When a court makes pronouncements about the sources and content of religious doctrine, or tells people how to practice their faith, the state speaks on behalf of the public on the basis of reasons that we could not all endorse without also endorsing the state's interpretation of religion.

An objective test for minister is thus in tension with the liberal idea that the content of our rights and, more broadly, the basis for the actions and pronouncements of the state, should be supported by reasons that do not require ascribing

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233 *Id.* at 2067.

234 *See, e.g.*, Sterlinski v. Catholic Bishop of Chi., 934 F.3d 568, 570–71 (7th Cir. 2019) (concluding that playing the organ for a Catholic parish served a religious function on the basis that the employer believed in good faith that organ music was vital to Catholic services).

235 *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2070 (Thomas, J., concurring); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 196–98 (2012) (Thomas, J., concurring) (proposing that the Religion Clauses require courts to "defer to a religious organization's good-faith understanding of who qualifies as its minister" when applying the ministerial exception).

to any one view of the good life.[236] The respect for freedom of thought and liberty of conscience that a liberal democracy is supposed to accord its members therefore rules out an objective test for who counts as a minister, unless such a test can be crafted in such a way that courts need not take a stand on the truth of religious claims,[237] such as which people are religious experts and which roles are integral to religious belief and practice. The Court's important functions standard, and the methodology deployed to apply it in *Our Lady of Guadalupe School*, thus borders on illiberal.

At the same time, a subjective test for a religious exemption to employment discrimination law would practically swallow the rule. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*,[238] a Mormon nonprofit gymnasium fired one of its building engineers after sixteen years of service because he was not Mormon. Under § 702(a) of Title VII, a religious organization may discriminate on the basis of religious belief when the employee is engaged in religious activities.[239] In *Amos*, the Court upheld an interpretation of that statutory exception according to which *all* "secular nonprofit activities of religious organizations" can be presumed by courts to be religious.[240] The Court reasoned that such an interpretation would avoid a potentially "intrusive inquiry into religious belief."[241]

The presumption upheld in *Amos* is particularly problematic in conjunction with the Court's current important functions standard for the ministerial exception. The Court in *Our Lady of Guadalupe School* left it ambiguous how much a court is supposed to defer to religious organization's own views of the religious significance of the jobs they claim are covered by the ministerial exception. If, going forward, courts were to weigh this factor heavily, or to outright adopt a subjective test for whether a religious employer can discriminate on *any* protected ground, that test, coupled with the presumption in *Amos*, risks insulating all of the employment decisions of relig-

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236 *See* RAWLS, *supra* note 15, at 137.

237 *See* Joshua Cohen, *Truth and Public Reason*, 37 PHIL. & PUB. AFF. 2, 6–13 (2009) (arguing that although public reason permits a society to take a stand on the "truth" of its political values, it precludes a society from taking a stand on matters that all members of society could not be reasonably expected to endorse, such as whether there is "a transcendent God").

238 483 U.S. 327 (1987).

239 *See* 42 U.S.C. § 2000e-1.

240 *Amos*, 483 U.S. at 330, 339.

241 *Id.* at 339.

ious nonprofit organizations automatically. Not only would the gym in *Amos* be able to fire its engineers for not being Mormon, they could also fire them for being Black, developing brain tumors or breast cancer, refusing to remain silent about sexual harassment, and all the other forms of discrimination protected by the current ministerial exception. Afterall, in *Amos*, all activity that such employees would be engaged in would be presumed to be religious. And who is a judge to say what aspects of religious work are important to the life of a religious organization?

## V
## AUTHENTICITY AND PUBLIC REASON IN RELIGIOUS WORKPLACES

The ministerial exception to employment discrimination law is challenging to reconcile with liberal democracy. As I have been arguing, a religious exemption to employment discrimination law requires a domain-sensitive argument that addresses and harmonizes the fundamental liberty and equality values protected by antidiscrimination law with the liberty interests of religious organizations. The ministerial exception is inherently unable to respond to that challenge. In its current form, the exception likely requires courts to make their own assessment of whether an employee at a religious organization performs important religious functions, treating the organization's view on that matter as one factor to be considered among possibly many others. Such an approach is potentially entangling, requiring courts to decide what kinds of work count as religious and are central to furthering a religious organization's values and mission. But if the ministerial exception is interpreted to require deference to a religious organization, the exception would be unjustifiably broad.

While revealing deep flaws in the ministerial exception's legal and normative foundations, a methodological shift to focusing on the religious significance of employment points to a possible liberal basis for an alternative religious exemption to employment discrimination law, one grounded in people's equally valuable interests in being able to exercise associational freedom through employment. Of course, a society could also avoid the challenges confronting the ministerial exception by simply not having any religious exemption to employment discrimination law. But, as I will now argue, relegating religious association to off-duty hours would impoverish associational life and would likely be discriminatory.

### A. Moral Association in the Workplace

For most adults, our jobs make significant demands on our time and energy. That leaves many of us with mostly just evenings and weekends (if we are lucky enough to have traditional shifts) to associate with others for purposes unrelated to our work.[242] Such a schedule barely leaves enough time to exercise and purchase groceries, and to see friends and loved ones, let alone to participate in religious and political groups, humanitarian associations, and other like voluntary and expressive associations.[243] For convenience, I will refer collectively to these latter kinds of associations organized for civil, political, religious, and other moral purposes as *moral associations*.

Given the demands of paid work on our time, permitting moral values to infuse the character and ends of employment relationships helps to ensure that our economic and productive needs do not eclipse our opportunities for exercising basic liberties of association and expression. Indeed, that so many moral associations even exist is itself likely due to the fact that those associations do not all rely exclusively on part-time volunteers. A society should therefore create legal space for moral association in employment.

#### 1. *Meaningful Work in a Liberal Democracy*

In response, one might point out that creating space for moral association in employment may produce losses in efficiency and, consequently, may create a less productive scheme of labor and employment than a society might otherwise have. As I argued earlier, employment is generally not the best site for exercising associational liberties because of the pressures that at-will employment and lack of workplace speech protections place on people's willingness to speak sincerely. Making paid work more hospitable to moral association would consequently require significant legal change, such as moving towards a regime in which employment can only be terminated for cause, or in which employees can morally criticize their bosses and ob-

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242 For an argument that free time is, much like money, an all-purpose means for advancing our ends and should accordingly be distributed fairly throughout society, see generally JULIE L. ROSE, FREE TIME (2016).

243 For people who have unpredictable or irregular shifts, such opportunities are even more constrained. Hence the importance of having not only maximum-hours regulation, but also scheduling regulation. *See, e.g.*, San Francisco Predictable Scheduling and Fair Treatment for Formula Retail Employees Ordinance § 3300G.4(b) (requiring at least two weeks' notice of work schedules for covered employees).

ject to the moral quality of their work.[244] Such changes can slow down production and delay the provision of services. Would it not violate liberalism's commitment to ethical neutrality to undertake these steps to make space for moral work? Surely some people may reasonably prefer to make more money or have more free time than to perform moral work. That is especially true since workforce participation can be for certain women and people of color a continuation of the long historical legacy of gender– and race-based labor exploitation.[245] Perhaps the better way to create space for moral association would be to shorten working hours or to pay people a lot more for working longer hours,[246] leaving intact the traditional hierarchical paradigm of employment.

I am sympathetic to these concerns about workforce participation. Before turning to these, I want to first clarify the respect in which liberalism is ethically neutral. Liberalism does not prohibit a state from taking a moral stand on issues in ways that conflict with some people's conception of the good. For instance, liberalism is committed to the fundamental moral equality of persons,[247] and a liberal democracy is supposed to implement that commitment through, among other things, its creation of a scheme of equal basic liberties.[248] So while some people may believe that, for instance, women, or people of color, are morally inferior, that does not in any way prevent a liberal democracy from ensuring that its laws treat all of its subjects as moral equals and hence, as people with equally weighty claims to the protection of the law and opportunities for exercising basic liberties.

Instead, liberal neutrality is violated when, among other things, a society's laws cannot be justified on terms that each of us, in our capacity as free and equal members of society, could accept.[249] That standard of public reason is not met when supporting a public policy requires endorsing a particu-

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244 I argue elsewhere that such changes are also required to ensure that our scheme of labor and employment law is compatible with the liberal commitment to treating people as moral equals. *See generally* Tsuruda, *Working as Equal Moral Agents*, *supra* note 130.

245 *See supra* subpart III.C.

246 For an argument that greater pay cannot necessarily compensate for the loss of associational opportunity, see generally Sabine Tsuruda, *The Moral Burdens of Temporary Farmwork*, *in* THE OXFORD HANDBOOK OF FOOD ETHICS 521–52 (Anne Barnhill, Mark Budolfson & Tyler Doggett eds., 2018).

247 *See* RAWLS, *supra* note 11, at 505–10; SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 68–69 (2014).

248 *See* RAWLS, *supra* note 11, at 302.

249 *See* RAWLS, *supra* note 15, at 226.

lar view about the good life.[250] But liberalism—in its commitment to distributive justice, protecting a scheme of equal basis liberties, and to treating people as moral equals more broadly—is itself a moral view. Consequently, preserving space for moral association in the paid workplace does not violate liberal neutrality if it can be grounded in the value of the equal liberty itself.

Second, according to the liberal principle of the priority of liberty, "a basic liberty . . . can be limited only for the sake of liberty itself, that is, only to insure that the same liberty or a different basic liberty is properly protected and to adjust the one system of liberties in the best way."[251] While the priority of liberty entails that efficient production is not itself an end that can take priority over the exercise of basic liberties, the priority of liberty does not require automatically giving associational liberty priority over production and economic growth. As the above neutrality objection suggests, production and growth are means to exercising basic expressive and associational liberties. More time off means more time to form and sustain intimate associations. More money can mean greater opportunities for self-definition and for supporting moral causes,[252] and to thereby concretely exercise one's freedoms of religion and conscience. There are liberties on both sides and so, for that reason, I am sympathetic to the concrete concerns that underlie the neutrality objection.[253]

But, to be clear, in proposing that we leave room for moral association through work, I am not proposing that our interests in exercising associational freedom should trump our liberty interests in efficient production. The proposal is less ambitious. The idea is rather that creating some space for moral association in employment is, under the current legal and economic conditions of modern democracies, a reasonable way to harmonize our liberty interests in association with our liberty interests in growth and production. As Seana Shiffrin and general liberty proponents of the ministerial exception argue, moral associations are sites for paradigmatic exercises of basic liberties of religion, conscience, expression, and thought.[254] While our liberty interests in production should

250 *See id.*

251 RAWLS, *supra* note 11, at 204.

252 *See* Hanoch Dagan, *Markets for Self-Authorship*, 27 CORNELL J.L. & PUB. POL'Y 577, 581–84 (2018).

253 Thank you to Barbara Herman for pressing me on these points.

254 *See supra* subpart II.B.

inform how we limit opportunities for moral association,[255] those limits should also be responsive to the more basic interests we have in the liberties to begin with, and so should leave ample room for core exercises of the liberties. As John Rawls explained,

> [L]iberty of conscience and freedom of thought should not be founded on philosophical or ethical skepticism, nor on indifference to religious and moral interests. [Liberal] principles of justice define an appropriate path between dogmatism and intolerance on the one side, and a reductionism which regards religion and morality as mere preferences on the other.[256]

Diverse opportunities for moral association through employment support a broader culture in which moral association can be a stable and regular part of our lives. In light of the role of moral associations as sites for core exercises of basic liberties, a society thus has compelling public reasons to preserve legal space for moral association in employment.

### 2. *Hiring for Authenticity*

By providing a domain-sensitive argument for why a society should preserve legal space for moral association in employment, the respects in which employment is not an ideal setting for association no longer operate as objections to exercising associational liberty at work (as they did for general liberty arguments for the ministerial exception). On the contrary, the domain-sensitive argument advanced here provides reason to object to the various ways in which employment compromises communicative conditions for moral association. A fuller discussion of how to create space for moral association at work would accordingly need to address these aspects of employment and how the various doctrines that constrain employee expression should be adjusted.[257] That is a much larger project than can be undertaken here.

Instead, I want to focus on a different obstacle to moral association at work, one that helps to justify why a society ought to have religious exemptions to employment discrimination law: legal prohibitions on what I will refer to as *hiring for*

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255 I have argued elsewhere that efficiency objections to workplace speech protections are overblown, and that protection for employee expression—even disruptive expression—is an ordinary feature of other liberal democracies outside of the United States. *See* Tsuruda, *Working as Equal Moral Agents*, *supra* note 130.

256 RAWLS, *supra* note 11, at 243.

257 *See* Tsuruda, *Working as Equal Moral Agents*, *supra* note 130.

*authenticity*. As I will now argue, an exemption to employment discrimination law that permits religious organizations to hire on the basis of religious belief is required to ensure that people can associate around religiously animated moral values on a par with people whose moral values are secular.

Organizations often rely on spokespersons to represent their values and beliefs to the world. Sometimes, for the message to be effective, it does not really matter whether the spokesperson means what she says. Consider commercials for products like deodorant: the commercials can still be highly effective in imparting Old Spice's message regardless of whether the actors think the product really does smell nice or will attract good looking people.[258] In other circumstances, the values that underpin the message (or the context in which it is made) will be compromised if the speaker does not believe what she says or if the audience feels she is inauthentic.

To further illustrate the connection between authenticity and the values of certain kinds of communications, it may help to take a brief interlude from religion and consider how authenticity matters in a different arena of social life—politics and government.

First, when a political candidate speaks to us about her values, she invites us to trust that she will remain faithful to those values in the future, perhaps even in the face of hard choices and political opposition. A candidate does so in part by showing us—through debate, through her past record of action, and the like—that the values to which she publicly attests are stable aspects of her character and vision for social life. Should we elect her, we will ultimately entrust her with important domains of our lives (with racial justice, social equality, the environment, employment, and the like), and her choices about those domains may not always be in the public light and thus possibly subject to public scrutiny and accountability.

For what she does later on to be an expression of our collective will, our support for the candidate needs to be based on some kind of reasonable belief that what she said while campaigning was what she planned to do (and in fact later aimed to do in office). That is in part because we depend on what candidates tell us to make and act on reasoned judgments about how the candidates will represent our interests later on—we are not mind readers or psychics. Accordingly, when we have reason to believe candidates are insincere (per-

258 *See* Shiffrin, *supra* note 119, at 871–73 (discussing detached roles).

haps we have reason to believe that what they say is rhetorical cover for allegiance to corporate or other private interests), or when we simply do not know whether they are sincere (perhaps the political party put the candidate forward because she is a superb actor, good looking, or regularly changes positions on major political issues, such as abortion), the connection between our reasoned judgment and actual governance is disrupted and procedural democracy is compromised. Pervasive insincerity and uncertainty with respect to the sincerity of our political leaders and representatives can also give rise to cynicism, which may in turn exert a further corrosive influence over the democratic process.

Consequently, when a political candidate speaks about her values, it is important for democracy that we be able to reasonably believe that the candidate is sincerely communicating the contents of her mind. And our warrant for so believing will be compromised when political parties are unable to select candidates on the basis of the values that the candidates support and embody. Moreover, if candidates are and ought to be understood to be speaking sincerely, we should avoid creating economic incentives for people to inhabit such roles who do not in fact have the beliefs their role requires them to communicate. Speakers therefore also have interests in a legal regime that permits political parties to select their representatives on the basis of their authenticity.

Returning now to employment, permitting an organization whose activities are organized around moral values to sometimes hire for authenticity can similarly make it possible to provide and secure warrant for the trust that supports an open exchange of ideas, cooperative conscience formation, and moral association more broadly. For example, it may be difficult to discuss ways of implementing racial justice if you know that one of your colleagues thinks we are living in a post-racial world. When occupying a workplace role that is understood by others to involve communicating sincere value commitments—such as in the role of an imam or a rabbi—occupants of that role also have moral and expressive interests in actually having the beliefs that they profess. And so, similar to political candidates, people employed in such a role have interests in being hired for their authenticity, and we should be wary of creating economic incentives for people who do not share the relevant values to occupy those roles.

Employment discrimination law leaves ample room for secular nonprofits to hire for authenticity. In contrast, without an

exemption, religious nonprofits cannot hire on the basis of shared religious values. The absence of a religious exemption would leave religious people with impoverished opportunities to engage in sustained and morally oriented cooperative projects.[259] That would be particularly regrettable given the kind of close and intimate relationships that tend to characterize religious worship and association.[260] As Lawrence Sager argues, the relationship between members of a congregation and their minister(s) is often personal and intimate.[261] Catholic priests, for example, "function . . . in close relationship to their congregants, acting as religious guides, moral advisors, sources of consolation, role models, best friends, and mentors."[262] As with the political candidate, having reason to believe that a priest was insincere about spiritual, moral, or other religious matters can have a destructive effect on the ability of priests to play such roles in people's lives. It may be hard to confess your greatest sins to a person you do not trust, or to put your spiritual salvation in the hands of someone who does not share in your faith (or whose faith is opaque to you). The loss of trust in spiritual leaders may in turn have a corrosive effect on a religious association's ability to be a safe place for moral development and culture.

In order to avoid the inegalitarian situation of making it more difficult for people to organize around religious beliefs on account of the religiosity of those beliefs,[263] it therefore seems that a society must exempt religious organizations from employment discrimination law's prohibition on religious discrimination.

### B. An Authenticity Exception

#### 1. *A Subjective Test for Religious Activity*

The purposes of hiring for authenticity also suggest a possible approach to determining when religious organizations should be able to hire for authenticity. First, the associational value of hiring for authenticity is not implicated in every activ-

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259 *See* TEBBE, *supra* note 8, at 146.

260 *See supra* subpart II.B.

261 *See generally* Sager, *supra* note 8 (arguing that the ministerial exception protects the right of close association, but that secular groups should also be recognized as having such a right and so should sometimes be exempted from antidiscrimination law).

262 *Id.* at 87.

263 *See* EISGRUBER & SAGER, *supra* note 111, at 52 ("[N]o members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects.").

ity a moral association engages in. For example, a political party is not always engaged in political activities for which hiring for authenticity would further its purposes. A political party will often have accountants, for instance, whose work is restricted to tax and other related matters. Similarly, religious organizations are not always engaged in religious activities. They may run "[gas] stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy."[264] A threshold issue as to whether a religious organization should be able to obtain the benefit of an exemption is thus whether the organization is acting in its capacity as a moral association and is hence engaged in a religious activity.

Second, as I argued in Part IV, an objective test that requires a court to decide what sorts of activities are religious is hard to square with the liberal requirement of public reason. Such a determination inevitably requires courts to decide whether, for instance, playing the organ or teaching religion is itself a religious activity, and who is competent to speak to such matters (whether the employee, the employer, or some third party).[265] That is a problem not—as historical and general liberty accounts argue—because such matters are private, internal affairs. They are not, at least not when they arise in the context of employment. Rather, it is because there are no generally acceptable grounds for making such determinations, for such determinations require having a view about how a given religion ought to be implemented and whose views are authoritative within that religion.[266]

Instead, to enable religious organizations to hire for authenticity, a court should defer to a religious organization's sincere beliefs—beliefs that are honestly held and advanced in good faith—as to whether the activity in question is religious. So, for example, in *Biel v. St. James School*, rather than try and adjudicate whether Kristen Biel or St. James School had the correct view about the religious character of her teaching position, the Ninth Circuit (and the trial court) should have just

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264 Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 292, 306 (1985) (holding that applying minimum wage law to a religious organization that employed recovering "drug addicts, derelicts, [and] criminals" in its commercial enterprises as unpaid "associates" would not impermissibly interfere with the organization's religious liberty).

265 *See supra* subpart IV.B.

266 *See supra* subpart IV.B.

deferred to the school's honest and good faith beliefs that teaching the fifth grade is a religious activity.

To be sure, a requirement of sincerity does involve a court in determining whether a religious organization is acting pretextually. But that is a virtue of the standard (in contrast to the wholesale presumption of religiosity under § 702(a) of Title VII,[267] upheld in *Amos*[268]). The religious organization is asking to limit someone's fundamental rights. In order to justify that limit to its employee and the broader society called upon to lend its support, the religious organization should at least be prepared to provide a publicly intelligible basis for why its activity falls within the scope of the liberty protected by the rights limitation. And a requirement that the belief be honestly held and put forward in good faith is the least intrusive way a religious organization could demonstrate that it is operating as a moral association under the circumstances, and thus meets one of the general requirements for an authenticity-based exemption.

### 2. *A Mixed Test for Rational Fit*

But that should not end the inquiry. Not all of the moral activities of a moral association may require conformity to the association's values for realizing the association's purposes. For example, for a public defender's office, having attorneys that share in the office's vision of social justice may be needed to facilitate trust in the persons and populations the office serves. But it may not matter whether certain administrative staff members share in that vision if they are not client-facing, even if their work involves editing, researching, and distributing documents that are part of the office's social justice activities. Nor do all moral activities for which authenticity matters require the same type of conformity. For example, it may be enough for most of the attorneys that they do not insult their clients for their poverty or otherwise display a flagrant disregard for social justice. In contrast, an elected public defender may need to openly and sincerely support and advocate for the office's ideals.[269]

The associational values of hiring for authenticity thus only extend to support a more circumscribed exemption, one

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267 42 U.S.C. § 2000e-1(a).

268 *See supra* text accompanying notes 238–241.

269 *Cf. supra* section V.B.1 (discussing how both political parties and religious organizations have different activities that may or may not require hiring for authenticity).

limited to situations in which religious belief, affiliation, or adherence to religious tenets is reasonably necessary for the employee's performance of her specific job duties.[270] I will refer to this kind of requirement as a *fit requirement* for employment.

In order to render such a requirement faithful to its purposes, fit should be understood both subjectively and objectively. Subjectively, the organization should sincerely believe that the requirement at issue is reasonably necessary for performance of the specific job—that is, the belief needs to be honest and that belief should be put forward in good faith. Such a showing is part of establishing that the discriminatory action at issue falls within the scope of the exemption as an exercise of associational liberty.

Objectively, the organization should be able to show that the particular form of discrimination requested is a reasonable means to the performance of the employees' specific job duties. Such a showing enables the religious organization to justify, not just to people who share in its own beliefs, but to its employees who, as *Our Lady of Guadalupe School* and *Hosanna-Tabor* illustrate, may not share all of its beliefs, as well as to other members of the workplace and broader society whose rights and statuses may be impaired by the discrimination. Such a requirement is thus needed to render the exemption responsive to the liberty interests and status equality of employees, as well as to the public interest in ending employment discrimination.

Before illustrating the fit requirement, I want to address two possible objections—one based on a principle of religious nondiscrimination and the other based on entanglement concerns—in order to clarify the grounds for the fit requirement.

First, one might notice that secular employers seem to face no such fit-based restrictions when they seek out candidates who share their values. This seems to even be true of for-profit employers. Nike, for instance, can require that its administrative employees embrace a certain vision of innovation ("Just do it!"[271]) without having to show that such values are required for the job. One might therefore worry that a fit requirement for religious employment reproduces the very form of antireligious

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270 For a similar requirement of rational fit, see, for example, Ont. Human Rights Comm'n v. Christian Horizons (2010), 102 O.R. 3d 267, 293–95 (Can. Ont. Sup. Ct. J.).

271 *See* Colin Mitchell, *Selling the Brand Inside*, HARV. BUS. REV., Jan. 2002, at 99, 103.

discrimination that being able to hire for authenticity was supposed to avoid.

In response, there is nevertheless good reason to subject religiously based hiring for authenticity to closer scrutiny. Religious belief and affiliation are protected statuses and having access to employment under conditions free from religious discrimination is a right—a right that, as I have been arguing, protects the exercise of basic liberties of conscience, expression, and association.[272] If a religious organization is going to condition access to the many social and material goods of a job on religious belief, and thus put a person "to the choice of either conforming to certain religious tenets or losing a job,"[273] then the organization should be prepared to offer such a person an intelligible explanation, if not a justification.[274]

Furthermore, a fit requirement for hiring for religious authenticity actually does have a secular analogue. Although a government employer generally may not take adverse employment actions against its employees on the basis of their political affiliation,[275] that presumption does not apply when "party affiliation is an appropriate requirement for the effective performance of the public office involved."[276] Several US states and variety of foreign jurisdictions have adopted a similar restriction on political affiliation discrimination undertaken by private employers.[277] Here, as with religious discrimination,

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272 *See supra* subpart III.B.

273 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 340–41 (Brennan, J., concurring).

274 For a discussion of the egalitarian value of interpersonal justification, see G. A. Cohen, *Incentives, Inequality, and Community*, *in* 13 THE TANNER LECTURES ON HUMAN VALUES 263–87 (1991). For a discussion of how that value might be deployed in the paid workplace, see Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 322 (1999) ("In regarding the economy as a cooperative venture, workers accept the demand of what G. A. Cohen has defined as the principle of interpersonal justification: any consideration offered as a reason for a policy must serve to justify that policy when uttered by anyone to anyone else who participates in the economy as a worker or a consumer.").

275 Such actions are presumptively unconstitutional under the First Amendment. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 64–65 (1990).

276 Branti v. Finkel, 445 U.S. 507, 518 (1980); *see* Elrod v. Burns, 427 U.S. 347, 366–67 (1976).

277 For example, Connecticut has extended by statute the same speech protections available to public employees to private employees, and has explicitly rejected the *Garcetti* principle that an employee's speech is not protected when the employee speaks pursuant to her job duties. *See* Conn. Code § 31–51q (West 2005) (granting private employees the same free speech rights as public employees under federal and state constitutional law and creating a private cause of action for damages for violations of those rights); Trusz v. UBS Realty Inv'rs, L.L.C., 123 A.3d 1212, 1221–22 (Conn. 2015) (holding that the Connecticut constitution is broader than the First Amendment in its protection of employee

political affiliation discrimination is morally and legally suspect because of its historical and social "vulnerability to hostility and neglect,"[278] and so hiring on the basis of political affiliation requires showing a rational connection between the protected status and the terms of the job.

A second possible objection to a fit requirement concerns not the fact that religious organizations would be asked to justify themselves, but how a court could permissibly evaluate that justification. In *Amos*, Justice Brennan worried that a fit requirement would burden religious organizations by requiring them, "on pain of substantial liability, to predict which of [their] activities a secular court will consider religious."[279] Fear of such liability might in turn shape how religious organizations define and implement their own values.[280]

While I am sympathetic to Brennan's worries, I do not think they apply here. First, in determining whether religious adherence is reasonably necessary for performance of particular job duties, a court is not supposed to evaluate whether those job duties are themselves religious. Rather, a court is supposed to evaluate the formal instrumental rationality of a religious organization's claim that religious adherence is required for the job. And to do so, a court should not evaluate the truth of the premises the religious organization offers; it should only evaluate the rational fit between the premises and the conclusion that performing the job requires religious adherence.[281] So in making such a determination, a court should not take any substantive stand on the truth of the religious tenet or practice, or the moral or religious advisability of hiring for authenticity under the circumstances of the case.[282] Instead, the court would be assessing the rough means-end rationality of the organization's justification, with an eye to

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speech, protecting employees even when they speak pursuant to their job duties). Most Canadian provinces and territories treat political opinion as a protected ground of discrimination except for Alberta, Nunavut, Ontario, and Saskatchewan. *See*, *e.g.*, British Columbia Human Rights Code, R.S.B.C. 1996, ch. 210, § 11 (Can.); Manitoba Human Rights Code, C.C.S.M. c. H175, § 9(2) (Can.); New Brunswick Human Rights Act, R.S.N.B. 2011, c. 24, § 2.1 (Can.).

278 EISGRUBER & SAGER, *supra* note 111, at 52.

279 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987) (Brennan, J., concurring).

280 *Id.*

281 Thus, a court should be reviewing for formal validity—and very loosely at that—and not evaluating whether the argument is both valid and reaches a true conclusion (namely, that it is sound).

282 *See* Cohen, *supra* note 237, at 6–13.

whether the reason offered by the organization could be intelligible as a rational basis for hiring for authenticity.

Second, such an objectively intelligible reason is needed for the political legitimacy of the exemption. Within a liberal democracy, law cannot be legitimate unless it is supported by public reasons.[283] This means that the contours and contents of our rights should be justifiable on the basis of reasons we could accept as free and equal members of society.[284] Were we to just defer, completely, to religious organizations as to when they needed to discriminate, the justification for such an exemption would be incomplete, for the exemption would extend beyond its public purpose of hiring for authenticity.

Public reason is also an ideal of reciprocity. Part of the way we treat one another in our legal and public relationships as free and equal members of society is by being prepared to offer one another mutually acceptable reasons for any limits on one another's liberties.[285] The goal of harmonizing production with association through permitting exemptions for organizations to hire for authenticity offers a general such reason for a religious exemption limiting employee rights. But the justification we owe to the particular employee will be incomplete if we cannot establish that, in her particular situation, her job reasonably demands religious authenticity. An objective test for rational fit ensures that such a justification is given and thus serves the end of creating a legal regime in which the contours and content of our rights are acceptable to each of us in our capacity as free and equal members of society.

Under such a legal regime, a religious organization might still seek to proceed with caution in deciding which employees to ask to share its religious beliefs. But that outcome is not necessarily problematic. Proceeding with such caution is a way of exercising care with respect to when the organization requires its employees to share its religious beliefs. And religious organizations should exercise such care in light of the liberties and equality rights at stake.

### 3. *Toleration and Subversion*

So far, I have been arguing for an *authenticity exception* to permit a religious organization to impose religious job requirements when reasonably required for performance of the specific duties of the job at issue. As stated, such an exception

283 *See* RAWLS, *supra* note 15, at 137.
284 *See id.*
285 *See id.* at xlix.

does not seem to impose any substantive limits on what kinds of jobs could qualify. What, if anything, would be stopping a religious white supremacist group from opening up a variety of stores, schools, restaurants, and hotels, and hiring only white people?[286] After all, the group may sincerely believe that the activities of such employees are religious. It may also be a central, non-pretextual, religious part of these jobs to embody and institute white supremacy, and it is not a stretch to believe that hiring only white people is reasonably necessary for that end.

Such an interpretation of the authenticity exception is incompatible with the exception's moral foundations. The liberal value of hiring for authenticity imposes an important substantive limitation on what kinds of ends a religious organization can pursue through the exception. Understood as a public reason warranting application of the exception, the need to hire for authenticity could not justify religiously motivated job requirements that aim at instituting white supremacy, patriarchy, and other forms of subordinating structures in ways that would subvert the central purposes of employment discrimination law.[287]

Public reason thus imposes a substantive requirement on how the exception can be applied. But how strong is that requirement? One might worry that such a requirement would tend to exclude any religious organization whose moral beliefs did not align with liberal democracy and its underpinning values. Consider, for instance, the case of the all-men Catholic priesthood, which is often thought to be a paradigmatic example of religious employment warranting an exemption. The idea that anyone is inherently unsuited for moral or spiritual roles on account of their gender cannot possibly be a public reason for limiting someone's fundamental rights.[288]

In response, first, a point of clarification: the public reason that the religious organization must give is that it needs to hire for authenticity. So if a court were to find that the authenticity exception permits a religious organization to engage in gender discrimination in its employment of priests, the court would not be holding that the moral or spiritual potential of (non-

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286 On the relationship between white supremacy and religion, see, for example Daryl Johnson, *Hate in God's Name*, S. POVERTY L. CTR. (Sept. 25, 2017), https://www.splcenter.org/20170925/hate-god%E2%80%99s-name [https://perma.cc/J2FY-VQJF].

287 Thank you to Larry Sager and Nelson Tebbe for pressing me on these points.

288 Thank you to Nelson Tebbe for a very helpful discussion of this example.

trans) men (as opposed to trans men, women, and nonbinary persons) is the reason for granting the exemption. To be sure, that may be the organization's reason for the job requirement. But from the point of view of society and the court, the reason why the organization needs to hire for authenticity is that gender is instrumental to performance of the job duties as defined by the religious organization.

Of course, this clarification does not address a second issue raised by the all-men Catholic priesthood: how could any gender discrimination be justified by public reasons?

The need for religious toleration, when coupled with the underlying reasons for creating space for moral association in the paid workplace, offers a possible reply. First, although a liberal democracy can regulate how illiberal views are put into practice, liberty of conscience and thought requires that it not seek to suppress any of the moral views of its members, even when those views are themselves illiberal or intolerant. The boundary between suppression and regulation is, of course, not obvious.[289] But the associational value of moral work points to a possible boundary for employment. As I have been arguing, part of why a society like the United States needs an authenticity exception is because the publicly supported way of accessing a decent standard of living is to sell one's labor, and the scheme of labor and employment that we have adopted places significant demands on people's time and opportunity for association. To avoid letting that public policy result in the suppression of illiberal views, the authenticity exception—an exception designed to temper the influence of production over associational life and facilitate a robust associational culture—should not be interpreted so as to automatically exclude any illiberal religions.

That being said, there is still conceptual and moral space between not automatically excluding illiberal religions and permitting organizations to hire in the service of bringing about a patriarchal world or system of white supremacy. While an all-men priesthood may conflict with antidiscrimination law, and surely conflicts with employees' liberty and equality rights, unlike the earlier white supremacy example, the all-men priesthood does not necessarily subvert employment discrimination law. It is, for instance, not obvious how it would follow from the claim that priests need to have the same gender as Jesus

289 RAWLS, *supra* note 11, at 219 ("Whether the liberty of the intolerant should be limited to preserve freedom under a just constitution depends on the circumstances.").

Christ to administer various sacraments that employment discrimination law ought not be the law of the land, or that trans men, women, and nonbinary persons ought not generally have a protected right to participate in working life as the equals of non-trans men.[290] The same cannot be said of a religious organization that deploys race-based hiring requirements to institute a potentially global racial hierarchy. Whereas the former request for an exemption is a request for a genuine exception to antidiscrimination law, the latter seeks to use the exception to undo antidiscrimination law.[291] As John Rawls wrote,

> [W]hile an intolerant sect does not itself have title to complain of intolerance, its freedom should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger.[292]

Liberal toleration thus recommends interpreting the authenticity exception to permit religiously motivated discrimination even when the religious organization's reasons for discriminating could not be supported by everyone in their capacity as free and equal persons. But it draws the line at subversion.

Determining whether a religious job requirement has the subversion of antidiscrimination law as its end is thus not a matter of applying a rule or a formula, but rather requires context sensitivity and interpretation of the underlying purposes of antidiscrimination law. It is, of course, not always obvious or uncontested what the purposes of antidiscrimination law in fact are. Courts may therefore sometimes get the answer wrong and, as a result, impair the liberties and interests of one of the parties. But then at least the risk of error is shared between employees and organizations, unlike the extant ministerial exception and § 702(a) of Title VII, which place practically all the risks of error onto the employee.[293] And while the authenticity exception would engage courts in a substantive inquiry into the purposes of the job requirement at

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290 This is not to say that there is nothing patriarchal or otherwise subordinating about holding that being of a certain gender is a requirement of playing certain central roles in spiritual, religious, and moral life. Applying the authenticity exception to permit a Catholic church to hire only non-trans men as priests would still conflict with antidiscrimination norms and their underpinning ideal of the moral equality of persons (hence the operation of the exception as an exception).

291 For an argument that religious organizations should not seek religious exemptions to further political goals, such as opposition to abortion and gay rights, see generally Brian Hutler, *Against the Political Use of Religious Exemptions*, 47 PHIL. & PUB. AFF. 319 (2019).

292 *See* RAWLS, *supra* note 11, at 220.

293 *See supra* text accompanying notes 238–241.

issue, it is not entangling because it does not ask a court to determine whether the purposes are religious, or even what the purposes are. Rather, it asks a court to engage in an inquiry that it already often engages in—to determine whether lending state support to a given end is compatible with treating equal liberty as a fundamental value.[294]

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In sum, in order to create legal space for moral association through employment, moral associations must be able to hire for authenticity. For religious organizations, this requires an exemption from employment discrimination law's prohibition on religious discrimination. To remain faithful to its purposes, such an exemption should be granted to religious organizations, provided that

> (1) the religious organization sincerely believes it is engaged in a religious activity;
> (2) the religious job requirement is imposed in the honest and good faith belief that it is reasonably required for performance of the job; and
> (3) the requirement is in fact reasonably necessary for performance of the job, taking into consideration the specific duties of the employee.

Additionally, even if these requirements are met, the requested rights limitation will be incompatible with public reason unless

> (4) the exception is interpreted and applied purposively to avoid subverting employment discrimination law.

Unlike the ministerial exception, by deferring to religious organizations on the issue of whether the work is religious, the approach ensures that courts do not make pronouncements about the importance of various types of work in religious life. The approach shares this feature with § 702(a) of Title VII, which presumes that the activities of a nonprofit religious organization are religious and thus that the organization may discriminate on the basis of religion in its employment practices.[295] But it departs from § 702(a) in requiring: (1) that the religious organization sincerely believes that religiosity is a requirement of the job, (2) that religiosity in fact be reasonably necessary for performance of the job, and (3) that the exception

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294 This requirement has affinities with constitutional jurisprudence permitting regulation of religiously motivated discrimination in other arenas. *See supra* subpart III.B.

295 *See* 42 U.S.C. § 2000e-1(a); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339–40 (1987).

be applied in a way that would not subvert the purposes of employment discrimination law.[296] By thus implementing the requirement of public reason, the authenticity exception supplies what § 702(a) and the ministerial exception are missing: a way of harmonizing the liberty interests of religious organizations with the liberty and equality interests of employees.

### C. Application

#### 1. *Canadian Human Rights Law*

Canadian law deploys this kind of test for determining whether to grant statutory exemptions for religious organizations and thus illustrates how an authenticity exception would operate in practice.

For example, in *Ontario Human Rights Commission v. Christian Horizons*,[297] a Canadian court rejected a religious organization's claim that it should be exempt from an employment discrimination law's bar on religious discrimination.[298] Christian Horizons, the religious organization, ran a number of nonprofit residential homes "minister[ing] to individuals with developmental disabilities within an Evangelical Christian environment."[299] All of its employees were required to agree to a "Lifestyle and Morality Statement" prohibiting, among other things, "homosexual relationships."[300] Connie Heintz agreed to the Statement as part of her employment as a social worker in the residential homes and was later fired, allegedly because she was in a "same sex relationship."[301]

Heintz subsequently filed a complaint with the Ontario Human Rights Commission against Christian Horizons for sex-

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296 The authenticity exception is thus a type of bona fide occupational requirement, similar to statutory exceptions for secular employers who seek to hire on the basis of gender or other protected statuses in light of their particular business model. § 703(e)(1) of Title VII, for instance, permits employers to hire on the basis of "religion, sex, or national origin" when "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). While a full discussion of the differences between § 703(e)(1) and the authenticity exception is not possible here, it may help to note that whereas § 703(e)(1) is targeted at association for commercial purposes, the authenticity exception is targeted at facilitating moral association. Hence the exception's requirements that the organization be acting in its capacity as a moral association and seeking to hire authentic individuals necessary for implementing its values.

297 (2010) 102 O.R. 3d 267 (Can. Ont. Sup. Ct. J.).

298 *Id.* at para. 110.

299 *Id.* at para. 4.

300 *Id.* at para. 6.

301 *Id.* at paras. 8–12.

ual orientation discrimination.[302] In response, Christian Horizons sought to make use of the following exception to the Ontario Human Rights Code's (OHRC) prohibition against employment discrimination:

> 24(1) The right . . . to equal treatment with respect to employment is not infringed where (a) a religious . . . organization that is primarily engaged in serving the interests of persons identified by their . . . creed . . . gives preference in employment to[ ] persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.[303]

The Ontario Human Rights Tribunal interpreted the exception to require that Christian Horizons show that it was engaged in a religious activity and that the religious requirement of conformity to the Lifestyle and Morality Statement be a bona fide occupational requirement for performance of the social work.[304] The tribunal then applied objective tests to determine whether both requirements had been met. It held that since Christian Horizons served the general public, it was not engaged in a religious activity and could not avail itself of the exception.

Christian Horizons then appealed to the Ontario Superior Court, which affirmed the tribunal's conclusion that Christian Horizons was not exempted under the exception but on different grounds. The court rejected the tribunal's objective test for whether the organization was engaged in a religious activity, explaining that such a test "failed to respect the religious character of Christian Horizons' activities and the purpose of s. 24(1)(a) as to protect group rights of association."[305] Instead, it should have sufficed that "from the perspective of the founders of Christian Horizons, its members and employees, the organization saw itself as an Evangelical Christian organization" engaged in the religious activity of ministering to people with disabilities.[306]

Nevertheless, the court found that Christian Horizons had failed to show that Heintz's specific job duties as a social worker required refraining from forming "homosexual relationships."[307] While the court acknowledged that a "Christian

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302 *Id.* at para. 11; *see* Ont. Human Rights Code, R.S.O. 1990, ch. H.19, § 5 (Can. 2019).
303 Ont. Human Rights Code, R.S.O. 1990, ch. H.19, § 24(1)(a).
304 *Christian Horizons*, (2010) 102 O.R. 3d 267 at para. 73.
305 *Id.* at para. 73.
306 *Id.* at para. 77.
307 *Id.* at para. 86.

ethos" animated the residential homes, Christian Horizons needed to claim that there was some kind of rational link between the prohibition on same sex relationships and the specific work Heintz performed, and Christian Horizons never made any such claims.[308] The court explained that such an objective link was needed to show, at a minimum, that the employer at least "put its mind to the issue in a meaningful way, with a recognition that there is an obligation to consider the fundamental rights of others."[309]

As with the authenticity exception I have argued for here, Section 24(1)(a) of the OHRC performs the dual functions of facilitating religious association through employment while remaining responsive to the fact that such association can require restricting important rights of others.

*Christian Horizons* also illustrates a way of working out two possible ambiguities in the exception. First, one possible ambiguity arises from the authenticity exception's permission to impose requirements of religious belief, affiliation, or adherence. As *Christian Horizons* illustrates, discrimination on the basis of religion and on the basis of other protected grounds can (and often do) overlap. A restrictive interpretation of the authenticity exception would only permit the imposition of religious requirements when they do not overlap with other protected grounds. Thus, Christian Horizons would never be able to enforce its ban on same sex relationships for any employees, just as the Catholic Church would be unable to employ exclusively men as priests. A broad interpretation of the exception would, in contrast, permit such overlap, so long as the religious organization had a sincere belief that discrimination on the basis of a protected ground was part of requiring religious belief, affiliation, or adherence.

As is implicit in *Christian Horizons*, a restrictive interpretation would undermine the exception's purpose of facilitating religious association through employment. Moreover, for religions that include beliefs that are in tension with antidiscrimination law, it is not clear how a requirement of religious belief in general could ever not overlap with protected grounds of discrimination. Instead, the requirement that religion be reasonably necessary for performance of the job duties should do the work of narrowing the exception in a way responsive to the fundamental rights of the employee, as the court in *Christian Horizons* explains.

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308 *Id.* at paras. 104–05.

309 *Id.* at para. 96.

This brings us to a second possible ambiguity in the authenticity exception: the specificity with which to characterize the job. On a more expansive reading of the fit requirement, it should suffice that a religious organization show that the work is infused by a religious ethos. But as the court in *Christian Horizons* explains, such an expansive reading would effectively collapse the fit requirement into the first requirement that the activity be religious.[310] To give effect to the fit requirement, a religious employer thus has to do more than show that the work is characterized by a religious ethos. It needs to show that a particular form of religious belief, affiliation, or adherence is reasonably needed for performance of the job, as was required in *Christian Horizons*. The restrictive reading is thus more faithful to the purpose of justifying to the employee the need to discriminate.[311]

### 2. Our Lady of Guadalupe School *and* Hosanna-Tabor *Revisited*

Similar to the First Amendment ministerial exception, the authenticity exception accordingly aims to create legal space for religious organizations to determine who will "personify" their beliefs in the performance of important religious functions. But unlike the ministerial exception, this authenticity exception neither requires courts to determine what counts as an important religious function nor demands that religious organizations frame their religious practices and beliefs in Christian terms.

Although the exemption defers to religious organizations about what counts as a sufficiently important religious activity, the exemption is nevertheless circumscribed—and circumscribed more narrowly than the ministerial exception—to reflect the fact that the exemption limits the liberty and equality rights of employees.

For example, in evaluating whether Kristen Biel could be fired for taking time off for breast cancer treatment, St. James School would have to show (1) not only that it sincerely believed that her teaching was religious, but (2) that it similarly believed that taking off such time was in contravention of the religious requirements of the position and (3) that not taking such time off was reasonably necessary for the performance of her specific job duties. St. James School would have no difficulty es-

310 *Id.* at para. 90.
311 *See supra* section IV.B.3.

tablishing that teaching the fifth grade was a religious activity. But it is highly unlikely that the school could meet either of (2) or (3), as it provided no evidence for concluding that Biel would fail to personify the school's faith if she took time away for breast cancer treatment, and in fact the school had regularly permitted teachers to take maternity leave for similar time periods.[312] An authenticity exception would thus support the same result as that reached by the Ninth Circuit, not because Biel wasn't a minister—the authenticity exception requires no such determination—but rather because breast cancer has nothing to do with what the school claims are the religious aspects of her job.

The situation is a little less clear with respect to Cheryl Perich's dismissal by Hosanna-Tabor. If Perich was fired merely for having developed narcolepsy, the outcome would likely be the same as under the facts in *Biel*, as Hosanna-Tabor never claimed that having narcolepsy left Perich unfit as a Lutheran teacher.[313] On the contrary, the school and affiliated Church explicitly condemned disability discrimination in employment. As a consequence, Hosanna-Tabor would likely not be able to avail itself of the exception because it is not at all clear that Hosanna-Tabor discriminated against Perich on the basis of religion.

Nevertheless, Hosanna-Tabor also claimed that Perich was fired for threatening to sue the school in violation of the school's religious belief that disputes should be resolved internally.[314] Assuming that the school honestly so believed and that the requirement was applied in good faith, then it seems that Hosanna-Tabor should be able to avail itself of the authenticity exception.

### D. The Nonideal Limits of Equal Liberty

But such a conclusion about *Hosanna-Tabor* under the authenticity exception is not self-evident. If it sufficed for a religious organization to say, even sincerely, that its religious beliefs required internal dispute resolution, such a justification would undermine the purpose of fit requirement in the exception—namely, to give some effect to the antidiscrimination

312 *See* Brief for Respondent Darryl Biel, *supra* note 62, at 10.

313 *See* Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Emp't Opportunity Comm'n, 565 U.S. 171 (2012).

314 *See id.* at 180. *But see supra* text accompanying notes 58–59.

rights of the employee.[315] Although it is not possible to fully discuss the issue here, it may help to note a few considerations that bear on whether such a justification would not be acceptable under a purposive interpretation and application of the authenticity exception.

First, although a theory of the purposes of employment discrimination law is not possible to develop here, how a society should interpret an authenticity exception to avoid subverting employment discrimination law should be sensitive to that particular society's experience and history of discrimination. As I have argued, the exception is not grounded in a bright line rule about how to balance the basic liberties of some against those of others. Instead, the exception is grounded in an imperative to preserve legal space for moral association, which is in turn grounded in the liberal imperative to secure social conditions for equal liberty. It may be that in societies marked by profound religious strife, such as Northern Ireland, the exception should be read more restrictively to prevent religious fault lines from continuing to structure much of daily life.[316] The boundary between acceptable toleration and subversion should therefore be sensitive not just to the abstract potential for an application of the exception to bring about structural injustice, but to the social and historical conditions on the ground.

Similarly, in societies with a history of pervasive disability discrimination (or racial or sexual orientation discrimination, and the like), it may be that courts should take a more restrictive approach to religiously motivated disability discrimination (or racial, etc., discrimination). Thus, with respect to Perich, perhaps the best way, on the whole, to implement a scheme of equal basic liberty is to interpret and apply the exception to exclude even sincerely held religious reasons for preventing

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315 In applying the same kind of exception as the authenticity exception argued for here, Canadian courts have interpreted the requirement of good faith to preclude considerations with objectives that would undermine the purposes of human rights law. According to the Supreme Court of Canada, "[t]o be a *bona fide* occupational qualification and requirement a limitation . . . must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work . . . and not for ulterior or extraneous reasons aimed at objectives which could defeat the purposes of the [Ontario Human Rights] Code." Ont. Human Rights Comm'n v. Etobicoke, [1982] 1 S.C.R. 202, 208 (Can.).

316 *Cf.* EISGRUBER & SAGER, *supra* note 111, at 59 ("Antidiscrimination principles in both law and common morality focus on what we could think of as cultural fault lines. They focus, that is, on chronic social circumstances that leave some groups peculiarly vulnerable to deep and undeserved disadvantage.").

employees from enforcing their rights against disability discrimination, given how stigmatized disability often is and how entrenched disability discrimination is in our construction of workplaces.

These considerations for and against broader and more restrictive applications of the authenticity exception accordingly illustrate an important limit of public commitments to equal liberty: that a society's ability to implement such a commitment is vulnerable to history, as well as to the moral quality of our privately held beliefs.

## CONCLUSION

According to the U.S. Supreme Court, the First Amendment requires a "ministerial exception" to employment discrimination law to insulate the employment relationship between religious organizations and their "ministers" from improper state control. In this Article, I have argued that the ministerial exception rests on unstable normative and legal foundations. The main arguments for the exception are problematically decontextualized, largely ignoring how the legal and economic character of employment makes paid workplaces rather hostile to religious liberty and overlooking how employment discrimination law itself protects a variety of fundamental liberty and equality values. Meanwhile, the ministerial exception is inherently unable to respond to these difficulties, requiring either an entangling objective test to circumscribe its reach, or a subjective test that cannot be justified in a way compatible with employees' weighty interests in workplace equality and in exercising expressive, religious, and associational liberties.

This context-sensitive critique of the ministerial exception nevertheless offers a way forward. Investigating why employment matters for religion reveals a strong reason, grounded in the priority of liberty, to preserve legal space for associating for moral values in paid workplaces. Without such legal space, the demands that production places on our time risks impoverishing associational life. Although employment discrimination law poses no systematic threat to associating for secular moral values, it does pose such a threat to religious associations' equally valuable liberty interests in sometimes hiring for authenticity. Preserving legal space for moral workplaces thus requires a religious exemption to employment discrimination law.

To illustrate, this Article advanced an alternative to the ministerial exception inspired by Canadian human rights law.

To permit religious organizations to hire for authenticity, courts should enable religious organizations to have religious job requirements that are reasonably necessary for performance of religious job duties and that would not subvert employment discrimination law.

In order to implement the associational values underlying such an authenticity exception, courts should defer to a religious organization's sincere beliefs about whether the work in question is religious. But to ensure that the limitation on employees' rights requested by the religious organization is justifiable to those employees, the religions organization should have to demonstrate a rational connection between the requirement of religiosity and the particular job duties in question. Courts should also interpret and apply the exception purposively so as to avoid subverting employment discrimination law. These formal and substantive requirements implement the ideal of public reason, according to which a society's laws should be supported by reasons that can be accepted by all in their capacity as free and equal members of that society. An authenticity exception thus avoids the entanglement quandary, confronted by the ministerial exception, by distinguishing the inherently religious issue of what makes certain kinds of work religious from the public issue of whether the rights limitation sought by the organization falls within the public purposes of the exception.

The Supreme Court recently reaffirmed the ministerial exception in *Our Lady of Guadalupe School*,[317] and so the Court is unlikely to adopt an alternative exception any time soon. But the Court's new important functions standard leaves open how much deference a court must grant a religious organization when deciding whether a given job is sufficiently important to the organization's religious ends. When courts are inevitably asked for clarification, they will have an opportunity to refine the exception's scope and normative foundations. Reflecting on the defects of the current approach and contemplating alternatives is therefore not just philosophically valuable, but also a matter of some practical urgency. Critical reflection can also encourage judges to challenge the status quo in dissenting opinions. Such opinions are likely to play a central role in laying legal and moral groundwork for change in the future,

317 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2071 (2020).

given the precedential stability of the ministerial exception and the current composition of the Court.[318]

318 *See supra* note 19.