A Necessary Recalibration: Why the Ministerial Exception's Bar on Whistleblower Actions Harms Teachers and Students

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The "ministerial exception" is a First Amendment shield for religious institutions facing employment-related lawsuits. The Catholic Church, for example, might invoke the exception if sued by a woman barred from joining the priesthood on account of her sex. In recent years, however, the Supreme Court has "vertically" expanded the scope of the exception down the hierarchy of a religious institution, holding that it bars actions brought not only by traditional "ministers," but also by teachers and other employees at religious schools—many of whom do not hold religious office or formally preach to students. This Note argues that this vertical expansion (i.e., the broadened conception of "minister") warrants a "horizontal" restriction on the types of claims that the exception bars. Namely, whistleblower actions should not be categorically barred by the now-bloated ministerial exception. As the law stands, over a hundred thousand secular teachers are left in a precarious double bind in which they must act as mandatory reporters for child abuse and yet lack protection from any consequent retaliation for whistleblowing.

Part I of this Note provides an overview of the ministerial exception and its recent expansion, including how lower courts have been handling whistleblower claims. Part II theorizes that the broadening of the ministerial exception, and the underlying First Amendment right of church autonomy, should trigger a proportionality approach that constrains the exception based on competing government interests. Part III applies this proportionality approach in the context of whistleblower cases, arguing that whistleblower actions are distinct from other applications of the ministerial

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exception in the way they implicate third parties—often children—and with respect to the unique societal interests in protecting those third parties.

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INTRODUCTION

At first glance, the Supreme Court's decision in *Bostock v. Clayton County* seemed to signal a new era of civil rights in the employment context. For the first time, gay and trans workers became federally protected from discrimination in hiring, firing, compensation, and other terms of employment.[1] In the same breath, however, the Court carefully emphasized a dialectic that "lies at the heart of our pluralistic society": the special status of religious employers under those federal laws.[2] In other words, while seemingly expanding the scope of civil rights protections, the Court simultaneously renewed the exceptions available for religious employers.[3]

One such exception is the "ministerial exception," which bars, on First Amendment grounds, the application of employment laws, such as anti-discrimination laws, "to claims concerning the employment relationship between a religious institution and its ministers."[4] In light of more expansive employment laws, religious institutions have increasingly invoked the ministerial exception as a tool to preserve their independence in making internal employment decisions.[5] In turn, recent Supreme Court decisions have broadened the exception, barring an increasing number of employees from finding relief under federal employment laws.[6]

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1. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 651–52 (2020).
2. *Id.* at 681.
3. *See* Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1322 (2022) ("In case after case, the Roberts Court has protected civil rights for LGBTQ people—think of *Bostock v. Clayton County*, which extended employment discrimination protections to LGBTQ workers—while at the same time ruling consistently for religious exemptions from the very same sorts of equality laws").
4. *Bostock*, 590 U.S. at 682 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012)).
5. *See* Sunu P. Chandy & Laura Narefsky, *Exception Swallowing the Rule? The Expanding Ministerial Exception Puts Workers at Religious Employers at Risk of Losing Civil Rights Protections*, HUMAN RIGHTS (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/exception-swallowing-the-rule/ [https://perma.cc/3K82-A4AS] ("In recent years, there has been a rise in instances of employers trying to use the ministerial exception to deny their employees civil rights protections."); *see also* Alex Reed, *Religious Organization Staffing Post-Bostock*, 43 BERKELEY J. EMP. & LAB. L. 203, 232–33 (2022) (finding that, post-*Bostock*, religious institutions still "retain unfettered discretion over a wide range of staffing decisions" because of the ministerial exception).
6. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 190; *cf.* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2082 (2020) (Sotomayor, J., dissenting) (warning that the

While one might think the "ministerial" exception would be limited to the traditional "minister" figure,[7] the exception's vertical breadth now ensnares "over a hundred thousand secular teachers . . . countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions."[8]

This Note argues that this amounts to a *vertical* expansion of the ministerial exception—and, as various commentators have noted, a rather jarring one.[9] If lay teachers and other administrators can be considered "ministers," their ability to bring employment-related claims and seek protection in the workplace could be severely constrained. At the same time, the Supreme Court has left open the question of the exception's *horizontal* bounds—that is, which claims by these "ministers" are barred by the exception?[10] Just those alleging discrimination? As Justice Sotomayor asked during oral argument in the Court's first ministerial exception case: "How about a teacher who reports sexual abuse to the government and is fired because of that reporting?"[11] Is such a teacher left without recourse?

In the most recent Supreme Court case on the ministerial exception, *Our Lady of Guadalupe School v. Morrissey-Berru*,

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majority's expansion of the exception will likely threaten the federal employment law protections of an increasing number of employees).

7. While the exception is not limited to literal, titular ministers (or rabbis, priests, nuns, imams, etc.), the exception at least purports to put a "focus on leadership" in its analysis; a qualifying role is one that is "'distinct from that of most of [the organization's] members,' someone who 'personif[ies]' the organization's 'beliefs' and 'guide[s] it on its way.'" *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2073–74 (2020) (Sotomayor, J., dissenting) (quoting *Hosanna-Tabor*, 565 U.S. at 188, 191, 196).

8. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2081 (Sotomayor, J., dissenting).

9. *See, e.g.*, Meghan McCarthy, Our Lady of Guadalupe School v. Morrissey-Berru*: A Broadening of the "Ministerial Exception" to Employment Discrimination in Religious Institutions*, 47 AM. J.L. & MED. 131, 137 (2021) ("[I]ndividuals who face discrimination in a religious workplace have been abandoned by the courts and made subject to arbitrary treatment and potential animus."); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 999 (2013) (criticizing the Court's expansion of the exception as at odds with the First Amendment); Patrick Hornbeck, *A Nun, A Synagogue Janitor, and A Social Work Professor Walk Up to the Bar: The Expanding Ministerial Exception*, 70 BUFF. L. REV. 695, 780 (2022) (finding that, because the Court's expansion has been both dramatic and unclear, employers should give employees advance notice about whether they intend to assert the exception).

10. *See Hosanna-Tabor*, 565 U.S. at 196 ("We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.").

11. Transcript of Oral Argument at 5, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (No. 10-553).

Justice Ginsburg brought up this same sort of "whistleblower" hypothetical.[12] In response, the Government, as *amicus curiae*, stated that it was not asking the Court to reach the question of whether the ministerial exception would bar a whistleblower claim—and indeed the Court did not reach the question in its majority opinion.[13] Lower federal courts and state courts, however, have attempted to draw the horizontal contours of the exception on their own, and have treated the ministerial exception as a categorical bar against adjudication of whistleblower actions.[14] At least one state court has addressed the very sort of whistleblower scenario considered by Justices Ginsburg and Sotomayor: the Michigan Court of Appeals refused to curb the ministerial exception in a case where a teacher was fired after filing a child abuse report in compliance with a mandatory reporting law.[15]

This Note uses the example of whistleblower actions as a vehicle for examining the problematic breadth of the ministerial exception, and makes two contributions to the literature on the subject. First, this Note draws on a particular theoretical point in rights discourse: at some stage, a bloated right becomes diluted and should thus invite new exceptions.[16] This Note then applies this theory to the bloated ministerial exception, arguing that the vertical breadth of the doctrine no longer reflects the "core" of the First Amendment.[17] For that reason, the ministerial exception should not carry the same categorical force against all employment actions. Instead, it should be subject to a proportionality approach that considers societal interests at stake in particular causes of action.

Second, this Note provides guidance on what courts should do about the ministerial exception in the context of whistleblower claims in particular. While various commentators have provided guidance on hostile work environment claims under the

12. Transcript of Oral Argument at 32–33, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (No. 19-267).

13. *See id.*; *see also Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069.

14. *See infra* Section I.B; *see also* Griffin, *supra* note 9, at 1014–15 (collecting examples of whistleblower claims against religious institutions).

15. *See* Weishuhn v. Lansing Cath. Diocese, 787 N.W.2d 513, 521 (Mich. Ct. App. 2010). While there is no precise explanation of the facts on the record, the court's discussion of mandatory reporting and whistleblower protection laws has led commentators to suspect that this is a case about child abuse. *See, e.g.*, Griffin, *supra* note 9, at 1013–14.

16. *See infra* Section II.A.

17. *See infra* Section II.B.

exception,[18] the problem of whistleblower claims is understudied[19]—though scholars and courts alike have recognized it as a "timely issue."[20] Specifically, this Note emphasizes the harms of allowing the exception to serve as a categorical bar against whistleblower actions, including disincentivizing reports of illegal conduct, such as child abuse.[21] Whistleblower actions should therefore be subject to the ministerial exception only on a case-by-case approach.[22] Such an approach minimizes intrusions into First Amendment rights while ensuring that weighty government interests are not ignored.

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18. *See generally* Ira C. Lupu & Robert W. Tuttle, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 249 (2019); Rachel Casper, *When Harassment at Work Is Harassment at Church: Hostile Work Environments and the Ministerial Exception*, 25 U. PA. J.L. & SOC. CHANGE 11 (2021); Aimee Wuthrich, Comment, *Unacceptable Exceptions: Why the Ministerial Exception Does Not Encompass Hostile Work Environment Claims*, 71 U. KAN. L. REV. 321 (2022); Winnie Johnson, Comment, *A Balancing Act: Hostile Work Environment and Harassment Claims by Ministerial Employees*, 96 TUL. L. REV. 193 (2021); Sara Riddick, Note, *The Seventh Circuit Got It Right the First Time: Addressing the Ministerial Exception and Workplace Harassment*, 71 DEPAUL L. REV. 141 (2021).

19. The most on-point discussion comes from Professor Jarod S. Gonzalez. *See* Jarod S. Gonzalez, *At the Intersection of Religious Organization Missions and Employment Laws: The Case of Minister Employment Suits*, 65 CATH. U. L. REV. 303, 306 (2015) (arguing, pre-*Our Lady*, that "there should be a strong presumption that minister whistleblower suits are generally barred on First Amendment grounds").

20. *See* Hornbeck, *supra* note 9, at 735 ("One timely issue is whether religious institutions may invoke the exception when they terminate or punish employees for whistleblowing activity. Especially in light of revelations concerning sexual abuse within religious communities, it surely hinders attempts to prevent future abuse if those who report what they know can be fired without recourse."); *see also* Ballaban v. Bloomington Jewish Cmty., Inc., 982 N.E.2d 329, 339 (Ind. Ct. App. 2013) ("The United States Supreme Court has not determined the applicability of the ministerial exception where a minister's employment was terminated or otherwise impacted for reporting or attempting to report child abuse or neglect, and under the facts of this case it is not necessary that we make that determination. . . ."); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 976 (2013) (identifying whistleblower claims as an open question following *Hosanna-Tabor*).

21. *See infra* Part III.

22. This Note advocates for an approach similar to one that the Ninth Circuit has taken in regard to hostile work environment claims—rejecting the use of the ministerial exception as a categorical bar against such claims. *See infra* Part III; Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944–46 (9th Cir. 1999).

I. THE CREATION AND EXPANSION OF THE MINISTERIAL EXCEPTION

The ministerial exception is a judicially-created affirmative defense[23] available to religious institutions in employment lawsuits.[24] As a quintessential example, the Catholic Church could invoke the defense if sued by a woman barred from joining the priesthood on account of her sex.[25] While the Supreme Court has only applied the exception in the context of anti-discrimination laws such as Title VII and the Americans with Disabilities Act (ADA), lower courts have held that the ministerial exception can be invoked in nearly any employment-related claim including sexual harassment claims, wage-and-hour claims, and breach of contract claims.[26]

In applying the exception, judges usually cite both Religion Clauses of the First Amendment.[27] Under the Establishment Clause, the ministerial exception is meant to prevent the government from impermissibly entangling itself in ecclesiastical decisions, such as determining what it means to be a "proper" minister worthy of appointment.[28] Regarding the Free Exercise Clause, the exception is meant to protect a religious institution's

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23. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195 n.4 (2012). The proper question thus falls under Fed. R. Civ. P. 12(b)(6) (i.e., whether the plaintiff's allegations entitle her to relief), rather than a subject matter jurisdiction inquiry into the court's power to hear the case.

24. *See* Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020), https://www.americanprogress.org/article/beyond-bostock-future-lgbtq-civil-rights/ [https://perma.cc/MUR5-C3EV].

25. To be clear, the exception "equally protects a church, that though it has no principled objection to women clergy, is simply sexist." Perry Dane, *"Omalous" Autonomy*, 2004 B.Y.U. L. REV. 1715, 1734–35 (2004).

26. *See* Chandy & Narefsky, *supra* note 5; *see also* Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1246 (10th Cir. 2010) (applying the ministerial exception to a harassment claim); Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 301 (4th Cir. 2004) (applying the ministerial exception to a wage-and-hour claim); Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 122–23 (3d Cir. 2018) (applying the ministerial exception to a breach-of-contract claim).

27. *See, e.g., Hosanna-Tabor*, 565 U.S. at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."); Rweyemamu v. Cote, 520 F.3d 198, 204–06 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 303 (3d Cir. 2006). *But cf.* Dane, *supra* note 25, at 1718–19 (suggesting that church autonomy can only be properly understood as a separate "third rubric, grounded in the structural logic of the relation between the juridical expressions of religion and the state.").

28. *See Hosanna-Tabor*, 565 U.S. at 188; Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991).

right to worship in the manner it sees fit—under the direction of whom it sees fit—free from government intervention.[29]

The exception is part of a broader "church autonomy" doctrine.[30] As theorized by Professor Douglas Laycock, the church autonomy doctrine suggests that "churches have a constitutionally protected interest in managing their own institutions free of government interference."[31] The ministerial exception, then, is the subpart of the church autonomy doctrine that is specifically concerned with the autonomy of religious institutions in making internal hiring and firing decisions.[32] Religious institutions invoke the exception to protect their right to select for certain qualities or beliefs when hiring—or choosing to terminate—employees who will perform key religious duties for the institution, such as those of a "minister."

The exception was born in the circuit courts in 1972, just eight years after the passage of Title VII of the Civil Rights Act.[33] In the first official case on the matter, *McClure v. Salvation Army*, the Fifth Circuit held that the exception constitutionally barred the application of Title VII to the employment relationship between The Salvation Army and a female minister.[34] Since *McClure*, every

29. *See Hosanna-Tabor*, 565 U.S. at 188–89 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."); *Petruska,* 462 F.3d at 306 ("The Free Exercise Clause protects not only the individual's 'right to believe and profess whatever religious doctrine one desires,' . . . but also a religious institution's right to decide matters of faith, doctrine, and church governance.").

30. *See, e.g.*, B. Jessie Hill, *Kingdom Without End? The Inevitable Expansion of Religious Sovereignty Claims*, 20 LEWIS & CLARK L. REV. 1177, 1193 (2017) ("Beyond the ministerial exception, courts have long applied—and continue to apply vigorously—a doctrine of 'ecclesiastical abstention,' a doctrine that seems to overlap somewhat with the ministerial exception but continues to apply in cases where the ministerial exception is irrelevant.").

31. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981).

32. In another subpart, for instance, the church autonomy doctrine operates to bar civil courts from intervening in church property disputes that turn on ecclesiastical questions. *See, e.g.*, Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 120–21 (1952).

33. *See* Griffin, *supra* note 9, at 982 (citing McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), as "creat[ing] the ministerial exception").

34. Billie B. McClure alleged that she received less salary and benefits than similarly situated male ministers at The Salvation Army. *See McClure*, 460 F.2d at 555. The Fifth Circuit affirmed the dismissal of her claim, stating that "Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister." *Id.* at 560–61.

federal circuit has developed some form of ministerial exception in the context of Title VII and other employment laws.[35]

As the name suggests, the exception unquestionably covers employees bearing the title of minister, along with other similar head-of-clergy positions.[36] However, recent decisions have made it clear that the exception's vertical reach has expanded down the church hierarchy, including far more employees than ordained priests and other official faith leaders.[37]

A. MORE THAN A MINISTER: THE VERTICAL EXPANSION OF THE MINISTERIAL EXCEPTION

1. Hosanna-Tabor *and the Multi-factor "Minister"*

In 2012, a unanimous Supreme Court officially recognized the ministerial exception, which had, by that time, been upheld for decades in the circuit courts.[38] In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, the Court held that the First Amendment barred an Americans with Disabilities Act claim by Cheryl Perich, a teacher who had been terminated by the Lutheran school at which she worked.[39] Perich was classified as a "called" teacher, which is a formal title earned only after theological study and church approval.[40] Still, Perich generally possessed the same sorts of duties as the lay teachers at the school.[41]

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35. *See* 2 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 15:7 (2d ed. 2022), Westlaw (database updated Dec. 2023).

36. *See, e.g.*, *McClure*, 460 F.2d at 558 ("The relationship between an organized church and its ministers is its lifeblood.").

37. Geoffrey A. Mort, *Freedom to Discriminate: The Ministerial Exception Is Not for Everyone—or Is It?*, N.Y. STATE BAR J., Jan./Feb. 2023, at 43–44 ("Since the Supreme Court's *Hosanna-Tabor* decision, courts have steadily expanded the reach of the ministerial exception. Perhaps the most significant respect in which they have done so, as suggested above, is interpreting who is a minister.").

38. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) ("Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue.").

39. *See id.* at 177–81.

40. *See id.* at 177–78 ("The Synod classifies teachers into two categories: 'called' and 'lay.' 'Called' teachers are regarded as having been called to their vocation by God through a congregation. 'Lay' or 'contract' teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran.").

41. *See id.*

Due to illness, Perich took disability leave in 2004.[42] She sought to return to her position for the following academic year but was instead terminated, prompting her to file an ADA retaliation claim with the Equal Employment Opportunity Commission (EEOC).[43] In a subsequent suit, the U.S. District Court for the Eastern District of Michigan granted summary judgment for the school, holding that the ministerial exception barred the suit.[44] However, the Sixth Circuit vacated and remanded, finding that Perich could not be considered a "minister" under the exception because her "primary duties were secular."[45] Indeed, while Perich taught religion, she mostly "taught math, language arts, social studies, science, gym, art, and music."[46] The fact that "called" and lay teachers generally shared the same duties also informed the Sixth Circuit's ruling.[47]

But the Supreme Court reversed, holding that the ministerial exception barred actions by an employee like Perich.[48] The *Hosanna-Tabor* majority opinion is significant not only because it marks the first time the Court formally considered the ministerial exception, but also because of the breadth of the Court's characterization of the doctrine.[49] Rather than creating a bright-line rule as to when the ministerial exception applies and to whom, the Court held Perich to be a "minister" under an expansive, multi-factor approach.[50] The Court considered (1) the formal title given to the employee and any requisite religious training, (2) whether the school held out the employee as a minister, (3) whether the

42. *See id.*

43. *See id.* at 178–80.

44. *See* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 892 (E.D. Mich. 2008).

45. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 781 (6th Cir. 2010), *rev'd by* 565 U.S. 171 (2012).

46. *Hosanna-Tabor*, 565 U.S. at 178.

47. *See EEOC*, 597 F.3d at 781 ("Given the undisputed evidence that all teachers at Hosanna-Tabor were assigned the same duties, a finding that Perich is a "ministerial" employee would compel the conclusion that all teachers at the school—called, contract, Lutheran, and non-Lutheran—are similarly excluded from coverage under the ADA and other federal fair employment laws. However, the intent of the ministerial exception is to allow religious organizations to prefer members of their own religion and adhere to their own religious interpretations.").

48. *See id.* at 190.

49. *See* Mort, *supra* note 37, at 44 ("In *Hosanna-Tabor*, the Supreme Court not only recognized the ministerial exception but also went a good deal further.").

50. *See Hosanna-Tabor*, 565 U.S. at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.").

employee held herself out as a minister, and (4) whether the employee's duties involved religious doctrine or church mission.[51]

The Court also construed the exception to grant employers the ability to discriminate for reasons entirely unrelated to religion.[52] The Court made no inquiry into whether "Hosanna-Tabor's asserted religious reason for firing Perich . . . was pretextual."[53] Instead, the Court clarified that the ministerial exception is meant to "safeguard a church's decision to fire a minister" for any reason, whether religious or not.[54]

Moreover, while the *Hosanna-Tabor* Court confirmed that the ministerial exception applies to discriminatory termination claims, it left the door open as to "whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."[55] Although the Court clearly imagined a broad ministerial exception, it hesitated to draw bright-line rules as to the exception's horizontal scope. "There will be time enough," the Court concluded, "to address the applicability of the exception to other circumstances if and when they arise."[56] Indeed, the chance to revisit the exception came less than a decade later.

2. Our Lady *and the Functional "Minister"*

In 2020, the Court again confronted the boundaries of the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*, reviewing two consolidated cases.[57] In the titular case, Agnes Deirdre Morrissey-Berru worked as an elementary school teacher for Our Lady of Guadalupe School in California.[58] After the School demoted her to a part-time position and subsequently declined to renew her contract, Morrissey-Berru brought a claim under the Age Discrimination in Employment Act (ADEA), alleging the School sought to replace her with a younger

51. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2062 (2020) (summarizing the *Hosanna-Tabor* factors).

52. *See Hosanna-Tabor*, 565 U.S. at 194–95; *see also Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting) ("[A]n employer need not cite or possess a religious reason at all; the ministerial exception even condones animus.").

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

54. *Id.*

55. *Id.* at 196.

56. *Id.*

57. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2049.

58. *See id.* at 2056–58.

teacher.[59] The second case, *Biel v. St. James School*, concerned another elementary school teacher, Kristen Biel.[60] Biel sued St. James School under the ADA, alleging that her employer discharged her after she requested a leave of absence to obtain cancer treatment.[61] Unlike Perich in *Hosanna-Tabor*, neither Biel nor Morrissey-Berru possessed special religious training or a religious title.[62] Although they also taught religion, they "taught primarily secular subjects . . . and were not even required to be Catholic."[63] Both schools successfully moved for summary judgment, arguing that the teachers were "ministers" for the purposes of the ministerial exception.[64] However, the Ninth Circuit reversed both decisions, holding that neither teacher fit into *Hosanna-Tabor*'s holistic framework.[65] Namely, the teachers lacked formal titles and training, and "neither presented herself as nor was presented by [the school] as a minister."[66] Believing the situations in these cases to be sufficiently distinct from the facts of *Hosanna-Tabor* to fall outside its precedential control, the court rejected the notion that "any school employee who teaches religion would fall within the ministerial exception."[67]

The Supreme Court reversed, ruling 7–2 that the ministerial exception applied to both teachers and thus foreclosed their claims.[68] The Court criticized the Ninth Circuit's approach for treating *Hosanna-Tabor* as a "rigid test" that "produced a distorted analysis," overemphasizing certain facts such as the lack of formal title.[69] While the four factors identified in *Hosanna-Tabor* may be informative, the Court reasoned, none are dispositive or even

59. *See id.*
60. *See id.* at 2058.
61. *See id.* at 2059.
62. *See id.* at 2058 (discussing Morrissey-Berru's title and training); Biel v. St. James Sch., 911 F.3d 603, 608–09 (9th Cir. 2018) (discussing Biel's title and training).
63. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).
64. *See* Biel v. St. James Sch., 2017 WL 5973293, at *3 (C.D. Cal. Jan. 24, 2017); Morrissey-Berru v. Our Lady of Guadalupe Sch., 2017 WL 6527336, at *2–3 (C.D. Cal. Sept. 27, 2017).
65. *See* Biel v. St. James Sch., 911 F.3d 603, 606–09, 611 (9th Cir. 2018); Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x. 460, 461 (9th Cir. 2019).
66. *Biel*, 911 F.3d at 610; *see Morrissey-Berru*, 769 Fed. App'x. at 461 ("Morrissey-Berru also did not hold herself out to the public as a religious leader or minister.").
67. *Biel*, 911 F.3d at 610 ("A contrary rule . . . would not be faithful to Hosanna-Tabor or its underlying constitutional and policy considerations.").
68. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069.
69. *Id.* at 2067.

necessarily helpful.[70] Instead, the Court argued that the true approach to defining a "minister" is a functionalist one: "What matters, at bottom, is what an employee does."[71] Accordingly, despite not possessing a formal religious title or clerical training, a schoolteacher may still be a "minister" if their job entails sufficient religious duties.[72] The *Our Lady* Court then went on to broadly construe the meaning of "sufficient" religious duties, emphasizing two key facts.

First, the Court held that teaching a religion class or otherwise providing religious instruction could, in fact, constitute sufficient religious duties to consider a teacher a "minister" under the exception.[73] The Court firmly rejected the Ninth Circuit's approach that lay teachers who mostly taught secular subjects, like Biel and Morrissey-Berru, were beyond the reach of the ministerial exception.

Second, the Court paid careful attention to the mission statement found in the teachers' faculty handbooks, which stated that the teachers "were expected to help the schools" in "[e]ducating and forming students in the Catholic faith[.]"[74] Dissenting, Justice Sotomayor scrutinized the majority's reliance on the employee handbooks:

> So long as the employer determines that an employee's "duties" are "vital" to "carrying out the mission of the church," then today's laissez-faire analysis appears to allow that employer to make employment decisions because of a person's skin color, age, disability, sex, or any other protected trait for reasons having nothing to do with religion.[75]

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70. *See id.* at 2063 ("[O]ur recognition of the significance of those factors in Perich's case did not mean that they must be met—or even that they are necessarily important—in all other cases.").

71. *Id.* at 2064.

72. The Court held that the exception covered "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id.* (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 199 (2012) (Alito, J., concurring)).

73. *See id.* at 2065 (emphasizing the importance of teaching and education as inherently religious activities for various faith groups); *see also* Mort, *supra* note 37, at 45 ("The Court also determined that all teachers who engage in 'religious education and formation of students' fall within the exception.") (citing *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055).

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

75. *Id.* at 2081–82 (Sotomayor, J., dissenting) (internal citations omitted).

By emphasizing the handbooks in determining that Biel and Morrissey-Berru were "ministers," the majority's analysis heavily deferred to the employer institution, even though the institution's perspective was merely one stated in generic terms in a document written for the entire faculty.

Our Lady thus reflects the Court's eagerness to stretch the vertical bounds of the ministerial exception. No longer restricted to the titled figureheads of an institution—those we might colloquially recognize as "ministers"—or relegated to some categorical approach, the current exception is sweeping. It covers, with ease, teachers and other school officials with primarily secular duties, and in its breadth risks clashing in new ways with competing government interests in overseeing those duties.[76] The classification of lay teachers as ministers—who are therefore incapable of suing their employers—leaves those teachers and their students unprotected by otherwise generally applicable laws.[77]

B. WHISTLEBLOWERS AND THE HORIZONTAL BOUNDS OF THE MINISTERIAL EXCEPTION

While the Supreme Court has offered two cases that illuminate the definition of a "minister," it has left the horizontal bounds of the ministerial exception largely undefined—to which *claims* by those ministers does the exception apply? In *Hosanna-Tabor*, the Court "express[ed] no view on whether the exception bars other types of suits" beyond employment discrimination.[78] In particular, the Court has not addressed the precise interaction between the ministerial exception and whistleblower claims, leaving state courts and lower federal courts to navigate the question on their own.[79]

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76. *See* Mort, *supra* note 37, at 45 (noting that *Our Lady* has encouraged employers to push the boundary of the definition of "minister").

77. *See infra* Section II.B.

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

79. *See* Rehfield v. Diocese of Joliet, 182 N.E.3d 123, 137 (Ill. 2021) ("The United States Supreme Court has not addressed application of the ministerial exception to a whistleblower claim."); Ballaban v. Bloomington Jewish Cmty., Inc., 982 N.E.2d 329, 339 (Ind. Ct. App. 2013) ("The United States Supreme Court has not determined the applicability of the ministerial exception where a minister's employment was terminated or otherwise impacted for reporting or attempting to report child abuse or neglect. . . .").

1. *Whistleblower Protection Statutes*

Whistleblower protection laws offer legal protection to employees who call attention to wrongdoing or illegal activities occurring in the workplace.[80] Usually, these protections only take effect if a report is made to the government and if the employer later tries to retaliate against the employee.[81] Whistleblower claims are distinct from employment discrimination claims, but are similar to the anti-retaliation provisions often included in anti-discrimination laws, including in Title VII.[82] For instance, a whistleblower law, absent the ministerial exception, might hold a church liable for firing its schoolteacher in retaliation for making a protected report to the relevant authorities. A protected report could be one of alleged sexual abuse, discrimination, misuse of funds, or health and safety violations.[83]

2. *In Lower Federal Courts*

Federal appellate courts offer limited guidance on the interaction between the ministerial exception and retaliation claims, and have not spoken on whistleblower claims in particular. Essentially, federal courts have taken a broad, functionalist approach to the ministerial exception's horizontal bounds.[84] They

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80. *See, e.g.*, CAL. LAB. CODE § 1102.5; MICH. COMP. LAWS § 15.361; 740 ILL. COMP. STAT. 174/1 *et seq.* (2024).

81. *See* Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending A More Flexible Approach to Reporting Requirements*, 96 CAL. L. REV. 1633, 1633–34 (2008) ("Most state whistleblower statutes restrict the parties to whom a whistleblower may report in order to receive protection from retaliation. The majority of states, for example, protect only those employees who file reports with external government bodies.").

82. *See* Weishuhn v. Lansing Cath. Diocese, 787 N.W.2d 513, 519 (Mich. Ct. App. 2010) ("Whistleblower statutes are analogous to antiretaliation provisions of other discrimination statutes" and thus warrant "parallel treatment.") (quoting Shallal v. Cath. Soc. Servs. of Wayne Cnty. 571, 619 (Mich. 1997)). A prima facie case of retaliation under Title VII requires "(1) [Plaintiff] engaged in a protected activity, (2) [Plaintiff] suffered an adverse employment action, and (3) there was a causal link between [Plaintiff's] activity and the employment decision." Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 965 (9th Cir. 2004) (quoting Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1065–66 (9th Cir. 2003)).

83. *See, e.g.*, Valarie Honeycutt Spears, *Former teacher wins $240,000 in Kentucky School for the Deaf whistleblower lawsuit*, LEXINGTON HERALD-LEADER (July 3, 2023), https://www.kentucky.com/news/local/education/article276972808.html [https://perma.cc/9TRE-XSHM] (discussing whistleblower suit in which teacher had reported "discrimination against students at the school with disabilities, abuse of authority, and actions creating a substantial danger to the health and safety of students").

84. *See* Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000); Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 961–62 (9th Cir. 2004); Petruska v. Gannon University, 462 F.3d 294, 307–08 (3d Cir. 2006).

have held that any claim that "directly implicates a church's constitutional authority to select its own ministers" should be barred by the exception.[85]

In *Petruska v. Gannon University*, for instance, the Third Circuit addressed a Title VII retaliation claim by a former lay chaplain of a private Catholic college. The plaintiff openly opposed the college's alleged cover-up of a priest's sexual misconduct, criticized the college's discrimination and harassment policies, and was allegedly frozen out of her position as a result.[86] In dismissing her claim, the court noted that the ministerial exception "operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions."[87] The *Petruska* court then held that the anti-retaliation provision of Title VII could impinge on such a right and, thus, its application would violate the First Amendment.[88]

In contrast, the Ninth Circuit in *Elvig v. Calvin Presbyterian Church* held that the ministerial exception barred some, but not necessarily all, retaliation claims.[89] The *Elvig* court established a functionalist distinction: if the retaliation involved a "tangible" employment action, such as a hiring or firing decision, then it was subject to the ministerial exception because it directly implicated church autonomy.[90] However, if the retaliation took the form of harassment, abuse, or intimidation, the claim could escape the ministerial exception as a court's analysis would more likely "involve a purely secular inquiry."[91] The plaintiff in *Elvig*, for example, alleged multiple acts of retaliation against her after she reported sexual harassment by a superior.[92] While the court dismissed her allegations of retaliatory removal, suspension, and termination, the court held that the plaintiff's "allegation of retaliatory harassment state[d] a retaliation claim that survives the ministerial exception."[93]

Because of the similarities between whistleblower and anti-retaliation laws, the above analysis likely applies to whistleblower

85. *Id.* at 692.
86. *See Petruska*, 462 F.3d at 300–01.
87. *Id.* at 307.
88. *See id.* at 308.
89. 375 F.3d 951, 965 (9th Cir. 2004).
90. *Id.* at 961–62 (defining and distinguishing "tangible" employment actions).
91. *Id.* at 959.
92. *See id.* at 965.
93. *Id.*

actions as well. Relying on current precedent, a federal court would probably hold that whistleblower claims are either totally barred by the ministerial exception (under the *Petruska* view) or at least barred when the alleged retaliation is in the form of a "tangible" employment action (under the *Elvig* view).

3. *In State Courts*

Various state courts have explicitly found whistleblower actions to be subject to the ministerial exception.[94] In *Archdiocese of Miami, Inc. v. Minagorri*, the District Court of Appeals of Florida held that the ministerial exception applied to bar a parochial school principal's whistleblower action, where the principal alleged that she had been terminated for reporting a priest's assault and battery.[95] Similarly, in *Rehfield v. Diocese of Joliet*, the Supreme Court of Illinois found that the ministerial exception barred another parochial school principal's whistleblower claim.[96] The principal, Mary Rehfield, alleged that the Diocese terminated her in retaliation for reporting a parent's threatening conduct to the police.[97] The court reasoned that a whistleblower claim "bears directly on the Diocese's right to select its ministers" in that it is essentially an action for wrongful termination.[98] Thus, citing both *Petruska* and *Elvig*, the court held that to allow the whistleblower action would violate the First Amendment.[99]

Other state courts have tackled the problematic interaction between the ministerial exception as applied to teacher whistleblowers and the mandatory reporting laws for suspected child abuse. In *Weishuhn v. Lansing Catholic Diocese*, a Catholic school math and religion teacher was fired after reporting potential abuse of a student, seemingly in retaliation for the filing

94. *See, e.g.*, Archdiocese of Miami, Inc. v. Minagorri, 954 So. 2d 640, 643 (Fla. Dist. Ct. App. 2007); Rehfield v. Diocese of Joliet, 182 N.E.3d 123, 139 (Ill. 2021); Weishuhn v. Cath. Diocese of Lansing, 787 N.W.2d 513, 519–20 (Mich. Ct. App. 2010).

95. *See Minagorri*, 954 So. 2d at 644 ("Moreover, allowing the whistleblower claim to proceed would especially run afoul of the First Amendment because the requested remedy of reinstatement would require the Archdiocese to employ [the principal], a concededly ministerial employee."). Notably, the parties had conceded that the principal was a ministerial employee. *See id.* at 642.

96. *See Rehfield*, 182 N.E.3d at 127–28.

97. *See id.* at 129.

98. *Id.* at 138.

99. *See id.*

of the report.[100] The Court of Appeals of Michigan held that the ministerial exception barred her whistleblower claim:

> We recognize that it seems unjust that employees of religious institutions can be fired without recourse for reporting illegal activities, particularly given that members of the clergy, as well as teachers, are mandated reporters. However, to conclude otherwise would result in pervasive violations of First Amendment protections.[101]

Meanwhile, the Court of Appeals of Indiana failed to reach the question of how the ministerial exception might interact with the mandatory reporting statute, but flagged it as an unanswered issue.[102]

As these cases suggest, expanding the ministerial exception to include lay teachers has left open a question of which sorts of suits these teachers may successfully file in court. Some courts, as *Weishuhn* demonstrates, have left teachers no recourse when they are fired for reporting child abuse, even when such reporting is mandatory.[103] This situation warrants a recalibration of the ministerial exception.

II. RECALIBRATING CHURCH AUTONOMY

The ministerial exception should no longer act as a categorical bar against all employment-related actions. The exception is meant to safeguard a religious institution's right to control internal governance[104]—an instance of the more general "church

100. *See* Weishuhn v. Lansing Cath. Diocese, 787 N.W.2d 513, 521 (Mich. Ct. App. 2010); *see also* Griffin, *supra* note 9, at 1013–14.

101. *Weishuhn*, 787 N.W.2d at 521 (internal citations omitted).

102. *See* Ballaban v. Blooming Jewish Comty., Inc., 982 N.E.2d 329, 339 (Ind. 2013) ("The United States Supreme Court has not determined the applicability of the ministerial exception where a minister's employment was terminated or otherwise impacted for reporting or attempting to report child abuse or neglect, and under the facts of this case it is not necessary that we make that determination. . . ."). Judge Nancy H. Vadik concurred to express her view that, had the Court reached the question, "the ministerial exception does not allow a congregation to fire a spiritual leader who refuses to commit a criminal offense." *Id.* at 341–43 (Vadik, J., concurring).

103. *See Weishuhn*, 787 N.W.2d at 521.

104. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) ("The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'") (quoting Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).

autonomy" right[105]—but courts have greatly expanded the exception to grant an institution unfettered control of lay teachers and other secular positions.[106] This Note argues that courts should respond by qualifying access to the now-bloated right of church autonomy with a proportionality approach that considers competing interests.[107] This Part provides the theoretical justifications for triggering a proportionality approach in general and argues that it should be triggered in the context of the ministerial exception.

A. THEORETICAL JUSTIFICATIONS FOR PROPORTIONALITY

A broadened right invokes less of its "core" essence, making it less weighty against competing interests.[108] Various scholars of rights discourse have explored this notion of a right's "core" or "epicenter."[109] In general, this theoretical approach encompasses two steps.

First, this approach begins with the premise that every right has a "core" that should be defined and distinguished from its "penumbra." This distinction may be made on various grounds depending on the nature of the right in question.[110] In the context of church autonomy, Professor Bruce N. Bagni notes that "activities and relationships within a church that can be termed purely spiritual or integral facets of the actual practice of the religion" should be considered "comprising the core."[111] However, "[e]manating from this core," Bagni argues, "are a series of activities and relationships with increasing indicia of secularity."[112] As an example of what might be considered beyond the core, Bagni cited "schools whose curricula are dominated by

105. *See id.* at 2061.

106. *See* Part I *infra*.

107. *See* Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 838 (2004) ("[A]n enlarged definition of any right may invite limitations on the circumstances in which it is available."); *id.* (descriptively pointing out this phenomenon through historical examples).

108. For a general discussion of this approach to proportionality, see AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 496–98 (2012).

109. *See* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539 (1979) ("This notion is best illustrated by reference to three concentric circles [of increasing secularity] revolving around an epicenter.").

110. *See* BARAK, *supra* note 108, at 497 (comparing subjective and objective approaches to defining the "core" of a right).

111. Bagni, *supra* note 109, at 1539.

112. *Id.*

secular courses and in which religious orientation is present but not pervasive, and relationships between the church and support employees with [only] some religious or quasi-religious functions."[113]

Second, this approach argues that this distinction between "core" and "penumbra" is constitutionally significant, for the way judges ought to evaluate intrusions on rights. Namely, while the core of a right represents an absolute minimum that should not be infringed, limitations on a right's penumbra may be subject to a proportionality approach.[114] Beyond the core, then, lies much space for the weight attached to a right to vary greatly, and it "may be evaluated in light of competing, and perhaps more weighty, general societal interests."[115] The implication of this approach is that when a right is broadened, the right is—or should be—weakened.[116] Simply put, a bloated right begins to invoke more "penumbra" than "core," and is more likely to be subject to other relevant government interests.[117] Professor Philip Hamburger has written about this phenomenon in the context of the right of free exercise in particular,[118] and Hamburger and other scholars have pointed to it as a warning against over-expanding various rights in the first place.[119]

However, in the context of the ministerial exception, increased breadth has not yet invited newfound limitations.[120] Some scholars predicted an effect akin to that described in Hamburger's

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113. *Id.*

114. *See, e.g.*, *id.* at 1540 ("Once, however, the church acts outside this epicenter and moves closer to the purely secular world, it subjects itself to secular regulation proportionate to the degree of secularity of its activities and relationships.").

115. *Id.*

116. *See* Hamburger, *supra* note 107, at 838.

117. *See, e.g., id.* at 837 ("[W]hen the right of free exercise of religion came to be defined broadly, it was rendered conditional on government interests.").

118. *See id.* at 837–38 (arguing that free exercise rights have suffered as a result of this phenomenon, and thus "[m]ore really can be less.").

119. *See id.* at 837 ("[T]he danger may be inherent in every attempt to expand a right, for at some point, as the definition of a right is enlarged, there are likely to be reasons for qualifying access."); *see also* Philip Hamburger, *Getting Permission*, 101 NW. U. L. REV. 405, 413–14 (2007) (applying *More Is Less* in the context of freedom of the press); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 654–55 (1980) (expressing a similar concern with regard to an expansive interpretation of the right of intimate association); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 478 (1985). *But see* John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 493–506 (2014) (critiquing Hamburger's claim that the weakening of the free exercise right is due to rights expansion).

120. *See* Inazu, *supra* note 119, at 504 (arguing that the ministerial exception's breadth is an example that goes against Hamburger's thesis).

thesis,[121] but so far this has not proven to be the case in light of the exception's continued breadth in lower and state courts.[122]

Continuing to treat such a broadened right as absolute risks "taking rights too literally," to borrow a phrase from Professor Jamal Greene.[123] Courts have allowed the invocation of the ministerial exception to act as an all-or-nothing trump card, refusing to tailor the weight attached to the underlying right based on fact-sensitive considerations, such as whether church autonomy is truly implicated by the employee's claim. If courts continue to treat the right as having a constant, uncompromising weight, regardless of the relative religious implications of the facts at hand, they risk drafting decisions that are unjust. As Professor Greene states:

> Justice means we must confront . . . the degree to which individuals are actually burdened by government practices that restrict our liberty or favor one person's rights over another's. These questions are empirical, not interpretive, because justice isn't abstract or literary or historical, but rather depends on the facts in the here and now.[124]

B. MOVING AWAY FROM THE CORE CHURCH AUTONOMY RIGHT

The vertical expansion of the ministerial exception has bloated the church autonomy right underpinning the exception and moved it further and further away from the "core" of the First Amendment. Courts have expanded the exception to cover predominantly secular positions and secular employment decisions, and have done so at the expense of other weighty government interests.

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121. *See* Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance:* Hosanna-Tabor *and the First Amendment*, 13 ENGAGE 114, 118 (2012) (warning of "a series of lower court opinions seeming to cut back on *Hosanna-Tabor*, with all the attendant rhetoric about a 'clear and present danger' of religion unregulated and out of control.").

122. *See supra* Section I.B.

123. JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 112 (2021).

124. *Id.* at 93.

1. *Secular Duties*

The Supreme Court in *Our Lady* explicitly abandoned any requirement of "religious title"; their inquiry into the ministerial exception's applicability was mostly rooted in an analysis of the relevant employee's duties.[125] This, at face value, is not a problematic approach. Placing too much weight on an employee's title could provide certain faiths with greater coverage under the ministerial exception, privileging them at the expense of other, less hierarchical religious groups.[126] Additionally, there is no question that an inquiry into an employee's duties can be reasonably indicative of a position's secularity.[127]

However, courts have been too lax in this inquiry, often accepting generic references in an employee handbook as dispositive.[128] In *Fitzgerald v. Roncalli High School, Inc.*, the Southern District of Indiana held that the ministerial exception barred all claims brought by Shelly Fitzgerald, a guidance counselor at a Catholic school, who alleged that the school fired her for being in a same-sex marriage.[129] The court openly acknowledged that "the job [was] predominantly secular" and that it was a "stretch to call a high school guidance counselor a minister."[130] Nevertheless, the court found that the ministerial exception applied based solely on vague references to Christian example-setting in the school's faculty handbook.[131] The handbook

125. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063–64 (2020) (holding that what an employee's duties are is the most important consideration in determining whether an employee is a minister).

126. *See id*. ("If titles were all-important, courts would have to decide which titles count and which do not, and it is hard to see how that could be done without looking behind the titles to what the positions actually entail. Moreover, attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal.").

127. *See* Bagni, *supra* note 109, at 1545 (arguing for a "primary duties" test for defining a "minister"). *But see* Joseph Capobianco, *Splitting the Difference: A Bright-Line Proposal for the Ministerial Exception*, 20 GEO. J.L. & PUB. POL'Y 451, 469–74 (2022) (critiquing functionalist approaches to defining "ministers" under the exception).

128. *See*, *e.g.*, *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2066; Fitzgerald v. Roncalli High Sch., Inc., 634 F. Supp. 3d 523, 530 (S.D. Ind. 2022).

129. *See Fitzgerald,* 634 F. Supp. 3d at 525.

130. *Id.* at 530 (quoting Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 945 (7th Cir. 2022)).

131. *See id.* ("Fitzgerald's employment agreement and Roncalli's description of Fitzgerald's expected duties are, *alone*, sufficient to resolve this case[.]") (emphasis added).

stated that the school expected employees to be Catholic "role models" and assist students in their "Christian development."[132]

Taking *Our Lady* to the extreme, the court in *Fitzgerald* adopted a standard that would seem to make nearly every employee at this Catholic school a "minister" under the exception.

Indeed, Fitzgerald claimed that "she never prayed or discussed religious doctrine as part of work, and that students did not come to her with religious or spiritual issues at all."[133] She focused on "SAT/ACT testing, career guidance, and scheduling"[134]—not the sort of duties that might have the potential to sway the spiritual leanings of a student population, and thus present a "core" church autonomy issue.[135]

Yet religious institutions have successfully raised the exception against other guidance counselors,[136] nearly-lay school teachers,[137] music directors,[138] church organists,[139] and kosher food supervisors.[140] The expansion beyond high-level religious leaders, exemplified by *Fitzgerald*, has moved the ministerial exception further away from the First Amendment "core." As Professor Bagni would say, the treatment of these employees is "distinctly nonepicentral" to the First Amendment right of church autonomy, and should thus not be totally exempt from employment law protections.[141]

It is true that the Court in *Hosanna-Tabor* held that the "ministerial exception is not limited to the head of a religious congregation."[142] Yet that Court never abandoned its attention to the leadership qualities of the "minister" position in question,

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132. *Id.*
133. *Id.* at 525.
134. *Id.*
135. *See* Bagni, *supra* note 109, at 1548–49 ("If, however, only a small percentage of the job entails duties of a religious nature, and most of the work is distinctly nonepicentral, to completely exempt that employment relationship form all of the antidiscrimination provisions of federal law would violate the establishment clause.").
136. *See, e.g.*, Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 937 (7th Cir. 2022) (finding a guidance counselor to be a "minister" despite "never actually" providing input on religious matters and not being listed as a leader of the "Faith Community").
137. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020).
138. *See* EEOC v. Roman Cath. Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000).
139. *See* Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036, 1041 (7th Cir. 2006).
140. *See* Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 363 F.3d 299, 309 (4th Cir. 2004).
141. *See* Bagni, *supra* note 109, at 1548–49.
142. Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 565 U.S. 171, 191 (2012).

referring to such a position as "a role distinct from that of most of its members," capable of "guid[ing]" a church.[143] The *Hosanna-Tabor* Court also recounted the history and intent of the Religion Clauses in the context of disputes regarding "heads of congregations and other high-level religious leaders."[144] Later, while dissenting in *Our Lady*, Justice Sotomayor characterized *Hosanna-Tabor*'s "focus on leadership" as suggesting that "[l]ay faculty, even those who teach religion at church-affiliated schools, are not 'ministers.'"[145]

Indeed, in the original Fifth Circuit opinion defining the ministerial exception, the court stated that "the relationship between an organized church and its ministers is its lifeblood."[146] "The minister," the court continued, "is the chief instrument by which the church seeks to fulfill its purpose."[147] The court's use of the word "chief" implies that there are other, lesser instruments of the church's purpose, and suggests a distinction between ministers and other employees of religious institutions—a spectrum of roles with varying degrees of connection to the church's core spiritual mission. While "[m]atters touching this relationship [with ministers] must necessarily be recognized as of prime ecclesiastical concern,"[148] there are relationships with other employees in the hierarchy of a religious institution that are not of such prime concern.

The government's interference with the selection or termination of a guidance counselor at a religious institution does not interfere with church autonomy to the same degree that it would if it interfered with the selection or termination of a clerical head. In *Our Lady*, the Supreme Court warned that "a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith."[149] Wayward ministers indeed carry that risk, but they act as religious leaders in ways that teachers and guidance counselors, even at

143. *Id.* at 196.
144. *See* Biel v. St. James Sch., 911 F.3d 603, 611 (9th Cir. 2018), *rev'd and remanded sub nom.* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020) (reading *Hosanna-Tabor*'s historical analysis to suggest "the exception need not extend to every employee whose job has a religious component").
145. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2073 (Sotomayor, J., dissenting).
146. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).
147. *Id.* at 559.
148. *Id.*
149. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060.

religious institutions, do not.[150] Despite being covered by the vertically-overstretched ministerial exception, suits by these increasingly secular employees hardly reach the "core" of the First Amendment or the core right of churches to control their ministerial leaders.

2. *Secular or Non-practicing Employees*

Another deviation from the core church autonomy right is that the ministerial exception has expanded to include even employees who were never personally affiliated with the religion of the employer institution.[151] That is, a Catholic school may invoke the ministerial exception in defense of a suit by a guidance counselor who does not personally practice Catholicism.[152] This expansion represents a diluted First Amendment concern in that actions involving these employees do not "interfere with the internal governance of the church, depriving the church of control of the selection of those who will personify its beliefs."[153] That the institution hired a non-practicing employee almost concedes that the employee's role is not one meant to "personify" the religion. Even if their role engages with religion, it is more likely that it does so an objective or comparative capacity, rather than as one "whose function is to demonstrate the superiority of a particular faith."[154] Further, there is less of an "internal governance" concern in such situations, since the employee does not belong to the same faith as the institution.

One could argue that the core church autonomy right actually prevents courts from limiting the ministerial exception to practicing employees. The Court in *Our Lady* expressed concern that "determining whether a person is a 'co-religionist' will not

150. This is especially the case if the employee's relationship to their limited religious duties is objective, formal, and generic, rather than subjective with elements of proselytizing. *See* Bagni, *supra* note 109, at 1545.

151. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2068 ("Respondents go further astray in suggesting that an employee can never come within the *Hosanna-Tabor* exception unless the employee is a 'practicing' member of the religion with which the employer is associated.").

152. *See, e.g.*, Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 936 (7th Cir. 2022) ("Starkey is not a practicing Catholic.").

153. *See* Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 565 U.S. 171, 188 (2012).

154. *See* Bagni, *supra* note 109, at 1545 (differentiating employees "whose function is to demonstrate the superiority of a particular faith" from those who approach religion objectively or comparatively).

always be easy" and could "risk judicial entanglement in religious issues."[155] The Court thus refused to consider, for example, whether or not a teacher was a practicing Catholic in order to avoid determining "what it means to be a 'practicing' member of a faith."[156]

However, there is no need for a court to make such a problematic determination, and thus the inclusion of non-practicing employees under the exception is not a necessary result of the core church autonomy right. A court can instead defer to the religious institution, reviewing the required qualifications for the position or hiring trends to determine whether the position is "reserved by the church for persons it considers 'ministers.'"[157] In light of this alternative, it seems that this expansion of the ministerial exception actually reflects a more penumbral part of the church autonomy right, rather than its core.

3. *New Competing Interests*

The broadened church autonomy right, represented by the current ministerial exception, is also more likely to collide with weighty government interests—beyond the original subset of interests that justified the exception in the first place.[158] The Supreme Court, in applying the ministerial exception to bar standard Title VII claims, determined that anti-discrimination interests did not override core First Amendment considerations.[159] However, the original balancing act between church autonomy and anti-discrimination laws no longer justifies the exception's expanded reach into the employment relationship between schools and their teachers. Yet courts continue to treat the right

155. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2068–69.

156. *Id.*

157. Jeremy Weese, *The (Un)Holy Shield: Rethinking the Ministerial Exception*, 67 UCLA L. REV. 1320, 1368 (2020). For example, "[i]f the organization fires a conductor . . . and then hires a conductor who is of a different religion, even though the conductor's presence may be part of a religious service, it is unlikely the organization realistically considers a person in that role a 'minister.'" *Id.*

158. *See* Bagni, *supra* note 109, at 1540 ("A church acting outside the epicenter may still enjoy some degree of first amendment protection, but its claims may be evaluated in light of competing, and perhaps more weighty, general societal interests."); *see also* Hamburger, *supra* note 107, at 875 (describing this phenomenon with respect to an expanded free exercise right).

159. *See* Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 565 U.S. 171, 196 (2012) (noting that the ministerial exception is the result of balancing society's interest in mitigating employment discrimination against the autonomy of religious institutions).

underpinning the ministerial exception as absolute even in situations where other government interests are more salient. In effect, the current ministerial exception operates at too high a level of abstraction, which risks unjust results far removed from social realities.[160]

One such competing government interest is the health, safety, and education of children.[161] In expanding vertically to quasi-lay teachers, for instance, the ministerial exception now reaches employees who interact with children—vulnerable third parties to the employer-employee relationship—on a daily basis. Beyond providing a quality education, teachers are also uniquely responsible for the safety and well-being of children. As the Eleventh Circuit has recognized, "[t]eachers plainly step into a unique setting heavily regulated by the state on account of its profound social importance to the well-being of the nation."[162] And because children spend a significant amount of time under the supervision and care of schools, "teachers . . . stand *in loco parentis* over the children entrusted to them."[163]

Accordingly, courts regularly weigh rights differently in the educational sphere. For instance, the Supreme Court has recognized that both teachers and students have diminished privacy interests in various contexts in light of heightened government interests.[164] And in the tort context, school officials experience heightened liability in some respects, such as the duty to supervise, but also retain heightened capacities, such as the ability to discipline.[165] Of particular concern to the government is

160. *See* GREENE, *supra* note 123, at 112 ("Rights themselves are powerful tools of social control. Tying that power to a binary, prefab category can produce its own distortion of justice.").

161. *See* Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 375 (6th Cir. 1998) (noting that teachers "occupy a singularly critical and unique role in our society in that . . . they occupy a position of immense direct influence on a child").

162. Friedenberg v. Sch. Bd. of Palm Beach Cnty., 911 F.3d 1084, 1106 (11th Cir. 2018).

163. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

164. *See* New Jersey v. T.L.O., 469 U.S. 325, 339–42 (1985); *Friedenberg*, 911 F.3d at 1084 (holding that "in the unique Fourth Amendment context of a public school, teachers are in a sufficiently safety-sensitive position so that guaranteeing a safe and effective learning environment presents a compelling need to justify suspicionless drug testing").

165. *See* Bernard James, *Restorative Justice Liability: School Discipline Reform and the Right to Safe Schools Part II: In Loco Parentis and the Duty to Protect*, 51 U. MEM. L. REV. 577, 599–610 (2021) (discussing tort cases that employ a more rigorous reasonableness standard to assess the liability of educators entrusted to supervise minor students); *id.* at 595–98 (discussing tort cases in which educators are shielded from liability for disciplining students except for "malicious misuse of authority under the pretense of administering policy").

child abuse, and "[b]ecause of the compelling state interest in protecting children from abuse," every state has adopted mandatory reporting statutes to uncover and deter instances of abuse.[166] These mandatory reporting statutes exemplify the heightened government interests in the classroom, requiring some or all individuals to report any suspected cases of child abuse.[167] The ministerial exception—now firmly involved with classroom affairs—implicates these interests.

III. A PROPORTIONALITY APPROACH TO WHISTLEBLOWER CLAIMS

Courts should restrain the now-bloated church autonomy right using a proportionality approach. Specifically, courts should carve out claims that operate on the periphery of the church autonomy right and implicate particularly salient government interests. This Part is devoted to arguing that whistleblower claims are the paradigmatic example of the sort of action that should no longer be categorically barred by the ministerial exception under a proportionality approach.

A. THE LIMITED SCOPE OF WHISTLEBLOWER ACTIONS

The scope of whistleblower laws is relatively narrow and hardly disrupts "core" church autonomy rights when wielded against a religious institution. This argument is most similar to that of the Ninth Circuit with regard to hostile work environment claims—that such claims are limited in scope and do not necessarily implicate the First Amendment in the same way that discriminatory firing claims do.[168] This Note argues that whistleblower actions are similarly-limited intrusions into church autonomy.

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166. Robert J. Shoop & Lynn M. Firestone, *Mandatory Reporting of Suspected Child Abuse: Do Teachers Obey the Law?*, 46 ED. LAW REP. 1115, 1122 (1988).

167. *See* Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 727–28 (1987) ("The obvious purpose of child protection statutes, is, as most statutes expressly state, to protect children.").

168. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944–46 (9th Cir. 1999); Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 965 (9th Cir. 2004); *supra* Section I.B.

The Ninth Circuit's rationale is that hostile work environment claims dispute "intangible" employment conditions rather than "tangible" employment decisions.[169] While whistleblower claims generally dispute "tangible" employment decisions, unlike hostile work environment claims,[170] even certain hiring and firing decisions are more likely to involve questions of church "internal governance" than others.[171] Firing someone—even from a religious institution—over a purely secular disagreement does not implicate church autonomy to the same extent as would a disagreement that requires a court to deliberate on religious beliefs themselves.[172] In other words, while this Note takes a more extreme approach than the Ninth Circuit in arguing that the ministerial exception should not categorically bar even certain "tangible" employment decisions, this Note's rationale is consistent with that of the Ninth Circuit: a whistleblower claim, like a hostile work environment claim, is not the sort of action that strikes at the core of the First Amendment or the church autonomy right.

Whistleblower actions stem from secular disagreements. A whistleblower protection statute is a secondary law that encourages compliance with and investigation of primary laws. Whistleblowers are only protected for reporting illegal activity, so in every whistleblower complaint a secular primary law must have been allegedly broken by the employer.[173] Almost definitionally, the illegal activity uncovered by the whistleblower does not implicate the "core" of the First Amendment. Post-*Employment Division v. Smith*, there are no constitutionally required exemptions for those participating in illegal conduct proscribed by

169. *See Elvig*, 375 F.3d at 961–62.

170. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

171. *See* Morgan Nelson, *Discussing Demkovich: An Analysis of Why and How the Supreme Court Should Reconsider the Expansion of the Ministerial Exception*, 54 TEX. TECH L. REV. 825, 849–52 (2022) (considering a variety of factors that would determine whether adjudication of a claim violates the First Amendment).

172. *See, e.g.*, Kevin J. Murphy, *Administering the Ministerial Exception Post-Hosanna-Tabor: Why Contract Claims Should Not Be Barred*, 28 ND J. L. ETHICS & PUB. POL'Y 383, 386 (2014) (arguing that the ministerial exception should not bar contract claims on this basis).

173. *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 106 (2000) ("[C]ourts are relatively conservative in what they recognize as protected whistleblowing, and if the whistleblower cannot point to a well-established law, rule or regulation that is being violated, she or he is unlikely to be protected.").

a generally applicable state law, such as one criminalizing sexual assault.[174] In other words, religious institutions already cannot claim First Amendment immunity to avoid liability for whatever the whistleblower is reporting.[175] They therefore should not be able to claim immunity for subsequently taking adverse action against the whistleblower.

Whistleblower claims thus do not require a court to conduct a searching inquiry into the validity of religious doctrine or the proper duties of a minister-figure. The whistleblower statute requires no more intervention into internal church governance than the related primary law (e.g., a statute criminalizing abuse of a child).[176] Just as "[a] suit claiming sexual abuse of a child does not require a court to decide whether a Church departed from the true faith," neither does a whistleblower suit of a teacher reporting such abuse.[177]

Additionally, whistleblower statutes generally only apply to reports that are made to relevant state authorities, rather than, say, to media publications.[178] Other sorts of "bad faith" whistleblowers would not be entitled to relief either, such as those relying on the whistleblower protection statute in order to extort and threaten their employer.[179]

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174. *See* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) (holding that there is no free exercise requirement to exempt religious individuals from "a valid and neutral law of general applicability").

175. *See* Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 B.Y.U. L. REV. 1789, 1892 (2004) ("The demise of constitutionally required exemptions from religion-neutral general laws, dictated by *Employment Division v. Smith*, suggests that clergy would have no basis for complaint under the Free Exercise Clause if they were among a wider group of professionals whose communication privileges were trimmed as a response to the problem of child abuse.").

176. *See* Kelly W.G. Clark et al., *Of Compelling Interest: The Intersection of Religious Freedom and Civil Liability in the Portland Priest Sex Abuse Cases*, 85 OR. L. REV. 481, 515 (2006) ("Because a child abuse victim is not disputing what the proper role or duties of a priest should be as a matter of religious doctrine, the ecclesiastical abstention doctrine does not block Oregon's respondeat superior liability in the priest abuse context.").

177. *See id.* at 513–14.

178. *See* Callahan & Dworkin, *supra* note 173, at 108 (finding that "virtually all statutes prohibit or discourage reporting to the media").

179. *See* Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316, 334 (1993) (noting that bad faith whistleblowers are regularly denied relief).

B. COMPETING INTERESTS IN WHISTLEBLOWER ACTIONS

Whistleblower actions also implicate important government interests that are not necessarily at stake in other traditional employment actions.[180] Primarily, whistleblower protection laws act as a deterrent for illegal conduct and incentivize reporting illegal conduct.[181] A significant government interest at stake in whistleblower actions at religious schools involves protecting children from abuse.

In the tradition of *parens patriae*, the state has a vested interest in the safety and protection of children.[182] Mandatory reporting laws exemplify the salience of that interest, having developed in the 1960s in response to significant public attention to the problem of child abuse.[183] As cases like *Weishuhn v. Lansing Catholic Diocese*[184] demonstrate, however, applying the ministerial exception to whistleblower actions may frustrate the purpose of mandatory reporting statutes.[185] This is especially concerning given an epidemic of sexual abuse allegations against religious institutions. Between 1950 and 2002, for example, 4,392 priests faced accusations of child sexual abuse, representing roughly 4% of all Catholic priests who served the Church during that time period.[186]

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180. *See* Gonzalez, *supra* note 19, at 320–21 (differentiating whistleblower claims from other employment actions in that the "underlying policy reason for protecting employee whistleblowers is that their reporting protects a policy interest that either impacts the public at large or more specifically affects a third party").

181. *See* Callahan & Dworkin, *supra* note 173, at 108 ("Most state legislatures continue to embrace whistleblower anti-retaliation measures as a mechanism for deterring and uncovering wrongful conduct.").

182. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control[.]"); Christopher R. Pudelski, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-*Smith *World*, 98 NW. U. L. REV. 703, 735 (2004) (noting that "the state's power to act on behalf of its children has a rich history of receiving deference by the courts").

183. *See* Mitchell, *supra* note 167, at 726–27; *supra* Section III.A.

184. *See* Weishuhn v. Cath. Diocese of Lansing, 787 N.W.2d 513, 521 (Mich. Ct. App. 2010) (barring the claim of a Catholic school teacher who was seemingly fired after reporting child abuse).

185. *See* Hornbeck, *supra* note 9, at 753 (noting that invoking the exception for whistleblowers "surely hinders attempts to prevent future abuse if those who report what they know can be fired without recourse").

186. *See* KAREN J. TERRY ET AL., THE CAUSES AND CONTEXT OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS IN THE UNITED STATES, 1950–2010 8 (2011).

The "initial stage in the protection of children from abuse is the reporting system,"[187] which may be weakened by application of the ministerial exception to whistleblower claims. Applying the ministerial exception disincentivizes reporting, as employees have to decide between reporting and potentially losing their job with no legal recourse.[188] Individuals are more likely to report illegal conduct when they are protected from such consequences.[189] Thus, in the context of teachers working with children, whistleblower protection laws encourage reporting suspected child abuse.[190]

Furthermore, if teachers are not incentivized to report abuse, there are limited avenues for such abuse to come to light.[191] Children will generally not report their own abuse.[192] At young ages, they may not fully understand the wrongness of abusive behavior.[193] If they do, they may experience shame and isolate themselves as a preventative measure.[194] One Harvard Medical study indicated that a child's first experiences of abuse can lead to psychological injury, including diminished ability to report and

187. Shoop & Firestone, *supra* note 166, at 1115.

188. The Supreme Court has acknowledged this crucial mechanism in the context of Title IX anti-retaliation. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 180 (2005) ("Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel.").

189. In the corruption context, one empirical analysis found that increased awareness of whistleblower protection laws resulted in more whistleblowing. *See* Rajeev K. Goel & Michael A. Nelson, *Effectiveness of Whistleblower Laws in Combatting Corruption* (BOFIT Discussion Paper No. 9, 2013), https://ssrn.com/abstract=2268429 [https://perma.cc/4A7Z-MW7W].

190. *See* Linda L. Hale & Julie Underwood, *Child Abuse: Helping Kids Who Are Hurting*, 74 MARQ. L. REV. 560, 565 (1991) (citing a "fear of retaliation" as a significant inhibitor to teachers reporting suspected child abuse).

191. *See* Shoop & Firestone, *supra* note 166, at 1122 ("Because school teachers often are the only professionals that see the abused child on a regular basis, they have a special responsibility to act to ensure the protection of the child."); Jackson, *supra* note 188, at 181 (noting that "teachers and coaches" are "often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators").

192. *See* Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225, 227 (2007) ("[V]ictims of childhood sexual abuse tend not to come forward to authorities or others approximately 90% of the time.").

193. *See* Shoop & Firestone, *supra* note 166, at 1122 (noting that "[a]bused children are often unaware of their own abuse or injury").

194. *See* Richard Fossey, *Law, Trauma, and Sexual Abuse in the Schools: Why Can't Children Protect Themselves?*, 91 ED. LAW REP. 443, 454 (1994) (exploring various factors as to why children who are sexually abused in schools are often unable to find effective help).

increased vulnerability to further abuse.[195] An abused child may also "develop[] a destructive attachment to the perpetrator, an attachment that may prevent the victim from breaking free from her abuser and seeking assistance."[196] In any case, if a child does report on their own, it will likely be too late.[197] Meanwhile, evidence may have deteriorated, key witnesses may have become unreliable or unavailable, and the perpetrator may have the chance to assault more victims.[198]

Additionally, research suggests that merely reporting to internal school or church officials may be insufficient. Institutional cover-up is an especially well-documented phenomenon in the places where the ministerial exception operates—religious institutions.[199] While sexual abuse is not a problem unique to religious institutions, scholars have noted the pronounced efforts of such institutions to engage in cover-ups.[200] One study of 110 sexual abuse cases in schools found that internal investigations "often jeopardized subsequent investigations," and principals often failed to report abuse to the state, "especially if the principal feared damage to the school's reputation."[201] A principal or clerical head may also prefer to hide allegations of child abuse by discreetly dismissing or reassigning a teacher, rather than

195. *See id.* at 451–53 (citing JUDITH HERMAN, TRAUMA AND RECOVERY 98–111 (1992)).

196. *See id.* at 451–52.

197. *See* Rosaleen McElvaney, *Disclosure of Child Sexual Abuse: Delays, Non-disclosure and Partial Disclosure: What the Research Tells Us and Implications for Practice*, 24 CHILD ABUSE REV. 159, 160 (2013) (noting the "consensus in the research literature that most people who experience sexual abuse in childhood do not disclose this abuse until adulthood").

198. *See, e.g.*, TYLER COUNSIL, EVIDENCE COLLECTION IN CHILD ABUSE CASES: A PRIMER FOR INVESTIGATORS AND PROSECUTORS 3, 33 (2023) (noting that time is a "critical factor that can affect the ability to generate substantive forensic information" and that "child sexual abuse allegations are more frequently believed when corroborating proof is present, compared to evaluating a case based on testimony alone").

199. *See, e.g.*, Aurelien Breeden, *Over 200,000 Minors Abused by Clergy in France Since 1950, Report Estimates*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/2021/10/05/world/europe/france-catholic-church-abuse.html [https://perma.cc/642M-88MK].

200. *See* Hamilton, *supra* note 192, at 227–28 (noting a "pattern of covering up child abuse, which includes (1) not going to authorities when abuse is reported to the institution; (2) imposing secrecy requirements on clergy and victims; (3) shifting perpetrators throughout the religious organization, both geographically and by specific house of worship; (4) asking law enforcement and newspapers to look the other way when they learn of individual cases; and, most important for [Hamilton's article], (5) insisting on autonomy from the tort and criminal law for the organization's role in the furtherance of the abuse.").

201. Richard Fossey & Todd A. Demitchell, *"Let the Master Answer": Holding Schools Vicariously Liable When Employees Sexually Abuse Children*, 25 J.L. & EDUC. 575, 594 (1996).

reporting.[202] This practice can be dangerous for children as, "[t]ypically, the [abusing] teacher finds a job in another district, and the truth or falsity of the allegation against him is never determined."[203]

Reporting on the Catholic Church sex abuse scandal of the early 2000s, in which over 789 victims of sexual abuse were identified in the Boston Archdiocese, the Massachusetts Attorney General summarized the cover-up phenomenon:

> [T]he widespread abuse of children was due to an institutional acceptance of abuse and a massive and pervasive failure of leadership. . . . [Those] in positions of authority within the Archdiocese chose to protect the image and reputation of their institution rather than the safety and well-being of children. They acted with a misguided devotion to secrecy and a mistaken belief that they were accountable only to themselves.[204]

Mandatory reporting laws, and the whistleblower laws that protect mandatory reporters, are thus the prime avenue by which child abuse can be discovered and addressed.

Whistleblower claims have a unique role in mitigating a significant risk of harm to children. In light of the state's strong interest in protecting child welfare, a proportionality approach to the church autonomy right would counsel against a categorical bar on whistleblower claims through the ministerial exception.

C. THE SOLUTION: A CASE-BY-CASE APPROACH TO WHISTLEBLOWER ACTIONS

A proportionality approach to church autonomy would remove the ministerial exception's categorical bar on whistleblower claims by ministerial employees. As established above, these whistleblower actions advance particularly important state interests and only narrowly infringe on church autonomy.

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202. *See* Hamilton, *supra* note 192, at 227; *see also* Richard Fossey, *Confidential Settlement Agreements Between School Districts and Teachers Accused of Child Abuse: Issues of Law and Ethics*, 63 EDUC. L. REP. 1, 1 (1990).

203. Fossey & Demitchell, *supra* note 201, at 595.

204. OFFICE OF THE ATTORNEY GENERAL, COMMONWEALTH OF MASSACHUSETTS, THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON 2–3 (2003).

Instead of a categorical bar, a case-by-case approach is warranted. This approach is most similar to one that the Ninth Circuit has taken with regard to hostile work environment claims—finding that the ministerial exception should operate on a case-by-case basis, rather than as a categorical bar.[205] While the Seventh[206] and Tenth[207] Circuits have held that the ministerial exception categorically bars hostile work environment claims, the Ninth Circuit lifted the categorical bar for such claims in *Elvig v. Calvin Presbyterian Church*.[208] This Note advocates for a similar approach in removing the categorical bar on whistleblower actions, as the balance between whistleblower claims and the ministerial exception should turn out no differently.

Adjusting the ministerial exception in this way would not mean that a plaintiff would automatically win in an employment suit alleging retaliation due to the filing of a whistleblower claim.[209] Nor does it mean that church autonomy has no salience: if a religious institution can articulate a genuine religious motivation underlying the termination of or retaliation against the whistleblower, the claim should indeed be barred on First Amendment grounds. This is consistent with the Ninth Circuit's approach in *Elvig*, where the court held that the First Amendment could still shield liability in a Title VII harassment suit if the institution could plead a religious justification.[210] However, in the absence of a doctrinal motivation, or if the institution simply denies that retaliation or termination occurred at all, there should be no categorical First Amendment protection from liability under whistleblower statutes.[211]

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205. *See* Riddick, *supra* note 18, at 151–52 (citing Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 964 (9th Cir. 2004)).

206. *See* Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 985 (7th Cir. 2021).

207. *See* Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1246 (10th Cir. 2010).

208. *See Elvig*, 375 F.3d at 965 (finding that hostile work environment claims are "not . . . protected employment decision[s]" when they are not doctrinally-motivated).

209. *See* GREENE, *supra* note 123, at 109 ("[J]ust because the [C]onstitution cares doesn't mean the plaintiff has to win[.]").

210. *See Elvig*, 375 F.3d at 965 ("[T]he Defendants may invoke First Amendment protection from Title VII liability if they claim that the alleged retaliatory harassment was doctrinal[.]") (citing Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944, 947 (9th Cir. 1999)).

211. Admittedly, non-doctrinal motivations can be easily shrouded in religious terms. In *Hosanna-Tabor*, the teacher was fired for a purportedly religious reason: "that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 180 (2012). In *Elvig*, the court acknowledged that the defendant religious institution had

One might argue that to even inquire into the motivation behind an employment decision requires a court to impermissibly entangle itself with religious doctrine or the internal governance of a religious institution.[212] However, just as courts inquire into the nature of an employment relationship in determining whether an employee counts as a "minister," courts should be comfortable with a baseline inquiry into the factual context of an employment decision.[213] Furthermore, courts have proven capable of making this sort of inquiry in other contexts. In Free Exercise cases, while courts are not to inquire into the truth of a religious belief, they regularly inquire into the baseline existence of a religion.[214] The Ninth Circuit's approach to hostile work environment claims suggests that courts are readily capable of inquiring into the motivation underlying an employment dispute at a religious institution.[215] Moreover, whistleblower claims require a far more objective inquiry than hostile work environment claims, requiring only that a plaintiff prove that reporting suspecting illegal activity was a contributing factor to some adverse employment action.[216]

In constraining the ministerial exception, judges should first re-examine the exception's bar on whistleblower actions. While more may be required to make the currently-bloated church autonomy right proportional to other competing interests, enabling whistleblower actions by the current swath of "ministerial" employees, especially lay teachers, is a fine place to start.

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not attempted to claim the harassment was doctrinal and suggested the outcome may have been different otherwise. 375 F.3d at 965.

212. *See Hosanna-Tabor*, 565 U.S. at 194 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."); Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir.1985) ("[T]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it.").

213. *See* William S. Stickman IV, *An Exercise in Futility: Does the Inquiry Required to Apply the Ministerial Exception to Title VII Defeat Its Purpose?*, 43 DUQ. L. REV. 285, 297 (2005) (pointing out the irony that the ministerial exception's "threshold determination of whether the exception should apply at all often requires an intensive examination of the exact nature of a plaintiff's role within the organization").

214. *See* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 713–14 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.") (citing Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972)).

215. *See Riddick*, *supra* note 18, at 162 ("In fact, the fear of excessive entanglement and intrusion on religious liberty may be unfounded. The Ninth Circuit has not encountered the issue of entanglement in a single case in the nearly twenty years after its *Elvig* decision.").

216. *See, e.g.*, Judicial Council of California Civil Jury Instructions, CACI No. 4603 (2023).

CONCLUSION

At the current crossroads, the Supreme Court has refused to set the horizontal bounds of the ministerial exception.[217] In the first Court case recognizing the ministerial exception, Chief Justice John Roberts stated:

> The [parties] foresee a parade of horribles that will follow our recognition of a ministerial exception to employment discrimination suits. According to the [parties], such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct. . . . There will be time enough to address the applicability of the exception to other circumstances if and when they arise.[218]

So far, the Supreme Court has taken the easy way out by embracing a vertical expansion of the ministerial exception without discussing its horizontal bounds. Yet the "parade of horribles" has already reared its ugly head in state court cases like *Rehfield*[219] and *Weishuhn,*[220] in which religious schools fired employees for reporting abuse and escaped liability. These problematic results suggest a conceptual flaw in treating the ministerial exception as an absolute bar to all church employment decisions. To avoid this flaw and its damaging real-world implications, a proportionality approach to church autonomy is necessary. And at least some claims—such as those by faculty whistleblowers—should fall beyond the bounds of the exception and escape its categorical bar.

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217. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 195–96.

218. *Id.*

219. *See* Rehfield v. Diocese of Joliet, 182 N.E.3d 123, 696 (Ill. 2021) (barring the whistleblower claim of a principal terminated for reporting a threatening parent).

220. *See* Weishuhn v. Cath. Diocese of Lansing, 787 N.W.2d 513, 521 (Mich. Ct. App. 2008) (barring the whistleblower claim of a teacher despite mandatory reporting statute).