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## Dias v. Archdiocese of Cincinnati: Deciphering the Ministerial Exception to Title VII Post-Hosanna-Tabor

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*DIAS V. ARCHDIOCESE OF CINCINNATI:*  
DECIPHERING THE MINISTERIAL EXCEPTION TO  
TITLE VII POST-*HOSANNA-TABOR*

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INTRODUCTION

Title VII and its ministerial exception remain in tension in at-will employment contracts, particularly in school settings. Though courts have uniformly concluded that “the Free Exercise and Establishment Clauses of the First Amendment require a narrowing construction of Title VII in order to insulate the relationship between a religious organization and its ministers from constitutionally impermissible interference by the government,”<sup>1</sup> no jurisprudence has been established that creates a uniform test for who qualifies as a ministerial employee and when the exception should apply.

In 2012, the Supreme Court had the opportunity to answer the aforementioned questions in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.<sup>2</sup> However, rather than setting a precedent for the ministerial exception’s parameters, the Court chose only to comment on the facts in the case at bar, holding that the exception covered the plaintiff, an employee fired for threatening to sue the church where she was employed.<sup>3</sup> Acknowledging that the school’s

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1. *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 U.S. Dist. LEXIS 43240, at \*9 (S.D. Ohio Mar. 29, 2012) (denying in part Defendants’ Motion to Dismiss).

2. *Hosanna-Tabor Evangelical Lutheran Church & Sch. V. E.E.O.C.*, 132 S. Ct. 694, 705 (2012).

3. *Id.* at 701, 710.

decision to fire an employee for threatening to sue the church should be afforded protection under the ministerial exception, the Court based its analysis on that fact that the affected employee's role and responsibilities required her to convey the Church's message and carry out its mission.<sup>4</sup> Further, the Court clarified that the ministerial exception is a fact-based affirmative defense,<sup>5</sup> not a "jurisdictional bar."<sup>6</sup> This is because "the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear [the] case.'"<sup>7</sup>

Courts across the United States would have benefitted from more specific judicial precedence in *Hosanna-Tabor*. One case in particular, *Dias v. Archdiocese of Cincinnati*, underscored the uncertainty of a religious organization's freedom to terminate members of its ministry based on failure to adhere to religious doctrine.<sup>8</sup> Like *Hosanna-Tabor*, *Dias* originated out of the Sixth Circuit; there, two private Catholic schools in Cincinnati, Ohio discharged a middle school teacher for breach of contract after she became pregnant out of wedlock via artificial insemination.<sup>9</sup> Operating under the assumption that they would be covered by the ministerial exception to Title VII, the school believed they were not exceeding any civil rights limitations by discharging *Dias* for violating her contract.<sup>10</sup> The United States District Court for the Southern District of Ohio disagreed, denying the Defendants' Motion for Summary Judgment and holding for *Dias* under the theory that she was not a ministerial employee and therefore the schools did not have a legitimate, non-discriminatory purpose for terminating her.<sup>11</sup>

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4. *Id.* at 710.

5. *Id.* at 709 n.4.

6. Pretrial Brief for Defendants at 2, *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251 (S.D. Ohio 2013)(citing *Hosanna-Tabor*, 132 S. Ct. 694 at 709, n.4).

7. *Hosanna-Tabor*, 132 S. Ct. 694, 709 n.4 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010)).

8. See *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 U.S. Dist. LEXIS 12417 at \*9-\*10 (S.D. Ohio Jan. 1, 2013) (granting Summary Judgment for Defendants in part, denying Summary Judgment for Defendants in part, and denying Summary Judgment for Plaintiff in part).

9. *Id.* at \*2.

10. *Id.* at \*2-\*3. Defendants argued that *Dias*'s contract contained a "morals clause" that, if enforceable, would "*per se* constitute a legitimate, non-discriminatory basis for the termination of Plaintiff's employment, and thus preclude any Title VII or analogous state law-based discrimination claim. An enforceable 'morals clause' would also mean that Plaintiff—an unmarried woman who conceived a child through artificial insemination while engaged in a homosexual relationship—*per se* violated the Catholic teachings incorporated into the morals clause, and thus cannot assert a claim for breach of contract." Defendants' Motion for Summary Judgment and Request for Oral Argument at 1, *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251 (S.D. Ohio Jan. 1, 2013).

11. *Dias*, 2013 U.S. Dist. LEXIS 12417, at \*18-\*19.

This Note investigates the pressing need—particularly in employment at-will contexts in religious schools—for the judicial system to articulate a test for determining who qualifies as a “ministerial employee.” A clearer definition is needed in order to preserve religious freedom while balancing fundamental civil rights. Failure to articulate more definite parameters for the ministerial exception could soon have significant impacts—from the end of the ministerial exception entirely, arguably precipitating a sharp decline in religious freedom, to a possible necessity for religious organizations and employees to adhere to stringent, detailed employment agreements that may border on unconscionable.

In Part I, *Dias v. Archdiocese of Cincinnati* is outlined as a case study on the ministerial exception, investigating Dias’s employment agreement and subsequent discharge. Though the fact pattern in *Dias* is particularly unique—and may not soon be replicated in future proceedings—the case highlights the need for a clearer definition of the “ministerial exception” in an ever-evolving modern employment context. Following *Dias* through its stages of litigation, beginning with Defendant’s motion to dismiss, and concluding with a jury holding in favor of Dias in Ohio, Part I traces the key issues that the Court identified as determinative in the case.<sup>12</sup>

Moving from specific to general, Part II next considers the state of the “ministerial exception,” tracing its judicially created roots from inception through *Hosanna-Tabor*. It evaluates in Part III how a minister should be defined in light of the deference the Supreme Court gave religious organizations in *Hosanna-Tabor*. Lastly, Part IV outlines a potential standard for applying the ministerial exception to Title VII suits and other employment discrimination disputes.

### I. DIAS V. ARCHDIOCESE OF CINCINNATI

Christa Dias began employment with Holy Family School and St. Lawrence School, two private, Catholic schools in Cincinnati, Ohio, in August 2008 and August 2009, respectively.<sup>13</sup> The schools teach

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12. The Southern District of Ohio identified three key issues in *Dias*, particularly significant in evaluating whether the case should be decided in summary judgment. Specifically, the Court identified the following issues: 1. Whether the ministerial exception applied to *Dias*, in light of *Hosanna-Tabor*; 2. Whether Dias raised legally sufficient claims for breach of contract and pregnancy discrimination; 3. Whether the case violates the Free Exercise Clause, thereby barring Dias from recovery. *Dias*, 2013 U.S. Dist. LEXIS 12417, at \*4–\*5; see also Lisa Cornwell, *Jury Finds for Ohio Teacher Fired While Pregnant*, ASSOCIATED PRESS (June 3, 2013, 8:08 PM), <http://bigstory.ap.org/article/jury-finds-ohio-teacher-fired-while-pregnant>, archived at <http://perma.cc/BW3V-HHWM> [hereinafter Cornwell, *Jury*].

13. *Dias*, 2012 U.S. Dist. LEXIS 43240 at \*2.

a Catholic curriculum to children in the kindergarten to eighth-grade levels.<sup>14</sup> Holy Family School and St. Lawrence School hired Dias to fill the role of Technology Coordinator, which entailed overseeing the school's computer systems and instructing students on computer technology.<sup>15</sup> Because she is a non-Catholic,<sup>16</sup> Holy Family and St. Lawrence did not permit Dias to teach religion classes; she also had "no responsibility for religious instruction" in the schools.<sup>17</sup> Her contracts with both Holy Family and St. Lawrence did, however, contain an explicit morals clause, which stated "[The teacher will] comply with and act consistently in accordance with the stated philosophy and teachings of the Roman Catholic Church and the policies and directives of the School and the Archdiocese."<sup>18</sup> Furthermore, her "job description, evaluations, and employee handbook each explained that her position included serving as a Catholic role model and purveyor of the faith."<sup>19</sup> The contracts also included an additional morality provision, which required that, in "keeping with the expectations of the students as well as the parents and donors who pay their tuition. . . . [A]ll certificated teachers, no matter their teaching subject, are expected to play a part in their students' religious instruction and the mission of the school."<sup>20</sup>

After Dias accepted her positions with St. Lawrence and Holy Family, the schools offered to rehire her for the 2010–2011 school year; accepting the positions, Dias again signed two contracts that contained the same morals clause.<sup>21</sup> Though this agreement was articulated in writing, the Archdiocese later argued that violating the terms

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14. *See About Us*, HOLY FAMILY SCHOOL, <http://www.holyfamilycincinnati.org/school/AboutUs.aspx>, archived at <http://perma.cc/7SZ6-G7ND> (last visited Jan. 28, 2015). Holy Family's stated goals are to "provide opportunities for the students to experience spiritual development through liturgy; sacraments and formal religious instruction in the classroom; to provide, as best possible, for the various levels of individual pupil ability; and to provide proper study habits and stress basic skills at all levels of study. Due to an extremely generous corporate donation to the Archdiocese of Cincinnati, Holy Family School was able to install state of the art computer equipment insuring the best possible computer training for our children." *Id.* St. Lawrence School states a similar mission, "to help each student find their unique strengths, build on those strengths and obtain academic and personal success while exploring and nurturing their relationship with God." *See About Us*, ST. LAWRENCE SCHOOL, <http://www.stlschool.com/about-us>, archived at <http://perma.cc/ND3E-UKY4> (last visited Jan. 28, 2015).

15. *Dias*, 2012 U.S. Dist. LEXIS 43240 at \*2.

16. *Id.*

17. *Id.*

18. Defendants' Motion, *supra* note 10, at 2. Dias signed a one-year employment agreement with Holy Family and St. Lawrence for the 2009–2010 school year; both contracts contained the morals clause provision.

19. *Id.* at 8.

20. *Id.* at 2.

21. *Id.* at 3.

of a signed employment contract is not the only basis for terminating employment. Even violating a known school policy can be a legitimate, non-discriminatory basis for terminating an employee.<sup>22</sup>

At the time that Dias signed her employment agreements for the 2009–2010 school year, she had been in a monogamous, homosexual relationship for several years.<sup>23</sup> She and her partner had also been planning to have children, and in 2008 decided that Dias would conceive via artificial insemination.<sup>24</sup> In fact, Dias was already pregnant at the time she signed her 2010–2011 employment agreements with St. Lawrence and Holy Family schools.<sup>25</sup>

On October 15th, 2010, Dias notified Jennifer O’Brien (“O’Brien”), the principal of Holy Family School, that she was five and a half months pregnant, and that she would require maternity leave beginning February 2011.<sup>26</sup> O’Brien stated that she did not “consider [Dias’s] pregnancy to be a problem. . . . However, O’Brien indicated that she would have to raise the matter with the pastor of Holy Family Church.”<sup>27</sup> Then, after speaking with another colleague, O’Brien informed Dias that she would likely be terminated “because she was pregnant and unmarried.”<sup>28</sup> The following Monday, October 18th, 2010, Dias informed O’Brien that her pregnancy was the result of artificial insemination, not premarital intercourse.<sup>29</sup> Following discussions among school administrators, Dias was discharged on October 21st and 22nd for “failure to comply and act consistently in accordance with the stated philosophy and teachings of the Roman Catholic Church.”<sup>30</sup> Initially, the schools cited Dias’s becoming pregnant outside of marriage as the reason for termination, but later changed their reason to Dias’s use of artificial insemination (a “violation of the philosophy and teachings of the Roman Catholic Church”).<sup>31</sup>

Dias filed a complaint on April 21st, 2011 against both schools and the Archdiocese of Cincinnati, claiming that the schools’ actions constituted pregnancy discrimination under federal and state law,

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22. *Id.* at 9 (citing *Boyd v. Harding Acad.*, 88 F.3d 410 (6th Cir. 1996); *Chambers v. Omaha Girls Club, Inc.*, 843 F.2d 697 (8th Cir. 1987)).

23. *Id.* at 3 (citing Deposition of Christa Dias at 202–203 (Oct. 1, 2012)).

24. Defendant’s Motion, *supra* note 10, at 2 (citing Deposition of Christa Dias at 202–203).

25. *Id.* (citing Deposition of Christa Dias at 248).

26. Complaint at 3, *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251 (S.D. Ohio Apr. 21, 2011).

27. *Dias v. Archdiocese of Cincinnati*, 2012 U.S. Dist. LEXIS 43240, at \*2–\*3 (S.D. Ohio 2012).

28. *Id.* at \*3.

29. *Id.*

30. *Id.* at \*4.

31. *Id.*

and breach of her employment contract without good cause.<sup>32</sup> She further alleged that the schools' policy was not enforced equally against men and women.<sup>33</sup>

The Archdiocese subsequently filed to dismiss, contending that Dias was terminated for "failing to meet the Schools' legitimate expectations for employment—particularly the requirement that she served as a Catholic role model," that her contract—particularly the morals clause—is enforceable as a matter of law, and that Dias failed to establish that the morals clause was not applied in a gender-neutral manner.<sup>34</sup> Furthermore, the Archdiocese contended that Dias and the Schools had a "meeting of the minds" regarding the morals clause in her contract, specifically regarding the Church's views on artificial insemination.<sup>35</sup>

When the case went before the Southern District of Ohio, the Court identified three determinative issues:

First, whether the ministerial exception applies to this case in light of the Supreme Court's recent ruling in *Hosanna-Tabor*; second whether Plaintiff has raised legally sufficient claims for breach of contract and pregnancy discrimination; and third, whether this case raises issues of entanglement between church and state and/or violates the Free Exercise Clause, such that Plaintiff has no recourse.<sup>36</sup>

Each issue is separately evaluated below.

#### *A. Does the Ministerial Exception Apply?*

Turning first to whether the ministerial exception should apply, the Court looked to the precedent set by the Supreme Court in *Hosanna-Tabor*. There, the Court articulated that "[f]or the ministerial exception to bar an employment discrimination claim, two factors must be present: (1) the employer must be a religious institution, and (2) the employee must be a ministerial employee."<sup>37</sup> Neither party disputed that Holy Family and St. Lawrence schools were religious institutions; therefore, the issue then turned on whether Dias qualified as a ministerial employee. Because the Court declined to articulate a test in *Hosanna-Tabor*, the Southern District of Ohio relied

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32. *Id.* at \*4.

33. Cornwell, *Jury*, *supra* note 12.

34. Defendants' Motion, *supra* note 10, at 6, 9.

35. *Id.* at 12.

36. *Dias*, 2012 U.S. Dist. LEXIS 43240, at \*8 (emphasis omitted).

37. *Id.* at \*10 (citing *Hosanna-Tabor*, 597 F.3d at 709–710, 707).

instead on how closely the *Hosanna* fact pattern aligned with Dias's in making its determination.<sup>38</sup>

Dias contended that her case was completely distinct from *Hosanna*—the Archdiocese “did not hold [her] out as a minister, they did not give her any sort of religious title or commission, and the congregations of the Defendant churches took no role in reviewing her ‘skills in ministry’ or her ‘ministerial responsibilities.’”<sup>39</sup> She further argued that the Archdiocese “never charged her with teaching the faith, participating in religious services, or leading devotional exercises, and she never held herself out as a minister, nor did she ever undergo religious training.”<sup>40</sup>

The Archdiocese contended that indeed Dias must be deemed a ministerial employee, particularly in light of *Hosanna-Tabor*'s interpretation that when an individual's “job duties reflect[] a role in conveying the Church's message and carrying out its mission,”<sup>41</sup> a ministerial exception bars an employment discrimination claim. Furthermore, “[r]equiring a church to . . . retain an unwanted minister . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”<sup>42</sup> Emphasizing that the Supreme Court expressly stated that “‘the ministerial exception is not limited to the head of a religious congregation,’”<sup>43</sup> and employees who “perform non-religious duties may also be deemed ‘ministerial,’” the Archdiocese urged the Court to defer to the Church's right to choose its ministers without the threat of judicial second-guessing.<sup>44</sup>

In addition to their reliance on judicial precedence, Archdiocese leadership testified at length to the school's culture and expectations of its employees. One Pastor at St. Lawrence stated, “[E]very person involved in [St. Lawrence] is part of the mission of the church and the school . . . it doesn't mean that just because you're not teaching a religion class, that you're not teaching. You teach by modeling and example as well.”<sup>45</sup> Furthermore, the Schools contended that Dias's role as a ministerial employee was understood by her students and

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38. *Id.* at \*11–\*12. In *Hosanna-Tabor*, the Court unanimously upheld the right of religious institutions “to select and control who will minister to the faithful,” barring “claims concerning the employment relationship between a religious institution and its ministers.” 132 S. Ct. 694, 709, 697 (2012).

39. *Dias*, 2012 U.S. Dist. LEXIS 43240 at \*14.

40. *Id.*

41. Defendants' Motion, *supra* note 10, at 15–16 (citing *Hosanna-Tabor*, 132 S. Ct. at 705–706).

42. *Id.* at 16.

43. *Id.* (quoting *Hosanna-Tabor*, 132 S. Ct. at 707).

44. *Id.* (quoting *Hosanna-Tabor*, 132 S. Ct. at 710–11 (Thomas, J., concurring)).

45. *Id.* at 17 (citing Watkins Deposition at 32).

fellow teachers, and was reflected in all of her employment-related materials—including her contract, job description, handbook, and evaluations.<sup>46</sup>

Not persuaded by the Archdiocese's contentions, the court held that Dias was not a minister for purposes of the ministerial exception, emphasizing that she was not permitted to teach Catholic doctrine, having "received no religious training or title and had no religious duties."<sup>47</sup> "[I]t is not enough," the court said, "to generally call her a 'role model,' or find that she is a 'minister' by virtue of her affiliation with a religious school."<sup>48</sup> Therefore, Dias was not barred by the ministerial exception in pursuing her claims.<sup>49</sup>

### *B. Breach of Contract and Pregnancy Discrimination*

Next the court turned to Dias's breach of contract and pregnancy discrimination claims. The Sixth Circuit has consistently upheld the validity of morals clauses.<sup>50</sup> Yet, the morals clause in Dias's contract posed an interesting question for the Court—does the phrase "comply with and act consistently in accordance with the stated philosophy and teachings of the Roman Catholic Church" encompass the use of artificial insemination, a practice that the Church considers to be "gravely immoral?"<sup>51</sup> Regardless, Dias argued that reading a restriction on artificial insemination in the clause was a reaching conclusion, and furthermore that the Sixth Circuit cases upholding morals clauses were inapplicable because they pertained to morals clauses that were applied in a gender-neutral fashion.<sup>52</sup> The District Court agreed, stating that when construing the facts in Dias's favor, her breach of contract claim did contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" because her termination was based on the schools' interpretation of the morals clause.<sup>53</sup>

The morals clause in Dias's contract also implicitly begged the question of whether—if the phrase "upholding Catholic doctrine" implicitly included a restriction on artificial insemination—this policy

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46. *Id.* at 18.

47. *Dias v. Archdiocese of Cincinnati*, 2012 U.S. Dist. LEXIS 43240, at \*17(2012).

48. *Id.*

49. *Id.*

50. *See Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) (noting moral clauses applied in a general, neutral fashion are not basis for pregnancy discrimination claims); *Boyd v. Harding Acad. of Memphis*, 88 F.3d 410, 413 (6th Cir. 1996) (upholding morals clause that prohibited employees from engaging in premarital sex).

51. *Dias*, 2012 U.S. Dist. LEXIS 43240, at \*17–\*18(2012).

52. *Id.* at \*18–\*19.

53. *Id.* at \*20 (internal quotation marks and citations omitted).

applied equally to men and women. In 1978, Congress passed the Pregnancy Discrimination Act, an amendment to Title VII, specifying that sex discrimination includes discrimination on the basis of pregnancy.<sup>54</sup> The Sixth Circuit has on several occasions reconciled Title VII with the ministerial exception.<sup>55</sup> Interestingly, in a separate Sixth Circuit case, *Boyd v. Harding Academy*, the court held that while violating a prohibition against employees engaging in premarital sex is a legitimate nondiscriminatory justification for termination, becoming pregnant by artificial insemination may not constitute a violation.<sup>56</sup> The *Boyd* Court's distinction turned on the defendant's conclusion that "if [plaintiff] was pregnant . . . it would establish that she had engaged in extramarital sexual intercourse," resulting in legitimate grounds for termination under the morals clause of her contract.<sup>57</sup> The court noted, "[a]lthough hypothetically plaintiff could have become pregnant by means of artificial insemination, during her conversations she gave no indication that this was so."<sup>58</sup> Regardless, the Archdiocese, with St. Lawrence and Holy Family schools, drew the distinction that the defendant in *Boyd* was a school affiliated with the Church of Christ, whereas the Catholic Church has "unequivocally declared the use of artificial insemination to be gravely immoral, and reviewing courts must give deference to a church's determination and enforcement of its own doctrine."<sup>59</sup>

Articulating that at the summary judgment stage, the court need only to "determine whether Plaintiff [had] alleged a plausible complaint of pregnancy discrimination," the court found that further discovery was needed to determine whether the policy was applied equally to both females and males, and whether artificial insemination should qualify as a contractual violation.<sup>60</sup>

### C. Does this Case Violate the Free Exercise Clause?

The Archdiocese further contended that a secular court's involvement in resolving an issue pertaining to a "morals clause" violates the

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54. 42 U.S.C. § 2000(e)(k) (1991).

55. See, e.g., *Cline*, 206 F.3d at 667, 668 (reversing the district court's grant of summary judgment to the Defendant, stating that a genuine issue of material fact existed as to whether the defendant "enforce[d] its policy solely by observing the pregnancy of its female teachers, which would constitute a form of pregnancy discrimination"); *Boyd*, 88 F.3d at 413 (violating a prohibition against employees engaging in premarital sex is a legitimate nondiscriminatory justification for termination).

56. *Boyd*, 88 F.3d at 412 n.1.

57. *Id.* at 412, 413.

58. *Id.* at 412 n.1.

59. Defendants' Motion, *supra* note 10, at 7 n.2. (citing *Curay-Cramer v. Ursuline Acad. of Wilmington, Inc.*, 450 F.3d 130, 141 (3rd Cir. 2006)).

60. *Dias v. Archdiocese of Cincinnati*, 2012 U.S. Dist. LEXIS 43240, at \*23 (S.D. Ohio 2012).

Free Exercise Clause of the First Amendment.<sup>61</sup> However, the Court blew past this argument, noting that, “religious institutions are, and have been, subject to court review of Title VII employment discrimination claims made by non-ministerial employees all across the country.”<sup>62</sup> After considering both parties’ fervent arguments, the Court ultimately concluded that Dias was not a ministerial employee, and that “she ha[d] raised plausible claims of pregnancy discrimination and breach of contract,” denying the Archdiocese’s motion to dismiss.<sup>63</sup>

The Archdiocese then moved for summary judgment, facing Dias again in the Southern District in a flurry of responses and cross-motions.<sup>64</sup> At this stage, the court articulated the matter as essentially an employment dispute.<sup>65</sup> Again the court rejected the Archdiocese’s contention that the ministerial exception should apply, articulating that the schools “attempt[ed] to swallow up the ministerial exception by characterizing teachers generally as role models and therefore ‘ministers,’” and emphasizing that because Dias was not permitted to teach Catholic doctrine, she could not “genuinely be considered a ‘minister’ of the Catholic faith.”<sup>66</sup>

Because the court rejected the ministerial exception’s application, Dias retained her Title VII protection against pregnancy discrimination. Again, the Archdiocese contended that Dias could not show that the morals clause in her contract was not the real reason for her termination, and therefore they were entitled to summary judgment in their favor.<sup>67</sup> Dias responded that the morals clause is “an illegal provision because it prohibits being unwed and pregnant and being pregnant by artificial insemination,” two conditions she claimed were “squarely protected by Title VII.”<sup>68</sup>

Again the District Court revisited Sixth Circuit precedence on the enforcement of morals clauses and related school policies, focusing on *Boyd v. Harding Academy of Memphis, Inc.* and *Cline v. Catholic Diocese*.<sup>69</sup> The District Court noted that in *Boyd*, the Sixth Circuit upheld the termination of a teacher at a religious school for violating the school’s policy against extramarital sex, holding that “so long as such a code of conduct was applied equally to both genders, it could

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61. *Id.* at \*23–\*24, \*10.

62. *Id.* at \*24.

63. *Id.*

64. *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 U.S. Dist. Lexis 12417 at \*1 (S.D. Ohio 2013).

65. *Id.* at \*2.

66. *Id.* at \*9–\*10.

67. *Id.* at \*12.

68. *Id.*

69. *Id.* at \*12–\*13.

be upheld as valid and non-pretextual.”<sup>70</sup> The district court further noted that “though the defendant in *Boyd* used the phrase ‘pregnant and unwed’ in conversations with the plaintiff, the real reason behind such statement, and consistent with the school’s policy, was a prohibition against engaging in premarital sex.”<sup>71</sup>

Similarly, the court in *Cline* maintained the validity of such a policy, holding that “a policy against premarital sex can be upheld so long as it is enforced in a gender-neutral fashion.”<sup>72</sup> Applying this precedent, the Southern District of Ohio held that the morals clause in Dias’s contract “lack[ed] specificity such that only an evaluation of the decision-makers’ testimony can show whether their initial reason for terminating Plaintiff was simply enforcement of a policy against premarital sex.”<sup>73</sup> Further, the court held that this is a “factual determination for a jury.”<sup>74</sup> The court further held that a jury needed to determine whether the morals clause in Dias’s contract was enforced equally against male and female employees; if only enforced against female teachers, it was a form of pregnancy discrimination.<sup>75</sup>

Additionally, the court rejected Dias’s arguments that in light of *Boyd*, the Archdiocese’s terminating her for becoming pregnant via artificial insemination was per se discrimination because there was “no reason that a policy against artificial insemination, like a policy against extra-marital sex, could be upheld so long as it would be enforced in a gender-neutral manner.”<sup>76</sup> However, the court did recognize a genuine issue of material fact as to whether the policy is equally enforced against men, noting that if “the policy ha[d] been enforced unequally as to men and women, [a jury] could find Defendants’ reason pretext for pregnancy discrimination.”<sup>77</sup> Likewise, the court rejected Dias’s cross-motion for summary judgment, viewing her contentions “as an expansive view of Title VII that does not comport with Sixth Circuit precedent.”<sup>78</sup>

The court also distinguished Dias’s Title VII claim as distinct from her breach of contract claim.<sup>79</sup> The court articulated that Dias could not attempt to enforce a contract against St. Lawrence and Holy Family Schools that she had knowingly breached; specifically, she had kept her long-term homosexual relationship a secret because she

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70. *Dias*, 2013 U.S. Dist. LEXIS 12417, at \*12–\*13.

71. *Id.* at \*13.

72. *Id.*

73. *Id.* at \*14.

74. *Id.*

75. *Id.*

76. *Dias*, 2013 U.S. Dist. LEXIS 12417, at \*16.

77. *Id.* at \*17.

78. *Id.* at \*19.

79. *Id.* at \*18.

knew “Defendants would view her relationship as a violation of the morals clause.”<sup>80</sup> Regardless, this fact did not in any way “absolve[] Defendants’ [sic] of any responsibility to conform to the requirements of law against pregnancy discrimination.”<sup>81</sup>

With both parties’ motions for summary judgment denied, the case moved to a jury trial.<sup>82</sup> After hearing extensive arguments on both sides, as well as testimony from Dias and several members of the Archdiocese ministry, a federal jury held for Dias under a theory of pregnancy discrimination and awarded her \$170,000 in damages.<sup>83</sup> The case drew nation-wide media attention, with commentators describing it as a “barometer on the degree to which religious organizations can regulate employees’ lives.”<sup>84</sup>

Speaking out after the verdict was returned, Dias’s attorney claimed that the case “shows jurors are willing to apply the law ‘even to churches and religious organizations when non-ministerial employees are discriminated against.’”<sup>85</sup> Almost immediately, experts predicted that the Archdiocese would appeal, potentially raising several issues, including “how to define a ministerial employee and how to resolve the conflict between religious employers’ rights versus the rights of women seeking to reproduce.”<sup>86</sup>

## II. RE-EXAMINING THE MINISTERIAL EXCEPTION POST-*HOSANNA-TABOR*

### A. *Tracing the Roots of the Ministerial Exception to Title VII*

Title VII of the Civil Rights Act of 1964 establishes the following parameters for employment:

It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for

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80. *Id.* at \*17.

81. *Id.* at \*18.

82. Cornwell, *Jury*, *supra* note 12.

83. Lisa Cornwell, *Christa Dias, Ohio Mom, Awarded More than \$170,000 for Discrimination, Cincinnati Catholic Diocese Expected to Appeal*, HUFFINGTON POST (June 4, 2013, 9:26 AM), [http://www.huffingtonpost.com/2013/06/04/christa-dias-mom-awarded-\\_n\\_3383022.html](http://www.huffingtonpost.com/2013/06/04/christa-dias-mom-awarded-_n_3383022.html), archived at <http://perma.cc/6NJZ-Q6DM> [hereinafter Cornwell, *Christa*].

84. *Id.*

85. Cornwell, *Jury*, *supra* note 12.

86. *Id.*

employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.<sup>87</sup>

Recognizing the inherent tension between Title VII and guaranteed religious liberties under the First Amendment, courts struggled after the passage of the Civil Rights Act of 1964 with how to preserve “a spirit of freedom for religious organizations, an independence from secular control or manipulation . . . power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine,”<sup>88</sup> while simultaneously enforcing the legislation's requirements. The first court to articulate a way to reconcile these competing principles was the Fifth Circuit, which created the ministerial exception to Title VII in the 1972 case, *McClure v. Salvation Army*.<sup>89</sup> The ministerial exception, a mechanism “rooted in the First Amendment's guarantees of religious freedom . . . precludes courts from adjudicating certain employment discrimination claims.”<sup>90</sup>

In *McClure*, the Court focused on Section 702 of Title VII, which, as originally written, provided that the title “shall not apply to an employer with respect to the employment of aliens outside any State or to a religious corporation, association, or society.”<sup>91</sup> Later amended by Substitute Senate Amendment No. 656 (which then became law), the general exemption of religious organizations is now limited to “those practices relating to the employment of individuals of a particular religion to perform work connected with the employer's religious activities . . . .”<sup>92</sup>

The court in *McClure* wrote with deference to a clear precedent that the First Amendment has built a “wall of separation” between church and State.<sup>93</sup> Emphasizing that the “relationship between an organized church and its ministers is its lifeblood,” the court highlighted that “[t]he minister is the chief instrument by which the church seeks to fulfill its purpose” and “[m]atters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.”<sup>94</sup>

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87. 42 U.S.C. § 2000e-2(a) (1991).

88. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *see, e.g.*, *Presbyterian Ch. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Ch.*, 393 U.S. 440, 445 (1969); *Watson v. Jones*, 80 U.S. 679, 709–11 (1871).

89. 460 F.2d 553, 560–61 (5th Cir. 1972).

90. Blair A. Crunk, *New Wine in an Old Chalice: The Ministerial Exception's Humble Roots*, 73 LA. L. REV. 1081, 1082 (2013).

91. *McClure*, 460 F.2d at 558.

92. *Id.*

93. *Id.*

94. *Id.* at 558–59.

Accordingly, the court emphasized that it restricted its holding only to the “church-minister relationship” and expressly refrained from “any decision as to other church employees of a type not involved in this controversy.”<sup>95</sup>

*B. Hosanna-Tabor Further Confuses Application of the Ministerial Exception*

Following *McClure*, the ministerial exception operated to “exempt from the coverage of various employment laws the employment relationships between religious institutions and their ‘ministers.’”<sup>96</sup> However, the standard that the Fifth Circuit articulated in *McClure*—that the exception be limited to a religious institution’s relationship with one of its “ministers”—begs the question of how a minister is defined in this context. A strict reading of the Title VII language that only “those practices relating to the employment of individuals of a particular religion to perform work connected with the employer’s religious activities”<sup>97</sup> produces a very different expectation than an interpretation which applies the exception to all employees of a religious organization. Further, neither a strict nor broad reading of the ministerial exception to Title VII under *McClure* implicated the middle ground, a scenario in which someone who is employed by a religious organization but is not necessarily connected with the employer’s religious activities—or at least not to a significant extent—violates that group’s religious doctrine.

*Hosanna-Tabor* presented the Supreme Court with an opportunity to address this question, and clearly define which religious institutions are protected by the ministerial exception and who qualifies as a “minister” of a religious organization.<sup>98</sup> Instead, *Hosanna-Tabor* further confused the issue. There, respondent Cheryl Perich worked at Hosanna-Tabor Evangelical Lutheran Church and School, the Lutheran Church–Missouri Synod, in Redford, Michigan.<sup>99</sup> Hosanna-Tabor School offers a “Christ-centered education” to students in grades kindergarten through eight, and classifies teachers into two categories: “called” and “lay.”<sup>100</sup> “Called” teachers are seen as having been called to their position by God; “[t]o be eligible to receive a call from

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95. *Id.* at 555.

96. *E.E.O.C. v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 (4th Cir. 2000).

97. *McClure*, 460 F.2d at 558.

98. Brian M. Murray, *The Elephant in Hosanna-Tabor*, 10 GEO. J.L. & PUB. POL’Y 493, 501–03 (2012).

99. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 699 (2012).

100. *Id.*

a congregation, a teacher must satisfy certain academic requirements,”<sup>101</sup> such as completing a “colloquy” program at a Lutheran college or university.<sup>102</sup> The program requires students to “take eight courses of theological study, obtain the endorsement of their local Synod district, and pass an oral examination by a faculty committee,”<sup>103</sup> only then may a teacher be called by a congregation.<sup>104</sup> A teacher who subsequently receives a call assumes the formal title “Minister of Religion, Commissioned,” and serves for an open-ended term.<sup>105</sup> “[A]t Hosanna-Tabor, a call could be rescinded only for cause and by a supermajority vote of the congregation.”<sup>106</sup> In comparison, “lay” or “contract” teachers at the school were not required to undergo any formal theology training, were appointed by the school board and were hired only when “called” teachers were unavailable.<sup>107</sup> Both lay and called teachers, however, “generally performed the same duties.”<sup>108</sup>

Perich served as a “called” teacher from 1999 to 2004; in addition to teaching math, language arts, social studies, science, gym, art, and music, her duties included teaching a religion class four days a week and leading the school in chapel services twice a year.<sup>109</sup> In 2004, Perich was diagnosed with narcolepsy and subsequently “began the 2004–05 school year on disability leave.”<sup>110</sup> After notifying Hosanna-Tabor in January 2005 that she would be able to return for the remainder of the school year, the school informed her that her position had been filled for that time.<sup>111</sup> Administrators then held a subsequent meeting in which they determined that Perich was unlikely to be physically capable of returning to work in the 2005 school year or the next, and voted to “offer Perich a ‘peaceful release’ from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher.”<sup>112</sup>

Perich returned to work on February 22, 2005, the day she had been medically cleared to resume working.<sup>113</sup> When she arrived at Hosanna-Tabor, Principal Stacey Hoeft asked her to leave.<sup>114</sup> Later the same day, Hoeft called Perich at home and told her she would likely

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Hosanna-Tabor*, 132 S. Ct. at 699.

106. *Id.*

107. *Id.* at 699–700.

108. *Id.* at 700.

109. *Id.*

110. *Id.*

111. *Hosanna-Tabor*, 132 S. Ct. 694, 700.

112. *Id.*

113. *Id.*

114. *Id.*

be fired from her position; “Perich responded that she had spoken with an attorney and intended to assert her legal rights.”<sup>115</sup> “Following a school board meeting” that was held “that same evening, board chairman Scott Salo sent Perich a letter” explaining that the school was “reviewing the process for rescinding her call in light of her ‘regrettable’ actions.”<sup>116</sup> Salo then followed up with a subsequent letter, explaining that the congregation would consider whether to rescind her call during its next meeting.<sup>117</sup> The letter cited “insubordination and disruptive behavior,” as well as damage done to her “working relationship” with Hosanna-Tabor and her “threatening to take legal action” as grounds for termination.<sup>118</sup> Following the congregation’s vote to rescind Perich’s call and her subsequent termination, Perich filed a complaint with the Equal Employment Opportunity Commission, which brought suit against Hosanna-Tabor for violation of the Americans with Disabilities Act.<sup>119</sup>

The District Court granted summary judgment for Hosanna-Tabor, agreeing that Perich’s claims were barred by the ministerial exception.<sup>120</sup> On appeal in the Sixth Circuit, the court “vacated and remanded the decision, concluding ‘Perich did not qualify as a “minister” under the exception [and] noting in particular that her duties as a called teacher were identical to her duties as a lay teacher.’”<sup>121</sup> The Supreme Court granted certiorari to determine “whether the Establishment and Free Exercise Clauses of the First Amendment bar [an employment discrimination] action when the employer is a religious group and the employee is one of the group’s ministers.”<sup>122</sup>

The Supreme Court then unanimously overturned the holding of the Sixth Circuit, with Chief Justice Roberts writing the opinion in the Court’s first occasion to consider whether the “freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment.”<sup>123</sup> Recognizing the existence of the ministerial exception, Justice Roberts wrote, “[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.”<sup>124</sup> Further, “[a]ccording the state the power to determine which individuals will minister to the faithful also

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115. *Id.*

116. *Id.*

117. *Hosanna-Tabor*, 132 S. Ct. at 700.

118. *Id.*

119. *Id.* at 700–01.

120. *Id.* at 701.

121. *Id.*

122. *Id.* at 699.

123. *Hosanna-Tabor*, 132 S. Ct. at 705.

124. *Id.* at 706.

violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.”<sup>125</sup>

It is this second aspect of the holding that begs the question of who exactly can qualify as a minister.<sup>126</sup> Justice Roberts acknowledged that “[e]very Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation,”<sup>127</sup> and the Supreme Court agreed. However, Justice Roberts articulated that the Court was “reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister”; instead, it was “enough for [the Court] to conclude, in [the first Supreme Court] case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”<sup>128</sup> Specifically, the Court pointed to the fact that “Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members,”<sup>129</sup> she was tasked with performing her role in accordance with specific religious doctrine, her “skills of ministry” were a factor in her performance reviews,<sup>130</sup> and “Perich’s title as a minister reflected a significant degree of religious training followed by a formal process of commissioning.”<sup>131</sup> Furthermore, Perich “held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms,”<sup>132</sup> and her job duties “reflected a role in conveying the Church’s message and carrying out its mission.”<sup>133</sup>

Lastly, the Court rejected the EEOC’s contention that “any ministerial exception ‘should be limited to those employees who perform exclusively religious functions.’”<sup>134</sup> The Court further narrowed this holding, noting the amount of time Perich spent performing religious functions is irrelevant; this is an issue that cannot be “resolved by a stopwatch.”<sup>135</sup> While the Court acknowledged the harms that the EEOC hypothesized could flow from applying the ministerial exception to this case,<sup>136</sup> Justice Roberts rejected the arguments, given that the

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125. *Id.*

126. Murray, *supra* note 98, at 499.

127. *Hosanna-Tabor*, 132 S. Ct. at 707.

128. *Id.*

129. *Id.*

130. *Id.* at 707.

131. *Id.*

132. *Id.*

133. *Hosanna-Tabor*, 132 S. Ct. at 708.

134. *Id.*

135. *Id.* at 709.

136. *Id.* at 710. The EEOC argued a “parade of horrors” would flow from recognizing the ministerial exception in employment discrimination suits, such as protecting “religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial.” *Id.* Further, the EEOC

case is “an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her.”<sup>137</sup> Chief Justice Roberts emphasized that the ministerial exception only bars “such a suit,” and noted that the Court expresses “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.”<sup>138</sup>

In a concurring opinion, Justice Thomas stated that “[a] religious organization’s right to choose its ministers would be hollow . . . if secular courts could second-guess . . . the organization’s theological tenants.”<sup>139</sup> Any “[j]udicial attempts to fashion a civil definition of ‘minister’ through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the ‘mainstream’ or unpalatable to some,” he said.<sup>140</sup> Here Justice Thomas takes perhaps the most deferential approach to the issue, asserting, “[T]he Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization’s good-faith understanding of who qualifies as its minister.”<sup>141</sup>

Similarly, in a separate concurrence, Justice Alito, joined by Justice Kagan, wrote that the term “minister” and the “concept of ordination” should not be viewed as central to the issue of religious autonomy.<sup>142</sup> Courts should instead “focus on the function performed by persons who work for religious bodies.”<sup>143</sup> The ministerial exception should be tailored to the purpose of the First Amendment, Justice Alito wrote, which “protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals,” in addition to “the critical process of communicating the faith.”<sup>144</sup> In accordance with this fundamental right, “religious groups must be free to choose the personnel who are essential to the performance of these functions.”<sup>145</sup> Indeed, it is a religious group’s constitutional right to remove an employee from his or her position if the group believes that the employee’s ability to perform the position has been compromised.<sup>146</sup>

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contended that the logic behind the exception would “confer on religious employers ‘unfettered discretion’ to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States.” *Id.*

137. *Hosanna-Tabor*, 132 S. Ct. at 710.

138. *Id.*

139. *Id.* (Thomas, J., concurring).

140. *Id.* at 711.

141. *Id.* at 710.

142. *Id.* at 711 (Alito, J., concurring).

143. *Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J., concurring).

144. *Id.* at 711–12.

145. *Id.* at 712.

146. *Id.*

### III. *HOSANNA-TABOR* COURT DEFERS TO RELIGIOUS ORGANIZATIONS TO DEFINE ITS “MINISTERS”

*Dias v. Archdiocese of Cincinnati* presented one of the first opportunities post-*Hosanna-Tabor* for a court to evaluate whether the ministerial exception applies in an employment discrimination case.<sup>147</sup> To determine whether Dias, a technology coordinator with no religious training, qualified as a minister of the Archdiocese, the Court closely examined her job functions within the school, distinguishing her responsibilities from Perich’s in *Hosanna-Tabor*.<sup>148</sup>

Defendants here did not hold Plaintiff out as a minister, they did not give her any sort of religious title or commission, and the congregations of the Defendant churches took no role in reviewing her “skills in ministry” or her “ministerial responsibilities” because she had none. Plaintiff argues Defendants never charged her with teaching the faith, participating in religious services, or leading devotional exercises, and she never held herself out as a minister, nor did she ever undergo religious training. In fact, as a non-Catholic, Defendants would not permit her to teach basic Catholic doctrine.<sup>149</sup>

[T]he Court concludes that Plaintiff is correct that her duties while employed by Defendants show that she was not a minister for purposes of the ministerial exception. Clearly, Plaintiff performed duties as a computer teacher and overseeing computer systems. The Court finds dispositive that as a non-Catholic, Plaintiff was not even permitted to teach Catholic doctrine. Plaintiff had received no religious training or title and had no religious duties. The authorities cited by Plaintiff show that it is not enough to generally call her a ‘role model,’ or find that she is a ‘minister’ by virtue of her affiliation with a religious school. As such, Plaintiff’s claims are not barred by the ministerial exception.<sup>150</sup>

Reaching this determination required precisely the kind of judicial second-guessing that Justice Thomas likely anticipated in his *Hosanna-Tabor* concurrence.<sup>151</sup>

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147. Jessica L. Waters, *Testing Hosanna-Tabor: The Implications for Pregnancy Discrimination Claims and Employees’ Reproductive Rights*, 9 STAN. J.C.R. & C.L. 47, 68–69 (2013).

148. *Id.*

149. *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 U.S. Dist. LEXIS 43240, at \*14 (S.D. Ohio Mar. 29, 2012).

150. *Id.* at \*17.

151. *Hosanna-Tabor*, 132 S. Ct. at 710 (Thomas, J., concurring),

Circuit courts have generally agreed that the definition of a “minister” depends on an individual’s job functions within a religious organization.<sup>152</sup> Not surprisingly, a separate debate has emerged regarding what qualifies as a religious organization,<sup>153</sup> but for the purposes of this Note, who qualifies as a minister is the determinative question once a court finds an organization to be of religious affiliation. Separately, the EEOC has its own standard for evaluating whether the ministerial exception applies in a Title VII discrimination case, though the organization’s guidelines are not clear. The EEOC states that the ministerial exception “applies only to employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction.”<sup>154</sup>

Prior to *Hosanna-Tabor*, Courts also differed in terms of the procedural application of the ministerial exception, specifically whether it should function as an affirmative defense on the merits or a jurisdictional bar.<sup>155</sup> As discussed above, the Supreme Court in *Hosanna-Tabor* articulated that the exception operates as an affirmative defense “to an otherwise cognizable claim, not a jurisdictional bar,” because “the issue presented by the exception is whether the allegations the plaintiff makes entitle him to relief, not whether the court has power to hear [the] case.”<sup>156</sup> Justice Roberts concluded that “District courts have power to consider ADA claims in cases of this sort, and to decide whether the claim can proceed or is instead barred

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152. See, e.g., *Headley v. Church of Scientology Int'l*, 2010 U.S. Dist. LEXIS 40533, at \*8 (9th Cir.) (“In this circuit, a person qualifies as a minister under this exception if she: (1) is employed by a religious institution; (2) was chosen for the position based largely on religious criteria, and (3) performs some religious duties and responsibilities.”) (internal quotation marks and citations omitted); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (in general, an employee will be considered a minister if her job responsibilities include “teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship”); *Petruska v. Gannon Univ.*, 462 F.3d 294, 394 n.6 (3d Cir. 2006) (agreeing that “a focus on the function of an employee’s position is the proper one”).

153. Murray, *supra* note 98, at 511.

154. EEOC, *Questions and Answers: Religious Discrimination in the Workplace* (Jan. 31, 2011), [http://www.eeoc.gov/policy/docs/qanda\\_religion.html](http://www.eeoc.gov/policy/docs/qanda_religion.html), archived at <http://perma.cc/V5A9-Q7RZ>.

155. See *Hosanna-Tabor*, 132 S. Ct. at 709 n.4 (comparing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007), and *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038–39 (7th Cir. 2006) (treating the exception as jurisdictional), with *Petruska*, 462 F.3d at 302, *Bryce v. Episcopal Church*, 289 F.3d 648, 654 (10th Cir. 2002), *Bollard v. Cal. Province of Soc. of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999) and *Natal v. Christian & Military Alliance*, 878 F.2d 1575, 1576 (all treating the exception as an affirmative defense)).

156. *Hosanna-Tabor*, 132 S. Ct. at 709 n.4 (internal quotation marks and citations omitted).

by the ministerial exception,<sup>157</sup> thus giving the courts the power to determine whether an employment discrimination claim, such as one filed under the Americans with Disabilities Act or Title VII, is bona fide or an exception to the rule.

#### IV. WHO SHOULD QUALIFY AS A MINISTER? A PROPOSED UNIFORM TEST FOR FUTURE APPLICATION

Now that the Supreme Court has recognized that a religious organization's freedom to select its ministers must be weighed in an employment discrimination context, perhaps the best test to apply in determining who qualifies as a minister in an employment discrimination context is something similar to the Ninth Circuit's. Like others, the Ninth Circuit recognizes that "[b]ecause the plain language of Title VII purports to reach a church's employment decisions regarding its ministers,"<sup>158</sup> the ministerial exception plays a critical role in reconciling the statute with the Constitution. In *Bollard v. California Province of the Society of Jesus*, the court explained that Title VII creates "two exemptions from its non-discrimination mandate for religious groups. One permits a religious entity to restrict employment connected with the carrying on . . . of its activities to members of its own faith; the other permits parochial schools to do the same."<sup>159</sup> However, the scope of the exception's application must be limited to "what is necessary to comply with the First Amendment,"<sup>160</sup> for example, "[i]n the case of lay employees, the particularly strong religious interests surrounding a church's choice of its representatives are missing,"<sup>161</sup> and therefore the Ninth Circuit has concluded that applying Title VII is constitutionally permissible. The Circuit seems to view the potential for a secular court to pass judgment on questions of faith or doctrine as the tipping point in a Title VII case where the ministerial exception may apply.<sup>162</sup>

So, if an employee's job functions are inextricably linked to performing religious functions—regardless of the extent of his or her additional, non-religious responsibilities—a church-minister relationship implicitly exists.<sup>163</sup> Additionally, if the nature of that relationship, or the duties imposed upon that minister, is outlined in his or her employment contract, a court's role in evaluating a contract

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157. *Id.*

158. *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 946–47 (1999).

159. *Id.* at 945 (internal quotation marks and citations omitted).

160. *Id.* at 947.

161. *Id.*

162. *Id.*

163. *Id.* at 948–49.

dispute between the parties should end there, absent any showing of race, sex or national origin discrimination. As the Ninth Circuit has articulated, “neither of [Title VII’s] exceptions remove race, sex, or national origin as an impermissible basis of discrimination against employees of religious institutions. Nor do they single out ministerial employees for lesser protections than those enjoyed by other church employees.”<sup>164</sup>

### CONCLUSION

Though the Supreme Court in *Hosanna-Tabor* recognized for the first time the ministerial exception as an affirmative defense in employment discrimination cases, by limiting its decision to one cause of action, the Court opened the door to much uncertainty in future application.<sup>165</sup> Indeed, it is precisely this type of uncertainty that arose in *Dias*, where a religious organization viewed one of its ministers as having violated a morals clause in her employment contract.<sup>166</sup> Courts in the Sixth Circuit have consistently upheld the sort of morals clause that was at issue in *Dias*, so long as they are applied equally to male and female employees.<sup>167</sup> However, this did not persuade the District Court in *Dias*; in evaluating whether the case should be resolved in summary judgment, the Court noted that this type of provision is a “close call” because “Plaintiff performed her duties under the contract, and the only basis for her termination was Defendant’s interpretation of the morals clause.”<sup>168</sup> Ultimately, the Court held

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164. *Bollard*, 196 F.3d at 945.

165. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) (“The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. Today we hold only that the ministerial exception bars such a suit. 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.”).

166. *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 U.S. Dist. LEXIS 43240, at \*17–\*20 (S.D. Ohio 2012). *Dias*’s contract explicitly stated that she would “comply with and act consistently in accordance with the stated philosophy and teachings of the Roman Catholic Church[.]” *Id.* Though in the church’s eyes *Dias*’s use of artificial insemination was “gravely immoral” under a Catechism of the Catholic Church, *Dias* contended that the contract made no specific reference to artificial insemination and that the school’s contention that “she engaged in bad faith by signing such contracts is contingent upon proof that she knew that such conduct was against the teachings and philosophy of the church[.]” *Id.*

167. *See id.* at \*18 (citing *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658–59 (6th Cir. 2000) (“morals clause applied equally to male and female employees provides no basis for pregnancy discrimination”); *Boyd v. Harding Acad. of Memphis*, 88 F.3d 410, 413 (6th Cir. 1996) (“morals clause upheld prohibiting employees from engaging in premarital sex”)).

168. *Id.* at \*19–\*20.

that contract law dictates that “[a]n enforceable contract requires a meeting of the minds,” and here defendants attempted to “use against Plaintiff a broad contract provision that does not specifically prohibit artificial insemination.”<sup>169</sup>

This type of uncertainty is precisely what should have been addressed in *Hosanna-Tabor*. There, the Court passed on a valuable opportunity to devise a standard for evaluating who qualifies as a minister. Further, the Court should have taken the opportunity to extrapolate on how the ministerial exception should function in other contexts, such as contract disputes (a key element in *Dias*, for example) and tort claims. “Such issues can be judged when they arise,” the Court concluded.<sup>170</sup>

However, the Court did not explain its rationale for this narrow holding. If the ministerial exception creates an affirmative defense for religious organizations that terminate the employment of its ministers, why should a contract dispute between these same parties be treated differently? When an individual takes on a role as a minister of a religious organization, it is inconceivable that job functions and responsibilities will not be outlined in an employment contract. Therefore, if a religious organization deems that one of its ministers has violated a provision in his or her employment contract that specifically pertains to a religious function, any ensuing contract dispute must necessarily be guided by the same principle underlying the exception itself. As the Court held in *Hosanna-Tabor*, 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;” instead, it “ensures that the authority to select and control who will minister to the faithful—[is] a matter ‘strictly ecclesiastical.’”<sup>171</sup>

Courts have frequently recognized that “‘a church is always free to burden its activities voluntarily through contract, and such contracts are fully enforceable in civil court.’”<sup>172</sup> Under the Free Exercise Clause of the First Amendment, “[e]nforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church’s free exercise rights.”<sup>173</sup> However, under the Establishment Clause, the issue is complicated by

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169. *Id.* at \*19.

170. Lyle Denniston, *Opinion Recap: A Solid “Ministerial Exception,”* SCOTUSBLOG (Jan. 11, 2012 11:33 AM), <http://www.scotusblog.com/2012/01/opinion-recap-a-solid-ministerial-exception/>, archived at <http://perma.cc/492D-DWXC>.

171. *Hosanna-Tabor*, 132 S. Ct. at 709 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952)).

172. *Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006), (quoting *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990)).

173. *Id.* at 310.

a contract that entangles competing religious and statutory rights.<sup>174</sup> Accordingly, “courts typically consider the character of the claim, the nature of the remedy, and the presence or absence of a direct conflict between the . . . secular prohibition and the proffered religious doctrine.”<sup>175</sup> If resolution of a contract dispute therefore turns on an ecclesiastical inquiry, it may be unconstitutional for a court to decide who should prevail. A contractual claim such as the one at issue in *Dias* highlights exactly this type of problem. Though the Church viewed Dias’s use of artificial insemination as strictly prohibited by Catholic Catechism, the District Court rejected summary judgment on the contract claim, holding that a genuine issue of material fact existed as to the interpretation of the morals clause at hand.

Aside from the fact that this type of holding creates precisely the judicial second guessing that Justice Thomas cautioned courts against employing, allowing a court to determine the breadth and meaning of a morals clause may require religious organizations to draft employment contracts with a high level of specificity as to each separate provision. It is easy to see how including this level of detail may be virtually impossible in an employment contract setting, leaving the door open to an employee—despite whether that individual is a minister of the church—to allege breach of contract based on his or her interpretation of the agreement. Furthermore, employees of a religious organization may have a strong argument that this type of employment agreement is unconscionable and therefore unenforceable, regardless of whether the employee signed the contract at the start of his or her employment.

As the Supreme Court emphasized in *Hosanna-Tabor*, the ministerial exception is critically important to preserving religious freedom as a right constitutionally granted by the First Amendment.<sup>176</sup> The Supreme Court has consistently upheld First Amendment principles, recognizing that hierarchical religious organizations have a constitutional right to “establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.”<sup>177</sup> Furthermore, “the Constitution requires that civil courts accept their decisions as binding upon them.”<sup>178</sup> This constitutionally guaranteed religious freedom might be threatened, however, by judicial second-guessing of employment decisions by religious employers. Without more clarity

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174. *Id.* at 311.

175. *Id.* (internal quotation marks and citations omitted).

176. See *Hosanna-Tabor*, 132 S. Ct at 712.

177. *Id.* at 705 (internal quotation marks and citations omitted); see also *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 119 (1952).

178. *Hosanna-Tabor*, 132 S. Ct. at 712 (internal quotation marks and citations omitted).

from the Supreme Court on who qualifies as a minister and in which contexts the exception should apply, religious employers may eventually draft contracts so stringent they border on unconscionable. On the other end of the spectrum is the more alarming possibility that religious organizations may have to defend all of its employment decisions, thereby dissolving the ministerial exception and tarnishing its First Amendment roots.

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