Journal of Liberal Arts and Humanities (JLAH)
Issue: Vol. 4; No. 6; August 2023 (pp. 1-14)
ISSN 2690-070X (Print) 2690-0718 (Online)
Website: www.jlahnet.com
E-mail: editor@jlahnet.com
Doi:10.48150/jlah.v4no6.2023.a1

Will aBroadened "Ministerial Exception" to Title VII of the Civil Rights Act of 1964 be Further Expanded to Include Employment Decisions Based on the Religious Views of Secular Employers?

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ABSTRACT

This article distinguishes between a narrow and a broad interpretation of the ministerial exception to Title VII of the Civil Rights Act of 1964, or on the other hand, raises questions whether courts have"opened the door" to an expansion of exceptions that would permit *any employer* to assert a religious basis for an employment decision,even relating to employees who were not performing a religious function based on *Burwell v. Hobby Lobby Stores, Inc.* in which the United States Supreme Court had allowed a privately held for-profit corporation to be exempt from a regulation to which its owners had objected on the basis of their own religious views.

Key Words: employment law, discrimination, Civil Rights Act of 1964, Equal Employment Opportunity Commission, ministerial exception, Religion Clauses

1. Research Question

Are courts in the United States, led by the United States Supreme Court, expanding exceptions under Title VII of the Civil Rights Act of 1964 which would permit employers to make employment decisions based on the "sex" of employees, as the term had been defined in *Bostock v. Clayton County, Georgia* (2020) or based on otherwise discriminatory criteria; or, are courts remaining faithful to a discreet and limited line of cases that provide First Amendment protections to "religious based" employers (Robb, 2019) based on the free exercise of religion in the area of employment where employees are playing a "key role" in transmitting the religious message of an employer?

2. Introduction

Consider these statements made by Rachel Laser, President of Americans United for Separation of Church and State, and a member of a plaintiff's legal team in a case that originated in Indiana, *Fitzgerald v. Roncalli High School, Inc. and Roman Catholic Archdiocese of Indianapolis, Inc.* (2023), who described the case as an attack by "religious extremists" who are "waging a crusade to undermine basic civil rights…" Laser continued: "These religious extremists are trying to expand a narrow, commonsense rule — meant to allow houses of worship to select their own clergy according to their own faith — into a broad license to circumvent civil rights laws and to discriminate." In the alternative, was the decision reached in *Fitzgerald* a legitimate and reasoned application of the "ministerial exception" recognized under Supreme Court precedent?

As a policy matter, was the Seventh Circuit correct in its broad interpretation of the "ministerial exception," as opposed to a narrower view that permitted an exception for clergy or other actual "religious ministers" or where an employee was performing a "key role" in transmitting the religious message of an employer?

3. The Heart of the Debate: The Civil Right Act of 1964 (adapted from Shannon & Hunter, 2020)

Title VII of the Civil Right Act of 1964 makes it "unlawful … for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual … because of such individual's race, color, religion, sex, or national origin."

In interpreting Title VII, the Eleventh Circuit Court of Appeals held that Title VII did not prohibit an employer from firing an employee (Gerald Bostock) for being gay and thus the plaintiff's suit for employment discrimination should be dismissed as a matter of law. In contrast, the Second and Sixth Circuits had allowed the claims of plaintiffs Donald Zarda and Aimee Stevens to proceed, setting up a classic case where decisions of Circuit Courts are in conflict.

Because of this direct conflict in the Circuit Courts of Appeals, the United States Supreme Court was asked to decide two discreet questions arising in three cases: *Bostock* v. *Clayton County, Georgia*(11thCircuit Court of Appeals), and two companion cases, *Altitude Express Incorporated v. Zarda* (2ndCircuit Court of Appeals),and *Harris v. EEOC*6th Circuit Court of Appeals):

"Does Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of … sex," encompass discrimination based on an individual's sexual orientation?"

"Does Title VII of the Civil Rights Act of 1964 prohibit discrimination against transgender employee based on (1) their status as transgender or (2) sex stereotyping?"

In *Bostock v. Clayton County, Georgia* (2020), a historic case decided by the United States Supreme Court on Monday, June 15, 2020, the Supreme Court in a 6-3 decision ruled that Title VII of the Civil Rights Act of 1964 protects gay, lesbian, and transgender people from discrimination in employment "on the basis of sex," one of the protected categories under the Act (Sherman, 2020; Turner, 2020).

To the surprise of many pundits—but not to some who knew Justice Neil Gorsuch personally—Justice Gorsuch, an appointee of President Donald Trump to the Court, authored the majority opinion and answered these two questions in the affirmative. Justice Gorsuch wrote for the Court: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. … Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

The genesis of the dispute which the Supreme Court at least partially resolved in *Bostock*can be traced to a historic piece of legislation from the 1960s, the Civil Rights Act of 1964 (United States Senate, 2023)—most especially Title VII—because of its inclusion of the term "sex" in its enumerated categories of race, religion, color, national origin, and sex (Miller-Merrell, 2022).

The Civil Rights Act of 1964 was designed to outlaw the most severe forms of discrimination against African Americans, including all forms of racial segregation. In addition, the Act attacked the unequal application of voter registration requirements and all forms of racial segregation in schools, in the workplace, and by facilities that offered services to the general public (adapted from Shannon & Hunter, 2020).

President John F. Kennedy's vision for a new civil right bill included provisions to ban all forms of discrimination in public accommodations,while most importantly to President Kennedy, enabling the United States Attorney General to join in lawsuits against state governments which operated or encouraged the formation of segregated schools.

Many Democratic and Republican members of the Congress (including a West Virginia Congressman, Arch Moore, whose daughter serves today as a member of the United States Senate) saw this as an unique opportunity to affect real change and crafted a bill which included calling for a fair employment section that would ban discrimination by *private employers*, as well as including a section that expanded the power of the Attorney General to intervene in Southern civil and voting rights cases.

Strong opposition to the bill came from South Carolina Senator Strom Thurmond (he would later officially join the Republican Party in 1964) who said: "This so-called Civil Rights Proposals, which the President has sent to Capitol Hill for enactment into law, are unconstitutional, unnecessary, unwise and extend beyond the realm of reason. This is the worst civil-rights package ever presented to the Congress and is reminiscent of the Reconstruction and actions of the radical Republicans" (quoted in Federer, 2019).

The future Republican nominee against President Lyndon Johnson in 1964, Senator Barry Goldwater of Arizona, voted against ending the debate in the United States Senate, and later against the bill itself, stating that the bill was a "threat to the very essence of our basic system." [This vote may have assured Sen. Goldwater's selection as the Republican nominee against President Johnson in 1964 but may have doomed his chances against the President in the fall elections.]

Title VII banned discrimination by employers on the basis of race, religion, color, sex or national origin in employment. It also added protections for individuals "associated with other races,"such as individuals involved in an interracial marriage.Employers were prohibited from discriminating in any phase of employment including hiring, recruiting, pay, termination, and promotions (see Miller-Merrell, 2022). The Equal Employment Opportunity Commission or EEOC plays a critical role in paper in enforcing Title VII (see Occhialino& Vail, 2005; Cunningham & Stetson, 2019).

However, the Act provided for certain limited "bona fide occupational qualifications" or exceptions under the Act (see May, 1985; Hunter, Shannon, & Amoroso, 2023; U.S. Equal Employment Opportunity Commission, 2023).

The Supreme Court has been called up on many occasions to interpret the constitutionality and reaches of some of the more important provisions of the Act. The following is a summary of some of the important decisions of the United States Supreme Court (and the 7th Circuit) relating to the Civil Rights Act of 1964:

- *Heart of Atlanta Motel Inc. v. United States* (1964), holding that the Commerce Clause gave the U.S. Congress power to force private businesses to abide by Title II of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, religion, or national origin in public accommodations (Cortner, 2002);
- *Katzenbach v. McClung* (1964), holding that Congress acted within its power under the Commerce Clause of the United States Constitution in forbidding racial discrimination in restaurants as a "burden to interstate commerce" (Wonders, 1991);
- *Griggs v. Duke Power Co.* (1974),holding that under Title VII of the Civil Rights Act of 1964, if certain job tests disparately impact ethnic minority groups, businesses must demonstrate that such tests are "reasonably related" to the job for which the test is required (Carrigan, 2007; Garrow, 2014);
- *Washington v. Davis* (1976), holding that laws that have a racially discriminatory effect but were not adopted to advance a racially discriminatory purpose are valid under the U.S. Constitution (Lerner, 1976; Margulies, 1995);
- *Chrapliwy v. Uniroyal* (1982) (7Th Circuit Court of Appeals), holding that reasonable attorney's fees are recoverable for time spent persuading the Federal Government to abrogate contracts when a party engages in discriminatory practices (Woods, 2008); and
- *Wards Cove Packing Co. v. Atonio* (1989), holding that if the respondents were able to establish a *prima facie* disparate-impact case, the petitioners would then need to "produce evidence of a legitimate business justification" for the hiring practices that created the disparity (see Shaw, Moore, & Braswell, 1990).

From the outset, the inclusion of the term "sex" in Title VII has proved to be vexing in both context and meaning (see Shannon & Hunter, 2020).

The prohibition on sex discrimination found in Title VII was added by Rep. Howard Smith, Chairman of the House Rules Committee, who strongly opposed the legislation. Rep. Smith's amendment to add the word "sex" to the bill was passed by vote of 168 to 133 in the House of Representatives and became part of the final legislation. The inclusion of the term "sex" in the bill under these confusing circumstances led to the comments of Justice William Rehnquist, who explained in *Meritor Savings Bank v. Vinson* (1986), "The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives... the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" This comment would be quite prophetic!

Precisely because of unanswered questions generated by the Act itself, the Supreme Court has been called upon to decide a variety of cases relating to sex discrimination. These cases may be summarized as follows:

- Cleveland Bd. of Ed. v. LaFleur (1974): The Court found that Ohio public schools' mandatory maternity leave rules for pregnant teachers violate constitutional guarantees of due process (Nesset-Sale, 2006);
- Meritor Savings Bank v. Vinson (1986): The Court found that a claim of "hostile environment" sexual harassment is a form of sex discrimination that may be brought under Title VII of the Civil Rights Act of 1964 (Onwuachi-Willig, 1986);

- Johnson v. Transportation Agency (1987): The Court decided that a county transportation agency appropriately took into account an employee's sex as one factor in determining whether she should be promoted (Cohn, 2003);
- Franklin v. Gwinnett County Public Schools (1992): The Court ruled that students who had been subjected to sexual harassment in public schools may sue for monetary damages (Vargyas, 1993);
- Oncale v. Sundowner Offshore Serv., Inc. (1998): The Court held that sex discrimination consisting of same-sex sexual harassment can form the basis for a valid claim under Title VII of the Civil Rights Act of 1964 (McLean, 2021);
- Burlington Industries, Inc. v. Ellerth (1998): The Court held that an employee who refuses unwelcome and threatening sexual advances of a supervisor (but suffers no real job consequences) may recover against the employer without showing the employer is at fault for the supervisor's actions (Scott, 1998);
- Faragher v. City of Boca Raton (1998): The Court decided that an employer may be liable for sexual harassment caused by a supervisor, but liability depends on the reasonableness of the employer's conduct, as well as the reasonableness of the plaintiff victim's conduct (Faragher, 2005).

4. *Bostock v. Clayton County, Georgia*(2020).

The three cases which the Court decided in June of 2020, capsulated as *Bostock v. Clayton County Georgia* (2020) (Widick, 2022), involved two gay men and a transgender woman who sued for employment discrimination after they had lost their jobs.

Bostock v. Clayton County, Georgia(2020)

The plaintiff received criticism for his participation in a gay softball league and for his sexual orientation and identity generally. Clayton County terminated Bostock allegedly for "conduct unbecoming of its employees."

Altitude Express v. Zarda(2020)

On one occasion after Zarda informed a female client about his sexual orientation and performed the tandem jump with her, the client alleged that Zarda had inappropriately touched her and disclosed his sexual orientation to excuse his behavior. In response to this complaint, Zarda's boss fired him. Zarda denied touching the client inappropriately and claimed that he was fired solely because of his reference to his sexual orientation.

Harris v. Equal Employment Opportunity Commission(2020)

Aimee Stephens worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc., a closely held for-profit corporation that operates several funeral homes in Michigan. For most of her employment at the Funeral Home, Stephens lived and presented as a man. Shortly after she informed the Funeral Home's owner and operator that she intended to transition from male to female, she was terminated.

Justice Gorsuchmade several important points in the majority opinion in *Bostock*:

"An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

Justice Gorsuch's majority opinion included a "pure expression of textualism,"a method of statutory interpretation that asserts that a statute should be interpreted according to its plain meaning and not according to the intent of the legislature, the statutory purpose, or the legislative history (Murrill, 2021).

"In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

Justices Samuel Alito, Brett Kavanaugh, and Clarence Thomas dissented from Justice Gorsuch's majority opinion. "The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous," Alito wrote in the dissent. "Even as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'"

Justice Kavanaugh wrote in a separate dissent that the Court was rewriting the law to include gender identity and sexual orientation—a job that belongs to Congress, and not to courts.

"Like many cases in this Court, this case boils down to one fundamental question: Who decides? Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of " an individual's "race, color, religion, sex, or national origin." The question here is whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court."

And then,Justice Kavanaugh seemed to "want to have it both ways" in making the following bizarre statement." Justice Kavanaugh acknowledged that the decision represents an "important victory achieved today by gay and lesbian Americans." Justice Kavanaugh wrote:

"Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit — battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result."

4.1. Why the Issue Will Simply Not "Go Away"

Echoing many of the points raised in the dissenting opinion of Justice Alito, Justice Gorsuch noted that the Supreme Court would no doubt be called upon in the not-too-distant-future to express its views and establish precedents under which a host of other questions would be litigated. For example, Justice Alito had noted that employers who have religious objections to employing LGBT people also might be able to raise those claims in a different case, which is where the Court in fact went in June of 2023 when the United States Supreme Court referenced its earlier opinion in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (*Hosanna-Tabor*) (2012) in an employment discrimination case.

5. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012): A Reappraisal

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (*Hosanna-Tabor*) (2012) (Waltman, 2012; Ellsworth, 2013), The United States Supreme Court considered the following question:
"Does a "ministerial exception," which prohibits most employment related lawsuits against religious organizations by employees performing religious functions, apply to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religious classes, is a commissioned minister, and regularly leads students in prayer and worship?"

Hosanna-Tabor is a member congregation of the Lutheran Church–Missouri Synod. The Synod classifies teachers working in one of its schools into two categories: "called" and "lay." "Called" teachers are considered having been *called* to their vocation by God. In order to be eligible to be considered "called," a teacher must complete certain academic requirements, including a course of theological study. Once called, a teacher receives the formal title of "Minister of Religion, Commissioned."

In contrast, "lay" teachers, were not required to be trained by the Synod or even to be a member of the Lutheran faith. Although both lay and called teachers at Hosanna-Tabor generally performed the same duties, lay teachers were hired only when called teachers were unavailable,indicating a preference for hiring called teachers.

5.1. The Record

After Cheryl Perich completed the required training, Hosanna-Tabor asked her to become a "called teacher." Perich accepted the call and was designated a commissioned minister of religion. In addition to teaching secular subjects, Perich taught a class in religion, led her students in daily prayer and other devotional exercises, and took her students to a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.

Perich developed narcolepsy, a sleep disorder that makes people drowsy during the day, and began the 2004–2005 school year on disability leave. In January of 2005, she notified the principal that she would be able to resume her work in February of 2005. The principal responded that the school had already contracted with a lay teacher to fill Perich's position for the remainder of the 2004-2005 school year. The principal also expressed concern that Perich would not be ready to return to the classroom.

The congregation subsequently offered to pay a portion of Perich's health insurance premiums in exchange for her resignation as a called teacher. However, Perich refused to resign. In February of 2005, Perich presented herself at the school and refused to leave until she received written documentation that she had reported to work. The principal later called Perich and told her that she would likely be fired.

Perich responded that she had spoken with an attorney and intended to assert her legal rights to return to her employment. In response, the chairman of the school board advised Perich that the congregation would consider whether to rescind her call at its next meeting. As grounds for termination, the letter cited Perich's "insubordination and disruptive behavior," as well as the damage she had done to her "working relationship" with the school by "threatening to take legal action." The congregation voted to rescind Perich's call, and Hosanna-Tabor sent her a letter of termination.

Perich filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming that her employment had been terminated in violation of the Americans with Disabilities Act. Having investigated the matter, the EEOC brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit.

Invoking what is known as the "ministerial exception," Hosanna-Tabor argued that the suit was barred by the First Amendment because the claims concerned the employment relationship between a religious institution and one of its ministers. The District Court agreed and granted summary judgment in Hosanna-Tabor's favor.

The Sixth Circuit Court of Appeals, however, vacated the judgment of the District Court and remanded the case for further action by the District Court.

While the Sixth Circuit recognized the existence of a ministerial exception rooted in the First Amendment, the Court concluded that Perich did not qualify as a "minister" under the exception.

5.2. The Ministerial Exception

The decision of the Sixth Circuit examined the import of the "ministerial exception," which is based on the *Establishment* and *Free Exercise* clauses (the "Religion Clauses") of the First Amendment to the Constitution of the United States (see Lund, 2011; Meek & Andress, 2020).

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the newly established Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. At the same time, the Religion Clauses would bar suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws.

Interestingly, the United States Supreme Court first considered the issue of government interference with a church's ability to select its own ministers in the context of disputes over church property. In *Watson* v. *Jones (1871), Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America (1952), and Serbian Eastern Orthodox Diocese for United States and Canada* v. *Milivojevich (1976),*the Supreme Court confirmed that it is impermissible for the government to question a church's determination of who can act as one of its ministers.

Since the enactment of Title VII of the Civil Rights Act of 1964 and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of the "ministerial exception," grounded in the First Amendment, that effectively precludes a court's inquiry as to claims concerning the employment relationship between a religious institution and its ministers.

The United States Supreme Court has also recognized the existence of the ministerial exception, stating that "requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision." Such actions would interfere with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs and act on its behalf in the public sphere.

By imposing an unwanted minister on a church, the state "infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." Granting the state, through enacting legislation such as Title VII, with the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical or church decisions.

The EEOC and Perich contended that religious organizations can defend against claims of employment discrimination by invoking their First Amendment right to "freedom of association." They thus saw no need—and no legal basis—for a special rule for ministers based on the Religion Clauses.

The Supreme Court disagreed and noted that the positions advanced by the EEOC and Perich was "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations," determining that the Court could not accept what it called the "remarkable view" that the Religion Clauses "have nothing to say about a religious organization's freedom to select its own ministers"—in essence, which would permit "government interference with an internal church decision that affects the faith and mission of the church itself."

While the Supreme Court added that the ministerial exception was not limited to the head of a religious congregation, the Court did not adopt a rigid formula for deciding when an employee qualifies as a minister in its broadest sense. In the case of Perich, it was "enough" to conclude that the ministerial exception covers Perich, given all the circumstances of her employment. Hosanna-Tabor held her out as a minister, with a role distinct from that of other employees. That title represented a significant degree of religious training followed in fact by a formal process of commissioning. Perich also held herself out as a minister by accepting the formal call to religious service. And Perich's job duties reflected a "role in conveying the Church's message and carrying out its mission," playing an important part in transmitting the Lutheran faith.

The Supreme Court stated that that in determining that Perich was not covered by the ministerial exception, the Sixth Circuit had committed three errors. First, the Sixth Circuit had failed to find any relevance in the fact that Perich was a commissioned minister. Although the title of "commissioned minister," by itself, would not automatically ensure the application ofthe ministerial exception, "the fact that an employee has been ordained or commissioned as a minister is surely relevant," as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's position.

Second, the Supreme Court stated that the Sixth Circuit gave too much weight to the fact that lay teachers at the school performed the same religious duties as did Perich. Though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions—particularly when, as here, they did so only because commissioned ministers were unavailable.

Third, the Supreme Court stated that Sixth Circuit placed too much emphasis on Perich's performance of non-religious or secular duties. Although the amount of time an employee spends on particular activities is relevant in assessing that employee's status, that factor cannot be considered in isolation, without regard to the "other considerations" discussed above.

The Supreme Court noted that the exception ensures that the authority to select and control who will minister to the faithful is the church's alone. The Court held that the First Amendment safeguards the right of a religious organization, free from interference from civil authorities, to select those who will "personify its beliefs," "shape its own faith and mission," or "minister to the faithful."

In addition, the Court also noted that the exception would apply to discrimination claims involving selection, supervision, and removal against a religious institution by employees who "*play certain key roles*" because "[s]tate interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion."

Though Perich was no longer seeking reinstatement, she was seeking frontpay, under circumstances "when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible (*EEOC v. Prudential Federal Savings and Loan Association*, 1985), backpay, compensatory and punitive damages, and attorney's fees.

However, the Supreme Court concluded that granting such relief would operate as a penalty on the Church for terminating an unwanted minister and would be "no less prohibited by the First Amendment than an order overturning the termination. Such relief would depend on a determination that Hosanna-Tabor was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception."

The Supreme Court thus concluded that because Perich was a minister for purposes of the exception, "this suit must be dismissed." An order reinstating Perich as a "called teacher" would have plainly violated the Hosanna-Tabor Evangelical Lutheran Church and School's freedom under the Religion Clauses to select its own ministers.

However, "This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission."

The Court expressed no view on whether the exception bars "other types of suits." That inquiry would take place in *Fitzgerald v. Roncalli High School* in July of 2023.

6.*Fitzgerald v. Roncalli High School, Inc. and Roman Catholic Archdiocese of Indianapolis. Inc*. (2023)

For fourteen years, Michelle Fitzgerald worked for the defendants as a guidance counselor and Co-Director of Guidance at Roncalli High School, operated by the Roncalli High School Board of Directors under the auspices of the Roman Catholic Archdiocese of Indianapolis, Indiana. Fitzgerald was, by all accounts, a "good and effective" employee and earned years of stellar performance reviews during her tenure at Roncalli. But in 2018, the defendants declined to renew her one-year employment agreement, explaining that her same-sex marriage was contrary to the Catholic faith.

Shortly after Fitzgerald was placed on administrative leave, her Co-Director of Guidance, Lynn Starkey, informed Roncalli that she too was in a same-sex marriage. Similar to what had taken place with Fitzgerald, Roncalli decided not to renew Starkey's employment agreement. Fitzgerald and Starkey brought separate lawsuits against Roncalli High School and the Archdiocese for, among other things, sex discrimination under Title VII of the Civil Rights Act of 1964.

Both cases were assigned to District Court judge, Richard L. Young. Starkey's case proceeded to summary judgment first, which the District Court granted in favor of the defendants. **[A summary** judgment may be granted upon a party's motion when the pleadings, discovery, and any affidavits show that there is no issue of material fact and that the party is entitled to judgment in its favor as a matter of law (Cappellino, 2023).] The Seventh Circuit Court of Appeals affirmed the decision in *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc*.(2022).

About two months after the decision had been handed down in *Starkey*, the District Court granted summary judgment to the defendants in *Fitzgerald*, as well. Although the Court acknowledged that there were numerous genuine factual disputes contained in the record, it found that *Starkey* foreclosed Fitzgerald's case*as a matter of law*under the ministerial exception.

Based on the Supreme Court's decision in *Bostock v. Clayton County, Georgia(2020)*, there was "no dispute that the defendants fired Fitzgerald because of her same-sex marriage and that Title VII prohibits this kind of sex discrimination."However, the defendants contended that certain *exceptions, exemptions, and protections* immunized their actions from statutory liability under Title VII.

6.1. *Applying Hosanna-Tabor*

In *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.* (2012), the United States Supreme Court held that language contained in the First Amendment bars employment discrimination suits "when the employer is a religious group and the employee is one of the group's ministers." This is what has long been called "the ministerial exception" (*Hosanna-Tabor*, 2012, p. 180). As the Supreme Court explained, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision" (*Hosanna-Tabor*, 2012, p. 188). "Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs" (*Hosanna-Tabor*, 2012, p. 188).

Because the ministerial exception is a defense to a Title VII action, the burden of proof that an employee is a minister is on the defendants (see Dygert, 2019; *Sterlinski v. Cath. Bishop of Chicago*, 2019), which the Court noted was a "a multi-factored, fact-specific inquiry," refusing to "adopt a rigid formula for deciding when an employee qualifies as a minister."

Justia (2023b) summarized *Sterlinski* as follows:

"The Parish hired Sterlinski in 1992 as Director of Music. In 2014 the Parish's priest demoted Sterlinski to the job of organist and in 2015 fired him outright. Sterlinski contends that the Parish held his Polish heritage against him. Until his demotion he could have been fired for any reason, because as Director of Music he held substantial authority over the conduct of religious services and would have been treated as a "minister." Title VII of the Civil Rights Act of 1964 does not apply to ministers. Sterlinski claims that as an organist, he was just "robotically playing the music that he was given" and could not be treated as a minister. The district court disagreed and granted summary judgment to the Bishop. The Seventh Circuit affirmed. Organ playing serves a religious function in the life of the Parish. The court stated: "If the Roman Catholic Church believes that organ music is vital to its religious services, and that to advance its faith it needs the ability to select organists, who are we judges to disagree?""

Among the factors to be considered are "the formal title given by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church" (see also *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 2020; Drust, 2022) which emphasized that about all factors, "[w]hat matters … is what an employee does."

In *Our Lady of Guadalupe*, although not strictly requiring that a plaintiff be a minister or that they perform a "key role" in transmitting the religious message of the school, the Court found abundant evidence that the teachers at Our Lady of Guadalupe School had "performed vital religious duties," including the following:

their employment contracts required them to carry out the schools' religious mission and specified "that their work would be evaluated to ensure that they were fulfilling that responsibility"; their job duties required them to teach all subjects, including religion; they prepared their students for participation in religious activities, prayed with them, and attended Mass with them; and, they were the staff members "entrusted most directly with the responsibility of educating their students in the faith," which included teaching them about the Catholic faith and guiding them "by word and deed, toward the goal of living their lives in accordance with the faith."

In determining whether an employee served in a religious role, Courts show deference to the judgment of the church. However, a church cannot show that it is entitled to assert the ministerial exception "simply by asserting that everyone on its payroll is a minister or by requiring that all employees sign a ministerial contract."

As in other cases arising under Title VII, the plaintiff can defeat a motion for summary judgment by producing evidence that the church's justification is pretextual (Fick, 1992-1993), that is, a false reason that is masking an employer's true motives (citing *Grussgott v. Milwaukee Jewish Day School*, 2018, p. 660).
Justia (2023a) summarized *Grussgott* as follows:

"In 2013, Grussgott was hired by a Milwaukee private school that provides non-Orthodox Jewish education. The school employs a rabbi and has a chapel and Torah scrolls but does not require its teachers to be Jewish. Grussgott claimed that she was solely a Hebrew teacher and had no responsibilities that were religious in nature. The school maintained that Grussgott was employed as a Hebrew and Jewish Studies teacher. Grussgott underwent treatment for a brain tumor and ceased working during her recovery. She has suffered memory and other cognitive issues. During a telephone call from a parent, Grussgott was unable to remember an event, and the parent taunted her. Grussgott's husband (a rabbi) sent an email, from Grussgott's work email address, criticizing the parent. The school then terminated Grussgott. Grussgott sued under the Americans with Disabilities Act. The school argued that because of Grussgott's religious role, the ADA's ministerial exception barred her lawsuit. The district court agreed without considering the merits of her ADA claim. The Seventh Circuit affirmed. Even taking Grussgott's version of the facts as true, she falls under the exception as a matter of law. Her integral role in teaching Judaism and the school's motivation in hiring her demonstrate that her role furthered the school's religious mission. The school's nondiscrimination policy did not waive the exception's protections."

In its decision in *Grussgott*, the Seventh Circuit added that "This does not mean that we can never question a religious organization's designation of what constitutes religious activity, but we defer to the organization in situations like this one, where there is no sign of subterfuge."

As was found in *Starkey*, there was no genuine dispute that Fitzgerald had played a crucial role on the Administrative Council of Roncalli High School, which was responsible for at least *some* of Roncalli's daily ministry, education, and operations. And like Starkey, Fitzgerald had "helped develop the criteria used to evaluate guidance counselors, which included religious components such as assisting students in faith formation and attending church services."

Additionally, and perhaps most critically, Fitzgerald "held herself" out as a minister, further supporting the District Court's finding. Similar to Starkey's role on the Council, Fitzgerald's membership in this group made her one of a handful of "key, visible leader[s]" of the school.

Considered together, these facts would preclude a reasonable jury from finding that Fitzgerald was not a minister, thus requiring the Court to recognize the appropriateness of granting the motion for a summary judgment. Fitzgerald conceded that she was a member of the Administrative Council in her capacity as the Co-Director of Guidance. Although Fitzgerald disputed the *extent* of the Council's involvement in the school's religious operations, she could not deny that the Administrative Council participated in at least *some religious planning and discussion.*Minutes of the Administrative Council meeting suggested that it planned religious details of religious services.

The Circuit Court determined that despite Fitzgerald's attempts to minimize her contributions, there was no genuine dispute that Fitzgerald participated in *some* of the religious aspects of the Administrative Counsel. The Circuit Court noted that Fitzgeraldparticipated in the Counsel's discussion of the Archdiocese's policy on transgender students and had expressed "over the part of having to tell the transgendered youth's parents." Following the Parkland shooting at the Marjory Stoneman Douglas High School on February 14, 2018, Fitzgerald was the individual who suggested the school provide students space and time to gather and pray for victims.

Fitzgerald attempted to characterize her contributions as "logistical" rather than "religious," but under Supreme Court precedent, a school's explanation of ministry issues is entitled to deference, noting that "[a] religious institution's explanation of the role of such employees in the life of the religion in question is important" (*Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 2020, p. 2066).

The Court of Appeals concluded that Fitzgerald was a member of and participated in a religious leadership committee at Roncalli as the Co-Director of Guidance. Also supporting the application of the ministerial exception, Fitzgerald conceded that she helped implement the Catholic Educator Advancement Program ("CEAP") for the evaluation of guidance counselors at Roncalli. Under this program, the school evaluated guidance counselors on their embodiment of the "Spirit of Roncalli," which "seeks to identify in specific ways how the teacher/guidance counselor is living out the mission of [the] school, supporting the fulfillment of the mission of [the] school, and living out the charisms of Saint John XXIII."

While deference would be applied to the church's characterization of certain activities as religious or secular, this deference did not relieve a religious institution of its obligation at the stage of summary judgment to show there is no genuine dispute regarding the relevant underlying facts—for example, that the employee was expected to or did perform those religious functions in the course of her employment.

The Seventh Circuit concluded that in this case, Fitzgerald had failed to dispute that she, like Starkey, participated in the Council and helped perform its religious duties.

Lastly, the Court stated that the record supported that Fitzgerald *held herself out as a minister in her 2016 CEAP self-evaluation.* In it, Fitzgerald had emphasized her participation in the school's religious services, noting: "I am working the first retreat of the year, and plan to help more with St. Vincent de Paul. I consistently attend Sunday church service, all masses at Roncalli, and morning communion services when I am able." She also emphasized the ways that she used her religious beliefs in her counseling duties, stating: "I consistently use spiritual life and resources in my counseling conversations as well as sharing my own spiritual experiences. … I am faithful, and have no problems sharing my beliefs and my love of God." She concluded: "In a faith-based school, I feel this definitely is a strength when working with young people who are seeking direction." These statements confirmed to the Court that Fitzgerald was herself conveying religious teachings in her work.

In response, Fitzgerald, confronted by her termination, only later contended that she had exaggerated her involvement in the religious components of the school because "it was part of the rubric" and she "wanted to get a raise in pay." The Court was skeptical and added:

"But this does not help her case. Even if we accept that she exaggerated on her evaluation and did not actually perform these religious duties, the fact that she mentioned these activities in her self-evaluation to get a raise supports that she understood these criteria to be important to the school. As the defendants persuasively explain, 'the very fact that she would exaggerate about performing religious tasks to get a raise only underscores that it was Roncalli's expectation that she perform them.'"

In its conclusion, the Seventh Circuit concluded that there is "no daylight between this case and *Starkey*."Cases decided in the Seventh Circuit made it clear to the Court that Fitzgerald was in fact a "minister" at Roncalli, and that the ministerial exception barred this suit (Weddle,2023).

7. Some Concluding Commentary – And Further Questions

This article distinguished between a narrow interpretation of the ministerial exception to Title VII of the Civil Rights Act of 1964, focusing on whether the plaintiff in *Roncalli*had played a "key role"in transmitting the religious message of her employer;or as Meek and Andress (2020) argue that under *Our Lady of Guadalupe*(2020), "To be under the exception, the individual does not need to be ordained and religious duties only make up a small portion of their overall responsibilities."

On the other hand, this article raises the question whether the decision had opened the door to an expansion of exceptions that would permit *any employer* to assert a religious basis for an employment decision (see Leonard, 2020)—even relating to employees who were not performing a religious function. The *Fitgerald* case never reached that question. The Court found, as a matter of law, that Fitzgerald was indeed a "minister" as understood in *Hosanna-Tabor*. And thus, her termination was not done in violation of Title VII.

However, in order to come to a decision on the larger question, it would also be important to consider the Supreme Court's opinion in *Burwell v. Hobby Lobby Stores, Inc.* (2014), in which the United States Supreme Court had allowed an exemption for a privately held for-profit corporation from an Obamacare regulation that its owners religiously objected to, if there is a less restrictive means of furthering the law's interest, citing provisions of the Religious Freedom Restoration Act of 1993 (see Abrams, 2019; generally Robb, 2019). In *Burwell*, the Supreme Court for the first time recognized a for-profit corporation's claim of religious belief (Meese & Oman, 2013-2014; Nadell, 2017), but *Burwell*, at that time, limited its application to privately held corporations (Lupu, 2015) and was not decided in the context of Title VII.

In light of*Burwell*, courts may be called upon in the future to resolve issuesnot raised in *Fitzgerald*(Adams & Barmore, 2014-2015), and to consider attempts by *secular employers* to assert a "religious basis" for an employment decision as a further expansion of the "Religion Clauses" in fending off charges of employment discrimination.

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