

COURTS' FAILURE TO USE RELIGION EXPERTS TO DECIDE DIFFICULT
FACT QUESTIONS CONCERNING WHO IS A MINISTER FOR THE
MINISTERIAL EXCEPTION: A HOLY MESS

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I. INTRODUCTION

“Courts temporal are not ideally suited to resolve problems that originate in the spiritual realm.”¹ As such, ministers of religious institutions cannot recover against their religious institution employers for employment discrimination in civil courts.² The ministerial exception, which flows from the broader church autonomy doctrine, permits religious employers to decide who will lead their faithful without court intervention.³ Cases in which

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¹ *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 432–33 (2d Cir. 1981).

² *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

³ *Id.* at 188–89.

defendants assert the ministerial exception are unlike other civil lawsuits involving religion in two primary ways: (1) for the exception to apply, the defendant must be a religious institution; and (2) despite complex and nuanced fact-intensive inquiries regarding who qualifies as a minister, courts typically refrain from using expert witnesses to assist with fact questions concerning religion.⁴

Some believe that from an adversarial system perspective, expert witnesses can make or break a case.⁵ This article regards expert witnesses not as the adversarial tool needed to win a case. Rather, the article regards expert witnesses as the basic evidentiary tool for which they are intended: to aid the factfinder (here, typically, the trial judge) by providing specialized knowledge about religion.

This article illustrates courts' use of expert witnesses in religion-related cases generally. And, while the article touches on the reliability of these experts under *Daubert*, the questions are not about the reliability of religion experts. Rather, the article looks at the intersection where church autonomy, which requires courts to refrain from ruling on certain questions because they involve religious doctrine or faith, meets courts' factfinding mission when the dispute requires judges to decide fact issues about religion. Much has been written on the church autonomy doctrine⁶ and courts' hands-off approach to deciding disputes that concern religion,⁷ but commentators have yet to examine when courts, deciding difficult factual disputes that involve religion, should rely on expert testimony and when they should refrain from doing so.

Part II of the article describes the doctrines underlying courts' reluctance to grapple with religion-related issues. In part III, the article describes the

⁴ See *id.* at 205–06 (Alito, J., concurring).

⁵ Harvey Brown & Melissa Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 HOUS. L. REV. 1, 1 (2014).

⁶ See *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002) (“This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity.”); see *infra* Part III.

⁷ See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998); see also Kent Greenawalt, Symposium: *The Supreme Court's Hands-Off Approach to Religious Doctrine: Hands Off: When and About What*, 84 NOTRE DAME L. REV. 913 (2009); see also Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 505 & 505 n. 51 (2013).

court-created ministerial exception and cases involving the exception.⁸ In these cases, courts are called on to consider a defendant religious institution's affirmative defense that the court should grant summary judgment⁹ because to decide the merits would involve an unacceptable intrusion into the hiring, firing, or retaining decisions of the religious employer. These cases typically arise in the context of an employee (priest, rabbi, principal, organist, choir director, spiritual director, teacher) suing a religious institution (private religious school or college, church, synagogue, private hospital) for employment discrimination, and the court must decide fact issues on whether the employee is a minister.¹⁰ Courts fail to allow expert testimony to assist with the religion-related fact issues.

Next, in part IV, the article looks at First Amendment Establishment and Free Exercise cases in which courts, confronted with fact issues similar to those in ministerial exception cases, rely on expert testimony (and sometimes reject such testimony). In these cases, courts are often called on to decide, as part of a *Lemon* or coercion test analysis, whether a particular activity (reciting Bible verses) or symbol (a crèche or menorah) is religious or secular or conveys a religious or secular message. Courts vary in their approach to using religion experts in these cases; some welcome the evidence to help decide the often nuanced questions while others reject the evidence as irrelevant or an unacceptable intrusion into church autonomy.

Part V explores why courts should use expert witnesses for fact issues concerning religion: first, as a practical matter, courts struggle to decide nuanced fact issues concerning religion and would benefit from the specialized knowledge theologians and academics who study religion provide. The Establishment Clause cases illustrate how religion experts help judges and juries, as fact finders, understand difficult religion questions. Second, failure to use these experts often means judges, as fact finders, rely on their own "expertise" about religion, which leads to the possibility, and arguably reality, of judicial bias.

The article also counters the obvious challenge to these arguments, that including expert testimony may cause government entanglement in matters of religious faith and doctrine. While this argument should certainly give

⁸The United States Supreme Court recognized the exception in 2012 in *Hosanna-Tabor Evangelical Church & Sch. v. EEOC*; yet, courts had applied this court-created piece of the church autonomy doctrine for many years prior. See 565 U.S. 171 (2012); see *infra* Part III.

⁹See Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 *FORDHAM L. REV.* 1847, 1854, 1873–76 (2018).

¹⁰See *Hosanna-Tabor*, 565 U.S. at 188.

courts pause before allowing expert testimony, a deeper look suggests that in ministerial exception cases, using experts for threshold fact issues concerning who is a minister will not result in court entanglement (just as using experts does not do so in Establishment Clause cases).

Though much has been written on expert witnesses generally,¹¹ on the ministerial exception, and on Establishment Clause cases, commentators have yet to focus on the myriad issues concerning expert witnesses in cases involving religion. Addressing the intersection between religion-related cases generally and the use of religion expert witnesses, the article highlights why experts should play the same role in ministerial exception cases, with fact questions concerning religion, as they often play in Establishment Clause cases.

II. THE ECCLESIASTICAL ABSTENTION DOCTRINE (WHICH QUESTIONS ABOUT RELIGION SHOULD COURTS RESOLVE)

As a threshold matter, the article will place the ministerial exception in the context of when courts decide (or refuse to decide) questions involving religion. The United States Supreme Court has held, “it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”¹² The ecclesiastical abstention doctrine, also referred to as the church autonomy doctrine,¹³ reflects the courts’ hands-off approach to disputes

¹¹ Many have written on the merits and challenges of social science experts. *See generally* Susan T. Fiske, Donald N. Bersoff, Eugene Borgida, Kay Deaux & Madeline E. Heilman, *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AMERICAN PSYCHOLOGIST 1049 (1991); Maxine D. Goodman, *Slipping Through the Gate: Trusting Daubert and Trial Procedures to Reveal the ‘Pseudo-Historian’ Expert Witness and to Enable the Reliable Historian Expert Witness—Troubling Lessons from Holocaust-Related Trials*, 60 BAYLOR L. REV. 824 (2008); Edward J. Imwinkelreid, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2294 (1994); Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 AMERICAN ANTHROPOLOGIST 555 (1977).

¹² *Emp’t Div., Ore. Dep’t of Human Res. v. Smith*, 494 U.S. 872, 887 (1990) (citing *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)) (discussing whether to apply a compelling state interest test to only a “central” religious belief).

¹³ *Redwing v. Catholic Bishop for the Diocese of Mem.*, 363 S.W.3d 436, 443 n.3 (Tenn. 2012) (“The origin of the term church autonomy doctrine as a substitute for the ecclesiastical abstention doctrine has been attributed to a 1981 law review article by Professor Douglas Laycock. Robert Joseph Renaud & Lael Daniel Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 N. KY. L. REV. 67, 88 (2008)”).

concerning matters of religious faith and doctrine (theology, church discipline, intra-church property disputes, or church members conforming to standards required of them by the church).¹⁴

The church autonomy doctrine¹⁵ stems from religious institutions' First Amendment right to autonomy concerning internal decisions of management, government, and faith,¹⁶ and applies whenever resolving the dispute must be informed by the institution's religious doctrine.¹⁷ It prevents courts from "wading into the religious controversy."¹⁸ The Second Circuit noted the doctrine's provenance, saying, "the notion of judicial incompetence with respect to strictly ecclesiastical matters can be traced at least as far back as James Madison, 'the leading architect of the religious clauses of the First Amendment.'"¹⁹

The United States Supreme Court appeared to modify its hands-off approach to religious disputes in 1990 in *Employment Division, Department of Human Resources v. Smith*, by ruling against plaintiffs' free exercise challenge to a neutral statute of general applicability that prohibited plaintiffs

¹⁴Commentators refer to the courts' unwillingness to decide certain religious questions as the courts' hands-off approach. See Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, *supra* note 7, at 1846; Samuel J. Levine, *A Critique of Hobby Lobby and the Supreme Court's Hands-Off Approach to Religion*, 91 NOTRE DAME L. REV. Online 26, 29 n.12 (2015) (citing several articles examining what Levine describes as the drawbacks to the courts' hands-off approach). See also *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708 (1976) (reversing lower court's decision regarding firing of clergy after deciding that court had wrongly rejected the "decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitute its own inquiry into church polity and resolutions based thereon of those disputes").

¹⁵See *Korte v. Sebelius*, 735 F.3d 654, 678 n.16 (7th Cir. 2013) (citing articles related to the doctrine).

¹⁶See *Lee v. Sixth Mount Zion Baptist Church of Pitt.*, 903 F.3d 113, 119 (3d Cir. 2018) (explaining the Free Exercise Clause protects a religious institution's decisions on matters of faith, doctrine, and church governance).

¹⁷*Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 709 (N.D. Cal. 1995) (holding that a Buddhist minister could not defeat church's summary judgment in her claims for Title VII wage rate discrimination because comparing salaries would infringe on church's autonomy in a matter of church doctrine).

¹⁸*Flynn v. Estevez*, 221 So. 3d 1241, 1243 (Fla. Dist. Ct. App. 2017) (recognizing a case involving Catholic school's requirement that all students receive immunizations before attending). The court said: "Unlike other church autonomy cases, the unique feature of this one is that both parties assert Catholic religious doctrine as the basis for their litigation positions, which cautions against a secular court wading into the squabble." *Id.* at 1249. The *Flynn* court refers to the dispute as an "intramural ecclesiastical kerfuffle." *Id.*

¹⁹*Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017).

from using peyote (which they claimed was for religious purposes).²⁰ Two former employees of a private drug rehabilitation organization were fired after ingesting peyote at their Native American Church's religious ceremony.²¹ When they were denied unemployment benefits because they were fired for workplace misconduct, they sued claiming their peyote use was religious and thus excused.²² The Court rejected the plaintiffs' constitutional objection to the law, saying, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"²³ Commentators thought *Smith* harkened the end of the ministerial exception (and other constitutional religious exemptions) and the courts' hands-off approach generally,²⁴ but it did not.²⁵

Church autonomy is broader than the ministerial exception. The ministerial exception reflects the courts' hands-off approach when the controversy involves an employment dispute between religion institution and one of its ministers.²⁶ The ministerial exception allows religious institutions to control who will "minister to the faithful—a matter strictly ecclesiastical."²⁷ Courts have applied the exception to disputes between

²⁰Emp't Div., Ore. Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

²¹*Id.* at 874.

²²*Id.* at 878.

²³*Id.* at 879.

²⁴See Charles A. Sullivan, *Clergy Contracts*, 22 EMP. RTS. & EMP. POL'Y J. 371, 383 (2018); Smith & Tuttle, *supra* note 9, at 1854.

²⁵Sullivan, *supra* note 24, at 382 ("[A]fter *Smith* some doubted the continued viability of the ministerial exception, but the circuit courts quickly put to rest any such debate. . . ."). In *Hosanna-Tabor*, the Supreme Court distinguishes *Smith* and its holding. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). The Court said *Hosanna-Tabor* was based on the church's dispute with Perich, which involved "government interference with an internal church decision that affects the faith and mission of the church itself." *Id.*; see also Smith & Tuttle, *supra* note 9, at 1854.

²⁶I would have preferred to use "clergy" here, rather than minister, because clergy is often defined to mean the leader of a religion other than Christianity as well as of Christianity while minister is typically "used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). The article discusses use of the term "minister" in more detail in part V. See *infra* Part V.

²⁷*Gregorio v. Hoover*, 238 F. Supp. 3d 37, 46 (D.D.C. 2017) (citing *Hosanna-Tabor*). See Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y, 821, 834 (2012) ("*Hosanna-Tabor* is the first real indication in a Court opinion that the separation between

religious institutions and clergy under employment laws as well as in other contexts.²⁸

Evaluating the current state of church autonomy, commentator Jared Goldstein describes a Religious Question doctrine²⁹ as requiring courts to first determine which questions courts can review and decide.³⁰ Accordingly, while “[c]ourts are not arbiters of scriptural interpretation,”³¹ courts may decide fact questions involving “what beliefs people hold and what practices they engage in.”³² As shown in the religion-related cases involving the Free Exercise and Establishment Clauses, courts routinely decide fact issues concerning religious practices and beliefs.³³

The next section describes the ministerial exception and how courts apply it. The article does not appraise the doctrine itself (commentators have

church and state is a two-way street, protecting the autonomy of organized religion and not just prohibiting governmental ‘advancement’ of religion.”).

²⁸ See *Lee v. Sixth Mount Zion Baptist Church of Pitt.*, 903 F.3d 113, 120 (3d. Cir. 2018) (citing *Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d. Cir. 2006)) (holding that the ministerial exception aims at keeping courts from the entanglement that comes from deciding religious disputes: “a court’s resolution of the dispute may involve ‘excessive entanglement with religion,’ and thereby offend the Establishment Clause. Such entanglement may be substantive—where the government is placed in a position of deciding between competing religious views—or procedural—where the state and church are pitted against one another in a protracted legal battle.”); see also Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 106 NW. U. L. REV. 951, 953–54 (2012) (“Interfering with clergy-employment decisions would undermine the church autonomy guaranteed by the Free Exercise Clause, and adjudicating these suits would lead to entanglement with religious doctrine and therefore violate the Establishment Clause.”).

²⁹ Jared Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 501 (2005) (“In other words, on religious matters, courts may not tell people what they should do or believe, but they may determine, in the sense of making factual findings, what beliefs people hold and what practices they engage in.”); see Michael A. Helfand, *When Judges are Theologians: Adjudicating Religious Questions*, RESEARCH HANDBOOK ON LAW & RELIGION (Rex Adhar ed. 2018) (citing *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 31 (D.D.C. 1990)) (prevents courts from resolving cases where there is an “underlying controversy over religious doctrine or practice.”).

³⁰ Goldstein, *supra* note 29, at 501 (“In other words, on religious matters, courts may not tell people what they should do or believe, but they may determine, in the sense of making factual findings, what beliefs people hold and what practices they engage in.”).

³¹ *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.* 450 U.S. 707, 716 (1981); See Helfand, *supra* note 7, at 547 (addressing “adjudicative disability, where courts should avoid religious questions because they are incapable of addressing them.”).

³² Goldstein, *supra* note 29, at 501.

³³ See *infra* Part IV.

already done so),³⁴ but rather highlights challenges courts face when applying the applicable test and shows how religion experts could lessen the possible pitfalls.

III. THE MINISTERIAL EXCEPTION

A. Background and Hosanna Factors

Within the framework of the church autonomy doctrine, the Supreme Court recognized a specific doctrine for employment discrimination claims by ministers against the religious organizations³⁵ that employ them. The doctrine is meant to keep courts out of the hiring, firing, and retaining decisions of these institutions because the decisions may involve religious doctrine.³⁶ In 2012, a unanimous United States Supreme Court decided

³⁴See Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 406 n.7 (2013) (“The literature on the exception is vast.”); see generally Leslie C. Griffin, *Religious Freedom, Human Rights, and Peaceful Coexistence*, 50 LOY. U. CHI. L.J. 77 (2018); McConnell, *supra* note 27; see also Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL’Y 839 (2012); see also Ira Lupu & Robert W. Tuttle, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment’s Religion Clauses*, 25 WM. & MARY J. OF RACE, GENDER & SOC. JUST. 249 (2019); see also Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981 (2013); see also Summer E. Allen, *Defining the Lifeblood: The Search for a Sensible Ministerial Exception Test*, Note & Comment, 40 PEPP. L. REV. 645 (2013); see also Mark E. Chopko & Melissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233 (2012); see also Marsha B. Freeman, *What’s Religion Got to do With it? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exception*, 16 U. PA. J.L. & SOC. CHANGE 133 (2013) (describing the difference between exception and exemption); see also Smith & Tuttle, *supra*, note 9; Michael J. West, Note: *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861 (2017); see also Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183 (2014); see also William A. Galston, *Why the Ministerial Exception is Consistent with Smith—And Why It Makes Sense*, 53 SAN DIEGO L. REV. 147 (2016); see also Brian M. Murray, *A Tale of Two Inquiries: The Ministerial Exception After Hosanna-Tabor*, 68 SMU L. REV. 1123 (2015).

³⁵In *Hosanna-Tabor*, the Court uses “religious organization,” “religious institution,” and “church” to describe the religious employers to which the exception applies. See 565 U.S. 171 (2012). In some cases, the status of the religious employer becomes an issue for purposes of whether the exception applies. See *Yin v. Columbia Int’l Univ.*, 335 F. Supp. 3d 803, 814 (D.S.C. 2018) (“As an initial matter, the court must decide whether CIU is a religious group under the ministerial exception by examining whether its ‘mission is marked by clear or obvious religious characteristics.’”).

³⁶*Hosanna-Tabor*, 565 U.S. at 188 (“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

*Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*³⁷ and, in doing so, formally established the ministerial exception. The exception, which state and federal courts had applied long before *Hosanna*,³⁸ acknowledges the First Amendment rights of churches to select and retain their ministers without government interference. It bars ministers' statutory employment discrimination claims against religious organizations for which they work.³⁹ In a footnote the *Hosanna* Court held that the exception is an affirmative defense, rather than a jurisdictional bar.⁴⁰

In *Hosanna-Tabor*, Cheryl Perich, a secular-subjects teacher who also taught a religion class at a church school,⁴¹ sued under the Americans with Disabilities Act after developing narcolepsy and being fired for alleged insubordination and disruptive behavior when she attempted to return to work after her medical leave.⁴² The United States Supreme Court held that because her employer was a religious institution and Perich was a minister, Perich's lawsuit was barred.⁴³

In evaluating who is a minister, the *Hosanna* Court declined to adopt a "rigid formula" but identified the following four factors for courts to consider: (1) the formal title the religious institution gives the employee (whether the position required education and training related to title);⁴⁴ (2) the substance reflected in this title (whether the religious organization "held out" the employee as a minister to the congregation, with a role distinct from other members); (3) the employee's use of the title (whether she "held herself out"

decision. . . . By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.").

³⁷ See *id.* at 171.

³⁸ According to commentators, the Fifth Circuit "created" the exception in 1972. See McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972); Griffin, *Religious Freedom, Human Rights, and Peaceful Coexistence*, *supra* note 34, at 87 n.74 (listing pre-*Hosanna* cases).

³⁹ *Hosanna-Tabor*, 565 U.S. at 196.

⁴⁰ *Id.* at 195 n.4.

⁴¹ Perich taught "math, language arts, social studies, science, gym, art, and music. . . . [Perich] also taught a religion class four days per week . . . and [she] attended a chapel service with her class once a week for thirty minutes." *Id.* at 178.

⁴² *Id.* at 179.

⁴³ The *Hosanna-Tabor* Court did not opine of whether the exception would bar other types of lawsuits, saying "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise." *Id.* at 196.

⁴⁴ Courts typically look to requisite education and training relating to the title. See Fratello v. Roman Catholic Archdiocese of N.Y., 175 F. Supp. 3d 152, 164, 166 (2016), *aff'd*, 863 F.3d 190, 203 (2d Cir. 2017).

as a minister by “accepting the formal call to religious service,” claiming a special housing allowance on taxes, or calling herself a minister);⁴⁵ and (4) the important religious functions the employee performed (whether these tasks conveyed the religious mission of the organization).⁴⁶

When analyzing Perich’s case, the Court first noted that after the school requested she do so, “Perich accepted the call” and was designated a commissioned minister.⁴⁷ In addition to teaching secular subjects, Perich “taught a religion class . . . led the students in daily prayer and devotional exercises each day, and attended a weekly school-wide chapel service.”⁴⁸ The Church “held out” Perich as a minister: “when Hosanna-Tabor extended her a call, it issued her a ‘diploma of vocation’ according her the title ‘Minister of Religion, Commissioned.’”⁴⁹ Accepting the call meant Perich would perform her role according to the church’s religious standards.⁵⁰ As for her title, the Court noted that her title of minister “reflected a significant degree of religious training followed by a formal process of commissioning.”⁵¹ When Perich completed her education, she was commissioned as a minister “only upon election by the congregation, which recognized God’s call to her to teach.”⁵²

The Court noted that Perich held herself out as a minister “by accepting the formal call to religious service, according to its terms.”⁵³ The Court also noted that she claimed a housing allowance on her taxes available only to ministers.⁵⁴ And, for the fourth factor, Perich’s function, the Court identified the following tasks as “conveying the Church’s message and carrying out its mission:” she taught her students religion and led them in prayer several days a week, she led a school-wide chapel service twice a year (choosing the

⁴⁵Courts look to whether the minister accepted a formal call or claimed ministerial status for tax or other formal purposes. *See id.* at 166.

⁴⁶Courts look to whether the person led prayers and adhered to religious values; planned services. *Id.* at 167.

⁴⁷*Hosanna-Tabor*, 565 U.S. at 178.

⁴⁸*Id.*

⁴⁹*Id.* at 191.

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.* at 192.

prayers and hymns), and in her final year teaching, she led a devotional exercise each day.⁵⁵

Many courts focus on the “function” factor to determine whether an employee is a minister; Justices Alito and Kagan described function as the touchstone for analyzing whether someone is a minister.⁵⁶

The functional consensus has held up over time, with the D.C. Circuit recognizing that the ministerial exception has not been limited to members of the clergy The Ninth Circuit too has taken a functional approach, just recently reaffirming that ‘the ministerial exception encompasses more than a church’s ordained ministers.’⁵⁷

Procedurally, courts are often faced with a “factual and case-specific analysis.”⁵⁸ As commentators writing on civil procedure as it relates to the exception noted, “[a]s in *Hosanna-Tabor*, this inquiry will often require the resolution of disputed questions of fact, such as what the employees actual responsibilities entail.”⁵⁹ The affirmative defense is typically resolved on summary judgment.⁶⁰ Discovery, if allowed, is then limited to questions concerning application of the exception.⁶¹ *Sterlinksi v. Catholic Bishop of Chicago* illustrates a court allowing limited discovery on the threshold

⁵⁵ *Id.*

⁵⁶ *Id.* at 198 (Alito, J., concurring); see *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (emphasizing the function of the music director in furthering the mission of the church and conveying the church’s message when deciding to apply the ministerial exception).

⁵⁷ *Hosanna-Tabor*, 595 U.S. at 203, 204 (Alito, J., concurring). The Supreme Court specified that the amount of time an employee spends doing a particular task is not necessarily dispositive. *Id.* at 194.

⁵⁸ *Sterlinksi v. Catholic Bishop of Chi.*, 2017 U.S. Dist. LEXIS 65613, at *7 (2017), *aff’d*, 934 F.3d 568 (7th Cir. 2019) (citing *Collette v. Archdiocese of Chi.*, 200 F. Supp. 3d 730, 733 (N.D. Ill. 2016)).

⁵⁹ Smith & Tuttle, *supra* note 9, at 1866.

⁶⁰ *Id.* at 1874.

⁶¹ See *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 198 (2d Cir. 2017) (allowing limited discovery on questions); see *Ginalski v. Diocese of Gary*, 2016 U.S. Dist. LEXIS 168014 at *23 (2016); see also *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671 (N.D. Ill. 2012) (describing the procedural background before the court’s decision on the ministerial exception, the court said, “[h]ere, the parties exchanged written discovery, submitted affidavits, took three depositions, and submitted statements of material facts in compliance with the local rules governing summary judgment.”); see also Smith & Tuttle, *supra* note 9, at 1878.

ministerial exception factors, even encouraging the plaintiff to offer expert testimony:

In addition to fact discovery about Sterlinski's duties, one or both sides might also want to engage in discovery on whether a musician who solely plays music chosen by others still ought to be considered as someone who performs a ministerial function For his part, Sterlinski might try to rebut that evidence with his own expertise, or offer evidence from an expert.⁶²

Despite allowing for discovery to decide the ministerial exception fact issues, courts routinely rely on the parties (or, arguably, on the courts' own perceptions and knowledge),⁶³ not on expert witnesses, to decide the fact issues about religion that arise when applying the *Hosanna* four-factor test. And, to make matters worse for the plaintiff employee, the religious entity defendant is often, in effect, an "expert" in religion, not in the sense of academic training and research, but by virtue of its role as head of the religious organization (the Catholic Bishop, the Roman Catholic Archdiocese of New York, heads of theological schools and seminaries). Thus, a court looking for religious expertise would have to look no further than the defendant religious institution. The plaintiff has no means of rebutting this evidence concerning the four factors.

In the next section, the article provides four examples of courts applying the ministerial exception.⁶⁴ It does so to highlight two main points. First, the

⁶² *Sterlinski*, 2017 U.S. Dist. LEXIS 65613, at *12. (granting the defendant's summary judgment on Sterlinski's employment discrimination claims related to his firing.); *see also* *Sterlinski v. Catholic Bishop of Chi.*, 319 F. Supp. 3d 940, 942 (N.D. Ill. 2018).

⁶³ *See infra* Part V.

⁶⁴ Other examples of ministerial cases from both before and after *Hosanna-Tabor* include the following: *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 418 (2d Cir. 2018) (holding a chaplain at New York Methodist Hospital could not sue because the hospital was a religious institution); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1240 (10th Cir. 2010) (finding the director of Dept. of Religious Formation could not bring Equal Pay Act claims); *Petruska v. Gannon Univ.*, 462 F.3d 294, 312 (3d Cir. 2006) (dismissing former chaplain's claims); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1043 (7th Cir. 2006) (holding a music director could not bring ADEA claim); *Shaliesabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (finding that a Kosher supervisor ("mashgiach") could not recover against his employer, Jewish home for the elderly, for alleged failure to pay him overtime); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (recognizing a Hispanic communications manager could not bring Title VII national origin claim); *Starkman v. Evans*, 198 F.3d 173, 177 (5th Cir. 1999) (dismissing a choirmaster's ADA claim); *Kant v. Lexington Theological Seminary*, 426

Hosanna test is still fairly new, and courts struggle with how to draw the line between secular and religious when deciding the necessary fact issues.⁶⁵ Courts struggle because the test is clumsy in its wording; as discussed by Justices Alito and Kagan in their concurring opinion,⁶⁶ the language of the test and factors do not comfortably align with religions other than those with a minister as a spiritual leader.⁶⁷ Second, courts struggle because the fact issues concerning who is a minister are complex and nuanced, not lending themselves to easy, clear-cut answers. And, judges themselves must serve as experts on religion in these cases, choosing whether a function is secular or religious.⁶⁸ The cases below illustrate courts' need for help with the nuanced fact questions involving religion courts are required to decide in these cases.

B. Examples of Courts Drawing the Line Between Secular and Religious to Decide Who is a Minister

In 2016, the Second Circuit decided *Fratello v. Roman Catholic Archdiocese of N.Y.*,⁶⁹ affirming the lower court's grant of summary judgment in favor of Defendant Roman Catholic Archdiocese in Joanne Fratello's lawsuit alleging gender discrimination against her employer, the Archdiocese.⁷⁰ Fratello was hired in 2007 as lay principal of St. Anthony's School, a Catholic elementary school in New York.⁷¹ She served in that role until 2011, when the Defendant did not renew her contract.⁷² The lower court granted summary judgment based on ministerial exception, and the Second Circuit affirmed.⁷³

S.W.3d 587, 589 (Ky. 2014) (finding a Jewish scholar of religion who taught various religion courses was not a minister and could sue the school); Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 621 (Ky. 2014) (holding a Methodist Episcopal Church pastor and teacher could not sue school where he taught religious courses and occasionally preached).

⁶⁵ See Murray, *supra* note 34, at 1125.

⁶⁶ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 202–05 (2012) (Alito, J. concurring).

⁶⁷ *Id.*

⁶⁸ See generally *Fratello v. Roman Catholic Archdiocese of N.Y.*, 863 F.3d 190, 203–05 (2d Cir. 2017).

⁶⁹ *Id.* at 190.

⁷⁰ *Id.* at 210.

⁷¹ *Id.* at 192.

⁷² *Id.*

⁷³ See *Fratello v. Roman Catholic Archdiocese of N.Y.*, 175 F. Supp. 3d 152, 168 (S.D.N.Y. 2016), *aff'd sub nom.*, *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 210 (2d Cir. 2017).

In the district court, after describing *Hosanna-Tabor*, the court concluded the Archdiocese's description of the principal's job, from the relevant evidence, "does hold principals out as ministers."⁷⁴ Unlike other school staff the principal is required to be a practicing Catholic."⁷⁵ Fratello's express tasks included "achieving the Catholic mission," and she was also evaluated based, in part, on her religious leadership.⁷⁶ Second, as for her title and required education and training, the court noted that Fratello had to provide a letter when she was hired confirming she was a practicing Catholic; yet, the court held this factor did not reflect the same education and training as others required to attain a ministerial position.⁷⁷ Thus the court held this factor weighed against the exception.⁷⁸

The court found the third factor weighed against applying the exception because Fratello had not accepted any call to religious service, and she did not take any special tax status as a minister.⁷⁹ Focusing on the fourth factor, the responsibilities and whether they reflected a role in carrying out the church's mission, the court held "the record clearly indicates that Plaintiff filled such a role from the beginning of her tenure as principal at the School."⁸⁰ The court noted the following responsibilities as showing Fratello conveyed the church's mission: she instituted a new daily prayer system to get students more involved and she often led prayers for the school over the intercom; she ensured teachers were including Catholic saints and religious values in their lessons; and she planned special services for certain holidays and occasions.⁸¹ The court summarized her work as "fostering a Christian atmosphere" and quoted from *Hosanna* in saying she "served as a messenger or teacher of [the Church's] faith."⁸²

The Second Circuit, in affirming the lower court, emphasized the hands-off underpinnings of the exception, saying:

[J]udges are not well positioned to determine whether ministerial employment decisions rest on practical and

⁷⁴ *Id.* at 165.

⁷⁵ *Id.*

⁷⁶ *Id.* at 165–66.

⁷⁷ *Id.* at 166.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 167.

⁸¹ *Id.*

⁸² *Id.*

secular considerations or fundamentally different ones that may lead to results that, though perhaps difficult for a person not intimately familiar with the religion to understand, are perfectly sensible—and perhaps even necessary—in the eyes of the faithful.⁸³

The Court departed from the lower court's analysis and held that all but the formal title factor weighed in favor of applying the exception.⁸⁴ The Court found the second factor weighed in favor of the Church because her title "entails proficiency in religious leadership" by requiring the principal be a practicing Catholic, committed to the church's teachings and to developing Catholic faith in the school.⁸⁵ As for the third factor, her use of the title, the Second Circuit disagreed with the lower court and found that even though she was not "called," she "understood that she would be perceived as a religious leader."⁸⁶ The Court described the fourth factor as the most important, noting the evidence established "beyond doubt" that Fratello conveyed the employer's message by working with teachers to fulfill the school's religious education mission, leading prayers for students, supervising the selection of hymns, and delivering commencement speeches with a religious messaging.⁸⁷

The next case shifts from principal to teacher and reflects fewer clear-cut facts concerning whether the employee's tasks are religious or secular. In *Grussgott v. Milwaukee Jewish Day School, Inc.*, the Seventh Circuit affirmed the lower court's grant of summary judgment in favor of defendant, the Milwaukee Jewish Day School, on grounds the ministerial exception barred Grussgott's Americans with Disabilities Act ("ADA") claim.⁸⁸

⁸³ Fratello v. Archdiocese of N.Y., 863 F.3d 190, 203 (2d Cir. 2017).

⁸⁴ *Id.* at 206–07.

⁸⁵ *Id.* at 208.

⁸⁶ *Id.*

⁸⁷ *Id.* at 208–09. The decision reflects the Second Circuit's sliding scale approach, such that the more religious the employer, the less religious the employee's job duties must be for the exception to apply. *See also* Stabler v. Congregation Emanu-El of N.Y., 2017 U.S. Dist. LEXIS 118964, at *18 (S.D.N.Y. 2017); Penn v. N.Y. Methodist Hosp., 158 F. Supp. 3d 177, 182 (S.D.N.Y. 2016) ("[t]he ministerial exception should be viewed as a sliding scale, where the nature of the employer and the duties of the employee are both considered in determining whether the exception applies. . . . [T]he more pervasively religious an institution is, the less religious the employee's role need be in order to risk first amendment infringement.").

⁸⁸ *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 662 (7th Cir. 2018) *cert denied*, 139 S. Ct. 456 (2018). The Court describes the school as "a private school dedicated to providing a

Miriam Grussgott was hired to teach Hebrew and Jewish studies to first and second graders.⁸⁹ After her medical treatment and recovery from a brain tumor in 2013, Grussgott returned to the school in 2014.⁹⁰ In 2015, Grussgott was unable to remember an event, which led to an incident with a parent, and, consequently, the school firing Grussgott.⁹¹ She sued under the ADA.⁹²

The parties disputed her teaching duties in the relevant year (2014-2015); Grussgott said she taught Hebrew and was no longer required to attend services; she acknowledged that she taught Jewish values, Torah portions, and prayers; Grussgott said she did so from a cultural and historical, rather than religious perspective.⁹³ The school said she was employed in '14-15 as a Hebrew and Jewish Studies teacher and was required to attend Jewish studies meetings.⁹⁴ Grussgott presented expert testimony from Michael Broyde, an ordained rabbi and law professor at Emory University, who testified that the exception should not apply to her circumstances.⁹⁵

In applying the factors, the district court in *Grussgott* first noted that Grussgott's teaching position "does not fit neatly within the factors Hosanna-Tabor found relevant."⁹⁶ The court noted she was not ordained and her role did not require prior religious training.⁹⁷ The district court focused on the third and fourth factors, stating as to the third factor (the substance flowing from her title) that Hebrew teachers at the school were required to follow a certain curriculum that integrated religious teachings into their lessons.⁹⁸

As for the fourth factor, the court concluded that she performed important religious functions by teaching her students about Torah portions, Jewish holidays, and prayers; the court rejected her contention that she taught these

non-Orthodox Jewish education to Milwaukee schoolchildren." *Id.* at 656. Today, the website describes the school as a "vibrant, pluralistic learning community committed to 21st century learning." *Mission*, MILWAUKEE JEWISH DAY SCHOOL, <https://www.mjds.org/about/mission> (last visited Dec. 12, 2019).

⁸⁹ *Grussgott*, 882 F.3d at 656.

⁹⁰ *Id.* at 657.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 656.

⁹⁴ *Id.* at 657.

⁹⁵ *Id.*; *Grussgott v. Milwaukee Jewish Day Sch. Inc.*, 260 F. Supp. 3d 1052, 1054 n.1 (E.D. Wis. 2017), *aff'd*, 882 F.3d 655 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 456 (2018). The opinion does not reflect whether he testified as to any of the underlying fact issues.

⁹⁶ *Grussgott*, 260 F. Supp. 3d at 1058.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1057.

topics from a historical, cultural perspective.⁹⁹ The court also noted that she prayed with them (thus performing important religious functions).¹⁰⁰

After describing its role in deciding the case as staying out of “matters of faith and doctrine,”¹⁰¹ the court rejected Grussgott’s position that teaching Hebrew is cultural and historical, rather than religious, as the school argued.¹⁰² The district court took her to task on this by claiming that Hebrew is like Latin, which the court described as “all but dead today.”¹⁰³ The court went on to say, “Plaintiff cannot reasonably contend that Defendant is teaching Hebrew so that its students may more easily converse with people thousands of miles away.”¹⁰⁴

In sum, Judge Stadtmueller, the district court judge,¹⁰⁵ concluded that Grussgott’s teaching of Torah portions, prayers, and holidays served a religious function, fulfilling the school’s religious mission, rather than a cultural and historical one.¹⁰⁶ The court concluded that because Grussgott’s job “is considered a ministry of Judaism,”¹⁰⁷ the exception should apply.

The Seventh Circuit affirmed the lower court, acknowledging fact issues existed but not enough to prevent summary judgment; the Court rejected the expert testimony for overstepping his expert role by opining on the ultimate issue of whether she was a minister.¹⁰⁸ The Court explicitly struggles with the fact issues involved in the religious/secular decision, quoting from Justice

⁹⁹ *Id.* at 1058–59.

¹⁰⁰ *Id.* at 1057.

¹⁰¹ *Id.* at 1060.

¹⁰² *Id.* at 1059–61.

¹⁰³ *Id.* at 1060 n.7.

¹⁰⁴ *Id.*

¹⁰⁵ According to the Federal Judicial Center, the judge went to undergraduate and law school at Marquette University (a Catholic, Jesuit university), and spent most of his career in the U.S. Attorney’s Office in Wisconsin before taking the bench. *Stadtmueller, Joseph Peter*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges/stadtmueller-joseph-peter> (last visited Dec. 10, 2019). Arguably, this background would provide him limited knowledge of Judaism, Jewish day schools, and why such schools teach Hebrew and prayers.

¹⁰⁶ See *Grussgott*, 260 F. Supp. 3d at 1057–58. According to the school’s website, the school is pluralistic and vibrant. *Mission*, MILWAUKEE JEWISH DAY SCHOOL, <https://www.mjds.org/about/mission> (last visited Dec. 10, 2019). A teacher of Jewish studies is often meant to teach a Torah portion without any type of indoctrination in terms of telling kids what or how to believe. The irony is that a teacher would probably get fired for telling the kids what they should believe (preaching religion) rather than what the religion teaches (teaching about religion).

¹⁰⁷ *Grussgott*, 260 F. Supp. 3d at 1061.

¹⁰⁸ *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 662 (7th Cir. 2018).

Brennan: “What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident.”¹⁰⁹ The Court goes on to say that while deciding the religious/secular fact questions “impermissibly entangles the government with religion,”¹¹⁰ it does not mean the court should always accept the religious institution’s position: “[t]his 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.”¹¹¹

The Seventh Circuit’s decision in *Grussgott* suggests the hands-off approach means that absent evidence of “subterfuge” by the religious institution, the court should always adopt the institution’s position on what is religious versus secular in deciding the fact issues for the *Hosanna* factors.¹¹² Yet, the Supreme Court did not announce such a test in *Hosanna*, and, as a practical matter, courts are allowing discovery on the very questions courts purportedly wish to avoid.¹¹³ Often, these fact issues are not questions about an employee’s failure to follow religious doctrine that led to the firing, as, arguably, was the case in *Hosanna* with Perich.¹¹⁴ Rather they are simply questions about whether an employee’s daily tasks (often unrelated to the underlying lawsuit claims) were religious or secular. Courts appear to base these decisions on their own perceptions of what a particular religion requires, as shown in *Grussgott*, and, at times, struggle mightily with a test that requires them to decide fact issues without sufficient resources for doing so.¹¹⁵

¹⁰⁹ *Id.* at 660 (citing Corp. of Presiding Bishop of Church of Jesus Latter-day Saints v. Amos, 483 U.S. 327, 343 (1987)).

¹¹⁰ *Id.*

¹¹¹ *Id.* The Circuit Court cites *Tomic v. Catholic Diocese of Peoria*, in which it used the example of a church claiming all its janitors were ministers as an example of subterfuge. *Id.* (citing *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006)).

¹¹² *Grussgott*, 882 F.3d at 660.

¹¹³ See *supra* note 61 regarding ministerial exception cases in which courts permit discovery on issues regarding the four factors. In *Grussgott*, the district court reviewed the school’s policy and procedures manual, the school’s website, and e-mails relating to *Grussgott*’s activities at the school. *Grussgott v. Milwaukee Jewish Day Sch. Inc.*, 260 F. Supp. 3d 1052, 1057 (E.D. Wis. 2017).

¹¹⁴ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 180 (2012). In *Hosanna-Tabor*, the Church allegedly fired Perich for “a religious reason—namely, that her threat to sue the Church violated the Synod’s belief that Christians should resolve their disputes internally.” *Id.*

¹¹⁵ See generally *Grussgott*, 260 F. Supp. 3d 1052.

Arguably, an expert witness in Judaism in *Grussgott* would have testified that many private, Jewish schools teach Hebrew, and parents encourage their children to take Hebrew, for just the reason the district court rejects; the Jewish day schools are eager to connect their students with Israel and many teach Hebrew as a precursor to students traveling to Israel through summer or school trips.¹¹⁶ Hebrew is very much a living, modern language,¹¹⁷ and teaching it does not necessarily convey spirituality in Judaism.¹¹⁸ Expert testimony on this question would be similar to a religion expert helping a judge decide whether teaching Intelligent Design is teaching science or religion or whether reciting the Lord's Prayer is secular or religious.¹¹⁹ Judge Stadtmueller does not merely defer to the school's position; his decision contains his reflections on Judaism and Jewish observance as he weighs the competing positions between secular and religious and decides teaching Hebrew is religious.¹²⁰

The next two cases show courts engaged in the same uncomfortable line drawing as the courts in *Fratello* and *Grussgott*.

In *Biel v. St. James School*, a divided panel of the Ninth Circuit decided the exception should not apply to a fifth grade teacher at St. James Catholic School who was fired after telling the school she had to miss work to receive chemotherapy for breast cancer treatment.¹²¹ Biel sued under the ADA; the

¹¹⁶ See generally Alex Pomson, Jack Wertheimer & Hagit Hacoen Wolf, HEARTS AND MINDS: ISRAEL IN NORTH AMERICAN JEWISH DAY SCHOOLS (The AVI CHAI Foundation 2014).

¹¹⁷ See *7 Things You Should Know About Hebrew*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/the-hebrew-language> (last visited Nov. 22, 2019). (“Eliezer Ben-Yehuda is considered the father of Modern Hebrew. He developed a vocabulary for Modern Hebrew, incorporating words from ancient and medieval Hebrew, in addition to creating new words. In 1922, Hebrew became one of the official languages of British Mandate Palestine, and today it is a modern language spoken by the citizens of Israel and Jews around the world.”).

¹¹⁸ See Erin Faigin, *Lernen yidish far sholem: Teaching Yiddish in a Secular Jewish School*, IN GEVEB (Mar. 20, 2017),

¹¹⁹ See *infra* Part IV.

¹²⁰ See generally *Grussgott*, 260 F. Supp. 3d 1052.

¹²¹ *Biel v. St. James Sch.*, 911 F.3d 603, 605 (9th Cir. 2018).

lower court granted summary judgment,¹²² and the Ninth Circuit reversed and remanded, holding the ministerial exception did not bar Biel's claim.¹²³

The two-judge majority held Biel did not satisfy any of the first three factors and focused its analysis on the fourth factor, whether she performed religious functions.¹²⁴ The Court held with this factor, Biel's role was somewhat similar to that of Perich in *Hosanna* because both taught both religion and secular classes.¹²⁵ The Court noted that Biel taught lessons on Catholicism four days a week and followed the school's required curriculum, which included teaching religious themes and symbols.¹²⁶ Yet, the Court held this was not enough to satisfy the exception.¹²⁷ The Court suggested that, even if *Grussgott* (involving the Hebrew and Judaics teacher) was correctly decided, which the Court cast doubt on, "Biel's role was less ministerial than that of the plaintiff in *Grussgott*."¹²⁸ The Court rejected the school's contention that by teaching religion, her functions were religious rather than secular.¹²⁹ "A contrary rule, under which any school employee who teaches religion would fall within the ministerial exception, would not be faithful to *Hosanna-Tabor* or its underlying constitutional and policy considerations.

¹²² *Biel v. St. James Sch.*, No. 15-04248, 2017 WL 5973293, at *3 (C.D. Cal. 2017), *rev'd*, 911 F.3d 603 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 680 (Dec. 18, 2019) (No. 19-348). In its order denying rehearing and the petition for rehearing en banc, Justice Nelson chastises the Court for splitting "from the consensus of our sister circuits that the employee's ministerial function should be the key focus" and for "turning a blind eye to St. James's religious liberties." *Biel v. St. James Sch.*, 926 F.3d 1238, 1239–40 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 680 (Dec. 18, 2019) (No. 19-348). He describes the Court's decision as "the narrowest construction" of the ministerial exception, challenging not the decision on fact issues but the Court's approach to applying the *Hosanna-Tabor* test. *Id.*

¹²³ *Biel*, 911 F.3d at 605.

¹²⁴ *Id.* at 608–09.

¹²⁵ *Id.* at 609.

¹²⁶ *Id.*

¹²⁷ *See id.* at 609–10. It is possible the Ninth Circuit based its decision on the amount of time she spent doing religious as opposed to secular, but the Supreme Court in *Hosanna-Tabor* rejected this as a measure.

¹²⁸ *Id.* at 610.

¹²⁹ *See id.* at 609–10. Similarly, in *Richardson v. Nw. Christian Univ.*, the lower court rejected Christian University's claim that the ministerial exception barred claims of an assistant professor who had a secular job title and lacked religious training. 242 F. Supp. 3d 1132, 1145–46 (D. Or. 2017). The court held that even though she performed some religious functions, "any religious function was wholly secondary to her secular role: she was not tasked with performing any religious instruction and she was charged with no religious duties such as taking students to chapel or leading them in prayer." *Id.* at 1145.

Such a rule would render most of the analysis in *Hosanna-Tabor* irrelevant.”¹³⁰

And, finally, in *Lishu Yin v. Columbia International University*, the district court, noting the Fourth Circuit had yet to rule on the scope of the exception, determined the ministerial exception protected a religious university, Columbia International University (CIU) in Columbia, South Carolina, because it “trains Christians for global missions, full-time vocational Christian ministry in a variety of strategic professions and marketplace ministry.”¹³¹ The school is meant to “educate people ‘from a biblical worldview to impact the nations with the message of Christ.’”¹³² Lishu Yin was employed as a TEFL-ESL¹³³ instructor and then Director of the TESOL¹³⁴ program from 2008 until 2014, teaching classes in TEFL and then as Director of the TESOL Program.¹³⁵ CIU claimed it terminated her employment because of financial difficulties.¹³⁶ She sued claiming the school violated Title VII by discriminating against her on the basis of sex, religion, and national origin.¹³⁷ The parties ended up filing cross-motions for summary judgment.¹³⁸

The district court held that the second factor (the substance reflected in Yin’s title) and the fourth factor (functions at CIU) weighed in favor of applying the exception and thus concluded she was a minister.¹³⁹ For the substance reflected in her title, the court noted that Yin, as a TEFL-ESL instructor, was meant to enhance student development in areas of spirituality,

¹³⁰ *Biel*, 911 F.3d at 610. In Justice Fisher’s lengthy dissent, the Justice chides the majority for evaluating “the relative importance of a ministerial duty to a religion’s overall mission or belief system,” and then goes on to disagree with the Court’s holding based on “the importance of her [Biel’s] stewardship of the Catholic faith to the children in her class.” *Id.* at 619, 621 (Fisher, J., dissenting). Justice Fisher cites *Catholic Bishop* for the purported truism concerning “the critical and unique role of the teacher in fulfilling the mission of a church-operated school.” *Id.* at 621.

¹³¹ See *Lishu Yin v. Columbia Int’l Univ.*, 335 F. Supp. 3d 803, 813–15 (D.S.C. 2018).

¹³² *Id.* at 806.

¹³³ *Id.* at 807 n.1 (“Teaching English as a Foreign Language (TEFL) . . . English as a Second Language (ESL)”).

¹³⁴ *Id.* (“Teaching English to Speakers of Other Languages (TESOL)”).

¹³⁵ *Id.* at 807.

¹³⁶ *Id.* at 808.

¹³⁷ *Id.* at 808–09.

¹³⁸ *Id.* at 809; see also *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 247 F. Supp. 2d 728, 729 (D. Md. 2003), *aff’d*, 363 F.3d 299, 310 (4th Cir. 2004) (deciding for employer in the district court after parties filed cross-motions for summary judgment).

¹³⁹ *Lishu Yin*, 335 F. Supp. 3d at 817.

“ministry orientation, and the professional skills necessary for service in a variety of cultural contexts,” as well as to “embody and to implement CIU’s purpose and mission.”¹⁴⁰ For the fourth factor, the court noted Yin “required her students to pray together over the course of the semester, integrated biblical materials into her courses, and prepared students for ministry roles.”¹⁴¹ This factor, to the court, “weighs heavily” in favor of the exception.¹⁴² The court called the decision “an extremely close case,” noting, “it seems that Yin’s position was ‘important to the spiritual and pastoral mission of the church.’”¹⁴³

These cases illustrate courts’ struggles to separate the secular from the religious, using only the parties and evidence such as employee manuals to assist in their factfinding. Arguably, these struggles lead to inconsistent results (as with the secular teachers who also taught religion in *Grussgott* and *Biel*) and decisions on fact issues that strike this author as misguided and biased toward ideas and beliefs commonly held by only mainstream religions. Part IV involves a different type of religion-related case and illustrates courts using expert witnesses (and rejecting them in a few cases) to aid with difficult religion-related questions, often involving the same secular or religious line drawing as in the cases above. These cases do not involve a religious employer. Rather, most involve the state or a public actor. The similarity between these cases and cases involving the ministerial exception is the fact questions the fact finders must resolve, which often involve line drawing between secular and religious.

IV. FIRST AMENDMENT FREE EXERCISE AND ESTABLISHMENT CLAUSE CASES: COURTS DRAWING THE LINE BETWEEN SECULAR AND RELIGIOUS

In First Amendment cases involving the Establishment and Free Exercise Clauses, courts have welcomed religion experts, using their expertise to decide whether a particular symbol (a crèche or menorah) is religious or secular, whether reading Bible verses at the beginning of the public school day counts as a religious ceremony as opposed to a secular one, and whether the Amish refusing to send their children to public school after eighth grade

¹⁴⁰ *Id.* at 815.

¹⁴¹ *Id.* at 817.

¹⁴² *Id.*

¹⁴³ *Id.*

is a religious requirement or a preferred way of life.¹⁴⁴ The experts guide the courts in the nuances of the fact issues concerning religious belief and practice, recognizing the diversity and complexity of these questions. The cases below illustrate courts relying on religion experts.¹⁴⁵ These differ both procedurally and substantively from ministerial exception cases, as they have public entities as defendants (rather than religious institutions), and these experts typically testify at trial on the merits. The article shows the questions which courts have used religion experts to help answer to highlight the similarity between these questions and the questions courts are deciding, without the help of expert testimony, in ministerial exception cases.

First, the article presents Establishment Clause cases in which courts have relied on expert witnesses to decide facts such as whether a particular practice or symbol is religious or secular and the importance and meaning of the

¹⁴⁴ See *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984); *Wisconsin v. Yoder*, 406 U.S. 205, 209–10 (1972); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 209–10 (1963).

¹⁴⁵ The cases in the article are a small sample of decisions featuring courts relying on religion experts. In contexts other than the First Amendment, courts have also relied on religion experts, as in the following cases: *Sutton v. Rasheed*, 323 F.3d 236, 257 (3d Cir. 2003) (concerning whether prison's policy of denying inmates access to certain religious reading material while the inmates were in a restricted housing unit violated Free Exercise Clause, religious experts testified concerning whether Nation of Islam books were essential to inmates' Nation of Islam religion. Plaintiffs' expert Professor Aminah Beverly McCloud testified, describing the writing the inmates sought to read as "not just the words of Elijah Muhammad or Louis Farrakhan. They are the words of Elijah Muhammad and Louis Farrakhan as inspired by God."); *Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 52 (Fla. Dist. Ct. App. 2006) (involving burden on religion under Florida's Religious Freedom Restoration Act for appellant license holder who was required to be photographed for her driver's license without her veil, experts in Islamic law testified about necessity of wearing veil under Islamic law and about exceptions to veil requirement under the law); *Stevens v. Berger*, 428 F. Supp. 896, 903–05 (E.D.N.Y. 1977) (involving plaintiffs' religious objection to giving children social security numbers in order to receive financial assistance from the state, plaintiffs contended such numbers would constitute the "mark of the Beast"). The court relied on expert testimony of Dr. Willis E. Elliott, an ordained minister of the United Church of Christ with knowledge of scriptural interpretation, to testify as to the spiritual meaning of the "mark of the Beast," to the plaintiffs' religious beliefs. *Id.* at 903. Based on this testimony, the Court held as follows:

Since having a social security number in this society has become a prerequisite for so many of the society's benefits (both from the public and private sectors), no great leap of imagination is necessary to travel from the exegesis of *Revelation* to the plaintiffs' belief that such numbers could function, if the state were to become too powerful, like the mark of the Antichrist spoken of in the biblical text.

Id. at 905.

practice or symbol for the practitioners. For example, in *Lynch v. Donnelly*, the United States Supreme Court reversed the lower court's ruling that a crèche (part of a holiday display including Santa's house, a Christmas tree, and a "Seasons Greetings" banner) in a park in Pawtucket, R.I. at Christmas time violated the Establishment Clause.¹⁴⁶ The original plaintiff was a taxpayer who sued Dennis Lynch, mayor of Pawtucket when the case began, the city, and other city officials.¹⁴⁷ The court examined whether the crèche was a religious symbol or was secularized (as the City argued) using the three-part *Lemon*¹⁴⁸ inquiry of purpose, effect, and entanglement.

In the trial court, each side presented expert witnesses regarding what impact the displays would have on viewers and whether the crèche was secular or religious.¹⁴⁹ The experts included Dr. Thomas Ramsbey, an ordained United Methodist minister and professor of religion, who testified about the religious symbolism of the nativity scene.¹⁵⁰ Dr. Ramsbey described the crèche as a "sacred religious symbol of Christianity," which he distinguished from secular or profane symbols.¹⁵¹ He also explained the connection between the crèche and the Christian belief about Jesus as savior.¹⁵²

Dr. David Freeman, a philosophy professor who has written on religious philosophy and symbolism, testified for the City that symbols have objective and subjective dimensions.¹⁵³ He explained that in the nonreligious context of the park where it was located, the crèche would put people in the Christmas mood; it would not have religious significance to those who viewed it.¹⁵⁴

After finding the crèche a religious symbol, the court applied the *Lemon* test, considering the purpose and effect of the scene and whether it fosters an excessive entanglement with religion.¹⁵⁵ Finding the City had violated the Establishment Clause by displaying the crèche, the trial court permanently

¹⁴⁶*Lynch v. Donnelly*, 465 U.S. 668, 672 (1984).

¹⁴⁷*See Donnelly v. Lynch*, 525 F. Supp. 1150, 1153–54 (D.R.I. 1981) *rev'd*, *Lynch*, 465 U.S. 668.

¹⁴⁸*Lynch*, 465 U.S. at 679.

¹⁴⁹*Donnelly*, 525 F. Supp. at 1159.

¹⁵⁰*Id.* at 1159–60.

¹⁵¹*Id.* at 1160.

¹⁵²*See id.*

¹⁵³*Id.*

¹⁵⁴*See id.* at 1161, 1167.

¹⁵⁵*See id.* at 1168–80.

enjoined the City from displaying the crèche, and the First Circuit affirmed.¹⁵⁶

The United States Supreme Court reversed the decision, holding in a 5-4 decision that even given the religious significance of the crèche, the City did not violate the Establishment Clause.¹⁵⁷ The decision, which makes no mention of the expert testimony relating to the religious/secular distinction, is replete with references to the nation's religious heritage and "the Government's acknowledgement of our religious heritage and governmental sponsorship of graphic manifestations of that heritage."¹⁵⁸ The Court focused on the context to determine the purpose was secular, given that Santa Claus with reindeer, carolers, a clown, an elephant, and a teddy bear surrounded the crèche.¹⁵⁹

Five years later, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, looking again at symbols in public spaces, the Supreme Court examined the constitutionality under the Establishment Clause of both a crèche and menorah, each on public property.¹⁶⁰ The crèche, with the phrase "Glory to God in the Highest," was displayed by Allegheny County during the Christmas season on the Grand Staircase of the county courthouse.¹⁶¹ In downtown Pittsburgh, outside a city-county building, the city displayed an eighteen-foot menorah alongside a forty-five foot Christmas tree. The Court held the crèche display unconstitutional because of its "patently Christian message"¹⁶² and held the menorah constitutional because it was surrounded by secular symbols.¹⁶³

¹⁵⁶ *Donnelly v. Lynch*, 691 F.2d 1029, 1029 (1st Cir. 1982), *rev'd*, *Lynch*, 465 U.S. 668.

¹⁵⁷ *Lynch v. Donnelly*, 465 U.S. 668, 670, 687 (1984).

¹⁵⁸ *Id.* at 677. In the dissenting opinion, Justice Brennan wrote that the decision left open the constitutionality of only a crèche on public property without all the surrounding decorations. *Id.* at 695 (Brennan, J., dissenting). Justice Brennan objected to the decision as ignoring the feelings of non-Christians. *See id.* at 709.

¹⁵⁹ *Id.* at 671 (majority opinion).

¹⁶⁰ *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 573 (1989).

¹⁶¹ *Id.* at 578, 598.

¹⁶² *Id.* at 601.

¹⁶³ *Id.* at 621. The Court, in an opinion by Justice Blackman, held the menorah was constitutional, though not the crèche because it conveyed a message that endorsed Christianity, as it was "indisputably religious." *See id.* at 598. On the crèche, the Court split 5-4, with Justices Kennedy, White, Scalia, and Chief Justice Rehnquist dissenting. The Court split 6-3 on the menorah with Justices Brennan, Stevens, and Marshall dissenting, believing it was also unconstitutional.

At trial, a rabbi testified for the American Civil Liberties Union (ACLU) about the religious symbolism and significance of the menorah, explaining that the menorah, like the crèche, represents a miracle in Judaism and disagreed with the notion of Hanukkah as a secular holiday in this country.¹⁶⁴ Justice Blackman's menorah analysis described in great detail why the menorah is religious, but its message is not "exclusively religious."¹⁶⁵ In his dissenting opinion, Justice Kennedy chastised the majority for delving into the meaning of the symbols, saying "[t]his court is ill equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its doing so."¹⁶⁶

Several religion experts also testified in *Kitzmiller v. Dover Area School District*, concerning the teaching of intelligent design (ID) in public school.¹⁶⁷ In *Kitzmiller*, Plaintiffs sued after the Dover Area School District school board passed a resolution requiring the school to teach Darwin's theory and "other theories of evolution including, but not limited to, intelligent design."¹⁶⁸ Plaintiffs challenged the inclusion of ID as part of the science curriculum under the First Amendment Establishment Clause.¹⁶⁹ Ultimately, the Court concluded is not science; it is religious.¹⁷⁰

The court relied on expert testimony to decide whether ID is secular or religious. Theologian Dr. John Haught testified for the Plaintiffs that ID is religious based on its underlying assumption that the referenced intelligent designer is God.¹⁷¹ According to the court, Dr. Haught, "traced this argument back to at least Thomas Aquinas in the 13th century, who framed the argument as a syllogism: Wherever complex design exists, there must have been a designer; nature is complex; therefore nature must have had an

¹⁶⁴ *Id.* at 654 n.15 (Stevens, J., concurring in part, dissenting in part) ("[A] rabbi testified as an expert witness that the menorah and the crèche 'are comparable symbols, that they both represent what we perceive to be miracles,' and that he had never 'heard of Hanukkah being declared a general secular holiday in the United States.'" (citation omitted)).

¹⁶⁵ *Id.* at 583, 613. ("To celebrate and publicly proclaim this miracle [the oil lasting eight days], the Talmud prescribes that it is a mitzvah (i.e., a religious deed or commandment), for Jews to place a lamp with eight lights just outside the entrance to their homes or in a front window during the eight days of Chanukah." (citation omitted)).

¹⁶⁶ *Id.* at 678 (Kennedy, J., dissenting).

¹⁶⁷ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

¹⁶⁸ *See id.* at 708.

¹⁶⁹ *Id.* at 709.

¹⁷⁰ *Id.* at 765.

¹⁷¹ *Id.*

intelligent designer.”¹⁷² Robert Pennock, Plaintiffs’ expert in the philosophy of science, agreed with Professor Haught that ID teaches that the features of the natural world are created by a transcendent, non-natural being; thus it is religious.¹⁷³ And, Dr. Barbara Forrest, another of Plaintiffs’ experts and author of a book about the history of ID, testified to the doctrine’s religious underpinnings.¹⁷⁴

The school district presented experts who testified that intelligent design does not officially acknowledge the source of the design and that the theory qualifies as science, rather than religion.¹⁷⁵ The Court agreed with Plaintiffs’ experts that ID is religious (essentially creationism) and that an objective observer would conclude the intelligent designer is God. As such, the Board’s policy of including the theory violated the Establishment Clause.¹⁷⁶

The last example of an Establishment Clause case shows a court rejecting expert testimony on religion as irrelevant. In *Americans United for Separation of Church & State v. Prison Fellowship Ministries*¹⁷⁷ the plaintiffs (taxpayers, prisoners, and others) sued the Iowa Department of Corrections alleging Establishment Clause violations concerning a voluntary, residential program in the prison called InnerChange, a Prison Fellowship corporation; the program is “an intensive, voluntary, faith-based program of work and study within a loving community that promotes transformation from the inside out through the miraculous power of God’s love.”¹⁷⁸ The plaintiffs

¹⁷² *Id.* at 718.

¹⁷³ *Id.* at 721.

¹⁷⁴ *Id.* at 719, 722.

¹⁷⁵ *See id.* at 718.

¹⁷⁶ *Id.* at 765. This case in some ways resembles *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982), in which plaintiffs challenged the “Balanced Treatment for Creation-Science and Evolution Science Act,” which required public schools in Arkansas to give equal treatment to both “creation-science and evolution-science.” *Id.* at 1256. The Court heard testimony from various theologians about the nature of creation as described in Genesis and whether creation is a religious concept. Dr. Langdon Gilkey, one of the Plaintiff’s experts in *McLean*, wrote a book about his experience as an expert. LANGDON GILKEY, CREATIONISM ON TRIAL: EVOLUTION AND GOD AT LITTLE ROCK, (1985). During his testimony, Dr. Gilkey described creation as “a purely religious idea, one quite unmixed with any other elements. Or let me put it this way, it is even more religious than Christmas.” *Id.* at 103. In his book, Gilkey describes this testimony as eliciting a gasp from the spectators. *Id.*

¹⁷⁷ *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007).

¹⁷⁸ *Id.* at 413.

sought to enjoin operation Inner Change within the Iowa correctional system and a return of state funds used to pay for the program.¹⁷⁹

In the lower court, Dr. Winnifred Fallers Sullivan testified that Prison Fellowship follows religious beliefs of Evangelical Christianity, which she described as emphasizing “the Bible as the inerrant, sole source of authority for Christian teaching and personal morality. Evangelical Christians also believe that true conversion is an adult religious experience, most commonly referred to as being ‘born again.’”¹⁸⁰ She testified that Christians who do not share these beliefs might feel uncomfortable in light of the InnerChange lessons.¹⁸¹

In response to Defendant’s *Daubert* challenge to Dr. Sullivan’s expert testimony, the lower court permitted her testimony (after describing her credentials as “impeccable”) “to situate, objectively, and Prison Fellowship within the well-accepted context of religious tradition and practice as they exist now.”¹⁸² The court cited a commentator’s distinction between an expert expressing value judgments about a particular religious belief and what the court in this case was relying on Dr. Sullivan’s testimony to establish:

Neither the institutional competence of the courts nor the separationist principle embodied in the Establishment Clause bars judicial resolution of positive religious questions, such as assessments of the content of religious doctrine, or determinations of the centrality or importance of a religious practice within the context of a religion. In other words, on religious matters, courts may not tell people what they should do or believe, but they may determine, in the sense of making factual findings, what beliefs people hold and what practices they engage in.¹⁸³

¹⁷⁹ *See id.* at 428.

¹⁸⁰ *Ams. United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 873 (S.D. Iowa 2006), *aff’d*, 509 F.3d 406 (8th Cir. 2007). The lower court stated that “Dr. Sullivan’s academic credentials as an expert in the fields of comparative religion and the history of Christianity are impeccable” *Id.* at 872 n.9.

¹⁸¹ *See id.* at 874.

¹⁸² *Id.* at 872 n.9.

¹⁸³ *Id.* at 873 n.9 (citing Jared A. Goldstein, *Is There A “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, CATH. U.L. REV. 497, 501 (2005)).

The lower court ruled the contractual relationship between Iowa and violated the Establishment Clause.¹⁸⁴

The Eighth Circuit agreed the program, as operated, violated the Establishment Clause.¹⁸⁵ In terms of expert witnesses, the Court held the district court abused its discretion in relying on Dr. Sullivan's testimony, calling it not relevant, "unnecessary" and "offensive" saying, "it is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."¹⁸⁶ Thus, the Court found the lower court's reliance on expert testimony somehow more intrusive than the court itself grappling with the same fact questions without such assistance.

The next three cases involve the Free Exercise Clause and, again, show courts relying on religion experts to varying degrees to make sense of nuanced questions concerning religious beliefs and practices. For instance, in *School District of Abington Township v. Schempp*, the Court considered the constitutionality of the public-school district's morning exercises that included students reading ten Bible verses and the Lord's Prayer over the intercom for the student body.¹⁸⁷ Parents complained these exercises violated their children's rights under the Free Exercise Clause. Both the lower court in Pennsylvania and the United States Supreme Court held the practice unconstitutional.¹⁸⁸

In the trial court, both sides introduced expert testimony on fact issues concerning whether reading the Bible and Lord's Prayer is secular or religious. For the Schempps, Dr. Solomon Grayzel, a rabbi who served as editor of the Jewish Publication Society, which published an English translation of the Holy Scriptures,¹⁸⁹ testified about differences between the Jewish Holy Scriptures and the Christian Holy Bible, specifically the fact that the New Testament, not part of the Jewish Holy Scriptures, contains portions

¹⁸⁴ *Id.* at 941.

¹⁸⁵ *Ams. United for Separation of Church and State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007).

¹⁸⁶ *Id.* at 414 n.2 (internal citation omitted).

¹⁸⁷ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 207 (1963). The case combined two lawsuits involving state action requiring students to read the Bible at the start of each school day. *Id.* at 205.

¹⁸⁸ *Schempp v. Sch. Dist. of Abington Twp., Pa.*, 177 F. Supp. 398, 408 (E.D. Pa. 1959), *aff'd*, 374 U.S. 203, 205 (1963).

¹⁸⁹ *Abington*, 374 U.S. at 209.

that negatively portray Jews.¹⁹⁰ Dr. Luther Weigle, an ordained Lutheran Minister and Dean Emeritus of the Yale Divinity School, testified for the defense that for him, the Holy Bible would include the Jewish Holy Scriptures but would not be complete without the New Testament, which, he acknowledged, “conveyed the message of Christians.”¹⁹¹ He also said the Bible was non-sectarian but specified that he meant within Christianity.¹⁹²

The trial court’s factual findings included the following: “The practice of the daily reading of ten verses of the Bible in the public schools of Abington Township constitutes religious instruction and the promotion of religiousness,”¹⁹³ and “[t]he practice of the daily reading of ten verses of the Bible together with the daily recitation of the Lord’s prayer in the public schools of Abington Township is a religious ceremony.”¹⁹⁴

According to the United States Supreme Court,¹⁹⁵ the trial court’s factual findings included that reading the Bible verses, “possesses a devotional and religious character and constitutes in effect a religious observance.”¹⁹⁶ Based on these factual findings, the Supreme Court held that the exercises violated the First Amendment rights of the families who sued; the exercises violated “the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.”¹⁹⁷

Similarly, in *Wisconsin v. Yoder*, courts relied on expert testimony to decide the constitutionality of compulsory public education for Amish teenagers after eighth grade.¹⁹⁸ The Supreme Court reviewed a decision of the Wisconsin Supreme Court that held convictions of Amish parents who allegedly violated the state’s public education law were invalid as a violation of their free exercise rights under the First Amendment.¹⁹⁹ The Supreme Court affirmed, ruling the compulsory education law requiring Amish kids to attend school until 16 years old unduly burdened their free exercise of religion. The Court’s ruling rested on the Amish’s fundamental religious belief, as testified to by the religious experts in the case, that attending public

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 210.

¹⁹² *Id.*

¹⁹³ *Schempp*, 177 F. Supp. at 408.

¹⁹⁴ *Id.*

¹⁹⁵ *Abington*, 374 U.S. at 203.

¹⁹⁶ *Id.* at 210.

¹⁹⁷ *Id.* at 225.

¹⁹⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

¹⁹⁹ *Id.*

school after eighth grade would prevent them from remaining “aloof from the world.”²⁰⁰ The experts helped the court consider whether the Amish reluctance to send their children to public school after eighth grade was a way of life or a religious requirement.²⁰¹

The Wisconsin Supreme Court relied on the testimony of expert Dr. John Hostetler,²⁰² a professor and scholar of Amish religion and culture, who explained the Amish requirement of separateness from the world: “The Amish separateness is dictated by their religious belief of what God’s will is for them and thus all the means by which they maintain this unique separateness have religious meaning.”²⁰³ The Wisconsin Court noted that it was not allowed to evaluate Amish religious beliefs “for ecclesiastical purposes.”²⁰⁴ But it could determine whether the Amish refusal to obey the State’s school law was part of their worship (as they contended) or merely a way of life (as the State contended).²⁰⁵

Dr. Hostetler testified that compulsory public school education after eighth grade would “ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today.”²⁰⁶ The Court describes the underpinnings of the Amish objection to compulsory education beyond eighth grade as follows: “[a]dult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community.”²⁰⁷ The Court cites to Hostetler’s books and a text on the intersection between religion and public education for this information.²⁰⁸

And, finally, in *Warner v. City of Boca Raton*, a federal district court in Florida considered a Florida regulation prohibiting vertical grave decorations

²⁰⁰ *Id.* at 210.

²⁰¹ *See id.* at 209–13.

²⁰² *State v. Yoder*, 182 N.W.2d 539, 541 (1971), *aff’d*, 406 U.S. 205 (1972); *see also* Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 AMERICAN ANTHROPOLOGIST 555, 562–64 (1977) (referring to Hostetler as an anthropologist and discussing certain issues his testimony raised regarding anthropologists as expert witnesses).

²⁰³ *Yoder*, 182 N.W.2d at 541.

²⁰⁴ *Id.*

²⁰⁵ *See id.* at 542.

²⁰⁶ *Yoder*, 406 U.S. at 212.

²⁰⁷ *Id.* at 210.

²⁰⁸ *Id.* at 210 n.5.

under the Free Exercise Clause.²⁰⁹ The municipal cemetery's regulations limited grave memorials to small, flat markers, flush with the ground. Between 1984 and 1996, plaintiff families of varying religions decorated the graves of their family members with vertical religious symbols: standing crosses, stars of David, and borders, all of which violated the regulations.²¹⁰ Once the City decided to enforce the rules and remove the vertical decorations, the plaintiffs sued, arguing the cemetery rules (and city's enforcement) violated the Free Exercise Clause and would substantially burden the plaintiffs' exercise of religion under the Florida Religious Freedom Restoration Act.²¹¹

The court noted it was undisputed that "plaintiffs placed vertical decorations on their Cemetery plots in observance of sincerely held religious beliefs."²¹² The judge ultimately framed the question as whether the vertical decorations (as opposed to the same symbols displayed horizontally) were religiously mandated or simply personal preference.²¹³

Five experts of religion testified concerning whether vertical grave memorials were religiously required or preferred. Dr. John McGuckin, a professor of Early Church History at Columbia University who served as an expert for the plaintiffs, testified "to the importance of standing crosses on grave sites in the Christian faith" and that it would be sacrilegious to decorate a grave with a horizontal cross, but the court rejected this testimony as lacking an objective basis.²¹⁴ Dr. Daniel L. Pals, a professor of Religious Studies and expert for the City, noted that while many Ashkenazic Jews "do place a vertical marker of sorts on the graves of family members, Sephardic and Ashkenazic Jews in Israel make almost exclusive use of horizontal rather than vertical grave markers."²¹⁵

²⁰⁹ Warner v. City of Boca Raton, 64 F. Supp. 2d 1272 (S.D. Fla. 1999), *aff'd*, 420 F.3d 1308 (11th Cir. 2005).

²¹⁰ *Id.* at 1277.

²¹¹ *Id.* at 1279. The trial judge read the RFRA to mean that a plaintiff must demonstrate "a substantial burden on conduct that, while not necessarily compulsory or central to a larger system of religious beliefs, nevertheless reflects some tenet, practice or custom of a larger system of religious beliefs. Conduct that reflects a purely personal preference regarding religious exercise will not implicate the protections of the Florida RFRA." *Id.* at 1283.

²¹² *Id.* at 1277.

²¹³ *Id.* at 1283–84.

²¹⁴ *Id.* at 1285.

²¹⁵ *Id.* at 1286.

The district court concluded that while marking the graves with religious symbols involves “customs or practices of the plaintiffs’ religious traditions,”²¹⁶ the placement of the markers and symbols as vertical or horizontal “reflects their personal preference with regard to decorating graves,” which is not protected under the Florida RFRA.²¹⁷ “In sum, nowhere in the sacred texts, doctrines, traditions or customs of either the Jewish or Christian faiths can the principle be found that grave markers or religious symbols should be displayed vertically rather than horizontally.”²¹⁸ The court agreed with the testimony of the defense experts that plaintiffs’ pursuit of vertical decorations was just a preference rather than a religious requirement.²¹⁹

Dr. Winnifred Sullivan noted that the *Warner* judge:

considered himself to be as much an expert in religion as any of the witnesses, notwithstanding his lack of academic training in religion.²²⁰ Indeed, he revealed a deep and very Protestant skepticism about the significance of the history of Christian burial offered by the church historian as well as the methods of Jewish legal practice employed by the Orthodox rabbinical expert, substituting his own lay evangelical understanding of the importance of Christian history and how scripture should be read.²²¹

Dr. Sullivan’s criticism of the court’s evaluation of the evidence illustrates, in part, why courts should rely on religion experts to aid fact finders in religion-related cases. Even if courts choose to disregard the testimony, at least the evidence of how the faithful draw their line between secular (in *Warner*, preferred) and religious (required) is available for the court to consider.

²¹⁶ *Id.* at 1287.

²¹⁷ *Id.*

²¹⁸ *Id.* at 1286.

²¹⁹ *Id.* at 1287. Dr. Sullivan, who testified in the case, is Provost Professor, Department of Religious Studies at Indiana Bloomington and Director of Center for Religion and the Human. Indiana University – Bloomington, Winnifred F. Sullivan, Dept. of Religious Studies, http://indiana.edu/~relstud/people/profiles/sullivan_winnifred (last visited Dec. 9, 2019).

²²⁰ Winnifred Fallers Sullivan, *The Religious Expert in American Courts*, 155 ARCHIVES DE SCIENCES SOCIALES DES RELIGIONS 41, 52 (2011).

²²¹ *Id.* at 52.

V. AS A PRACTICAL MATTER, AND TO AVOID POSSIBLE BIAS, COURTS SHOULD USE RELIGION EXPERTS TO HELP WITH DIFFICULT FACT QUESTIONS CONCERNING WHO IS A MINISTER

Based on the examples shown throughout, the article presents two primary reasons for using religion expert witnesses to help courts decide the threshold fact questions concerning whether an employee is a minister. First, as a practical matter, courts struggle to decide the nuanced fact issues *Hosanna* requires, and religion experts could help judges decide the religion questions for which specialized knowledge would prove valuable, just as it has in Establishment Clause cases. Courts note the challenges of resolving fact issues concerning diverse faiths: “Once again, it is painfully obvious that lay courts familiar with Western religious traditions characterized by sacramental rituals and structured theologies are ill-equipped to evaluate the relative significance of particular rites of an alien faith.”²²²

Second, religion expert witnesses could help mitigate judicial bias²²³ about other religions, how they operate, and their beliefs. The article posits that religion experts will allow courts to remain neutral in their decision-making to a greater extent than if they function alone. Already, the odds are stacked against the employee pursuing relief because the religious defendant employer can present evidence, in the form of testimony from a leader of the religious employer, that appears as religious “expertise.” Allowing experts would level the playing field.

In *Hosanna*, the Supreme Court did not establish a test under which courts should simply defer to religious employers when resolving fact questions involving the four factors.²²⁴ Courts have emphasized in the broader context of ecclesiastical abstention that the doctrine should not “render ‘civil and property rights . . . unenforceable in the civil court simply because the parties involved might be the church and members, officers, or the ministry of the church.’”²²⁵ Rather, the test requires courts to decide whether, for example,

²²²Int’l Soc’y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).

²²³I use “bias” here to mean perceptions and assumptions that lead to an inclination toward a belief. Merriam-Webster defines “bias” as follows: “**a**: an inclination of temperament or outlook *especially* : a personal and sometimes unreasoned judgment : PREJUDICE **b**: an instance of such prejudice **c**: BENT, TENDENCY“. *Bias*, MERRIAM-WEBSTER DICTIONARY (NEW EDITION, 2019).

²²⁴*Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 197 (2012) (Thomas, J., concurring).

²²⁵*Kant v. Lexington Theological Seminary*, 426 S.W.3d 587, 596 (Ky. 2014) (citing *Jenkins v. Trinity Evangelical Lutheran Church*, 356 Ill. App. 3d 504, 825 N.E.2d 1206 (2005)).

teaching Hebrew to first and second graders is secular (historical, cultural) or religious (fulfilling the spiritual mission of the institution)²²⁶ or whether choosing and playing the music for Mass fulfills the spiritual mission of Catholicism or is a secular/administrative duty.²²⁷ Courts have expressed the difficulty of such “fact-intensive inquiries,”²²⁸ concluding that certain of the disputes involve very close calls.²²⁹ As a practical matter, then, relying on religious experts would help courts resolve these nuanced fact questions, and, as with First Amendment cases, experts could do so without weighing in on the ultimate legal issues of whether the employee is a minister or whether a certain practice endorses a particular religion.

In terms of questions arising in religion-related cases generally, Professor Samuel J. Levine provides a four-part taxonomy for looking at the common questions courts must address in religion-related lawsuits.²³⁰ The taxonomy identifies the following potential questions: (1) “sincerity of a religious claim”;²³¹ (2) “[m]etaphysical truth of a religious claim” (courts cannot adjudicate the validity or merit of a particular religious belief);²³² (3) “accuracy or consistency of a religious claim” (courts are confronted with differing takes on a religious practice or belief – intra-faith disputes);²³³ and (4) “substantial burden/compelling government interest.”²³⁴

²²⁶ See, e.g., *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018).

²²⁷ See, e.g., *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (deciding that a music director was a “minister,” the Fifth Circuit highlighted the Church’s evidence that “the Music Director provides a major service by overseeing the planning and coordination of the church’s music program, fostering the active participation of the ‘liturgical assembly’ in singing, and promoting the various musicians — choir members, psalmists, cantors, and organists — all of whom play instruments in service of the liturgy. Thus, the person who leads the music during Mass is an integral part of Mass and ‘a lay liturgical minister actively participating in the sacrament of the Eucharist.’”).

²²⁸ *Id.* at 176. The Fifth Circuit, in applying the new *Hosanna* test with the support of constitutional law scholars, including Professor Leslie Griffin, said: “the *Hosanna-Tabor* Court engaged in a fact-intensive inquiry and explicitly rejected the adoption of a ‘rigid formula’ or bright-line test.” *Id.*

²²⁹ See *Lishu Yin v. Columbia Int’l Univ.*, 335 F. Supp. 3d 803, 817 (D.S.C. 2018); *Richardson v. Nw. Christian Univ.*, 242 F. Supp.3d 1132, 1145 (D. Or. 2017) (“The out-of-circuit cases cited by the parties are of limited use in determining whether the ministerial exception applies here. It is difficult to distill broadly applicable rules from those cases, which involved distinct fact patterns.”).

²³⁰ See Levine, *supra* note 14, at 34–38.

²³¹ *Id.* at 34.

²³² *Id.* at 35.

²³³ *Id.* at 36.

²³⁴ *Id.* at 38.

The ministerial exception raises fact questions²³⁵ that do not fit neatly within any of these categories but that most closely align with question number three, arguably inviting the court to decide between two competing interpretations of religious doctrine, belief, or practice.²³⁶ Yet, the questions do not easily fit in this category because the “who is a minister inquiry” requires line drawing between what is religious and what is secular rather than competing ideas of what a particular religion requires. For instance, to return to *Grussgott*, the court was deciding between accepting as fact that a secular teacher educating students about prayers is religious as opposed to accepting the teacher’s position that it is secular. This inquiry strikes this author as similar to that in *Schempp*, which led Justice Goldberg to distinguish between “teaching about religion,” and “the teaching of religion.”²³⁷

In First Amendment cases, courts have heard from experts when deciding whether vertical grave decorations are religious or simply personal preference²³⁸ or whether teaching Intelligent Design means teaching religion or science.²³⁹ Though courts have not always heeded the expertise of one expert or another, allowing the expertise in these cases provided the courts with the fullest arsenal of available resources to decide difficult fact questions. Similarly, in cases where defendants raise the ministerial exception, using religion experts would allow courts to evaluate whether a particular practice is, in fact, religious or secular without evaluating the practice for religious purposes or deciding the ultimate question of whether fulfilling the function makes the employee a minister (which remains strictly

²³⁵ Courts routinely acknowledge that while the ultimate questions of whether an employee is a minister or whether a religious institution is a church for purposes of the exception are questions of law, the underlying questions that relate to the four *Hosanna* factors are questions of fact.

²³⁶ See Samuel J. Levine, *Hosanna-Tabor and Supreme Court Precedent: An Analysis of the Ministerial Exception in the Context of the Supreme Court’s Hands-Off Approach to Religious Doctrine*, 106 NW. U. L. COLLOQUY, 120, 134 (2011) (describing *Hosanna-Tabor* as concerning “the parties’ conflicting interpretations of Lutheran church doctrine.” Perich purportedly failed to follow church doctrine for dispute resolution.).

²³⁷ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (Goldberg, J., concurring) (“And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains and of the teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools.”). The Court in *Kant v. Lexington Theological Seminary* relied on this distinction to decide Kant’s role was teaching about religion, rather than teaching to spread the tenets of the faith. 426 S.W.3d 587, 595–96 (Ky. 2014).

²³⁸ See *supra* Part IV.

²³⁹ See *supra* Part IV.

in the court's arena). This would not require the court to decide whether the employee serves the religion well or poorly, thus opining on the religious institution's employment decision, which the court cannot do.

Courts could use *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, to test the reliability of the expert testimony, just as a court would with any expert witness.²⁴⁰ In terms of relevance, Judge Harvey Brown says “[t]he relevance inquiry originated from *Daubert*'s requirement that the opinion must ‘fit’ the issues in the case; it must be ‘sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.’”²⁴¹ These experts would certainly provide specialized knowledge that could aid the factfinder. Thus, procedurally, cases involving the ministerial exception would sometimes require a *Daubert* examination during the typical limited discovery phase. Yet, courts already rely on evidence in support of one side's position, like an employee handbook.²⁴² This would add little in terms of judicial time and effort.

In response, commentators and courts may object that relying on experts in these cases leads to improper court entanglement in religion. My reaction to this objection is straightforward. Nothing about the religious institution as defendant, other than that the defendant is religious, makes the possibility of state entanglement more or less likely here than in Establishment Clause cases. In other words, arguably, entanglement comes from the nature of the questions the court is called upon to answer, not the nature of the parties to the dispute. And, they are the same types of questions that religion experts have been helping courts decide in religious cases with public schools, cities, states, and other state actors as defendants.

Further, it is unclear what exactly courts mean when they warn of government entanglement as a reason for abstaining from deciding a controversy that involves religion or a religious institution. When courts seek to avoid excessive entanglement, they typically mean the government should not interfere with the functioning of religious institutions and religious institutions should not interfere with the running and functioning of the government.²⁴³ As the Supreme Court said in *Larkin*, “[t]he Framers did not set up a system of government in which important, discretionary

²⁴⁰ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 578 (1993).

²⁴¹ Brown & Davis, *supra* note 5, at 36–37 (citing *Daubert*, 509 U.S. at 591).

²⁴² *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 582 F. Supp. 2d 881, 885 (E.D. Mich. 2008), *vacated*, 597 F.3d 769 (6th Cir. 2010), *rev'd*, 565 U.S. 171 (2012).

²⁴³ *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

governmental powers would be delegated to or shared with religious institutions.”²⁴⁴ The Third Circuit described entanglement as either substantive—“where the government is placed in the position of deciding between competing religious views—or procedural—where the state and church are pitted against one another in a protracted legal battle.”²⁴⁵ As described above, using religion experts for the threshold ministerial exception fact questions would require neither substantive nor procedural entanglement.

And, as one commentator notes (and describes as the irony of *Hosanna-Tabor*), courts are already entangled with religion to the extent they are deciding fact issues concerning whether an employee is a minister.²⁴⁶ The commentator goes on to say, “A court could have easily resolved Perich’s retaliation claim without becoming entangled with doctrinal or theological questions.”²⁴⁷ In the ministerial cases described herein, religion experts would be opining on only those questions courts are already analyzing, using evidence the parties provide. The entanglement argument lacks merit as long as *Hosanna* requires courts to determine who is a minister.

In addition, relying on experts would allow for greater judicial neutrality and impartiality. Courts should decide religion-related cases without referencing one primary religion²⁴⁸ or the judge’s own religion. Disestablishment means “the abolition of all the religious preferences associated with the old established churches of Western Europe.”²⁴⁹ In today’s highly pluralistic/religiously diverse society, the need for judicial neutrality regarding religion is paramount. In 1965, the United States Supreme Court remarked on the complexity of our country’s religious

²⁴⁴ *Id.* at 127 (describing how when the American Revolution occurred, the concern was the political oppression from the church controlling government functions).

²⁴⁵ *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 120 (3d Cir. 2018) (citing *Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d Cir. 2006)).

²⁴⁶ Corbin, *supra* note 28, at 965–69 (2012) (“The very nature of the question—is this person a ‘minister’?—invites courts to become entangled with theological and doctrinal issues beyond their institutional competence.”).

²⁴⁷ *Id.* at 959.

²⁴⁸ See Sullivan, *supra* note 220, at 48 (“Because of the ambivalence of Americans with respect to expertise in religion, because of their general unfamiliarity with the social scientific study of religion, and because any and all defining of religion by US law is unconstitutionally establishmentarian, the argument has been made that expertise about religion is simply not necessary.”).

²⁴⁹ See Christopher C. Lund, *Leaving Disestablishment to the Political Process*, 10:1 DUKE J. CONST. L. & PUB. POL’Y 45, 46 (2014).

diversity: “Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace.”²⁵⁰ Today, the Pew Forum reports that 70.6% of Americans are Christian (which includes Evangelical Protestant, Mainline Protestant, Historically Black Protestant, Catholic, Mormon, Orthodox Christian, and Jehovah’s Witness).²⁵¹ Non-Christian faiths account for 5.9% of the population, while “Unaffiliated” account for 22.8%.²⁵² Given this rich religious diversity, courts should be vigilant (and use all available tools) to not view every religion’s practices and beliefs just as they view mainstream religions’ practices and beliefs.

At the same time, judicial decision-making itself has a dynamic that might lead a judge to favor the religious institution or its leaders’ position on what is religious. This point is not necessarily about how a judge’s own religious values inform her decision-making.²⁵³ Rather, this is about how judges’ perceptions of other religions (stemming from judges’ education, religious experiences, and general backgrounds) inform their decisions about how other faiths work and function. This article assumes (with only anecdotal but not empirical evidence) that some judges decide facts about others’ religions based on misconceptions and false perceptions that may stem from their own religious backgrounds or “sense” of another’s religion.²⁵⁴ Commentators have mentioned the concern with juries that “preconceived notions of religion

²⁵⁰ *United States v. Seeger*, 380 U.S. 163, 174 (1965).

²⁵¹ *Religious Landscape Study*, PEW RESEARCH CENTER, <http://www.pewforum.org/religious-landscape-study> (last visited Dec. 9, 2019); see also JULIA CORBETT-HEYMAYER, *RELIGION IN AMERICA* 28–29 (7th ed. Routledge 2016). (“The majority of the population is Christian (78 percent) . . . Slightly over half are Protestants (51 percent) and about one-quarter are Catholic.” She goes on to explain that religions other than Christianity account for less than 5% of the population.)

²⁵² *Religious Landscape Study*, *supra* note 251.

²⁵³ See generally Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-Making*, 15 WM. & MARY BILL RTS. J. 43 (2006); Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537, 560 (1998); Howard Kislowicz, *Judging Religion and Judges’ Religions*, 33 J. OF L. & RELIGION 42, 42 (2018).

²⁵⁴ This is obviously not a new idea. Others have commented on courts’ lack of sensitivity toward minority religions and heightened sensibility toward a majority religion: See Samuel J. Levine, *A Look at the Establishment Clause Through the Prism of Religious Perspectives: Religious Majorities, Religious Minorities, and Nonbelievers*, 87 CHI.-KENT L. REV. 775, 777 (2012) (“[T]he Court’s rhetoric and, at times, the Court’s holdings demonstrate an inability or unwillingness to look beyond majoritarian religious perspectives.”). In his conclusion, Professor Levine describes the “latent majoritarian religious perspectives that continue to characterize the Supreme Court’s Establishment Clause jurisprudence.” *Id.* at 808.

and religious issues may obscure the resolution of a case.”²⁵⁵ This article applies the same concern to judges.

In a sense, this bias would resemble what Professor Dan Simon describes as the judiciary’s “coherence bias.”²⁵⁶ Judges aspire to make decisions with certainty. When a judge is confronted with a hard, complex case, the judge mentally “restructure[s]” the arguments so that the judge dismisses all the points related to the less favored position to arrive at a single, certain, favored position.²⁵⁷

Professor Simon describes this shift toward closure as follows:

[T]he judge’s mental representation of the dispute evolves naturally towards a state of coherence. That is, the cognitive system *imposes coherence* on the arguments so that the subset of arguments that supports one outcome becomes more appealing to the judge and the opposite subset, including arguments that previously seemed appropriate, turns less favorable.²⁵⁸

Simon illustrates in his research how the coherence model actually results in decisions based on skewed mental models: “Due to these *coherence shifts*, at the culmination of the process, the decision-maker’s mental model is skewed toward conformity with the emerging decision. As the hard case morphs into an easy one, the decision follows easily and confidently.”²⁵⁹ Thus, the judicial decision-making process impels the judge toward certainty.

Professor Linda L. Berger talks about judges engaging “in sensemaking,” which she describes as “an unconscious process in which the decisionmaker’s implicit knowledge and background experience intuitively affect his or her perceptions and impressions, and those in turn add up to an increasingly coherent and cohesive whole.”²⁶⁰ She describes as part of coherence-based reasoning (judicial decision-making as moving from conflict to closure) the idea of “cultural cognition” in which “the decisionmaker’s values are

²⁵⁵ See Chopko & Parker, *supra* note 34, at 248.

²⁵⁶ See generally Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 20 (1998).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 517 (2004).

²⁶⁰ Linda L. Berger, *A Revised View of the Judicial Hunch*, 10 LEGAL COMM’N. & RHETORIC: JALWD 1, 13 (2013).

subconsciously influencing cognition during the reasoning process. The decisionmaker's cultural outlook is not the source of his or her judgments, but unconsciously influences how the decisionmaker perceives the facts."²⁶¹

For instance, Professor Rhett Larson described the Ninth Circuit's decision in *Navajo Nation v. U.S. Forest Service*²⁶² as the Court's failure to understand and appreciate "the importance many indigenous faiths give to water."²⁶³ In *Navajo Nation*, the Court upheld the government's plan to use recycled wastewater (sewage) on the San Francisco Peaks, sacred Navajo land, for artificial snow, rejecting the Plaintiffs' argument that it would substantially burden their religious beliefs; they argued it would spiritually contaminate the entire mountain and devalue their religious exercises.²⁶⁴ In applying the substantial burden test, the Court ruled that because the artificial snow would impact only Plaintiffs' subjective experience ("[t]hat is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities"),²⁶⁵ the government action would not constitute a substantial burden.

The dissent, in explaining why using wastewater on the Peaks would constitute a substantial burden on Navajo religious practice, challenged the majority's bias, saying:

Perhaps the strength of the Indians' argument in this case could be seen more easily by the majority if another religion were at issue. For example, I do not think that the majority would accept that the burden on a Christian's exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water, based on an argument that no physical harm would result and any adverse effect would merely be on the Christian's 'subjective spiritual experience.' Nor do I think the majority would accept such an argument for an orthodox Jew if the government permitted only non-Kosher food.²⁶⁶

²⁶¹ *Id.* at 14.

²⁶² *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008).

²⁶³ Rhett B. Larson, *Holy Water and Human Rights: Indigenous Peoples' Religious-Rights Claims to Water Resources*, 2 ARIZ. J. ENVTL. L. & POL'Y 81, 103 (2011).

²⁶⁴ 535 F.3d at 1067.

²⁶⁵ *Id.* at 1070.

²⁶⁶ *Id.* at 1097 (Fletcher, J., dissenting).

Professor Larson posits that “[d]rawing lines between substantial and insubstantial burdens in religion is especially difficult in cases of minority religions, like those of many indigenous communities.”²⁶⁷ This is because courts often “view faith through the lens of mainstream religions,” and are thus “ill-equipped” to decide the degree of burden with regard to minority religions.²⁶⁸

As a result of the likely biases Native Americans will face in court,²⁶⁹ Congress passed the Indian Child Welfare Act in 1978.²⁷⁰ Congress was concerned “that Native-American culture was under a systematic assault from an Anglo-centric state court culture that seemed to think removal of Indian children from their native culture was, *de facto*, ‘in the best interest’ of any child before the court.”²⁷¹ In terms of convincing federal judges that certain Native American practices are religious rather than secular, Professor Allison Dussias posits that “twentieth-century Native Americans continue to face much of the same skepticism about the religious nature of their beliefs and practices that was used to justify the suppression of the beliefs and practices of their ancestors in the nineteenth century.”²⁷²

As a further example, Dr. Winnifred Sullivan, a comparative religion scholar who served as an expert in the *Warner* and *Prison Fellowship Ministries* cases described in part IV, opines that American courts typically reject religion experts to honor disestablishmentarianism (or avoid establishmentarianism) and in doing so, ironically, allow the judges increased power to define religion according to their own religious biases.²⁷³ She describes the thinking of many judges deciding religion cases as follows:

Because of the ambivalence of Americans with respect to expertise in religion, because of their general unfamiliarity

²⁶⁷Larson, *supra* note 263, at 102–03.

²⁶⁸*Id.* at 103, 106.

²⁶⁹In terms of religion, Professor Dussias describes the challenges when “plaintiffs must explain their religious concepts to judges who are more familiar with the concepts of Christianity—a formidable task, given the fundamental differences between Christianity and Native American religions.” Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 816 (1997).

²⁷⁰25 U.S.C. §§ 1901–63.

²⁷¹Paul David Kouri, Note, *In Re M.J.J., J.P.L., & J.P.G: The “Qualified Expert Witness” Requirements of the Indian Child Welfare Act*, 29 AM. INDIAN L. REV. 403, 404 (2005).

²⁷²Dussias, *supra* note 269, at 810–11.

²⁷³Sullivan, *supra* note 220, at 52.

with the social scientific study of religion, and because any and all defining of religion by US law is unconstitutionally establishmentarian, the argument has been made that expertise about religion is simply not necessary.²⁷⁴

She goes on to describe *Warner v. Boca Raton* where the judge “developed his own theory of religion . . . using his own religious knowledge as a member of a conservative Presbyterian Church as well as picking and choosing among the views of the courtroom experts.”²⁷⁵

In a similar vein, commentators have advanced reasons to use other types of experts to alleviate bias in judicial decision-making for complex questions of culture,²⁷⁶ anthropology,²⁷⁷ and history.²⁷⁸ For instance, Professor Masua Sagiv of Tel Aviv University recommends courts use anthropologists and sociologists as experts to alleviate the challenge of cultural bias.²⁷⁹ According to Sagiv, courts often “perceive facts and evidence as empirical, precise, and positivistic. . . . However, when the conflict involves cultural differences, this approach is problematic, since culture-dependent facts can be highly contextual and may be subject to competing interpretations by those involved in the case.”²⁸⁰ This coincides with the sensemaking and coherence-based reasoning theories described above, suggesting that as judges are drawn toward precise and positivistic results, they are less inclined to perceive the nuance from the highly contextual facts.

It is hard to imagine facts that are more “contextual” and “subject to competing interpretations” than those involving whether activities are religious and whether the person doing them is fulfilling the mission of the religion or religious organization. Professor Sagiv mentions John Hostetler’s testimony in *Yoder v. Wisconsin* as an example of Supreme Court relying on a cultural expert.²⁸¹ Commentators recommend cultural experts²⁸² like

²⁷⁴ *Id.* at 48.

²⁷⁵ *Id.* at 51.

²⁷⁶ See Masua Sagiv, Essay, *Cultural Bias in Judicial Decision Making*, 35 B.C. J. L. & SOC. JUST. 229, 229 (2015).

²⁷⁷ See Rosen, *supra* note 11.

²⁷⁸ See Goodman, *supra* note 11.

²⁷⁹ Sagiv, *supra* note 276, at 235.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 239 (describing Hostetler as an anthropologist).

²⁸² *Id.* at 235. In the article, the author provides several definitions of culture, including “the meanings and values that arise amongst distinctive social groups and classes, on the basis of their

anthropologists and sociologists to remedy the possible bias that accompanies complex issues of culture. Judges typically decide facts based on evidence that is “empirical, precise, and positivistic,”²⁸³ which sometimes does not apply when evidence or facts flowing from the evidence are informed by a litigant’s culture.²⁸⁴ For the fact finder, this requires a nuance atypical of the usual sets of evidence. For gaps in judges’ understanding of cultural differences, the commentator suggests courts use cultural experts as “the most prominent ways to mitigate the potentially unjust consequence.”²⁸⁵

Hosanna is clumsy in that the opinion uses language and factors largely informed by Christianity.²⁸⁶ Yet, the Establishment Clause is meant to prohibit government conduct that advances or inhibits religion or that amounts to preferentialism among religions or between religion and no religion.²⁸⁷ Religion experts could help courts understand that a rabbi is not a minister, neither in the Jewish sense nor in the Christian sense of the term.²⁸⁸ In the Christian sense of the term, a minister is a person with special authority to perform certain sacred rituals.²⁸⁹ A rabbi, on the other hand, has similar authority to perform Jewish rituals as other adults in the community.²⁹⁰

historical conditions and relationships, through which they handle and respond to the conditions of existence.” *Id.* at 231.

²⁸³ *Id.* at 235.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 198 (2012) (Alito, J., concurring) (noting the language issue in *Hosanna*, Justices Alito and Kagan remarked in their concurrence that courts should focus on an employee’s function because the designation minister “is rarely if ever used in this way [as a member of the clergy] by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart,” with other faiths.).

²⁸⁷ *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216 (1963).

²⁸⁸ One commentator who writes about judges’ socioeconomic bias defines bias as “inclination; prejudice; predilection.” Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 141 (2013). The commentator describes judicial bias as a predilection toward or prejudice against one or more of the parties to a dispute. *Id.*

²⁸⁹ *See* GotQuestions.org, What is a Christian Minister?, <https://www.gotquestions.org/Christian-minister.html> (last visited Dec. 9, 2019) (“A minister is, literally, a ‘servant,’ but the word has taken on a broader meaning in religious circles. Today, a Christian minister is seen as someone authorized to conduct religious services. A person who leads worship services, administrates a church, or conducts weddings and funerals is considered a Christian minister. Synonyms of *minister* are *clergy* and *pastor*.”).

²⁹⁰ *See* LearnReligions.com, What is a Rabbi? <https://www.learnreligions.com/what-is-a-rabbi-2076767> (last visited Dec. 9, 2019) (“Among the local spiritual leaders in major world religions,

Judaism makes no distinction between “called” and “lay.” A rabbi is a teacher,²⁹¹ just as a Judaics teacher is a teacher. Thus, the title, Rabbi, does little to distinguish leader from lay in terms of what religious functions a rabbi can perform.²⁹² And, while a rabbi would “minister”²⁹³ to a grieving congregant, rabbis are never referred to as ministers. These nuances could easily be lost on a judge, as factfinder.

Finally, to avoid adversarial bias and the other frequently discussed ills²⁹⁴ from expert witnesses selected by each party, courts could also use court appointed expert witnesses. In Justice Breyer’s concurrence in *General Electric Co. v. Joiner*,²⁹⁵ he recommended courts appoint special masters pursuant to Federal Rule of Evidence 706 to assist the court in understanding specialized knowledge.²⁹⁶ Yet, judges rarely use court-appointed experts.²⁹⁷ “A survey of federal judges revealed that 81% had never appointed an expert under FRE 706, and only 8% had appointed a court expert more than one time.”²⁹⁸ Judges are concerned about the cost of such experts and may be unfamiliar with the process for appointing an expert.²⁹⁹

Rule 706 allows the court to appoint an expert *sua sponte*, ask the parties to identify candidates and appoint an agreed on expert, or select its own

the Jewish rabbi occupies a somewhat different role for a synagogue than does, for example, a priest for a Roman Catholic church, the pastor of a Protestant church, or the Lama of a Buddhist temple. The word *Rabbi* translates as “teacher” in Hebrew. In the Jewish community, a rabbi is viewed not only as a spiritual leader but as a counselor, a role model and an educator. Education of the young is, in fact, the principle role of a rabbi. . . . The rabbi does not hold the kind of ritual authority granted clerics in other religions, but serves a more important role as revered leader, advisor and educator.”).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Merriam-Webster defines the verb “minister” as “1: to function as a minister of religion 2: to give aid or service” *Minister*, MERRIAM-WEBSTER DICTIONARY (NEW EDITION, 2019).

²⁹⁴ See David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, 93 IOWA L. REV. 451 (2008).

²⁹⁵ *Gen. Electric Co. v. Joiner*, 522 U.S. 136, 147, 149 (1997) (Breyer, J., concurring).

²⁹⁶ *Id.* at 149 (Breyer, J., concurring).

²⁹⁷ See Stephanie Domitrovich, Symposium: *Fulfilling Daubert’s Gatekeeping Mandate Through Court-Appointed Experts*, 106 J. CRIM. L. & CRIMINOLOGY 35, 47 (2016); Sven Timmerbeil, *The Role of Expert Witnesses in German and U.S. Civil Litigation*, 9:1 ANN. SURV. OF INT’L & COMP. L.: 168, available at <https://digitalcommons.law.ggu.edu/annlsurvey/vol9/iss1/8>.

²⁹⁸ Timmerbeil, *supra* note 297, at 168.

²⁹⁹ Domitrovich, *supra* note 297, at 42.

expert.³⁰⁰ The rule vests authority with the court to control the selection process. Commentators posit that court-appointed experts may solve some of the ills now plaguing the existing system of dueling expert witnesses.³⁰¹ Specifically, Judge Richard Posner notes that our adversarial system suffers when proffered evidence “is beyond the ken” of the average judge, recommending court appointed experts as a possible solution.³⁰² This procedural tool would allow courts to select a true third party religious expert to aid in the court’s decision-making.

VI. CONCLUSION

Ultimately, if courts rely on religious expert witnesses to help decide who is a minister, results in these cases may remain the same. If, for instance, both sides hire religion experts, courts might still routinely rule in favor of the religious employer. Yet, if courts allow evidence from religion experts, at least plaintiffs would stand a chance under the evidentiary rules to present evidence about religion to combat the factual assertions the defendant religious employer presents. Then, courts could look beyond the religious institution defendant for guidance on the complex questions about religion they confront in these cases.

In First Amendment cases, religion expert witnesses have served to clarify and educate, at times, dispelling courts’ misconceptions. Attaching no value to parties’ beliefs and practices, these experts simply educate the fact finders on what religions believe and practice and, accordingly, whether certain practices are religious or secular. In cases involving the ministerial exception, courts, as well as the individuals seeking relief, would certainly benefit from leveling the playing field in terms of specialized knowledge of religion by allowing religion experts or retaining third party experts on religion.

³⁰⁰ FED. R. EVID. 706.

³⁰¹ See Anthony Champagne, Danny Easterling, Daniel W. Shuman, Alan Tomkins & Elizabeth Whitaker, *Are court-appointed experts the solution to the problems of expert testimony?*, 84 JUDICATURE 178, 181 (2001).

³⁰² Richard A. Posner, *What is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable*, 19 GREEN BAG 2D 187, 190 (2016).