

**MODIFYING THE MINISTERIAL
EXCEPTION: PROVIDING MINISTERS WITH
A REMEDY FOR EMPLOYMENT
DISCRIMINATION UNDER TITLE VII WHILE
MAINTAINING FIRST AMENDMENT
PROTECTIONS OF RELIGIOUS FREEDOM**

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INTRODUCTION

Although the foundation of every religious organization is its doctrine, the clergy are the pillars upon which the message of a religious organization ultimately rests. Ideally, every religious organization would treat its clergy members with respect, fairness, and generosity. In reality, however, ministerial employees often face the same types of employment discrimination as their secular counterparts. Generally, an employee who has been subjected to discrimination in the workplace may bring an action against his or her employer under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, sex, religion, or national origin.¹

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¹ Title VII of the Civil Rights Act provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2000).

Despite the general applicability of Title VII to the employment practices of religious organizations,² the majority of the circuit courts have refused to adjudicate the employment discrimination claims of clergy members, creating a “ministerial exception” to Title VII.³ This exception arose in response to concerns that the application of Title VII to a religious organization’s ministerial employment decisions would violate the organization’s rights under the First Amendment, which provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁴

Ambiguity regarding the nature of the religious freedoms protected by the First Amendment has left ministerial employment discrimination claims stuck in a constitutional quagmire.⁵ Although the majority of circuits have adopted a ministerial exception in order to avoid the difficulty of applying First Amendment protections to ministerial Title VII claims, the lingering effects of First Amendment ambiguity are inescapable. The breadth of the ministerial exception differs among the circuits, depending upon a court’s determination of the religious freedoms protected by the First Amendment.⁶ First Amendment

² Title VII contains a limited exception for religious organizations in regard to religious discrimination, stating that it shall not apply “to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities.” 42 U.S.C. § 2000e-1(a). The constitutionality of this exception was upheld in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–30 (1987).

The inclusion of this narrow exception for religious discrimination indicates that Congress intended Title VII otherwise to apply to religious institutions. See 2 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 8.05 (3d ed. 2002). This is confirmed by the congressional record, which shows that the legislature debated the scope of the exception and chose to limit it to discrimination on the basis of religion. See JULIA K. STRONKS, LAW, RELIGION, AND PUBLIC POLICY 66 (2002); Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86, 90–91 (2002). Thus, pursuant to Title VII, ministers have a cause of action against their employers for discrimination on the basis of race, sex, or national origin.

³ The First, Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits employ a broad ministerial exception to Title VII. See *infra* Part II.

⁴ U.S. CONST. amend. I.

⁵ The scope of the protections provided by the religion clauses of the First Amendment is the subject of continuing debate, largely due to the lack of legislative history regarding the drafting of the clauses, and the expansive academic and judicial exhortations on the topic of religious freedom. See *infra* Part I.A.

⁶ While the majority of circuits have adopted a broad ministerial exception,

ambiguity is also evident in the use of different constitutional justifications for the exception.⁷ Consequently, both the foundation and the scope of the ministerial exception vary from circuit to circuit.

Although the exception is alive and well in many circuits, the tides are beginning to turn. Recent attempts by the Second and Third Circuits to move away from the ministerial exception⁸ and increased public scrutiny of exceptions exempting religious organizations from generally applicable federal laws⁹ suggest that the Supreme Court may have occasion to rule on the ministerial exception in the near future. In the meantime, the circuits are desperately in need of a uniform and systematic way of applying First Amendment protections in the context of ministerial employment discrimination cases.

The purpose of this Note is threefold: first, to provide a comprehensive understanding of the current use of the ministerial exception in the circuits; second, to clarify the First Amendment issues implicated in the adjudication of ministerial employment discrimination claims; and third, to provide a test that will allow for a consistent and accurate application of the First Amendment to Title VII claims against religious organizations.

Part I examines the collision of Title VII and the First Amendment in the context of ministerial employment discrimination, and the creation of the ministerial exception in response to this conflict. In addition, Part I provides an overview of the two basic arguments employed by the circuits in support of the ministerial exception, and briefly explores how the Supreme Court decision in *Employment Division, Department of Human Resources v. Smith*¹⁰ may influence the future application of the ministerial exception. Part II analyzes how the exception has

some have applied a narrower version of the exception, which requires that the religious organization provide some religious basis for the alleged discriminatory conduct. See *infra* Part II.

⁷ See *infra* Part I.B.

⁸ See *infra* Part III.

⁹ See, e.g., Diana B. Henriques, *Where Faith Abides, Employees Have Few Rights*, N.Y. TIMES, Oct. 9, 2006, at A1.

¹⁰ 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) *and recognized in part in* *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).

been used in the circuits, highlighting: (1) the particular form of the exception adopted; (2) justifications for the exception; and (3) application of the exception post-*Smith*. Part III looks at the recent attempts by the Second and Third Circuits to move beyond the ministerial exception. Part IV synthesizes Parts I through III, clarifying the current state of the law and critiquing the ministerial exception as an ineffective means of applying First Amendment protections to ministerial employment discrimination claims. Finally, Part V proposes a new test for determining whether a Title VII claim against a religious organization violates the organization's rights under the First Amendment.

I. OVERVIEW OF THE MINISTERIAL EXCEPTION

A. *The Conflict Between Title VII and the Religion Clauses in the Context of Religious Employment: The Evolution of the Ministerial Exception*

Although it is clear that Congress intended Title VII to apply to religious organizations,¹¹ the courts have had enormous difficulty determining whether an employment decision by a religious organization is actionable, discriminatory conduct under Title VII or a religious matter protected by the First Amendment.¹² This difficulty reaches its peak in the context of employment discrimination claims concerning ministers, where courts are presented with the daunting task of reviewing a church's employment decision while avoiding an unconstitutional intrusion into religious doctrine or belief.

Instead of attempting to steer a ministerial Title VII claim through the demands of the First Amendment, the majority of the circuit courts have decided that such navigation is impossible, barring ministerial Title VII claims altogether.¹³ These circuits have concluded that it is better to partially sacrifice the goals of Title VII by giving religious organizations complete immunity than to risk the constitutional infringements

¹¹ See *supra* note 2 and accompanying text.

¹² See RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 527 (Paul Finkelman ed., 2000) [hereinafter ENCYCLOPEDIA] (describing how the question of whether federal antidiscrimination laws should apply to religious organizations has "perplexed the courts for decades").

¹³ See *infra* Part II.A–B.

that may result from government regulation of ministerial employment.¹⁴

What are the constitutional risks of allowing ministerial Title VII claims to proceed? What are the First Amendment freedoms upon which we may not trespass? Congressional intent regarding the scope of protections afforded by the religion clauses is largely unknown, due to a lack of legislative history.¹⁵ This gap in legislative history, combined with the extensive litigation of issues pertaining to religious freedom, has spawned a maelstrom of First Amendment jurisprudence.

Generally, the Free Exercise Clause prohibits government infringement on religious beliefs and practices.

The claimant in a free exercise case can be a religious individual or a religious group. Their claim is that the law at issue somehow “prohibits” the freedom of their religious exercise. The law infringes on their beliefs of conscience. It inhibits their acts of worship or of religious speech, press, or association. It

¹⁴ See, e.g., *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (“While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs.”).

Barring all ministerial Title VII claims effectively avoids the question of whether the conduct was a legitimate exercise of religious belief, but the broad ministerial exception inevitably leads to the question of who qualifies as a “minister.” The ministerial exception thus shifts the focus of litigation from a genuine analysis of First Amendment concerns to a semantic argument—or worse, a religious judgment—about the nature of the employee’s role in the religious organization. See William S. Stickman, IV, Comment, *An Exercise in Futility: Does the Inquiry Required to Apply the Ministerial Exception to Title VII Defeat Its Purpose?*, 43 DUQ. L. REV. 285, 297–98 (2005); see also, e.g., *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006) (reasoning that a church music director was a “minister” and consequently could not bring an age discrimination action against the church because if he “played the organ with a rock and roll beat, or played excerpts from *Jesus Christ Superstar*, at an Easter Mass he would be altering the religious experience of the parishioners”).

¹⁵ The original version of the Constitution ratified by the states in 1788 did not contain any provision for the protection of religious freedom or civil rights. See JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 76–77, 79 (2d ed. 2005). Of the nine states that ratified the Constitution in 1788, five ratified it only on assurances that a bill of rights would be prepared by the First Session of Congress. See *id.* at 79. During the First Session of Congress, the House and the Senate independently debated the wording of a religious freedom provision. See *id.* at 83. Ultimately, Congress appointed a joint committee of three senators and three representatives to draft a final version. See *id.* Unfortunately, the intent of the committee in its selection of the final wording of the religion clauses is unknown; the First Session of Congress did not maintain an official record of its debates, nor is there any record of the deliberations within the joint committee. See *id.* at 80, 88.

commands them to do something, or to forgo something, that conflicts with the demand of their individual consciences or collective faiths. . . . In brief, the government unduly “burdens” their religion.¹⁶

Until 1990, the Supreme Court and the circuit courts typically employed a strict scrutiny standard of review to determine whether a government act violated the Free Exercise Clause.¹⁷ In *Sherbert v. Verner*,¹⁸ the Court stated that the government may substantially burden free exercise of religion only if the conduct is the least restrictive means of furthering a compelling government interest.¹⁹ Notwithstanding this precedent, the Supreme Court effectively discarded the *Sherbert* compelling interest test in the landmark decision *Employment Division, Department of Human Resources v. Smith*,²⁰ in which the Court found that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability.’”²¹

The *Smith* decision was sharply criticized for its curtailment of Free Exercise rights.²² In response, Congress passed the

¹⁶ *Id.* at 144–45.

¹⁷ See PETER K. ROFES, THE RELIGION GUARANTEES 151 (2005).

¹⁸ 374 U.S. 398 (1963).

¹⁹ *Id.* at 403.

²⁰ 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997) *and recognized in part in* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

²¹ *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)). In *Smith*, the Court held that Oregon could constitutionally apply a state law that denies unemployment benefits to “drug users” to people who ingest peyote for religious purposes. See *id.* at 890. In response to Smith’s argument that the Free Exercise Clause prohibits the government from requiring him to observe a law that forbids an act that his religion requires, the Court stated: “Respondents urge us to hold, quite simply, that when otherwise prohibitible conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.” *Id.* at 882. The Court held that “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’” *Id.* at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 451 (1988)).

Although the Court refused to apply the *Sherbert* compelling interest test to the facts of *Smith* and indicated that it would be willing to forgo any future use of it, the Court did not decidedly do away with the test. See *id.* at 883–86.

²² See ROFES, *supra* note 17, at 157 (“The news of [*Smith*] promptly triggered widespread outcries, nowhere more prominently than on the floor of Congress.”).

Religious Freedom Restoration Act of 1993 (“RFRA”).²³ The RFRA explicitly states that its purpose is to restore the *Sherbert* compelling interest test for determining violations of the Free Exercise Clause.²⁴ The renewed compelling interest test under the RFRA “applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.”²⁵ While *Smith* remains good law, many circuits continue to apply some type of compelling interest analysis in determining free exercise violations.²⁶

Unlike the Free Exercise Clause, which until recently was generally understood, the Establishment Clause has been a perpetual matter of debate.²⁷ On a basic level, the Establishment Clause prohibits government endorsement of a particular religion.²⁸ Due to the dearth of legislative history regarding the various rewordings of the Establishment Clause prior to the enactment of the First Amendment, “much remains up for grabs among the justices regarding the precise contours of the anti-

²³ 42 U.S.C. § 2000bb (2000).

²⁴ 42 U.S.C. § 2000bb(a)–(b) (2000).

²⁵ 42 U.S.C. § 2000bb-3(a) (2000). Further complicating matters is the Supreme Court decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), in which the Court held that the RFRA is an unconstitutional use of congressional legislative powers under the Enforcement Clause of the Fourteenth Amendment. *See id.* at 536. Last year, in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), the Court held that the RFRA was constitutional in regard to federal law. *See id.* at 418 (employing the RFRA compelling interest test as to a claim that application of the federal Controlled Substances Act to the religious use of hallucinogenic tea violates the Free Exercise Clause).

Even if the RFRA is constitutional as applied to Title VII, the RFRA’s impact on ministerial employment discrimination claims is uncertain. The RFRA provides that “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief *against a government*.” 42 U.S.C. § 2000bb-1(c) (2000) (emphasis added). While most circuits have interpreted this provision as limiting the scope of the RFRA to proceedings between a government entity and a private party, *see, e.g.*, *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), the Second Circuit has extended the RFRA compelling interest test to actions between private parties, displacing the ministerial exception in determining Free Exercise violations. *See infra* Part III.B.

²⁶ *See, e.g.*, *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999) (applying a three-part test for determining free exercise violations).

²⁷ *See* FRANKLYN S. HAIMAN, *RELIGIOUS EXPRESSION AND THE AMERICAN CONSTITUTION* 14 (2003) (“[D]ebate rages within the Supreme Court and among legal scholars as to whether an establishment of religion means an explicit endorsement of a particular religion, an endorsement of all religion as against irreligion, or more passive and implicit forms of support to one or more religions.”).

²⁸ *See* ROFES, *supra* note 17, at 30.

establishment principle,” and “modest changes in the Court’s membership can produce dramatic changes in the jurisprudence of the anti-establishment guarantee.”²⁹

In *Lemon v. Kurtzman*,³⁰ the Court created a test for determining whether a statute is permissible under the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”³¹ The *Lemon* test’s prohibition of excessive government entanglement in religious matters is particularly relevant in the context of ministerial Title VII claims, where courts are often asked to determine whether there was a genuine religious reason for the conduct in question.

Due to the ambiguity surrounding First Amendment religious freedoms, the reach of the ministerial exception varies from circuit to circuit, depending on the court’s interpretation of the extent to which the First Amendment protects the conduct of religious organizations. Likewise, justifications for the ministerial exception may be based on one or both of the religion clauses.³² A justification attributed to the Free Exercise Clause in one circuit may be attributed to the Establishment Clause in

²⁹ *Id.*

³⁰ 403 U.S. 602 (1971).

³¹ *Id.* at 612–13 (quoting *Walz v. Tax Comm’n*, 397 U.S. 644, 674 (1970)). *But see infra* notes 39–42 and accompanying text (regarding the nature of entanglement concerns and how they are rooted in the Free Exercise Clause, rather than in the Establishment Clause). There is some debate as to the current vitality of the *Lemon* test:

[T]he *Lemon* test has ignited an unusually wide range of hostility from a wide range of sources, including members of the very Court responsible for creating and applying it. . . . Nevertheless, no majority opinion of the Court has expressly rejected the three-pronged tool. . . . To be sure, every now and then the Court ignores *Lemon*. . . . For the most part, however, the test announced in *Lemon* persists in meandering through the contemporary jurisprudence of anti-establishment, a testament less to its inherent soundness than to the inability of its critics to muster agreement on a suitable replacement around which to coalesce.

ROFES, *supra* note 17, at 32.

³² See ENCYCLOPEDIA, *supra* note 12, at 530 (noting that some courts “blindly invoke” a ministerial exception, while others “expressly ground their decisions on free exercise or establishment theories”); *see also infra* Part II (examining the justifications used by different circuits for adopting a particular form of the ministerial exception).

another.³³ Careful examination of the case law shows that there are two basic justifications for the ministerial exception that dance around one another, sometimes appearing distinct, and sometimes overlapping. One is the argument that the minister-church relationship is so sacrosanct that discrimination claims arising out of it are inseparable from religious practice. The other is the more pragmatic rationale that adjudication of a ministerial employment discrimination claim requires excessive judicial entanglement in religious matters.

B. Justifications for Adopting a Ministerial Exception

1. The “Lifeblood” Justification: The Inseparability of Ministerial Employment Decisions from Religious Practice

The circuits that maintain a broad ministerial exception primarily support the exception through the “lifeblood” justification. Coined by the Fifth Circuit in *McClure v. Salvation Army*,³⁴ the justification is based on the premise that ministers are the “lifeblood” of a religious organization, essential to its spiritual functions.³⁵ Therefore, because ministerial employment is inextricably tied to the organization’s functions as a religious entity,³⁶ judicial review of ministerial employment decisions is tantamount to the review of religious belief and practice, and consequently violates the religious organization’s free exercise rights.³⁷

2. The Entanglement Justification: Prevention of Government Interference in Religious Matters

Circuits adhering to the ministerial exception also find support in the entanglement justification.³⁸ Unlike the more conceptual lifeblood argument, the entanglement justification proceeds pragmatically, maintaining that the adjudication of

³³ See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1378–80 (1981) (describing the confusion between the respective scopes of the religion clauses).

³⁴ 460 F.2d 553 (5th Cir. 1972).

³⁵ See *id.* at 558–59.

³⁶ See *id.* at 559.

³⁷ See *id.*

³⁸ See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465–67 (D.C. Cir. 1996).

ministerial employment discrimination claims requires excessive government interference in the internal affairs of religious organizations. The entanglement justification, invoking the Jeffersonian notion of the wall of separation between church and state, is an element of the Establishment Clause test set forth by the Supreme Court in *Lemon*.³⁹ As a result of *Lemon*, courts often attribute entanglement justifications to the Establishment Clause.⁴⁰ The true threat of entanglement, however, is that adjudication will interfere with a religious organization's spiritual functions and beliefs. The fear is not that a court will *endorse* a religious text or doctrine, but that the court will *impose* its interpretation of that doctrine upon the religious organization, and thereby prevent the organization from engaging in its own religious discourse and decision making.⁴¹ It is submitted that excessive government entanglement is more appropriately categorized as a violation of the Free Exercise Clause as opposed to one of the Establishment Clause, the latter of which primarily concerns government endorsements of, or preferences granted to, a particular religion.⁴² Regardless of the clause to which they are tied, entanglement concerns loom large in the arena of ministerial employment discrimination claims, posing very real and immediate obstacles to adjudication.

Entanglement concerns fall into one of two categories: substantive or procedural. Substantive entanglement concerns arise when adjudication of a claim would require a secular entity to interpret religious law or doctrine.⁴³ In contrast, procedural entanglement issues arise from the litigation itself, when the process of discovery, investigation, examinations, etc., is so invasive or protracted that it becomes unconstitutionally burdensome to the religious organization's spiritual functions.⁴⁴

³⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

⁴⁰ See Laycock, *supra* note 33, at 1379–80 (explaining how the *Lemon* test is “[o]ne important source of confusion” regarding the respective protections of the religion clauses).

⁴¹ See, e.g., *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1170 (4th Cir. 1985) (“[T]he guidance of the state cannot substitute for that of the Holy Spirit . . .”).

⁴² See *supra* notes 27–29 and accompanying text.

⁴³ See *Catholic Univ.*, 83 F.3d at 465 (finding that unconstitutional entanglement occurs when a trier of fact chooses between competing interpretations of a religious text).

⁴⁴ See *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000) (“Investigation by a government entity into a church’s employment

Of the two, substantive entanglement poses a greater threat to the constitutionality of ministerial employment discrimination claims.⁴⁵ Usually, procedural entanglement concerns are cited as additional support for barring claims that already pose significant substantive entanglement issues.⁴⁶ Although procedural entanglement may exist independent of substantive entanglement, no circuit court has barred a minister's Title VII claim on the grounds of procedural entanglement alone.

C. *Questions Regarding the Validity of the Ministerial Exception After Employment Division, Department of Human Resources v. Smith*

Further complicating matters is the potential impact of *Smith* on the ministerial exception. In *Smith*, the Supreme Court held that when the law and religious belief conflict, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"⁴⁷ Title VII applies to virtually all employers, and its primary purpose is to eliminate the pervasive social harm of discrimination in the workplace.⁴⁸ Therefore, it is reasonable to read *Smith* as supporting the enforcement of Title VII against religious organizations, regardless of whether this would incidentally infringe upon the organization's free exercise rights. By knocking out the free exercise justifications for the ministerial exception, the *Smith* decision would supersede the lifeblood argument.⁴⁹ This would leave only entanglement justifications

of its clergy would almost always entail excessive government entanglement into the internal management of the church."); *Catholic Univ.*, 83 F.3d at 466–67 (noting that procedural entanglement may occur through extensive investigation that diverts a significant amount of the religious organization's time and resources).

⁴⁵ See *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 949 (9th Cir. 1999) ("Where [substantive entanglement concerns are] absent, procedural entanglement considerations are reduced to the constitutional propriety of subjecting a church to the expense and indignity of the civil legal process.").

⁴⁶ See *id.*

⁴⁷ *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997) and *recognized in part in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).

⁴⁸ See SULLIVAN ET AL., *supra* note 2, § 8.04.

⁴⁹ See *supra* Part I.B.1 (discussing the "lifeblood" justification for the ministerial exception and its basis in the Free Exercise Clause).

for the exception, and these too could fall under *Smith* if interpreted as being derived from the Free Exercise Clause.⁵⁰

While some circuits have explicitly found that the ministerial exception survives *Smith*, many have not addressed the issue—either by choice or because they have not been confronted with a case invoking the ministerial exception since the *Smith* decision in 1990.⁵¹ Until the Supreme Court hears a ministerial exception case, the true impact of *Smith* on the exception remains a matter of speculation.⁵²

II. INCARNATIONS OF THE MINISTERIAL EXCEPTION: APPLICATION OF THE EXCEPTION IN THE CIRCUIT COURTS

A. *Strict Adherence to the Broad Ministerial Exception: The Fourth, Fifth, Seventh, and D.C. Circuits*

In 1972, the Fifth Circuit became the first circuit to formally adopt a ministerial exception. In the watershed case *McClure v. Salvation Army*,⁵³ the court barred the Title VII sex discrimination claim of a woman ordained as a minister of the Salvation Army.⁵⁴ After her ordination, McClure worked as a secretary, a Corps Commander, and a welfare caseworker.⁵⁵ McClure was fired after she complained to her superiors about unequal pay and benefits.⁵⁶

The court held that application “of Title VII to the employment relationship existing between . . . a church and its minister would result in an encroachment by the State into an

⁵⁰ See *supra* Part I.B.2 (examining the constitutional foundation for entanglement justifications for the ministerial exception).

⁵¹ In *Equal Employment Opportunity Commission v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996), the Circuit Court of Appeals for the District of Columbia held that the ministerial exception survives *Smith*. In *Catholic University*, the D.C. Circuit drew a distinction between the free exercise rights of individuals and those of religious organizations, interpreting *Smith* as limited exclusively to the former. See *infra* notes 72–77 and accompanying text. The Fourth, Fifth, Tenth, and Eleventh Circuits have adopted the reasoning of the D.C. Circuit in *Catholic University* in their continued application of the ministerial exception post-*Smith*. See *infra* notes 78, 94, 122 and accompanying text.

⁵² In addition, see *supra* notes 21–25 and accompanying text, discussing the potential impact of the RFRA and *Gonzales* on the applicability of *Smith* to ministerial Title VII claims.

⁵³ 460 F.2d 553 (5th Cir. 1972).

⁵⁴ See *id.* at 555.

⁵⁵ *Id.*

⁵⁶ *Id.*

area of religious freedom that it is forbidden to enter by the principles of the free exercise clause of the First Amendment.”⁵⁷ In support of its conclusion, the Fifth Circuit penned the oft-quoted “lifeblood” argument, stating that “[t]he relationship between an organized church and its ministers is its lifeblood,” and that all “[m]atters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.”⁵⁸ The Fifth Circuit also stated its fear of entanglement, asserting that adjudication of ministerial Title VII claims would “cause the State to intrude upon matters of church administration and government.”⁵⁹

Seven years later, the Fourth Circuit adopted a ministerial exception in *Rayburn v. General Conference of Seventh-Day Adventists*.⁶⁰ Rayburn, a woman denied a position as an associate of pastoral care in the Seventh-Day Adventist Church, brought a Title VII action against a church alleging sexual and racial discrimination.⁶¹ Although the Fourth Circuit acknowledged that Rayburn “did submit some evidence to support her claims of sexual and racial discrimination,”⁶² it affirmed the district court order granting summary judgment for the church.⁶³

Unlike the Fifth Circuit, the Fourth Circuit attempted to apply the *Sherbert* compelling interest test to determine whether Rayburn’s claim could proceed without violation of the church’s free exercise rights.⁶⁴ Although the Fourth Circuit acknowledged the government’s interest in ensuring equal employment opportunities, the court concluded that application of Title VII to religious organizations creates an “extraordinary” burden upon a church’s basic religious functions that outweighs the government interest in equality.⁶⁵

⁵⁷ *Id.* at 560.

⁵⁸ *Id.* at 558–59. The court felt so strongly about the sanctity of this relationship that it found all arguments against complete insulation to be “useless.” *Id.* at 560.

⁵⁹ *Id.*

⁶⁰ 772 F.2d 1164 (4th Cir. 1985).

⁶¹ *Id.* at 1165. Although the church only permitted men to be ordained as ministers, women who had received seminary training were permitted to hold the position of an associate in pastoral care. *See id.*

⁶² *Id.*

⁶³ *Id.* at 1165, 1172.

⁶⁴ *See id.* at 1168–69.

⁶⁵ *See id.* at 1168.

The Fourth Circuit also diverged from the Fifth Circuit by emphasizing the religious nature of the decisions protected by the First Amendment. The Fourth Circuit found that “in an employment decision of a *theological nature*, the church is entitled to pursue its own path without concession,”⁶⁶ but “may be subject to Title VII scrutiny, where the decision does not involve the church’s *spiritual functions*.”⁶⁷

Despite this distinction between religious and non-religious employment decisions, the Fourth Circuit stated that employment decisions regarding ministers are “quintessentially religious” and that, as a result, “the [F]ree [E]xercise [C]lause of the First Amendment protects the act of a decision rather than a motivation behind it.”⁶⁸ Thus, the Fourth Circuit held that all ministerial employment decisions are automatically protected by the Free Exercise Clause, prohibiting inquiry into “whether the reason for Rayburn’s rejection had some explicit grounding in theological belief.”⁶⁹

While the Fourth Circuit came to the ministerial exception by its own circuitous analysis, the Circuit Court for the District of Columbia directly followed the Fifth Circuit approach. Adopting a broad version of the ministerial exception in *Minker v. Baltimore Annual Conference of United Methodist Church*,⁷⁰ the D.C. Circuit held that all ministerial employment decisions are exempt from judicial review, regardless of whether the church has a religious justification for the decision.⁷¹

In one of the most cited cases regarding the ministerial exception, *Equal Employment Opportunity Commission v. Catholic University of America*,⁷² the D.C. Circuit held that the

⁶⁶ *Id.* at 1171 (emphasis added).

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.* at 1169.

⁶⁹ *Id.*

⁷⁰ 894 F.2d 1354 (D.C. Cir. 1990).

⁷¹ *See id.* at 1357 (“We need not find that the factors relied upon by the Church were independently ecclesiastical in nature, only that they were related to a pastoral appointment determination.”).

⁷² 83 F.3d 455 (D.C. Cir. 1996). In *Catholic University*, the D.C. Circuit held that the ministerial exception barred the adjudication of a nun’s sex discrimination and retaliation claims. *See id.* at 457. The nun, who was employed as a professor, brought a Title VII action against the university after she was repeatedly denied tenure. *See id.* at 457–59. The court found that the ministerial exception applied to the nun’s claims because her position in the Department of Canon Law was “vital to the spiritual and pastoral mission of the Catholic Church.” *Id.* at 464. The D.C. Circuit found it irrelevant that the university did not provide any religious

ministerial exception remained intact after the Supreme Court decision in *Smith*.⁷³ The court distinguished ministerial employment discrimination cases concerning the free exercise rights of religious organizations from the facts of *Smith*, which involved the free exercise rights of individuals.⁷⁴ The D.C. Circuit concluded that *Smith* did not affect the ministerial exception because: (1) “the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith*,”⁷⁵ (2) the application of the ministerial exception does not present the danger of encouraging illegal conduct;⁷⁶ and (3) unlike in *Smith*, the exception may be applied in ministerial exception cases without determining the exact contours of religious beliefs.⁷⁷ In subsequent ministerial exception cases, the Fourth and Fifth Circuits adopted the D.C. Circuit’s reasoning in *Catholic University*, affirming the continued vitality of the exception post-*Smith*.⁷⁸

In 1994, the Seventh Circuit joined the Fourth, Fifth, and D.C. Circuits, adopting a broad ministerial exception.⁷⁹ The

justification for the employment decision. *Id.* at 464–65. Somewhat more surprising, the court was equally unconcerned by the fact that the employment decision was made by university administrators and not by official representatives of the church. *See id.* at 458–59.

⁷³ *See id.* at 462.

⁷⁴ *See id.* at 461–62.

⁷⁵ *Id.* at 462.

⁷⁶ *See id.*

⁷⁷ *See id.* In addition, the court stated that because the ministerial exception is historically founded on the principle that all issues arising from the minister-church relationship are inherently religious, the exception is independent of, and precedes, the *Sherbert* compelling interest test. *See id.* at 462–63. This analysis of the ministerial exception helps explain why circuits that have attempted to employ a compelling interest test to ministerial Title VII claims quickly conclude that no government interest is sufficient, without any actual “balancing.” *See supra* notes 64, 65, and accompanying text; *see also infra* note 105 and accompanying text.

⁷⁸ *See* *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 800 (4th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 348–49 (5th Cir. 1999).

⁷⁹ *See* *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (“[T]he First Amendment forbids a review of a church’s procedures when it makes employment decisions affecting its clergy.”); *see also* *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (dismissing the Title VII discrimination claims of a woman employed as a press secretary for a church because she was “critical in message dissemination,” and, therefore, sufficiently “ministerial” to make any regulation of church decisions regarding her employment a violation of the church’s free exercise rights).

Seventh Circuit pushed the exception to its broadest limits in *Tomic v. Catholic Diocese of Peoria*.⁸⁰ In an opinion written by Judge Posner, the court held that the ministerial exception barred a church music director's Title VII claim.⁸¹ The Seventh Circuit roundly proclaimed that courts do not have jurisdiction over the "internal affairs" of churches, "[e]ven if the suit does not involve an issue of religious doctrine."⁸²

Despite the fact that the church did not provide a religious justification for the alleged discriminatory conduct, the court found that the mere potential for future entanglement issues was enough to constitute a violation of the First Amendment. The court speculated that "the church *would be likely* to defend its employment action on grounds related to church needs rooted in church doctrine,"⁸³ that "Tomic *would argue*" that these grounds were mere pretext,⁸⁴ and that the church, in turn, "*would rebut with evidence*" of legitimate religious grounds for termination.⁸⁵ The court concluded that Tomic failed to state a valid cause of action because the court "*would be asked* to resolve a theological dispute."⁸⁶

After affording religious organizations complete immunity in regard to ministerial Title VII claims, the balance of Judge Posner's opinion in *Tomic* is devoted to the question of whether the ministerial exception should apply to a music director.⁸⁷ The Seventh Circuit concluded that Tomic's claims fell within the exception because "he would be altering the religious experience of the parishioners" if he "played the organ with a rock and roll beat, or played excerpts from *Jesus Christ Superstar*,"⁸⁸ thereby making him "more like a clergyman than a math teacher."⁸⁹

⁸⁰ 442 F.3d 1036 (7th Cir. 2006).

⁸¹ *See id.* at 1037, 1043.

⁸² *Id.* at 1037–38.

⁸³ *Id.* at 1040 (emphasis added).

⁸⁴ *Id.* (emphasis added).

⁸⁵ *Id.* (emphasis added).

⁸⁶ *Id.* (emphasis added).

⁸⁷ *See id.* at 1040–41.

⁸⁸ *Id.* at 1040.

⁸⁹ *Id.* at 1041.

B. Falling in Line: The First, Sixth, Eighth, and Eleventh Circuits

The broad version of the ministerial exception has also been applied in the First,⁹⁰ Sixth,⁹¹ Eighth,⁹² and Eleventh⁹³ Circuits, although the case law is sparse. Of these circuits, only the Eleventh has formally adopted the reasoning of the D.C. Circuit in *Catholic University* for maintaining the exception after *Smith*,⁹⁴ although the Sixth and Eighth have also continued to apply the exception.⁹⁵

A recent case in the District Court for the Northern District of Ohio exemplifies the harsh consequences of the broad

⁹⁰ The First Circuit has spoken on the ministerial exception only once, in the 1989 case of *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575. In *Natal*, the First Circuit held that “a religious organization’s fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents,” and therefore “the difficulties inherent in separating the message from the messenger” prevent judicial review of ministerial employment decisions. *Id.* at 1578. Although the First Circuit has not affirmed the use of the ministerial exception since the Supreme Court decision in *Smith*, *Natal* continues to be applied in the district courts within the First Circuit. *See, e.g.*, *Rockwell v. Roman Catholic Archdiocese of Boston, Mass.*, No. 02–239–M, 2002 WL 31432673, at *3 (D.N.H. Oct. 30, 2002).

⁹¹ *See Hutchinson v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986) (stating that claims related to “internal church discipline, faith, and organization” are beyond the jurisdiction of the courts, and that all claims regarding ministerial employment decisions fall within this immunity).

⁹² In *Scharon v. St. Luke’s Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991), an ordained priest employed as a chaplain at a religious hospital claimed sex and age discrimination. *Id.* at 361. The Eighth Circuit affirmed summary judgment for the hospital, holding that all ministerial employment discrimination claims are insulated from possible adjudication: “Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts, for to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law.” *Id.* at 363.

⁹³ In *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000), the plaintiff was a minister who was “reassigned to a church over 800 miles away from his home at a substantial reduction in salary” after he aided another minister in filing a sexual harassment complaint. *See id.* at 1301. The Eleventh Circuit affirmed the dismissal of his Title VII retaliation claim, holding that any judicial interference in the relationship between a church and its ministers “would infringe upon the church’s right to be the sole governing body of its ecclesiastical rules and religious doctrine,” and “would almost always entail excessive government entanglement into the internal management of the church.” *Id.* at 1304.

⁹⁴ *See id.* at 1303–04.

⁹⁵ *See, e.g.*, *Cooper-Igwebuikie v. United Methodist Church*, 160 F. App’x 549, 549 (8th Cir. 2005); *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 942–43 (6th Cir. 1992).

ministerial exception. In *Rosati v. Toledo, Ohio Catholic Diocese*,⁹⁶ Rosati was a nun with the order of the Sisters of Visitation.⁹⁷ In August of 2000, she was diagnosed with breast cancer.⁹⁸ When Rosati's doctor disclosed the condition to her superiors at the Order, the Mother Superior stated, "We will have to let her go."⁹⁹ Even though the doctor explained to Rosati's superiors that it would be very difficult for Rosati to obtain other health insurance if the Order dismissed her, Rosati was officially discharged in January of 2001 and consequently lost her home, her employment, and her health insurance.¹⁰⁰ Rosati brought a claim against the Order under the Americans with Disabilities Act ("ADA").¹⁰¹ The District Court held that "just as there is a ministerial exception to Title VII, there must also be a ministerial exception to ADA claims," and dismissed Rosati's claim of unlawful termination.¹⁰² Cases like *Rosati* illustrate how the ministerial exception throws the baby out with the bathwater, denying a remedy for even the most blatant cases of employment discrimination. Faced with these difficult cases, some circuits have attempted to refine the exception.

C. *Narrower Versions of the Exception: The Ninth and Tenth Circuits*

The Ninth and Tenth Circuits are relative newcomers to the ministerial exception. The Ninth Circuit first discussed the exception in the 1999 case *Bollard v. California Province of the Society of Jesus*.¹⁰³ In *Bollard*, the court examined whether the ministerial exception barred a novice priest's Title VII sexual harassment claim.¹⁰⁴ Like the Fourth Circuit in *Rayburn*, the *Bollard* decision discussed the use of the *Sherbert* compelling interest test for determining free exercise violations, but quickly concluded that "[s]ome religious interests . . . are so strong that no compelling state interest justifies government intrusion," and that selection of clergy "is one such core matter of ecclesiastical

⁹⁶ 233 F. Supp. 2d 917 (N.D. Ohio 2002).

⁹⁷ *Id.* at 918.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 918–19.

¹⁰¹ *Id.* at 919.

¹⁰² *Id.* at 922–23.

¹⁰³ 196 F.3d 940 (9th Cir. 1999).

¹⁰⁴ *Id.* at 944.

self-governance with which the state may not constitutionally interfere.”¹⁰⁵ In addition, the Ninth Circuit stated: “[T]he ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions.”¹⁰⁶ Despite this affirmation of the exception in dicta, the court ultimately held that “the Free Exercise rationales supporting an exception to Title VII [were] missing” in *Bollard*, because the church did not provide a religious justification for its conduct, and because the claim did not concern the church’s selection of ministers.¹⁰⁷

Likewise, the Ninth Circuit did not see any entanglement issues that would justify applying the exception to *Bollard*. The court found that the adjudication of *Bollard*’s claim posed only a “restricted inquiry”¹⁰⁸ that would not “require a jury to evaluate religious doctrine or the ‘reasonableness’ of the religious practices.”¹⁰⁹ Instead, the jury could “make secular judgments about the nature and severity of the harassment and what measures, if any, were taken . . . to prevent or correct it.”¹¹⁰

The Ninth Circuit then expanded its use of the ministerial exception in *Werft v. Desert Southwest Annual Conference of the United Methodist Church*¹¹¹ on additional lifeblood grounds. Affirming the dismissal of a minister’s Title VII discrimination claim, the court applied the dicta of *Bollard*, and further stated that the ministerial exception relates not only “to the hiring and firing of ministers, but also . . . to the broader relationship between an organized religious institution and its clergy.”¹¹²

In an interesting turn of events—less than a year after *Werft*—the Ninth Circuit heard a case that teased out the lurking tension between *Werft* and *Bollard*. In *Elvig v. Calvin Presbyterian Church*,¹¹³ Elvig was a pastor subjected to sexual harassment by her superior.¹¹⁴ After she filed a complaint with

¹⁰⁵ *Id.* at 946.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 947.

¹⁰⁸ *Id.* at 950.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 377 F.3d 1099 (9th Cir. 2004).

¹¹² *Id.* at 1103–04.

¹¹³ 397 F.3d 790 (9th Cir. 2005).

¹¹⁴ *Id.* at 791.

the Equal Employment Opportunity Commission, the church fired Elvig and prevented her from obtaining employment in other Presbyterian churches.¹¹⁵ Applying the precedent of *Bollard* and *Werft*, the Ninth Circuit carved up Elvig's Title VII claim. The court determined that the religion clauses protected the church's conduct with regard to Elvig's termination and the prevention of her future employment, but did not shield the church from those parts of Elvig's claims directly related to the sexual harassment.¹¹⁶ In effect, the court held that it was unconstitutional for Elvig to seek compensation for lost wages under her sexual harassment and retaliation claims, but that she could constitutionally use the claim to seek compensation for emotional distress, damage to reputation, or other harms which immediately resulted from the harassment.¹¹⁷

The Tenth Circuit also grappled with the application of the ministerial exception to sexual harassment claims in *Bryce v. Episcopal Church in the Diocese of Colorado*.¹¹⁸ Parting ways with the majority of circuits, the Tenth Circuit limited the application of the ministerial exception to conduct "rooted in religious belief,"¹¹⁹ permitting Title VII actions by ministers against religious organizations when the alleged discriminatory conduct is "not motivated by sincerely held religious beliefs or practices."¹²⁰

Although the Tenth Circuit adopted this narrower version of the exception, the court ultimately barred Bryce's sexual harassment claim because the conduct in question *was* arguably rooted in religious belief and practice. In *Bryce*, the alleged harassment consisted of disparaging remarks made by church officials regarding the sexual orientation of Bryce, a non-ordained youth minister in the church.¹²¹ Even though the comments were possibly offensive or factually incorrect, the court

¹¹⁵ *Id.*

¹¹⁶ *See id.*

¹¹⁷ *See id.* The difficulties presented by ministerial Title VII claims are exacerbated in the context of sexual harassment claims due to the dual nature of sexual harassment, which functions as part discrimination and part tort. Courts implicitly seek to provide a remedy for the tortious aspects of harassment, while maintaining the ministerial exception for its discriminatory components.

¹¹⁸ 289 F.3d 648 (10th Cir. 2002).

¹¹⁹ *Id.* at 657 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

¹²⁰ *Id.* (citing *Malicki v. Doe*, 814 So. 2d 347, 365 (Fla. 2002)).

¹²¹ *See id.* at 659.

held that they were protected by the First Amendment because they were made in the context of a legitimate religious dialogue within the church regarding doctrinal views of homosexuality.¹²²

The Tenth Circuit has not encountered the ministerial exception since *Bryce*, but the district courts within the Tenth Circuit have adhered to its precedent. In *Dolquist v. Heartland Presbytery*,¹²³ the District Court for the District of Kansas—facing facts almost identical to the Ninth Circuit case *Elvig*¹²⁴—held that Title VII sexual harassment and retaliation claims are permissible as long as they do not involve a church’s “right to select clergy or decide matters of church government, faith, and doctrine.”¹²⁵ The court indicated, however, that claims must be strictly monitored to ensure that they do not violate First Amendment protections, and may only proceed “so long as [the] defendant does not assert a religious justification for the alleged harassment.”¹²⁶

Of the various incarnations of the ministerial exception adopted by the circuits, the Tenth Circuit’s version is the most restrained, due to its threshold requirement that the religious organization provide some religious justification for the alleged discriminatory conduct. The *Dolquist* dicta, however, indicates that the Tenth Circuit might bar adjudication of a ministerial employment discrimination claim *whenever* the church provides a religious justification, without inquiry into whether this justification was merely pretextual. The Second and Third Circuits have picked up where the Tenth Circuit left off, taking even greater steps to dismantle the broad ministerial exception and replace it with a more accurate First Amendment analysis.

¹²² See *id.* at 658. In *Bryce*, the Tenth Circuit also held that the ministerial exception remains valid after *Smith*, stating that “unlike *Smith*, the ministerial exception addresses the rights of the church, not the rights of individuals.” *Id.* at 656.

¹²³ 342 F. Supp. 2d 996 (D. Kan. 2004).

¹²⁴ See *id.* at 1000.

¹²⁵ *Id.* at 1007.

¹²⁶ *Id.* at 1009.

III. RECENT EFFORTS TO TAILOR OR REPLACE THE MINISTERIAL EXCEPTION

A. *Third Circuit: Petruska v. Gannon University*

In *Petruska v. Gannon University*,¹²⁷ the Third Circuit made a valiant, though ultimately unsuccessful, attempt to tailor the ministerial exception. Petruska was the chaplain at Gannon, a religiously affiliated university.¹²⁸ Upon her initial appointment, she sought and received assurances from the president of the university that: (1) she would not be replaced if a capable male became available; (2) decisions regarding her employment would be made on the basis of her performance and not her sex; and (3) the chair of the board of directors—who had a reputation for removing women from official positions—would not obstruct her tenure.¹²⁹

The president subsequently resigned, and the chair of the university's board of directors began to take actions to terminate three high-ranking female university officials, including Petruska.¹³⁰ Facing removal, Petruska resigned from her position and commenced an action in the District Court for the Western District of Pennsylvania against the university, the board, and various officials, alleging sex discrimination and retaliation under Title VII.¹³¹ The district court granted the university's motion to dismiss, holding that the ministerial exception barred Petruska's claims.¹³²

On appeal, a three-judge panel of the Third Circuit ruled 2–1 to reverse the dismissal. In an opinion written by Judge Becker, the Third Circuit held that the university's failure to provide a religious justification for Petruska's demotion prevented the conclusion that litigation of her Title VII claims would intrude upon "matters of faith, doctrine, or internal church regulation."¹³³

¹²⁷ 448 F.3d 615 (3d Cir. 2006) (withdrawn on grant of reh'g, June 20, 2006), *reh'd*, 462 F.3d 294 (3d Cir. Sept. 6, 2006), *cert. denied*, 127 S. Ct. 2098 (2007).

¹²⁸ *Id.* at 621.

¹²⁹ *See id.*

¹³⁰ *See id.* at 621–22.

¹³¹ *See id.* at 622.

¹³² *Id.*

¹³³ *See id.* at 620–21.

The court held in relevant part:

When a religious organization fires or demotes a woman on the basis of sex, it may be acting according to religious belief, religious doctrine, or church regulation. . . . In such a case, the religious organization would be immune from a Title VII suit. But a religious institution might also fire a woman because the individuals making the decision are, simply put, sexist. Religious doctrine and internal church regulation play no role in such a decision.¹³⁴

Relying on this distinction, the Third Circuit broke away from the traditional ministerial exception:

While several of our sister circuits have opined that the employer's reasons are irrelevant to the ministerial exception, we conclude that these reasons make all the difference. The Constitution protects religious exercise, and we decline to turn the Free Exercise Clause into a license for the free exercise of discrimination unmoored from religious principle.¹³⁵

The court acknowledged that the determination of whether an otherwise discriminatory action is rooted in religious belief may "require a nuanced analysis," but concluded that the courts in the Third Circuit "are up to the task."¹³⁶ Dissenting in part, Judge Smith argued that the traditional ministerial exception should be maintained because all ministerial employment decisions are inherently religious decisions protected under the First Amendment.¹³⁷

Shortly after the opinion was filed, Judge Becker passed away.¹³⁸ Less than one month later, the Third Circuit granted a rehearing of *Petruska*, withdrawing the prior opinion delivered by Judge Becker.¹³⁹ The three-judge panel appointed to the rehearing included Judge Smith. After the rehearing, the Third Circuit reverted to the traditional ministerial exception, affirming the district court's dismissal of *Petruska*'s Title VII claims.¹⁴⁰ The opinion was delivered by Judge Smith.

¹³⁴ *Id.* at 626.

¹³⁵ *Id.* at 628.

¹³⁶ *Id.* at 633.

¹³⁷ *See id.* at 637–38 (Smith, J., dissenting).

¹³⁸ *See* Henriques, *supra* note 9.

¹³⁹ 448 F.3d 615 (3d Cir. 2006) (withdrawn on grant of reh'g, June 20, 2006).

¹⁴⁰ *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007).

Not surprisingly, the justifications the court provided for this renewed adherence to the broad ministerial exception echoed the lifeblood justifications Judge Smith expounded in his previous dissent. The court stated that ministers are the lifeblood of a church and the embodiment of its message, that all employment decisions regarding ministers are per se religious matters, and that any judicial restriction on ministerial employment decisions “necessarily infringes upon [a church’s] free exercise right to profess its beliefs.”¹⁴¹

Although the original *Petruska* opinion was inefficacious in displacing the traditional ministerial exception, it was not entirely unfruitful. *Petruska* demonstrates that change is feasible and that the ministerial exception is a legitimate issue of contention, even among experienced circuit court judges.

B. Second Circuit: Hankins v. Lyght and Redhead v. Seventh Day

The Second Circuit is the only circuit that currently does not recognize any ministerial exception to Title VII claims. The court recently disposed of the exception in *Hankins v. Lyght*¹⁴² by means of a rather novel application of the Religious Freedom Restoration Act of 1993 (“RFRA”). In *Hankins*, a minister brought an age discrimination action against his church after he was forced to retire upon reaching the age of seventy.¹⁴³ The District Court for the Eastern District of New York granted the church’s motion to dismiss, holding that the ministerial exception barred the minister’s claim.¹⁴⁴ A three-judge panel of the Second Circuit vacated and remanded, holding that the compelling interest test of the RFRA supersedes the judicially created ministerial exception in determining whether the conduct of a religious organization is protected under the Free Exercise Clause.¹⁴⁵ The court stated that “[g]iven the absence of other relevant statutory language, the RFRA must be deemed the full expression of Congress’s intent with regard to the religion-

¹⁴¹ *See id.* at 307.

¹⁴² 441 F.3d 96 (2d Cir. 2006).

¹⁴³ *Id.* at 99.

¹⁴⁴ *Id.* at 100.

¹⁴⁵ *See id.* at 99, 109.

related issues before us and displace earlier judge-made doctrines.”¹⁴⁶

The RFRA was enacted in response to dissatisfaction with the Supreme Court’s eradication of the *Sherbert* compelling interest test through its holding in *Smith*.¹⁴⁷ The RFRA provides:

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.¹⁴⁸

The RFRA also states that “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”¹⁴⁹ These provisions can be reasonably read to imply that Congress intended the RFRA to apply specifically to actions between *government entities* and individuals, *not* to actions between private parties. In *Hankins*, the Second Circuit did not directly address this issue of applicability. Instead, the court relied on the fact that the Equal Opportunity Employment Commission (“EEOC”) could have brought the same claim against the church on behalf of the minister:

We need not, however, decide whether the RFRA applies to a federal law enforceable only in private actions between private parties. The [Age Discrimination in Employment Act of 1967] is enforceable by the EEOC as well as the private plaintiffs, and the substance of the ADEA’s prohibitions cannot change

¹⁴⁶ *Id.* at 102.

¹⁴⁷ See *supra* notes 22–24 and accompanying text; see also *supra* note 25 (examining the constitutionality of the RFRA after *Boerne* and *Gonzales*).

¹⁴⁸ 42 U.S.C. § 2000bb-1(a)–(b) (2000).

¹⁴⁹ 42 U.S.C. § 2000bb-1(c).

depending on whether it is enforced by the EEOC or an aggrieved private party.¹⁵⁰

Finding the RFRA to be applicable on the facts, the Second Circuit remanded *Hankins* to the district court for application of the RFRA compelling interest test.¹⁵¹ This determination is currently pending.

An important question not examined in *Hankins* is whether the RFRA compelling interest test effectively addresses entanglement concerns. The District Court for the Eastern District of New York found itself confronted with this issue when it attempted to apply the *Hankins* precedent in *Redhead v. Conference of Seventh-Day Adventists*.¹⁵²

In *Redhead*, a schoolteacher brought a Title VII discrimination action against a private religious school after she was fired for being pregnant and unmarried.¹⁵³ Acknowledging the precedent of *Hankins*, the court stated that since “the district court has not yet issued a decision following remand, this court is the first to consider how to analyze an employment discrimination issue under the RFRA . . .”¹⁵⁴ The district court noted its “strong reservations” about applying the RFRA to actions between private parties,¹⁵⁵ but nonetheless examined the teacher’s claims under the RFRA compelling interest test.

Redhead concluded, however, that even if application of the RFRA compelling interest test is appropriate, its use does not entirely displace the ministerial exception.¹⁵⁶ The court stated that the ministerial exception still serves a very important function because it “guards against excessive entanglement and is a tool for analyzing the nature of the alleged burden on religious exercise.”¹⁵⁷

Despite this recognition of entanglement concerns, the district court did not analyze what burdens, if any, the adjudication of *Redhead*’s claims would impose on the school’s religious function,¹⁵⁸ summarily noting that its method of

¹⁵⁰ *Hankins*, 441 F.3d at 103.

¹⁵¹ *See id.* at 109.

¹⁵² 440 F. Supp. 2d 211 (E.D.N.Y. 2006).

¹⁵³ *See id.* at 214.

¹⁵⁴ *Id.* at 218.

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* at 220.

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* at 221. Ultimately, the court held that the ministerial exception did

analysis effectively eliminates entanglement concerns.¹⁵⁹ Even if it is appropriate to apply the RFRA to actions between private parties, lingering entanglement issues pose a substantial threat to the constitutional viability of the Second Circuit's approach.

IV. ANALYZING THE CURRENT STATE OF MINISTERIAL EMPLOYMENT DISCRIMINATION CLAIMS

A. *The Ministerial Exception Misconstrues the Protections of the First Amendment*

1. Entanglement Must Be Untangled

Despite the fact that excessive entanglement is often considered a violation of the Establishment Clause, entanglement concerns are more appropriately ascribed to the Free Exercise Clause. Though the Free Exercise and Establishment Clauses are sometimes referred to as “two sides of the same coin,”¹⁶⁰ these sides provide unique protections. Together, they function to maintain the separation between church and state. Separately, the Establishment Clause prohibits the government from extolling—explicitly or constructively—the virtue of a religion, while the Free Exercise Clause prohibits the government from circumscribing religious practice and belief.¹⁶¹

In the context of ministerial Title VII claims, entanglement concerns arise from the fear that the court will impose its judgments regarding religious doctrine upon the church, and thereby prevent the church from engaging in its own doctrinal interpretation and decision making.¹⁶² While such judicial interference could have the incidental effect of endorsing or disapproving of a religion in violation of the Establishment Clause, excessive entanglement primarily affects the free exercise of religion because it restricts the spiritual functions of a religious organization.

not apply in *Redhead* because the teacher's primary responsibilities were secular in nature. *Id.*

¹⁵⁹ *Id.* at 221–22.

¹⁶⁰ HAIMAN, *supra* note 27, at 11–12.

¹⁶¹ *See supra* Part I.A.

¹⁶² *See supra* notes 39–42 and accompanying text.

2. The "Lifblood" Justification Misses the Mark

The lifblood justification employed by the majority of the circuits in support of the ministerial exception is fundamentally flawed. The Free Exercise Clause protects the religious beliefs, doctrines, and—at least to some extent—practices of individuals and religious organizations. A religious organization's right to set the criteria for the selection of its clergy is protected by the Free Exercise Clause because it is clearly a matter of religious doctrine and belief. The connection between church doctrine and the criteria for minister selection is so clear, in fact, that we reasonably assume the impetus of doctrine behind a church's selection of its ministers even when the connection is not explicit. It does not follow, however, that all employment decisions affecting ministers are per se religious matters.

Erroneously conflating the employment decision with the spiritual role of the minister, the lifblood justification shifts the focus of the constitutional inquiry to the religious nature of the employee's duties, obfuscating the fact that the decision itself must be traceable to some religious belief or doctrine in order to trigger Free Exercise Clause protections.¹⁶³ The mere status of "religious organization" and "minister" is not enough; no matter how essential a minister is to the spiritual functions of a church, a religious organization cannot tack prohibited conduct wholly unconnected to religious belief onto a job description and expect constitutional protection. Judicial acknowledgment of this is evinced by the treatment of sexual harassment claims brought by ministers against their religious employers. Under the ministerial exception, such claims should be barred. And yet the circuits have found some way of providing relief for ministers who have been subjected to this treatment, implicitly conceding that this conduct is devoid of religious justification and is therefore not afforded First Amendment protection.¹⁶⁴ In the context of sexual harassment, claims by ministers against religious organizations have survived motions to dismiss, despite

¹⁶³ See, e.g., *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040–41 (7th Cir. 2006) (church music director), *cert. denied*, 127 S. Ct. 190 (2006); *Alicia-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 702–04 (7th Cir. 2003) (press secretary for a church); *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801–04 (4th Cir. 2000) (church music director and part-time music teacher).

¹⁶⁴ See *supra* Part II.C (discussing how the Ninth and Tenth Circuits have addressed ministerial sexual harassment claims).

the fact that the conduct occurred within the “lifeblood” relationship and despite the fact that the conduct was previously investigated by the internal governance of the religious organization.¹⁶⁵ Ministers may be the lifeblood of religious organizations, but they are also citizens of the United States, and as such they are entitled to equal protection under the law.

B. The Sherbert Compelling Interest Test Is Ineffective

Even if a circuit court applies the *Sherbert* compelling interest test to a ministerial employment discrimination case instead of the broad ministerial exception, the circuit case law shows that this test has not been particularly helpful or effective in finding the middle ground between Title VII and the First Amendment.¹⁶⁶ Courts routinely acknowledge that eradicating discrimination is a government interest of the highest order. Although the application of Title VII to all employers—including religious organizations—may be the least restrictive means of furthering a compelling government interest in ending workplace discrimination, most courts find that First Amendment concerns outweigh any and all compelling government interests.¹⁶⁷ Thus, the *Sherbert* test devolves into a subjective value judgment regarding the primacy of equality or religious freedom.

C. Smith Is Inapplicable to Ministerial Employment Discrimination Claims

Despite that the weight of Supreme Court precedent favors the application of a compelling interest test to Free Exercise issues, *Smith* remains good law and its impact, if any, on the determination of Free Exercise violations is unclear.¹⁶⁸ It is submitted that *Smith* is inapplicable to Title VII actions, although for reasons different than those provided in *Catholic University*. In *Catholic University*, the D.C. Circuit held that *Smith* applied only to the free exercise rights of individuals, not

¹⁶⁵ See, e.g., *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 652–55 (10th Cir. 2002); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 944–45 (9th Cir. 1999).

¹⁶⁶ See, e.g., *Bollard*, 196 F.3d at 946–47; *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).

¹⁶⁷ See, e.g., *Bollard*, 196 F.3d at 946; *Rayburn*, 772 F.2d at 1168.

¹⁶⁸ See *supra* notes 22–26 and accompanying text.

of religious organizations.¹⁶⁹ The Free Exercise Clause, however, makes no distinction between the rights of individuals and religious organizations.¹⁷⁰ Likewise, the reasoning of the *Smith* decision is equally applicable to religious organizations and individuals. If *Smith* had concerned a church's right to use otherwise illegal drugs in its ceremonies, it is unlikely that the Court would have ruled any differently.

And yet, application of *Smith* to ministerial Title VII claims leads to drastic results that the Supreme Court would not possibly uphold. Under *Smith*, there is no Free Exercise violation in the enforcement of a religiously neutral law of general applicability.¹⁷¹ The goal of Title VII is the eradication of employment discrimination, which is religiously neutral.¹⁷² Title VII applies to virtually all employers, making it generally applicable.¹⁷³ Therefore, if *Smith* applied to ministerial employment discrimination claims, a minister could bring any Title VII action against a religious organization. Under *Smith*, a woman could sue the Catholic Church for refusing her ordination on the basis of sex. Given these results, it is extremely unlikely, to say the least, that the Court—in particular Justice Scalia, who delivered the *Smith* opinion—would apply *Smith* to cases of ministerial employment discrimination.

It is then just a matter of guesswork to determine on what grounds the Supreme Court would distinguish *Smith* from a ministerial Title VII case. One salient characteristic of the *Smith* case is that it involved a religious practice that violated a criminal statute.¹⁷⁴ Though its holding is not limited to criminal conduct, the Court made several references to criminal law throughout the opinion.¹⁷⁵ On a basic level, a distinction between the protection of religious conduct that violates criminal law and conduct that violates civil rights is consistent with the historic

¹⁶⁹ See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462–63 (D.C. Cir. 1996).

¹⁷⁰ See U.S. CONST. amend. I.

¹⁷¹ See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.A.N. (107 Stat.) 1488, *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997) and *recognized in part* in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).

¹⁷² See SULLIVAN ET AL., *supra* note 2, § 8.04.

¹⁷³ See *id.*

¹⁷⁴ See *Smith*, 494 U.S. at 874.

¹⁷⁵ See *id.* at 878–79, 882, 884–85.

refusal to extend Free Exercise Clause protections to conduct that threatens public health or safety.¹⁷⁶ Criminal conduct poses a much greater risk of harm than employment discrimination, which while reprehensible, does not present an imminent threat to public safety. Regardless of whether the Court would use the criminal law distinction or another distinction, or whether it would overrule *Smith* entirely, it can be safely assumed that the Court would not apply *Smith* to ministerial Title VII claims.

D. The RFRA Is Inapplicable to Actions Between Private Parties

It is also unlikely that the Court would apply the RFRA to ministerial employment discrimination claims. The district court in *Redhead* was correct to have strong reservations about applying the RFRA to actions between private parties.¹⁷⁷ The purpose of the RFRA is to restrict government infringement on free exercise rights.¹⁷⁸ Nothing in the RFRA indicates that Congress intended its application to actions between private parties.¹⁷⁹ Even if the RFRA was applicable to such actions, in a ministerial employment discrimination claim it would be the *religious organization's* right to invoke the application of the RFRA in support of its own position. Again, under the RFRA, the "person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding."¹⁸⁰ A religious organization, already afforded total immunity under the ministerial exception, has no incentive to solicit the application of the RFRA compelling interest test. Thus, the application of the RFRA to actions against religious organizations is at best a dead end.

E. What Remains When the Smoke Clears and the Dust Settles

After analyzing the applicable law, we are left with exactly what we had before *Smith*: a compelling interest test for determining violations of the Free Exercise Clause, and a ministerial exception. The first is ineffective when applied to

¹⁷⁶ See ENCYCLOPEDIA, *supra* note 12, at 170–71.

¹⁷⁷ See *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 218–19 (E.D.N.Y. 2006).

¹⁷⁸ See ROFES, *supra* note 17, at 158.

¹⁷⁹ See *supra* notes 25, 148–50, and accompanying text.

¹⁸⁰ 42 U.S.C. § 2000bb-1(c) (2000).

ministerial employment discrimination claims, and the second completely denies them.

Clarification of the protections afforded by the First Amendment shows that the threat posed by the adjudication of ministerial Title VII claims is the possible violation of a religious organization's free exercise rights. By breaking down the justifications for the ministerial exception, substantive entanglement comes to the forefront as the critical obstacle to the adjudication of ministerial Title VII claims.

The ministerial exception evolved out of desperation. The entanglement issues in ministerial employment discrimination claims are unwieldy and elusive. Without a systematic way of addressing these entanglement issues, courts have felt like they have no choice but to turn away even the most egregious examples of discrimination against ministers. There is no easy way to address entanglement; no precise formula for determining how much entanglement is too much. Under proper analysis, however, some ministerial employment discrimination claims may proceed without constitutional violation.

V. A NEW TEST: A SYSTEMATIC WAY OF APPLYING FIRST AMENDMENT PROTECTIONS TO EMPLOYMENT DISCRIMINATION CLAIMS

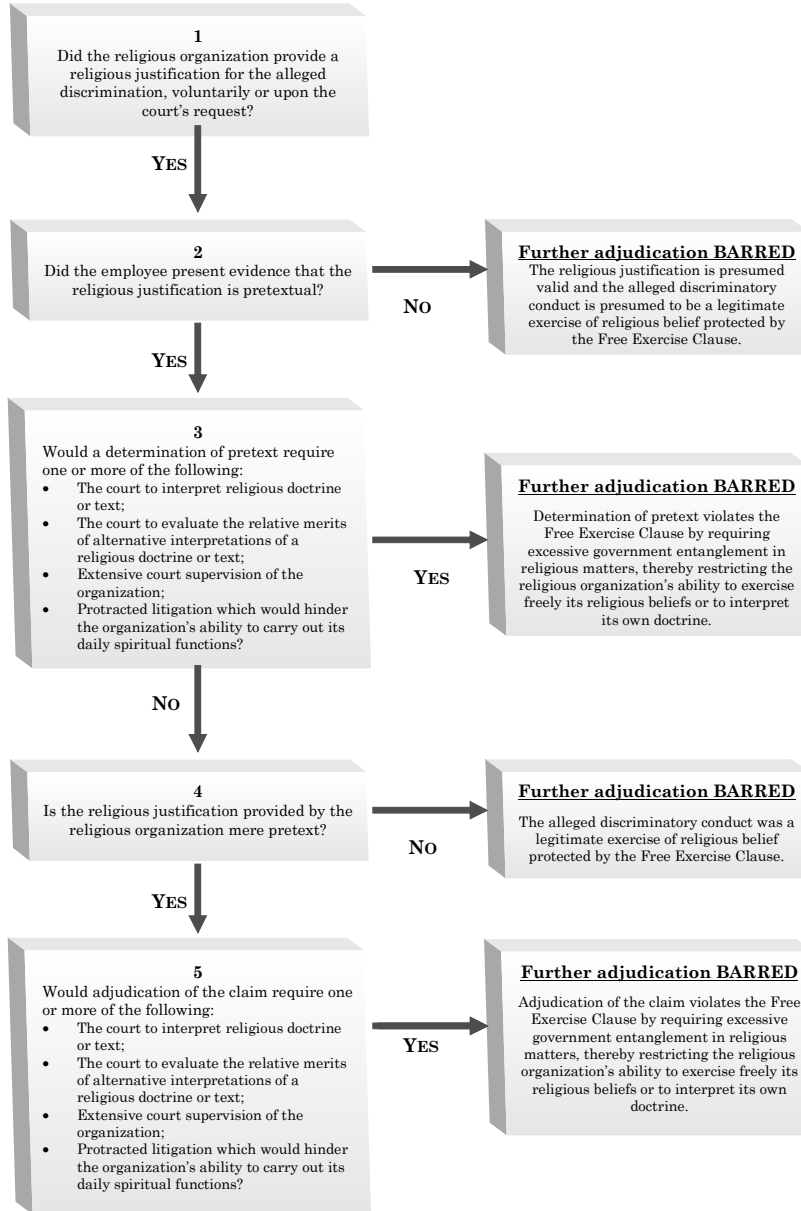
The proposed test attempts to provide guidance for applying the protections of the First Amendment to Title VII claims against religious organizations. The test itself is a framework for a restricted judicial inquiry into the religious justifications for alleged discriminatory conduct, allowing cases of blatant discrimination to advance while at the same time preventing excessive government entanglement in religious matters. The following section sets forth the proposed test, and discusses aspects of its implementation. A cursory review of the test reveals how difficult it is for a ministerial Title VII claim to reach a final decision on the merits. The vast majority of the cases previously dismissed under the ministerial exception would meet a similar end under the proposed test. Again, the purpose of the test is to clarify analysis, to standardize application, and to allow truly egregious cases of employment discrimination by religious organizations to pass through the Constitution unscathed.

Fundamentally, some might object to the fact that the test allows the court to ask the religious organization to provide a

religious justification for its conduct. Such an inquiry should not be eschewed as an automatic infringement on Free Exercise rights. Requiring an explanation of the motivation behind the alleged discriminatory conduct does not in any way restrict a religious organization's exercise of its beliefs. Nor does this request for information require the court to make judgments regarding religious doctrine. The limited inquiry permitted under this test is entirely secular. If at any time the court finds that it cannot proceed without making a value-laden judgment on religious belief or doctrine, then the claim must be dismissed.

It should also be noted that the traditional ministerial exception often requires the court to engage in substantial debate regarding who qualifies as a "minister." In making such a determination, the court examines the role of the employee in relation to the church in order to assess the spiritual nature of the employee's duties. In contrast, the proposed test applies to all Title VII claims brought against a religious organization, thereby avoiding the "minister" debate. In sum, the proposed test provides a systematic method for culling religious debate from the courtroom. To the extent that the request for an explanation is an intrusion into the religious realm, this intrusion is trivial when compared to the religious inquiry that currently occurs under the ministerial exception in determining who qualifies as a minister.

FIRST AMENDMENT TEST FOR TITLE VII CLAIMS AGAINST RELIGIOUS ORGANIZATIONS



Step 1: Religious Justification

Once the plaintiff has sufficiently pled a Title VII employment discrimination claim against a religious organization, the burden shifts to the organization to refute the occurrence of the alleged discriminatory conduct or to provide a religious justification for such conduct. The religious justification does not need to be the sole motivating factor. The conduct can be motivated by a combination of factors (religious, personal, political, etc.), as long as the religious reasons alone would have been substantial enough to compel the conduct in question. If the religious organization provides a facially adequate religious justification for the conduct, then the burden shifts to the employee to show that the justification is pretextual. If the religious organization fails to provide adequate religious justification, then the claim skips ahead to Step 5.

Steps 2–4: Pretext

A facially adequate religious justification is presumed to be valid. To overcome this presumption, the employee must establish pretext by a preponderance of the evidence. If the employee fails to provide evidence of pretext, then the religious justification is accepted and the conduct is protected by the First Amendment as an exercise of religious belief. If the employee presents evidence of pretext, the court can consider that evidence and render a determination of pretext as long as the determination can be made without excessive judicial entanglement in religious matters.

A judicial inquiry causes unconstitutional substantive entanglement in religious matters when it requires the trier of fact to evaluate the merits of a particular religion or religious belief, to actively interpret a religious text or doctrine, or to choose between competing interpretations of a religious text or doctrine. The trier of fact may, however, evaluate and make secular judgments concerning evidence of a religious nature, including religious texts and the testimony of church officials. Adjudication causes unconstitutional procedural entanglement in religious matters if it involves extensive court supervision of the religious organization's activities or internal governance, or if the litigation becomes so protracted and invasive that it disrupts the daily religious functions of the organization.

If the court finds that it can determine pretext without excessive entanglement, and that the religious justification was legitimate, then the conduct of the religious organization is protected under the Free Exercise Clause, and the employee's claim is barred. If, however, the evidence establishes by a preponderance of the evidence that the religious justification was pretext, then the claim survives and proceeds to Step 5.

Step 5: Adjudication

At Step 5, the court may begin to evaluate the merits of the employee's claim under Title VII. Throughout the litigation, the court must remain acutely aware of entanglement concerns. Step 5 of the test functions as a safety valve. If at any time the court finds that litigation cannot proceed without causing excessive substantive or procedural entanglement, then the claim must be dismissed. Note, however, that the threat of unconstitutional entanglement must be imminent, not speculative. Dismissal is only proper when the court cannot take any further action without causing excessive entanglement.

In the event the claim results in a judgment for the plaintiff on the merits, the court must be aware of entanglement issues that arise in regard to remedies and damages. In general, injunctive relief will cause excessive entanglement in religious practice. For example, an order requiring a church to rehire a former employee would be unconstitutional. Compensatory damages, however, may be properly awarded as in any other Title VII action.

CONCLUSION

Courts do not apply the ministerial exception because they wish to deny relief to ministers; they apply the exception because they do not see any constitutional way for the Title VII claims of ministers to proceed. With the lack of Supreme Court precedent and the judicial, academic, and historical ambiguity surrounding the First Amendment protections of religious freedom, it is understandable that the task of finding space for ministerial Title VII claims under the First Amendment may seem impossible. It is indeed an arduous and delicate process, but with the proper analytical framework, a court may be able to navigate a ministerial employment discrimination claim through

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the constitutional restrictions and ultimately arrive at a decision on the merits.

The fundamental importance of religious freedom in the United States cannot be gainsaid. Maintaining the protections of the First Amendment must be of primary concern in adjudicating Title VII claims against religious organizations. Many of these claims will result in dismissal due to entanglement issues, just as they were dismissed under the ministerial exception. A correct understanding and application of the religion clauses, however, will provide ministers who have suffered discrimination unconnected to religious belief a proper opportunity to litigate. Moreover, a clear and systematic analysis of the First Amendment issues in ministerial employment discrimination claims will help to standardize the adjudication of ministerial claims among the circuits while we await a Supreme Court decision on the ultimate fate of the ministerial exception.