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FIRST AMENDMENT LAW—HANKINS v. LYGHT AND THE UNNECESSARY INTERSECTION OF THE RELIGIOUS FREEDOM RESTORATION ACT AND THE MINISTERIAL EXCEPTION

John LeVangie

FIRST AMENDMENT LAW—*HANKINS V. LYGHT* AND THE UNNECESSARY INTERSECTION OF THE RELIGIOUS FREEDOM RESTORATION ACT AND THE MINISTERIAL EXCEPTION

INTRODUCTION

The separation of church and state is a foundation upon which this country rests.[1] This separation is twofold, protecting the state from religion and religion from the state.[2] The protection of the free exercise of religion is based on the principle that matters of conscience are personal, and that people are free to determine their beliefs uninhibited by state interference.[3] It does not follow, however, that the exercise of those beliefs are afforded the same protection. The government has duties and obligations to "establish Justice, insure domestic Tranquility . . . and secure the Blessings of Liberty."[4] Occasionally, liberty and domestic tranquility conflict; in those circumstances it must be determined what is more important: religious liberty or government authority?

The First Amendment of the U.S. Constitution reaffirms the individual's right to believe in any and all gods he or she pleases, or in no god at all.[5] The First Amendment also protects the rights of religious organizations. These two interests are fundamentally different from each other. An individual's interests lie in religious belief and practice. Meanwhile, a religious organization's interests lie in institutional autonomy, including the development and expression of religious beliefs. Because these are separate interests, courts and Congress have developed different protections when the enforcement of a law burdens the free exercise of religion.

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1. *See* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 100-02 (2d ed. 2005).

2. *Id.* at 53-54; Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1232 ("[T]he primary purpose underlying the . . . Free Exercise Clause . . . is the preservation of autonomy—of the state, of religious institutions, and of individuals.").

3. THOMAS JEFFERSON, WRITINGS 510 (Univ. of Cambridge 1984) (1803) ("[R]eligion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship . . . ."); WITTE, *supra* note 1, at 41-46.

4. U.S. CONST. pmbl.

5. *Id.* amend. I; *see also* Sherbert v. Verner, 374 U.S. 398, 402 (1963) (holding that the Free Exercise Clause excludes all "governmental regulation of religious *beliefs* as such").

The current standard for judging the validity of the enforcement of laws that burden an individual's religious practice was established by Congress in the Religious Freedom Restoration Act (RFRA) in 1993.[6] Under the RFRA, a burden on a person's exercise of religion is permitted if the government can demonstrate that its action serves a compelling interest.[7] Meanwhile, courts have traditionally deferred to religious organizations regarding the development and dissemination of religious doctrine.[8] This deference has led to the development of the ministerial exception, a doctrine that prohibits the enforcement of employment discrimination laws as applied to the relationship between a church and certain employees.

In *Hankins v. Lyght*, the court asked whether the RFRA supplanted the ministerial exception.[9] The court held that the RFRA was Congress's attempt to codify the area of free exercise law, thus replacing all common law such as the ministerial exception.[10] This result was reached over a vigorous dissent,[11] and a subsequent case by the Court of Appeals for the Seventh Circuit declined to follow this holding.[12] The *Hankins* dissent and the Seventh Circuit were concerned with the danger that matters traditionally left to churches, such as decisions concerning who should represent them in spreading their faith and religious doctrine, may now be subject to secular review.[13] Thus, the courts disagree over the level of protection afforded by the statute, the scope intended by Congress, and the constitutional questions that arise if the RFRA was intended to supplant the ministerial exception.

Part I of this Note discusses the origins of the RFRA.[14] Particularly, it focuses on the continuous struggle of courts to adequately protect the individual's religious exercise while providing for society's interest in enforcing the law. Part II discusses the origins and

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6. 42 U.S.C. § 2000bb (2000).

7. *Id.* § 2000bb-1(b).

8. *See* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107 (1952) ("[L]egislation that regulates church administration, the operation of the churches [or] the appointment of clergy . . . prohibits the free exercise of religion.").

9. Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006).

10. *Id.* at 102.

11. *Id.* at 109 (Sotomayor, J., dissenting).

12. Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006).

13. *Id.*; *see Hankins*, 441 F.3d at 109 (Sotomayor, J., dissenting); *see also* Van Osdol v. Vogt, 908 P.2d 1122, 1131 (Colo. 1996) (applying the compelling state interest test to a church's choice of minister would "compel the church to accept certain ideas into their belief system").

14. *See generally* 42 U.S.C. § 2000bb (2000).

development of the ministerial exception. Part III discusses the *Hankins* case and a district court case that applied the RFRA to the traditional ministerial exception scenario. Part IV shows that the RFRA and the ministerial exception do not apply to the same situations because they are focused on different aspects of the free exercise of religion. This will be done by first analyzing the RFRA to determine its scope and applicability. Next, Part IV compares and contrasts the RFRA and the ministerial exception in order to illustrate the differences in the protection granted, the interests protected, and the independent development of each doctrine. This Note demonstrates that the RFRA was not meant to affect the ministerial exception in any way, based on the statutory language and the differences in both the concerns and the underlying theories of the two doctrines. Consequently, this Note concludes that the *Hankins* court erred in giving the RFRA a broad scope.[15]

I. THE FREE EXERCISE CLAUSE AND THE COMPELLING-INTEREST STANDARD

A. *Early Developments and the Reluctant Expansion of Constitutional Protection of the Free Exercise of Religion*

The First Amendment expressly prohibits Congress from mak-

15. This Note does not, however, seek to add to the criticism of the underlying doctrines. For a sample of the literature discussing the underlying doctrines that are the subject of this Note, see Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 438 (1994) (arguing that the RFRA is unconstitutional); Whitney Ellenby, *Divinity Vs. Discrimination: Curtailing the Divine Reach of Church Authority*, 26 GOLDEN GATE U. L. REV. 369, 407 (1996) ("[A] compelling reason for holding churches accountable for their discriminatory behavior is that religious institutions have enormous capacity to influence behavior and moral convictions far beyond the church polity itself."); 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, 1408-09 (1981) (arguing in favor of church autonomy when dealing with people who voluntarily submit to the church's authority); Laura L. Coon, Note, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 485 (2001) (arguing that the ministerial exception currently provides too much protection and should be limited to employment decisions involving religious doctrine or practices); Shawna Meyer Eikenberry, Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269, 292 (1998) (arguing that the First Amendment does not require churches to be exempt from discrimination suits); Michelle L. Stuart, Note, *The Religious Freedom Restoration Act of 1993: Restoring Religious Freedom After the Destruction of the Free Exercise Clause*, 20 U. DAYTON L. REV. 383, 423 (1994) (arguing that the RFRA is essential "to restore the First Amendment to its proper place as one of the cornerstones of American civilization").

ing any law that burdens the free exercise of religion.[16] Problems arise, however, because the scope and extent of the prohibition is nowhere defined. Does it simply mean that Congress cannot make a law that seeks to burden the exercise of religion, or does it offer broader protection by prohibiting Congress from making any law that in fact burdens, even incidentally, the free exercise of religion? The Supreme Court has struggled in developing the proper formulation that would accommodate both society's interest in the enforcement of the law and the interests of individuals in exercising their religion. Initially, the Court had to face the fact that this is "a cosmopolitan nation made up of people of almost every conceivable religious divergence," and it would be an enormous taxation of Congress's time and efforts to formulate effective laws that also respect every religious practice under every circumstance.[17]

The Court first addressed the scope of the First Amendment in *Reynolds v. United States*, which involved George Reynolds, a member of the Church of Jesus Christ of Latter-day Saints who was convicted for practicing bigamy, an action encouraged by his religion.[18] Reynolds contended that being punished for the religious practice of bigamy would violate the First Amendment as a burden on his free exercise of religion.[19] The Court held that the First Amendment does not protect against incidental burdens on a person's free exercise when enforcing a legitimate law.[20] The Court was concerned that if citizens could circumvent the law by claiming that his unlawful actions were taken while exercising religious beliefs, the government could exist in name only.[21] The Court distinguished between beliefs and actions, holding that beliefs are free from interference by the government while actions may be inter-

16. *See* Garrett Epps, *What We Talk About when We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 573-76 (1998) (discussing the various possible meanings of "free exercise" and the inconclusive "original meaning" of the Clause).

17. Braunfeld v. Brown, 366 U.S. 599, 606 (1961) ("[I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions.").

18. Reynolds v. United States, 98 U.S. 145, 161 (1878); *see* Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws that Target Religion*, 28 W. NEW ENG. L. REV. 257, 265 (2006) ("Latter-day Saints saw plural marriage . . . as a divine commandment.").

19. *Reynolds*, 98 U.S. at 162.

20. *Id.* at 166.

21. *Id.* at 167 (noting that to permit the exemption would be to make "doctrines of religious belief superior to the law of the land"); *see also* Epps, *supra* note 16, at 575 (describing *Reynolds* as "rewrit[ing] the Clause to make it easier to enforce").

fered with only so long as the purpose of the law was not to burden religious exercise.[22]

In the decades following *Reynolds*, the level of protection recognized by the Court eventually increased. While continuing to regulate actions,[23] the Court began to hold the government to a higher standard when enforcing a law that burdens a person's religious exercise. The enforcement of the law would be valid if the law being enforced was "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State."[24] A statute not narrowly drawn would not be enforceable if burdened a person's religious exercise.[25]

B. *The Rise of Heightened Scrutiny*

The trend toward a more protective First Amendment continued since *Reynolds*. Initially, the Court was concerned that if the First Amendment offered too much protection, people could avoid following the law simply by claiming that the enforcement of the law burdened their religious exercise.[26] However, the Court, in time, became increasingly aware of the incidental burdens on a person's religious practices.[27] As a result, the Court held the govern-

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22. *Reynolds*, 98 U.S. at 166 ("Laws . . . cannot interfere with mere religious belief and opinions.").

23. Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute."); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

24. *Cantwell*, 310 U.S. at 311; *see Braunfeld*, 366 U.S. at 607 ("[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."); W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) ("[F]reedom . . . of worship may not be infringed . . . [unless] to prevent grave and immediate danger to interests which the state must lawfully protect.").

25. *See Barnette*, 319 U.S. at 639-40; *id.* at 644 (Black, J., concurring) ("Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation."); *id.* at 645 (Murphy, J., concurring) ("[R]equiring a declaration of allegiance as a feature of public education . . . is not essential to the maintenance of effective government and orderly society.").

26. *See supra* notes 18-22 and accompanying text.

27. *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (noting that a law is constitutionally invalid if its effect burdens the free exercise of religion, even if that burden is indirect).

ment to a higher standard in cases where the enforcement of a law burdens a person's religious exercise.[28]

This standard was developed in the Supreme Court cases *Sherbert v. Verner*[29] and *Wisconsin v. Yoder*.[30] In these cases, the Court required the government to demonstrate a compelling "interest of sufficient magnitude" to justify the enforcement of the law whenever it would burden a person's exercise of religion.[31] If the government manages to satisfy this requirement, its interest must still be balanced against the individual's liberty interest.[32] In that balance, "only those interests of the highest order" may justify the burdening of religion[33] and "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[34] If such a showing is made, the government is required to demonstrate that it is using the least intrusive means available,[35] and that the religious practice burdened is inconsistent with the governmental interest being served, in order to minimize the intrusion on the exercise of religion.[36]

C. *Application and Fall of Heightened Scrutiny as a Constitutional Requirement and the Rise of Statutory Protection*

Despite the establishment of the more protective compelling-interest standard, the application of that standard resulted in far less protection than the Court had suggested.[37] In the subsequent

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28. *Yoder*, 406 U.S. at 215 ("[H]owever strong the State's interest . . . it is by no means absolute to the exclusion or subordination of all other interests.").

29. *Sherbert*, 374 U.S. at 404.

30. *Yoder*, 406 U.S. at 214. This case involved parents who were prosecuted for violating the state's school-attendance law, which required parents to keep their children in school until the age of sixteen. *Id.* at 207. The parents objected to formal education beyond eighth grade because secondary school education exposes the children to influences inconsistent with the Amish lifestyle. *Id.* at 211.

31. *Id.* at 214; *Sherbert*, 374 U.S. at 406.

32. *Yoder*, 406 U.S. at 214 ("[A] State's interest . . . is not totally free from a balancing process."); *see also id.* at 220 ("[T]here are areas of conduct protected by the Free Exercise Clause . . . even under regulations of general applicability.").

33. *Id.* at 215.

34. *Sherbert*, 374 U.S. at 406 (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

35. *Id.* at 407; *see Yoder*, 406 U.S. at 227.

36. *Yoder*, 406 U.S. at 222-25.

37. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990) ("In recent years we have abstained from applying the *Sherbert* test."), *superseded by statute*, 42 U.S.C. § 2000bb (2000), *as recognized in* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006); Religious Freedom Restoration Act of 1993, H.R. REP. NO. 103-88, at 14-15 (1993) (additional views of Hon.

cases where the compelling-interest test was applied, the Court required a more substantial burden on religious exercise,[38] while deferring to legislative judgment.[39] Administrative convenience rivaled, and often defeated, any individual free exercise interests.[40] Furthermore, the Court, in some circumstances, had abandoned the strict scrutiny standard altogether.[41]

This progressive diminution of protection culminated in *Employment Division, Department of Human Resources of Oregon v. Smith*, where the Supreme Court discarded the compelling-interest balancing standard for claims alleging a substantial burden on the free exercise of religion in exchange for a more deferential standard.[42] *Smith* held that actions may be regulated, regardless of any incidental burden on the exercise of religious practice.[43] Since, however, religious beliefs often require action, there are some ac-

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Henry J. Hyde, Hon. F. James Sensenbrenner, Hon. Bill McCollum, Hon. Howard Coble, Hon. Charles T. Canady, Hon. Bob Inglis, and Hon. Robert Goodlatte asking if the statute "was a true 'restoration' of the law as it existed prior to *Smith*," because the standard in *Sherbert* and *Yoder* was "stronger than the court had been applying prior to *Smith*" and "in recent years it has been quite difficult, if not impossible, for plaintiffs bringing constitutional free exercise claims to prevail"); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV 357, 411 (1990) ("The cases [under strict scrutiny in religious freedom] have been inconsistent"); James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413-14 (1992) (noting the divergence "between the apparent protection afforded by the compelling interest test and the actual success of the free exercise claimant").

38. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 942-46 (1989) (discussing the higher level of burden required by the Court after *Sherbert* and *Yoder*).

39. *See* Lying v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 448-49 (1988); Bowen v. Roy, 476 U.S. 693, 707-10 (1986); *see also* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1495 (1999) ("[T]he *Sherbert*-era constitutional exemption framework was a complex body of law, with not one but several tests.").

40. United States v. Lee, 455 U.S. 252, 258-59 (1982) (finding, after extolling the virtues of the social security system, that it would be difficult to administer if participation was voluntary; thus making government policy supreme.); *see Bowen*, 476 U.S. at 707-08; James J. Lawless, Jr., Note, Roy v. Cohen*: Social Security Numbers and the Free Exercise Clause*, 36 AM. U. L. REV. 217, 225-28 (1986) (discussing administrative efficiency as a compelling interest).

41. *See Bowen*, 476 U.S. at 707-08 ("Absent proof of an intent to discriminate . . . the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.").

42. *Smith*, 494 U.S. at 890.

43. *Id.* at 877 (stating the Free Exercise Clause "obviously excludes all 'governmental regulation of religious *beliefs* as such'" (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963))).

tions that are beyond the government's reach.[44] The protection of actions is the exception, however, and not the rule.[45] The Court was concerned that under the compelling-interest standard, there would be a multitude of laws invalidated for failure to meet such a high standard, because there are only so many "interest[s] of the highest order" that can satisfy the compelling-interest standard; a rule of presumptive invalidity would prevent the government from enforcing a wide variety of laws.[46] Thus, individuals must follow laws of general application.[47]

In response to *Smith*, Congress reestablished the compelling-interest standard by enacting the RFRA in 1993.[48] The statute declared that the government "shall not substantially burden a person's exercise of religion" even in the face of a "rule of general applicability," unless the enforcement of the law furthers a compelling governmental interest while using the least restrictive means available to achieve that interest.[49]

II. Church Autonomy and the Ministerial Exception

The ministerial exception is a doctrine developed by various federal appellate courts, which prevents a court from enforcing certain antidiscrimination laws against religious organizations when the organization makes an employment decision regarding certain employees.[50] The exception applies when a religious organization

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44. *Id.* at 877-78 (giving examples of unconstitutional restrictions on action: banning the casting of statues used for worship and a prohibition on bowing before a golden calf); *see* Epps, *supra* note 16, at 576 (describing this protection as expanding the Court's strict "free exercise" definition to include the "exercise of worship").

45. *Smith*, 494 U.S. at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

46. *Id.* at 888-89 ("[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.").

47. *Id.* at 879-80.

48. 42 U.S.C. § 2000bb (2000). The RFRA was later determined to be unconstitutional as applied to the states. City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997). The statute is applicable to actions of the federal government. *See* Gonzales v. O Centro Espírita Beneficiente União Do Vegetal, 546 U.S. 418, 430-37 (2006) (applying the RFRA to federal law).

49. 42 U.S.C. § 2000bb-1.

50. *See* Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); Bollard v. Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Ray-

makes an employment decision regarding a "ministerial" employee. Whether an employee is "ministerial" depends on the extent the employment involves religious beliefs.[51] The exception prohibits regulation of this type because it would adversely affect the ability of religious organizations to operate freely and independently.[52]

The deferential ministerial exception was established to respect the "wall of separation"[53] between church and state, and it operates on the principle that matters of church hierarchy are beyond the control of the government.[54] Inherent in this deference to religious authorities is the fear that government involvement will inhibit the freedom of the church to develop religious doctrine.[55] The employment relationship with ministerial employees involves these matters because the relationship involves persons "at the heart of any religious organization."[56] Consequently, any intrusion into such matters would violate the First Amendment.[57]

The scope of the ministerial exception is not limited to circumstances where the organization is a church[58] and the employees are

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burn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1168-69 (4th Cir. 1985); McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972).

51. *Compare* EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980), *with Rayburn*, 772 F.2d at 1169.

52. *McClure*, 460 F.2d at 558-60.

53. The phrase "wall of separation" was first used by Thomas Jefferson in a letter to the Danbury Baptist Association: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus *building a wall of separation between church and State*." THOMAS, *supra* note 3, at 510 (emphasis added). The language was first used by the Supreme Court in *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

54. *McClure*, 460 F.2d at 558-59; *see also* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107 (1952) ("[L]egislation that regulates church administration . . . prohibits the free exercise of religion."); Gonzales v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929) ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals . . . are accepted . . . as conclusive."); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871) ("[W]henever the questions of discipline, or of faith or ecclesiastical rule, custom, or law have been decided . . . the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.").

55. *McClure*, 460 F.2d at 560 (quoting *Kedroff*, 344 U.S. at 116); *see also* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

56. *McClure*, 460 F.2d at 560.

57. *Id.* at 558-59 ("Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.").

58. Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1168-69 (4th Cir. 1985); EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981) (holding that a seminary was a "church" because it was "principally sup-

ministers. Nor does the ministerial exception extend to every employment decision made by religious organizations.[59] Its application depends on the nature of the organization and function of the employee's position.[60] Specifically, the employee's duties must involve matters of faith and religious doctrine.[61]

In addition, the decision protected by the ministerial exception need not be based on a religious belief.[62] Rather, the exception prohibits the investigation of claims of discrimination against the religious organizations that involve ministerial employees.[63] The fundamental concern of the ministerial exception is autonomy and the ability of a religious organization to select employees who speak on the behalf of that organization.[64] This bar is not absolute; the ministerial exception only protects the employment relationship itself, and not every action involving a ministerial employee.[65] There are various forms of actions that may be brought by a minister against the church, including common law torts of fraud, collusion, and sexual harassment.[66]

III. Case Discussion

A. Hankins v. Lyght

John Paul Hankins was an ordained clergy member for the New York Annual Conference of the United Methodist Church who was forced to retire as a minister upon reaching the age of

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ported and wholly controlled by the Convention" and its purpose was to train Baptist ministers).

59. *Sw. Baptist Theological Seminary*, 651 F.2d at 284-85 ("[P]ersonnel who equate to or supervise faculty should be considered ministers as well.").

60. *Rayburn*, 772 F.2d at 1168-69 (stating the applicable factors to be "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship").

61. *Id.*; *see also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1396-97 (4th Cir. 1990) (noting that just because a person is labeled a minister does not mean that the individual is covered by the ministerial exception).

62. *Rayburn*, 772 F.2d at 1169 ("[W]e may not then inquire whether the reason for Rayburn's rejection had some explicit grounding in theological belief.").

63. *Id.*

64. *Id.*

65. *See id.* at 1168-69; EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980) (stating that the ministerial exception applies only when the employees act as "intermediaries between a church and its congregation," "attend to the religious needs of the faithful," or "instruct students in the whole of religious doctrine").

66. Van Osdol v. Vogt, 908 P.2d 1122, 1134 & n.5 (Colo. 1996).

seventy in accordance with the Methodist Book of Discipline.[67] Hankins alleged that the mandatory retirement policy violated the Age Discrimination in Employment Act (ADEA).[68] The district court granted the defendant's motion for summary judgment based on the ministerial exception.[69]

1. Majority Opinion

The majority noted that the RFRA applies to the implementation of all federal law.[70] The statute further provides that the "person whose . . . free exercise has been burdened . . . may . . . obtain appropriate relief" in a judicial proceeding against the government.[71] The court determined that the ministerial exception is a doctrine adopted by some circuits with "no basis in statutory text"; essentially it is federal common law and, as such, it must yield to a statute that addresses the relevant issue.[72] Therefore, the court determined that if the RFRA is applicable to this suit, it must be deemed to be Congress's full expression of intent regarding the free exercise of religion, thereby displacing prior judge-made exceptions.[73]

The court found that the language of the statute was sufficiently broad for the RFRA to apply in this situation.[74] The statute applies to *all* federal law and its implementation.[75] Also, the RFRA provides a defense whenever the government substantially burdens a person's exercise of religion.[76] The only language that could be limiting is that relief is to be obtained "against a government"; however, the court found that this language is "most reasonably read as broadening."[77] As an alternate ground for its decision, the court reasoned that even if the language is limiting, the ADEA could be enforced by the government, as well as private parties, and there is no policy reason for applying the statute in one instance

67. Hankins v. Lyght, 441 F.3d 96, 99 (2d Cir. 2006).

68. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000); *Hankins*, 441 F.3d at 100.

69. *Hankins*, 441 F.3d at 100.

70. *Id.* at 102; *see* 42 U.S.C. § 2000bb-3(a) (2000).

71. 42 U.S.C. § 2000bb-1(c).

72. *Hankins*, 441 F.3d at 102; *see* City of Milwaukee v. Illinois, 451 U.S. 304, 313-14 (1981).

73. *Hankins*, 441 F.3d at 102.

74. *Id.* at 103.

75. *Id.*

76. *Id.*

77. *Id.* The court, however, does not explain why the language is broadening.

and not the other.[78] Thus, the court held that the RFRA applies because the government may bring the suit under the RFRA.[79]

2. Dissenting Opinion

The dissent concluded that the RFRA applies only when the government is a party because a person may use the RFRA as a defense to seek relief "against a *government*."[80] Moreover, the statute requires that the government demonstrate that the law furthers a compelling governmental interest and that it is using the least restrictive means of achieving that end.[81] Thus, according to the dissent, in order for the RFRA to apply, the government must be a party because it must demonstrate a compelling interest.[82] The application of the RFRA to all federal law is consistent with this view because, "the provision simply requires courts to apply the RFRA 'to all Federal law' in any suit to which the government is a party."[83]

B. *Application of* Hankins

The *Hankins* decision was applied in *Redhead v. Conference of Seventh-day Adventists* to the traditional ministerial exception situation.[84] Redhead, an unmarried, pregnant female, was fired from her job as a teacher at a school run by the Conference of Seventh-day Adventists.[85] She alleged that the school fired her because of her gender, pregnancy, and marital status.[86]

The school admitted that it dismissed her for "exhibiting 'immoral or unsatisfactory personal conduct inconsistent with the principles of the Seventh-day Adventist Church.'"[87] The school contended that the ministerial exception prohibited the suit.[88] The district court applied the RFRA, despite having "strong reservations" about applying it to suits between private parties.[89]

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78. *Id.*
79. *Id.*
80. *Id.* at 114 (Sotomayor, J., dissenting); *see* 42 U.S.C. § 2000bb-1(c) (2000).
81. 42 U.S.C. § 2000bb-1(b); *Hankins*, 441 F.3d at 114.
82. *Hankins*, 441 F. 3d at 114-15.
83. *Id.* at 115 (quoting 42 U.S.C. § 2000bb-3).
84. Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d 211 (E.D.N.Y. 2006).
85. *Id.* at 214-15.
86. *Id.* at 216.
87. *Id.* at 215.
88. *Id.* at 217.
89. *Id.* at 218-19.

Before beginning the RFRA analysis, the court first discussed the recent Supreme Court case of *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,[90] which declared that "'*judicially crafted* exceptions' are relevant when" the RFRA is raised as a defense.[91] Therefore, the RFRA leaves room for judges to create exceptions to the statutes in question.[92] Thus, the court determined that the ministerial exception is one of the exceptions to the RFRA, and it could be used for determining that, in certain instances, the burden on the free exercise of religion will always outweigh the interest of the government.[93]

IV. ANALYSIS

While both problems above implicate the Free Exercise Clause of the First Amendment, each involve different interests and concerns, and, therefore, require two separate methods of analysis. These forms of free exercise interests give rise to a constant struggle to maintain a balance between the rights of individuals and religious organizations on the one hand, and the duties of governing a nation on the other.

The cases discussed in Part III involve situations that implicate the free exercise of religion. These cases involve factual scenarios similar to those cases involving the ministerial exception. However, in *Hankins v. Lyght*, the two free exercise doctrines collided when the court determined that the RFRA was meant to supplant the ministerial exception.[94]

Other courts have addressed the issue as well, albeit briefly.[95] These cases decided the issue contrary to *Hankins*, but not for the same reasons. One view focuses on whether the RFRA requires

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90. Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

91. *Redhead*, 440 F. Supp. 2d at 219 (quoting *O Centro Espírita*, 546 U.S. at 434).

92. *Id.*

93. *Id.* at 220. This finding is questionable, given the context the language relied upon appears in *O Centro Espírita*. In *O Centro Espírita*, the Court was referring to the ability of the courts to exempt persons from liability for violating the law. *O Centro Espírita*, 546 U.S. at 423-24. Specifically, the Court was responding to the government's argument that because exceptions were included within the statute, the enumeration should be considered the full extent of Congress's leniency; thus prohibiting the courts from reading in further exceptions under the RFRA. *Id.* at 434-35; *see also* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996).

94. Hankins v. Lyght, 441 F.3d 96, 103 (2d Cir. 2006).

95. *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006); *Catholic Univ.*, 83 F.3d at 462; Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849, 853 (S.D. Ind. 1998).

the government to be the party that brings the suit.[96] The other view focuses on the different origins of each doctrine and the problems they address, specifically the fact that the doctrines were created at different times, for different purposes, and in response to different concerns.[97] While various courts have addressed the issue in some fashion or another, none of the courts have analyzed the issue in full.

In an attempt to provide such an analysis, this Part first analyzes the proper scope of the statute, concluding that the RFRA does require the government to be a party and that the statute's scope is much narrower than the *Hankins* court believed. However, this initial conclusion does not fully answer the question of whether the RFRA applies even when it is the government that brings the suit. Therefore, this Part goes on to provide a broader analysis of the differences between the RFRA and the ministerial exception—specifically the differences in the scope, protection afforded, and development of the two doctrines. The RFRA's requirement that the government must be a party to the action, coupled with a narrow construction of the statute, reveals that the two doctrines protect different interests, and that the RFRA does not displace the ministerial exception.

A. *The Application of the RFRA*

The *Hankins* court based its ruling on two assumptions. The court first assumed that the RFRA applies when the government *may* bring the suit, even though the actual suit at hand may be brought by a private individual.[98] Second, the court assumed that the statute should be read broadly because the statute allows a person to obtain relief against the government.[99] This section will analyze these assumptions in light of the statute. This section will conclude that both the statutory scheme and the legislative history prove these assumptions to be false.

1. The Government Must Be a Party in the Action

The *Hankins* decision was based on the assumption that the RFRA applies in all cases where the government could have been a

96. *Tomic*, 442 F.3d at 1042.
97. *Catholic Univ.*, 83 F.3d at 462.
98. *Hankins*, 441 F.3d at 103.
99. *Id.*

party, regardless of whether it actually was.[100] The majority in *Hankins* arrived at its conclusion on policy grounds, finding that no policy of either the RFRA or the ADEA is served by restricting the application of the RFRA.[101] In broad terms, the policy goals of the RFRA may not be harmed by the application of the statute to suits between private parties.[102] However, that does not change the fact that the statute provides "a claim or defense . . . against a government."[103]

The *Hankins* court's interpretation is in conflict with the statutory scheme. The statute requires the government to demonstrate the existence of a compelling interest when its actions burden the exercise of religion; if that is accomplished, it must show that the means adopted is the least intrusive available to achieve that end.[104] In the statute, "to demonstrate" means to meet "the burdens of going forward with the evidence of persuasion."[105] Thus, the government bears the burden of persuading the court that its action is justified under the RFRA.[106] If the government is not a party to the action, however, it cannot demonstrate that its action satisfies the statute without intervening in every suit brought by a private party.[107] The result of such a policy or requirement would be costly and time consuming, not to mention peculiar, seeing as it was neither discussed in the statute or the legislative history. Also, there has been no instance where the government has acknowledged or accepted that burden.

The only way for the statute to properly apply in *Hankins* would be for the plaintiff to be considered the "government." The broadest meaning of "government," as defined in the RFRA, may include a person "acting under the color of law."[108] An approach consistent with *Hankins* is that any party bringing a suit against a religious organization under a federal statute is "acting under color of law."[109] This approach, however, is untenable. Actions by pri-

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100. *Id.*
101. *Id.*
102. *See generally* 42 U.S.C. § 2000bb(b)(2) (2000).
103. *Id.*
104. *Id.* § 2000bb-1(b)(2).
105. *Id.* § 2000bb-2(3).
106. *See Hankins*, 441 F.3d at 114-15 (Sotomayor, J., dissenting).
107. *Id.*
108. 42 U.S.C. § 2000bb-2(1).
109. *See* Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826 (9th Cir. 1999). The court noted that principles of statutory construction require a word to be understood by the surrounding words, and when a general term follows a more specific term, the general term is to be considered of the same category as the specific term. *Id.* at

vate parties are presumed not to be a government action.[110] This presumption is rebuttable only in circumstances where the private party has acted in a way that made him a government actor.[111] These instances are rare, and require some relationship with the government beyond a mere claim of right under a statute.[112] In circumstances where the ministerial exception has traditionally been applied, the private party initiates a cause of action created by a statute. Thus, the extent of the private party's "state action" is the participation in a judicial proceeding that involves federal law. Therefore, in the absence of additional connections to the government in bringing the action, private parties are not acting under color of law simply by initiating a lawsuit under a statute.[113] Accordingly, the contention that the private parties are acting "under color of law" in this particular instance is unsupported.

Notwithstanding the statutory requirement that the government be a party to the action, the issue that remains is whether the RFRA would apply if the government did in fact bring the action against the religious organization. Both the dissent in *Hankins v. Lyght* and the majority in *Tomic v. Catholic Diocese of Peoria* expressed the belief that the RFRA applies only where the government is a party because it provides that "[g]overnment shall not substantially burden a person's exercise of religion."[114] This distinction resolves the issue of whether the RFRA applies when the

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834. However, the court found that the overwhelming tool of construction, which says when the legislature uses a term in a statute that has been used in previous statutes, it is presumed that the intention was to adopt the prior definition as used and interpreted in the prior statute. *Id.* at 834-35. Here, "acting under color of law" has been previously used to implicate private parties in limited circumstances, and is, therefore, the relevant portion of the discussion. *Id.*

110. Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982) ("Action by a private party pursuant to this statute, without something more, [is] not sufficient to justify a characterization of that party as a 'state actor.'").

111. *Id.* at 937 (creating a two-prong test requiring, first, that the private party either act in accordance with a right or privilege granted by the state, act in accordance with a rule imposed by the government, or that the state is responsible for the actor; and second, that the person must be a state official, receives substantial aid from the state, or is one whose conduct is "chargeable to the state").

112. *See* Flagg Bros. v. Brocks, 436 U.S 149, 157 (1978) (joint-action test); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (government-nexus test); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970) (requiring compulsion); Terry v. Adams, 345 U.S. 461, 469-70 (1953) (public-function test). For a more thorough discussion of the state action doctrine, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 6.4-6.5 (3d ed. 2006).

113. *See Lugar*, 457 U.S. at 937.

114. Hankins v. Lyght, 441 F.3d 96, 102 (2d Cir. 2006) (Sotomayor, J., dissenting); *see also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006).

suit is brought by a private party, but it does not address the issue of whether the RFRA applies to the traditional ministerial exception situation when the government brings the suit. This is so because, as pointed out by the majority in *Hankins*, the government is authorized to bring suit under certain antidiscrimination laws.[115] Thus, while determining who brings the suit against the religious organization is useful for ascertaining when the RFRA does not apply, it does little to address the underlying issue of whether the RFRA does indeed supplant the ministerial exception when the suit is brought by the government.

Because suits involving the ministerial exception may be brought by either private parties or the government, the most reasonable inference is that the RFRA does not apply in the traditional ministerial exception context. If the RFRA were to apply in cases where the government brings the initial action, but not apply when a private party does, cases that involve similar facts would require different analyses and possibly different results.[116] The RFRA was passed in order to provide a defense to combat incidental burdens on the free exercise of religion.[117] If the ministerial exception applies to this type of problem and Congress meant the RFRA to supplant the ministerial exception, then it makes little sense for Congress to have distinguished the parties bringing the suit.[118] In the context of the ministerial exception, the penalties are the same whether a government brings the action or a private party does, and the free exercise burden is no less substantial.[119] The result is the same: the organization is faced with having to yield to the wishes of the party bringing suit.

Therefore, since the statute provides that the government must be a party, the argument that the RFRA supplants the ministerial exception is precluded. If the RFRA did supplant the ministerial exception, it would result in a two-tiered division of the law, which would require different methods of analysis for similar cases involving near-identical claims and facts; the only difference being the

115. *Hankins*, 441 F.3d at 103.

116. This argument cuts the other way. If the statute requires the government to be a party, then the statute should only apply when the government is a party.

117. *See supra* notes 48-49 and accompanying text.

118. *Hankins*, 441 F.3d at 103.

119. *Id.*

party bringing the action. There is no evidence that Congress intended such a drastic result in enacting the RFRA.[120]

2. The Breadth of the Statute

The alternate assumption relied upon in *Hankins* was that the language in the statute allowing a person to "obtain appropriate relief against a government" was broad because it applies to the implementation of all federal law.[121] In reading these two provisions, the court believed that there is no requirement that the government party bring the action.[122] While the language referred to does tend to make the RFRA seem quite expansive, if it is read in the context of the entire statute and its legislative history, the argument ultimately fails. While the *Hankins* court found the language to be "a most awkward way of inserting" Congress's intent to limit the applicability of the statute,[123] there is plenty of evidence in both the statute itself and the legislative history to show that the language is limiting.[124] Both the congressional reports and the declared purpose of the statute indicate that the desired effect of the statute is to expand the protection afforded to the free exercise of religion by reestablishing the standard that was in force prior to the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[125] In viewing the RFRA as an explicit response to *Smith*, as well as understanding why Congress desired to increase the protection afforded, reveals that the congressional understanding of "implementation" was much narrower than the *Hankins* interpretation.

The RFRA was created "to provide a claim or defense to a person whose religious exercise is substantially burdened by the government."[126] Specifically, Congress sought to provide an increased level of protection for free exercise claims in response to the Supreme Court's decision in *Smith*, which "virtually eliminated the requirement that the government justify burdens on religious

120. This conclusion is based more on policy considerations. The forthcoming section, *infra* Part IV.B, provides additional reasons for this conclusion.

121. *Hankins*, 441 F.3d at 103.

122. *Id.*

123. *Id.*

124. *See infra* notes 131-138 and accompanying text.

125. 42 U.S.C. § 2000bb(a)(4) (2000); *accord id.* § 2000bb(b)(1); *see* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990), *superseded by statute*, 42 U.S.C. § 2000bb, *as recognized in* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

126. 42 U.S.C. § 2000bb(b)(2).

exercise."[127] *Smith* held that the Free Exercise Clause prohibited only those laws clearly aimed at coercing actions in violation of a religious belief or preventing actions in furtherance of religious worship.[128] The goal of the statute was to reestablish the standard set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,[129] which required the government to show that it is using the least restrictive means available to further a compelling governmental interest when it burdens a person's religious practice.[130] Accordingly, the section of the RFRA that makes it apply in all instances where a government action burdens the free exercise of a person's religious beliefs must be read in relation with the overall purpose of the statute.[131]

The RFRA was Congress's attempt to mediate the debate surrounding the proper scope of the First Amendment's prohibition of laws that burden the free exercise of religion.[132] The Court in *Smith* was focused on intentional burdens of religious practice, whereas the cases referenced in the RFRA were concerned with the incidental burdens placed on religion in the enforcement of a law.[133] Accordingly, the RFRA reflects Congress's belief that the Free Exercise Clause is concerned with the actual burdens placed on an individual and not on the intent of the legislature to burden the exercise of religion.[134] The legislative history reveals that Con-

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127. *Id.* § 2000bb(a)(4).

128. H.R. REP. NO. 103-88, at 6 (1993); *see also Smith*, 494 U.S. at 885 ("[A] State would be 'prohibiting the free exercise [of religion] if it sought to ban such acts or abstentations only when they are engaged in for religious reasons.").

129. 42 U.S.C. § 2000bb(b)(1); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

130. 42 U.S.C. § 2000bb-1(b)(1)-(2); *see also supra* notes 27-36 and accompanying text.

131. 42 U.S.C. § 2000bb-3(a); *see also* H.R. REP. NO. 103-88, at 6.

132. *Compare Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may . . . offend the constitutional requirement . . . if it unduly burdens the free exercise of religion."), *with* Reynolds v. United States, 98 U.S. 145, 167 (1878) (noting that to permit the exemption would be to make "the professed doctrines of religious belief superior to the law of the land" and thus "permit every citizen to become a law unto himself").

133. *See Yoder*, 406 U.S. at 220; Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("If the . . . effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.").

134. S. REP. NO. 103-111, at 4-5 (1993) ("This fundamental constitutional right may be undermined not only by Government actions singling out religious activities for special burdens, but by governmental rules of general applicability which operate to place substantial burdens on individuals' ability to practice their faiths. . . . [F]acially neutral laws that operated to burden the free exercise of religion . . . severely undermined religious observance by many Americans.").

gress believed that there is no less of a burden on the free exercise of religion when dealing with the enforcement or application of neutral laws or policies.[135]

Based on these concerns and the express purpose of the statute, it seems that Congress, in extending the scope of the RFRA to the "implementation" of federal law, was clarifying that the statute protects against the burden that results from the application of law.[136] The statute is expansive only in the sense that it is seeking to provide more protection than is constitutionally required, reflecting the more protective free exercise standard once recognized by the Supreme Court.[137] The statute applies when the government enforces a law or policy, and requires exceptions to be made when the enforcement of the policy or law would burden a person's religious practice. It is the execution and enforcement of the law that the RFRA is concerned with, not the intent of the law being enforced. Therefore, the RFRA increased the protection afforded to the exercise of religion by its application to the enforcement laws of general applicability.[138]

3. The Scope of the RFRA

As shown above, the RFRA is a defense to a government action that burdens the free exercise of religion. Accordingly, the government must be a party to the action.[139] Because the statute was passed in response to a particular case, the scope of the statute must be read in relation to its purpose. The purpose of the RFRA was to expand the protection afforded to individuals in cases where the government incidentally (opposed to purposefully) burdens the free exercise of religion in the course of enforcing or implementing a law or policy.[140] Understanding this narrow purpose of the statute and the reason the court in *Hankins* was mistaken in interpreting it broadly requires an understanding of the differences in both the origins and purposes of the RFRA and the ministerial exception, which are explored next.

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135. *Id.*; H.R. REP. NO. 103-88, at 1 (recognizing cases where "the free exercise of religion has been burdened by a law of general applicability").

136. *See supra* note 134; *see also* H.R. REP. NO. 103-88, at 6.

137. *See supra* notes 27-36 and accompanying text.

138. *See* S. REP. NO. 103-111, at 7-8; H.R. REP. NO. 103-88, at 6 ("[G]overnment activity need not coerce individuals into violating their religious beliefs. . . . [T]he test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion.").

139. *See supra* text accompanying notes 100-120.

140. *See supra* text accompanying notes 121-138.

B. *The RFRA and the Ministerial Exception: Their Differences in both Origin and Purpose*

Additional factors to consider in light of the *Hankins* decision are the different origins of the doctrines and reasons for their creation.[141] Even though the two doctrines have developed independently from each other, each seeking to remedy a particular constitutional problem, the court in *Hankins* nevertheless held that the RFRA supplanted the ministerial exception, holding that it applies in every instance where there is a burden on the free exercise of religion.[142] In order to determine the validity of this view, it is important to focus on the reasons why the RFRA was adopted. Thus, it is necessary to determine Congress's purpose in passing the statute and to contrast that intent with the focus of the ministerial exception. In doing so, it is important to look at the protection afforded by each doctrine, the interests they protect, and their independent development. In light of these differences, it will be clear that the RFRA was not intended to replace the ministerial exception.

1. The Level of Protection Granted

While the approach of the *Hankins* court may not seem like much of a departure from the ministerial exception, if that approach is followed the outcome may be contrary to the result demanded by the ministerial exception.[143] Several problems arise under the *Hankins* approach because the RFRA and the ministerial exception afford different protections.[144] The RFRA allows the government to burden the exercise of religion exercise upon showing proper justification, while the ministerial exception completely prohibits government intrusion.[145] The ministerial exception's sole purpose is to prevent the government from intruding on the employment relationship between a church and ministerial employees.[146] The RFRA, however, does not foreclose the risk of

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141. *See supra* note 120.

142. Hankins v. Lyght, 441 F.3d 96, 102-03 (2d Cir. 2006).

143. Van Osdol v. Vogt, 908 P.2d 1122, 1131 (Colo. 1996) (applying the compelling-interest test to a choice of minister would "compel the church to accept certain ideas into their belief system").

144. *Id.*

145. Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006); Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985).

146. *See supra* notes 50-66 and accompanying text.

governmental interference in these situations.[147] It may, perhaps, make no difference and the results may be the same.[148] However, there is no guarantee. The difficulty in applying the RFRA is that there is a great deal of discretion left to the court in its determination of the interests involved and the weight given to these interests in the balance thereof. Any shift in the balance of the interests in these circumstances would lead to a result contrary to what the ministerial exception normally requires.[149]

The difficulty may arise in future cases where perhaps a judge finds that there is a governmental interest that justifies the interference with the employment relationship.[150] Such a result would implicate constitutional issues because the RFRA is a statute, while the ministerial exception is based on constitutional principles.[151] The application of the statute in lieu of the ministerial exception may result in a constitutional violation.[152] The theory behind the ministerial exception is that interference into the defined employment relationship would *always* result in a violation of the First Amendment.[153] The RFRA, on the other hand, is a statute that seeks to raise the level of protection to a standard once applied by the Court. Even when the Supreme Court applied the heightened standard, it was increasingly willing to find a compelling government interest and became less sympathetic to burdens on a person's religious exercise, thus making government interference more likely.[154] If the RFRA replaced the ministerial exception as the

147. *See* 42 U.S.C. § 2000bb-1(b) (2000) ("Government may substantially burden a person's exercise of religion.").

148. *Cf.* Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006).

149. *See supra* notes 63-64 and accompanying text.

150. *Cf.* Van Osdol v. Vogt, 908 P.2d 1122, 1131 (Colo. 1996) (applying the compelling state interest test to a choice of minister would "compel the church to accept certain ideas into their belief system").

151. Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) ("Any attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights.").

152. *Id.* ("[S]tate scrutiny of the process for filling the [ministerial] position would raise constitutional problems."); *see also* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 254 (1993) ("The possibility of amendments to RFRA . . . is . . . the weak spot of the legislation. Protection for religious liberty . . . insulate[s] religious liberty from shifts in political majorities. Making the protection statutory necessarily subjects religious liberty to shifting political majorities.").

153. *See* McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972); *see also* Volokh, *supra* note 39, at 1496 ("[T]hat the Free Exercise Clause bars applying antidiscrimination laws to clergy . . . is in fact a per se ban on interference with a church's reasons for choosing its clergy, not an application of strict scrutiny.").

154. *See supra* notes 37-41 and accompanying text.

governing standard in situations where the ministerial exception traditionally was applied, the government may have the authority to interfere in matters that would have been declared constitutionally protected by the Free Exercise Clause.[155] It would be an anomalous result, indeed, if Congress, in increasing the protection afforded to the exercise of religion, actually diminished it. The Supreme Court has stated that in cases where constitutionality of a statute is in doubt, "it is a cardinal principle that the Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[156] Therefore, Congress did not replace the ministerial exception with the RFRA.[157]

2. The Interests Protected

In addition to the different levels of protection afforded by each doctrine, the RFRA and the ministerial exception protect different interests. The RFRA applies when a government action either compels or prohibits an action that if done or forgone, would violate a religious belief.[158] Therefore, the RFRA is concerned with an action that is either required or prohibited by a religious belief. Meanwhile, the ministerial exception is indifferent to the motives of the action, and concerns itself, rather, with the potential burdens imposed by government regulation of church employment decisions.[159] The free exercise burden that gives rise to the ministerial exception "is of a fundamentally different character" than the burden that the RFRA seeks to remedy.[160]

The ministerial exception was created and developed as a result of the Supreme Court's recognition of "the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doc-

155. *See supra* note 54.

156. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

157. *See McClure*, 460 F.2d at 560-61 (applying this principle).

158. *See* S. REP. NO. 103-111, at 7-8 (1993); H.R. REP. NO. 103-88, at 6 (1993) ("[G]overnment activity need not coerce individuals . . . . [T]he test applies whenever . . . an action taken by the government to implement a law burdens a person's exercise of religion.").

159. Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985).

160. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996); *see also* Volokh, *supra* note 46, at 1496 (barring the application of "antidiscrimination laws to clergy . . . is in fact a per se ban . . . not an application of strict scrutiny").

trine.'"[161] The interests involved in the RFRA context, on the other hand, deal with the ability of a member of the church to act against the law but in accordance with a religious belief, and the fear that "each conscience [may become] a law unto itself."[162] The ministerial exception does not pose these dangers; the members of the church are not empowered to disregard the law while worshiping.[163] Rather, the exception only applies when the employee serves a ministerial function, assuring that the protection extends only to "what is necessary to comply with the First Amendment."[164]

Of additional importance is the role played by religious beliefs in the application of each doctrine.[165] In order for a person to qualify for the protection under the RFRA, that person must demonstrate that the government substantially burdened the exercise of religious belief.[166] Meanwhile, the ministerial exception does not require that the employment decision be based on religious belief.[167] Rather, the ministerial exception is concerned with the church's authority to select ministerial employees—the reason behind the decision is irrelevant.[168] Accordingly, the role of religious beliefs in the application of each doctrine further illustrates the different concerns protected by the two doctrines.

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161. *Catholic Univ.*, 83 F.3d at 462 (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

162. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990), *superseded by statute*, 42 U.S.C. § 2000bb (2000), *as recognized in* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

163. *Catholic Univ.*, 83 F.3d at 462.

164. *See* Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1396 (4th Cir. 1990).

165. *Compare* Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) ("[T]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it."), *with* Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) ("[G]overnment regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a prisoner's individual beliefs.").

166. This showing requires some form of compulsion. *See* Henderson v. Kennedy, 253 F.3d 12, 16-17 (D.C. Cir. 2001) (holding that there was no substantial burden because plaintiff "cannot claim that the regulation forces them to engage in conduct that their religion forbids or that it prevents them from engaging in conduct their religion requires"); Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996) (holding that there is a substantial burden under the RFRA only if there is pressure to modify beliefs); *see also* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988) ("[I]ncidental effects of government programs . . . which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not "require government to bring forward a compelling justification for its otherwise lawful actions."); Lupu, *supra* note 38, at 942-46.

167. *Rayburn*, 772 F.2d at 1169.

168. *Id.*

Because the function of the ministerial exception is principled on respect for the autonomy of religious organizations in matters concerning religion,[169] and because the exception is narrowed in scope,[170] the RFRA does not appear to extend to situations where the ministerial exception has traditionally been applied. Each doctrine was developed in response to a particular concern, and each is designed to combat its respective concern. The two doctrines are formulated to take into consideration each interest that must be analyzed and the corresponding weight that those interests must be afforded. Furthermore, because the RFRA requires that the action be based on a sincere religious belief, whereas the ministerial exception does not, the two doctrines do not clash.[171] Therefore, while both doctrines implicate the free exercise of religion, the RFRA does not displace the ministerial exception.

3. The Independent Development of the Doctrines

In addition to the different interests protected and the amount of protection afforded, the two free exercise doctrines have developed independently of each other. The RFRA is a result of a century-long development of free exercise law that has been constantly evolving. In fact, the RFRA was passed in response to one of the many shifts; it was a statutory remedy that sought to keep the law stationary.[172] The Supreme Court has struggled with the proper balance of the interests of an individual's religious practice and the interests of the government in enforcing the law.[173] While the level of protection recognized by the Court continuously fluctuated, the circumstances in which the Court applies the doctrine remains the same.[174] On one side is a person engaging in the exercise of his religious beliefs, while on the other side is a branch of the govern-

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

170. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999).

171. *See supra* note 165.

172. *See supra* notes 48-49 and accompanying text.

173. *Compare* Reynolds v. United States, 98 U.S. 145, 167 (1879) (noting that an exemption to the law would make "doctrines of religious belief superior to the law of the land"), *with* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment . . . even under regulations of general applicability."). "Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe." Lupu, *supra* note 38, at 947.

174. *See supra* notes 16-47 and accompanying text.

ment seeking to penalize that person when his religious practice violates the law.

The ministerial exception, on the other hand, developed independently from this doctrine.[175] The exception was a result of a development of cases that held that matters of church government and other administrative matters is a per se exercise of religion.[176] Moreover, any attempt by the government to interfere and regulate such matters constitutes a burden on free exercise.[177] Under this theory, the First Amendment protects the religious organization's right and ability to attend to matters of faith and administration without having to answer to a governmental authority, thus respecting church autonomy and separating ecclesiastic authority from civil authority.[178] The ministerial exception addresses the problem of government enforcement of civil suits involving the employment relationship between the religious organization and ministerial employees.[179]

The *Hankins* decision does not take into account the independent development of both the RFRA and the ministerial exception. Of significant importance is that the RFRA did not create a new standard; rather, the compelling-interest test reflected in the RFRA was a reinstatement of a standard that previously existed and was rejected in *Employment Division, Department of Human Resources of Oregon v. Smith*.[180] In *Smith*, the Supreme Court found the compelling-interest standard to be too burdensome on the government.[181] The RFRA was enacted to provide additional protection

175. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) (noting that the ministerial exception is of "a fundamentally different character" than the RFRA).

176. Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006); *see also* Laycock, *supra* note 15, at 1400-01 ("[T]he effects of interference with church labor relations . . . is an exercise of religion, which the churches are entitled to perform freely.").

177. *Petruska*, 462 F.3d at 307; *see also* Laycock, *supra* note 15, at 1391 ("When the state interferes with the autonomy of a church . . . it interferes with the very process of forming the religion as it will exist in the future.").

178. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107-08 (1952); Gonzales v. Roman Catholic Archbishop, 280 U.S. 1 (1929); Watson v. Jones, 80 U.S. (30 Wall.) 679, 727 (1871).

179. Rayburn v. Conference of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) ("In 'quintessentially religious' matters the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it." (citations omitted)).

180. 42 U.S.C. § 2000bb (2000).

181. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888-89 (1990), *superseded by statute*, 42 U.S.C. § 2000bb, *as recognized in* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

as a mater of statutory right.[182] Therefore, the *Hankins* court necessarily assumes either that the ministerial exception did not exist while the Supreme Court applied the compelling-interest balance as a constitutional protection, or that the ministerial exception relies upon the compelling-interest standard for its existence. These assumptions, however, are inaccurate.

The compelling-interest balance was first expressed in 1963 in the case of *Sherbert v. Verner*.[183] Meanwhile, the ministerial exception was first established in 1972 in *McClure v. Salvation Army*, long before *Smith* overruled *Sherbert*.[184] What is more important is that even though *McClure* was decided after *Sherbert*, it did not rely on *Sherbert* in its holding.[185] While *McClure* may have adopted the general principles of free exercise expressed in *Sherbert*, *McClure* ultimately rested upon a long line of other Supreme

182. 42 U.S.C. § 2000bb(a)(4); *accord id.* § 2000bb(b)(1).

183. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

184. McClure v. Salvation Army, 460 F.2d 553, 558 (1972).

185. There have been other decisions that relate to the relationship between the RFRA and ministerial exception that may be read as being consistent with the court's holding in *Hankins*. For example, in *Rayburn v. General Conference of Seventh-day Adventists*, the court discussed the compelling-interest balancing test, finding both a substantial burden and a compelling government interest being forwarded. Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985). In the balancing, the court grounded its decision on the ministerial exception, holding that the church's interest in selecting ministers is of paramount importance, which overrides any possible government concern because the First Amendment requires that such questions of who to appoint as representative of the church in religious matters be left solely to the church. *Id.* at 1168-69. While *Rayburn* may be read as applying the compelling-interest balancing test, subsequent decisions in the Fourth Circuit have remedied this peculiarity. For example, in *EEOC v. Roman Catholic Diocese of Raleigh*, the Fourth Circuit upheld *Rayburn* after the compelling-interest standard was abolished as a constitutional requirement in *Smith* but made no mention of the RFRA or a balancing test. EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800-02 (4th Cir. 2000). Additionally, the court in *EEOC v. Catholic University of America* found that the RFRA did not supplant the ministerial exception because the two doctrines were "of a fundamentally different character." EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996). However, the court erred on the side of caution and held in the alternative that if the RFRA were to apply in lieu of the ministerial exception, the religious organizations interest always overrides the state's interest. *Id.* at 467. In these cases, the courts found that any interference into the employment relationship between a religious organization and its ministerial employees is always a substantial burden. *Id.*; *Rayburn*, 772 F.2d at 1169; *see also* Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849, 853 (S.D. Ind. 1998) (stating that "[r]ejecting the ministerial exception is judicial shorthand for holding that Defendant's First Amendment rights are not burdened by the application" of the statute). Related to these cases is the decision *Redhead v. Conference of Seventh-day Adventists*, where the court read the ministerial exception into the RFRA and went on to apply it instead of balancing the relevant interests. Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006).

Court cases dealing with the free exercise rights of religious institutions.[186] Consequently, *McClure* was not a byproduct of the compelling-interest test established in *Sherbert*.

Moreover, because *McClure* was not decided under the compelling-interest balance, it was not overruled by *Smith*. In fact, courts continued to apply the ministerial exception in the period between the *Smith* decision and the passage of the RFRA.[187] Since the RFRA only impacted the law affected by the decision in *Smith*, the ministerial exception was not affected by *Smith*. Additionally, because the RFRA sought to reestablish the law as it stood before *Smith*, and because the ministerial exception existed alongside of and independently from the test that the RFRA seeks to reestablish, the ministerial exception was not affected by the passage of the RFRA.

CONCLUSION

The *Hankins* court erred by holding that the RFRA supplanted the ministerial exception and is to apply in all cases where a person's free exercise is burdened, whether the government is a party or not. By its terms, the RFRA only applies when the government is a party. Meanwhile, the ministerial exception applies when either the government or a private party brings the action. Because there is no difference in remedies and no less of a burden on the exercise of religion when the private party brings the suit, and because the RFRA requires that the government be a party to the suit, it seems that Congress did not intend the RFRA to apply in the ministerial situation. The statute acts as a defense in cases where the government burdens the exercise of religion in implementing federal law.

In addition to the arguments based upon statutory construction, the two doctrines have different origins and purposes. The RFRA was a congressional response to *Employment Division, Department of Human Resources of Oregon v. Smith*, which involved the balancing of interests between individuals and the government. On the other hand, the ministerial exception is concerned with the autonomy of religious organizations, and was never reliant on a balancing of interests. While the RFRA allows the government to burden the free exercise of religion if it demonstrates a compelling

186. *See supra* notes 53-55 and accompanying text.

187. *E.g.*, Young v. N. Ill. Conference of United Methodist Church, 818 F. Supp. 1206, 1211-12 (N.D. Ill. 1993), *aff'd*, 21 F.3d 184 (7th Cir. 1994).

interest narrowly tailored to achieve the desired end, the ministerial exception prohibits any government interference when any burden would exist. Because the ministerial exception offers greater protection, if the RFRA were to supplant the ministerial exception, a doctrine of constitutional necessity, the RFRA's constitutionality would be questionable. Therefore, the RFRA did not supplant the ministerial exception.

John LeVangie