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Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions

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I. INTRODUCTION

A religious organization enters a contract with a builder to construct a new facility and breaches the contract; a student at a

private, religiously-affiliated school slips on a patch of ice and is seriously injured because of the school maintenance crew's negligence. The builder and the student are aggrieved by the actions of the respective religious institutions. Consequently, they seek to resolve their disputes through the judicial system, as would any other individual with a potential legal claim. Although the adjudicative process would involve church and state, the First Amendment Religion Clauses would not likely be implicated, because the application of contract and tort law to these secular activities does not inhibit religious exercise or involve government in religious activities.

In contrast to the above contract and tort examples, consider the relationship between church and state that would ensue from adjudicating a tort claim filed by a parishioner whose priest's marriage counseling progressed to sexual misconduct,[1] or an employment discrimination claim by a female nun who was allegedly denied tenure as a professor of canonical law because of her gender.[2] These legal disputes do not involve mere application of a secular standard to secular conduct.[3] Rather, adjudicating claims that implicate matters of church doctrine or governance necessitates a certain degree of intrusion into constitutionally significant religious matters.

As long as church and state have coexisted, courts have struggled with the question of how to treat disputes involving religious institutions. On the one hand, religious institutions are like corporations and other organizations in that they are comprised of individuals but act as unified entities. Clearly, the state regulates corporations and non-religious organizations, so by analogy, religious institutions should not be immune from state regulation.[4] On the other hand, the Framers of the Constitution distinguished religion from other group activities by affording religious groups special protections from state interference in the First Amendment's

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1. *See* Doe v. Evans, 718 So. 2d 286, 293 (Fla. Dist. Ct. App. 1998) (affirming the dismissal of a female plaintiff's claim against her church for negligent hiring, retention, and supervision because examining the church's decisions to hire, terminate, or retain clergy would necessarily entangle the court in issues of religious law, practices, and policies), *review granted*, 735 So. 2d 1284 (Fla. 1999).

2. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 460-67 (D.C. Cir. 1996) (holding that the application of Title VII to a nun's sex discrimination claim would impermissibly entangle church and state under the Free Exercise and Establishment Clauses).

3. *See, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310, 320 (Colo. 1993) (en banc) ("Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution.").

4. *See* Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985) ("Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts.").

Religion Clauses.[5] This protection from state regulation is not without limit, however, especially when religious organizations' interests collide with those of individuals whom the state has a regulatory interest in protecting. Considering this conflict of interests, how courts should respond when individuals assert that a religious institution has violated their legal rights is a complicated issue, especially in the context of an increasing amount of state regulation.

The issue varies in complexity, however, depending on the type of legal dispute at hand. Intuitively, certain bodies of law are less controversial than others in their application to religious institutions. For example, application of contract law to a breach of contract issue or tort law to a negligence claim does not raise substantial issues of state intrusion into important church matters.[6] When the applicable body of law intrudes more extensively into religious governance or doctrine, however, courts struggle to determine the extent to which churches should comply. One such troublesome area of law is employment discrimination. This Note seeks to define the proper role of courts in mediating discrimination-based employment disputes involving religious institutions.[7] Specifically, this Note argues that instead of focusing on whether an employment dispute implicates a ministerial relationship,[8] as courts have done by analyzing the primary duties of the plaintiff in order to determine application of the constitutional ministerial exception, jus-

5. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....").

6. *See, e.g.*, Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 76 (1986). One commentator argues that the judicial bar on adjudicating certain tort claims against churches, which most frequently applies to cases involving clergy misconduct toward congregants or children and is intended primarily to restrain courts from adjudicating religious questions, is likely to be deconstructed over time do to the influence of cultural, institutional, doctrinal, and theoretical factors. Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 240-59 (2000) (arguing that cultural, institutional, doctrinal, and theoretical factors "point towards the eventual erosion or abrogation of the constitutional prohibition on subjecting religious entities to standard forms of tort adjudication").

7. This Note will primarily focus on federal statutory employment discrimination claims but will also address various state law claims that are similar to employment discrimination claims in terms of the extent to which church/minister relationships are implicated by adjudication. *See infra* Part V.A (analogizing federal hostile environment sexual harassment claims to state law negligent hiring and supervision claims on the basis of their proclivity to raise Free Exercise and Establishment Clause issues when asserted against religious institutions).

8. This Note uses the term "ministerial relationship," to describe the employment relationship between a church and its minister. See *infra* Part IV for a more detailed definition of a "minister."

ticiability should be based on whether adjudication of the dispute would actually implicate religious doctrine or practice.

Part II of this Note examines the statutory framework of Title VII and the extent to which Title VII's language facially applies to employment disputes involving religious employers. Part III of this Note lays out the constitutional arguments for excluding religious institutions from compliance with federal employment discrimination laws and discusses the development of a constitutionally-based ministerial exception to the application of Title VII and other federal employment discrimination laws. Part IV of this Note evaluates the "primary duties of the plaintiff" analysis employed by courts to determine whether the ministerial exception should apply to particular employment discrimination claims against religious employers. Part V of this Note examines the ministerial exception in the context of sexual harassment and negligent hiring and supervision claims involving harm to third parties outside the ambit of the church/minister relationship, in which courts have diverged from the traditional ministerial exception analysis and refused to grant immunity to church employment decisions absent a religious belief or practice implicated by adjudication.

Finally, Part VI of this Note argues that the standard for determining whether a court should adjudicate a particular employment discrimination case involving a religious organization should focus on whether the court would have to examine religious doctrine or practice in order to resolve the particular claim.[9] Such a standard is necessary in order to ensure that the constitutional ministerial exception only applies if the defendant has a legitimate First Amendment interest in an exemption from the requirements of Title VII. If no question of religious doctrine or practice is implicated by adjudication of the plaintiff's employment discrimination claim, the defendant fails to satisfy the basic Free Exercise Clause requirement of a significant burden on religious exercise.[10] In addition, a religious institution cannot plausibly argue that the Establishment Clause is violated when a court adjudicates a dispute in-

9. Essentially, the model that this Note proposes would examine whether a question of religious doctrine or practice would be implicated by the plaintiff's claim, rather than whether the plaintiff's job duties are sufficiently ecclesiastical to classify the position as ministerial—the focus of the current ministerial exception test. *See infra* Parts IV.A, VI.B.

10. *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 18 (1989) ("It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." (quoting Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303 (1985))).

volving purely secular conduct and motivation, because the state would not be entangling itself in *religious* matters. Given that the ministerial exception is doctrinally based in the First Amendment's Free Exercise and Establishment Clauses, this Note's proposal to require the implication of religious conduct or practice for the ministerial exception's application results in a test more closely aligned with the exception's underlying purpose.

II. STATUTORY EXEMPTION OF RELIGIOUS INSTITUTIONS UNDER TITLE VII

When an employee brings a Title VII employment discrimination claim against a religious organization, the organization has two defenses it may assert to preclude application of Title VII to its employment decision. First, if the claim stems from an allegation that the organization discriminated against employees based on *religion*, the organization may invoke the protection of the Title VII statutory religious exemption.[11] Alternatively, if the plaintiff's current or desired employment position involves primarily religious functions, a church defendant may assert the constitutional ministerial exception as a defense to application of Title VII.[12] Thus, when a church employee brings a Title VII claim against her employer, a religious organization has two possible lines of defense to prevent a court from adjudicating the dispute: one statutory, based on the type of discrimination at issue, and the other constitutional, based on the primary employment duties of the plaintiff.

A. The Title VII Religious Institution Exemption Pre- and Post-Amendment

When Congress enacted Title VII of the Civil Rights Act of 1964, the statute's terms did not apply equally to all employers and employment activities. Rather, section 702 of Title VII provided,

> This title shall not apply to an employer with respect to the employment of aliens outside any State, *or to a religious corporation, association, or society* with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society *of its religious activities* or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.[13]

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11. *See infra* Part II.A.
12. *See infra* Part III.
13. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (emphasis added).

As enacted, Title VII exempted religious institutions only to the extent they discriminated against employees involved in strictly religious activities.[14]

Eight years after enacting Title VII, however, Congress expanded the scope of the religious institution exemption to include *all* activities of religious institutions, instead of merely their *religious* activities.[15] By amending the statute to include religious institutions' "activities," rather than merely their "religious activities," Congress brought the full range of a religious institution's employment activities within the ambit of the religious institution exemption.[16] Because Congress did not limit the scope of the amendment's application, exempted "activities" could arguably extend to any for-profit endeavors pursued by a religious institution.[17] In extending

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14. *Id.*

15. Act of March 24, 1972, Pub. L. No. 92-261, § 702, 86 Stat. 103, 104 (codified as amended at 42 U.S.C. § 2000e-1(a) (1994)) (stating that Title VII shall not apply to a religious institution "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society *of its activities*") (emphasis added). This amendment originated from concerns that private religiously-affiliated educational institutions were unable to apply religious criteria in hiring educators, because education was not considered a religious activity under the Title VII exemption. *See* 118 CONG. REC. 946 (1972) (statement of Sen. Allen), *reprinted* in SENATE SUBCOMM. ON LABOR, COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 844 (1972). In debating the proposed deletion of the religious activity requirement from the exemption, one of the amendment's sponsors expressed fears that Title VII could force a religious school to hire atheists if the class subject matter was not theology or a religiously-based topic. *Id.*

16. *See* 118 CONG. REC. 4503 (1972) (statement of Sen. Ervin), *reprinted* in SENATE SUBCOMM. ON LABOR, COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1645 (1972). The amendment's sponsors argued that extending the exemption to non-religious activities would remedy this problem, because it would "take the political hands of Caesar off of the institutions of God, where they have no place to be." *Id.*

17. For a discussion of the potential Establishment Clause violations arising from exempting religious organizations from government regulation, see *King's Garden, Inc. v. FCC*, 498 F.2d 51, 54 (D.C. Cir. 1974) ("If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act."); William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 324-26 (1986) ("Freeing religious organizations from regulation provides a relative benefit for religion over nonreligion, which may raise establishment concerns."). One commentator characterizes the problem arising from government regulation of the employment relationship between churches and their employees as a "three-way web of tensions." Scott D. McClure, Note, *Religious Preferences in Employment Decisions: How Far May Religious Organizations Go?*, 1990 DUKE L.J. 587, 591 (asserting that "[g]overnment creates a three-way web of tensions when it attempts to legislate in areas that concern employment in religious organizations" because (1) the Free Exercise Clause prohibits government from requiring individuals to forgo practicing their religious beliefs in order to procure and maintain employment, (2) First Amendment principles dictate that government should not intrude upon a religious institution's selection of employees to carry out its spiritual

the exception's application to *non-religious* activities, however, Congress also opened the door to constitutional challenges based on the amendment's seemingly preferential treatment of religious institutions conducting non-religious activities.

B. Constitutional Attacks on the 1972 Amendment to the Religious Institution Exemption: The Free Exercise v. Establishment Clause Debate

The amended statutory exemption treated religious and non-religious institutions differently with respect to non-religious activities by exempting religious institutions to the exclusion of non-religious organizations. As a result, courts faced numerous Establishment Clause challenges to the exception's constitutionality.[18] Such challenges arose when secular church employees alleged that the exception unconstitutionally favored religious organizations by allowing religious employers to avoid application of Title VII, while similarly situated non-religious employers remained open to liability.[19] Since the Establishment Clause prohibits state regulation that inhibits *or advances* religion,[20] various lower courts reasoned that exempting the non-religious activities of religious organizations would result in an Establishment Clause violation. Consequently, these courts hesitated to construe the amendment as a limitless expansion of the scope of religious organizations' protected activities.[21] The following Sections outline the constitutional issues raised by Congress's exemption of religious institutions from liability for certain forms of otherwise prohibited employment discrimination, and explain how courts resolved the tension between the two Religion Clauses in the context of Title VII's application to religious institutions.[22]

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mission, and (3) the Establishment Clause prohibits laws that will result in the establishment of religion).

18. *See, e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334-40 (1987) (addressing the application of the statutory religious institution exemption to a building engineer for a church gymnasium); Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 977-79 (D. Mass. 1983) (addressing a journalism student's Title VII employment discrimination case against the *Christian Science Monitor* for its application of a religious affiliation test to candidates for reporter positions).

19. *See, e.g., Amos*, 483 U.S. at 334-40; *Feldstein*, 555 F. Supp. at 977-79.

20. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (asserting that, to pass muster under the Establishment Clause, a law must not have a primary effect that inhibits or advances religion).

21. *E.g., King's Garden*, 498 F.2d at 53-57.

22. See *Everson v. Board of Education*, 330 U.S. 1, 13-18 (1947), for one of the Supreme Court's first statements regarding the apparent tension between the Establishment Clause's

1. Constitutional Issues Raised by Governmental Accommodation of Religion

When government exempts a religious institution from a law, regulation, or other burden otherwise imposed on the institution's exercise of religion, the Free Exercise and Establishment Clauses define the limitations and requirements for such accommodation. Prior to the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*,[23] government could not burden a religious institution's free exercise of religion unless it was necessary to achieve a compelling state interest.[24] The Supreme Court's decision in *Smith*, however, severely restricted courts' ability to grant relief to religious institutions on Free Exercise grounds insofar as such institutions are merely being forced to comply with neutral laws of general applicability, such as Title VII.[25] Although exemption from a neutral law of general applicability may not be mandated by the Free Exercise Clause after *Smith*, courts and legislatures are free to accommodate religious exercise through legislative exemptions, provided that the provision does not run afoul of the Establishment Clause.[26] Section 702 of Title VII is an example of such a permissive accommodation.

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restrictions on governmental support of religion and the Free Exercise Clause's mandate against governmental interference with religious exercise.

23. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

24. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406-09 (1963) (holding that, in order to justify a direct or indirect burden on religious exercise, government needs a compelling state interest).

25. *Smith*, 494 U.S. at 878-82 (holding that no Free Exercise problem results when a neutral, generally applicable law incidentally infringes on religious institutions' free exercise of religion).

26. The Supreme Court has consistently found that a sphere of constitutionally permissible "accommodation" of religion exists, despite the absence of a Free Exercise mandate for a religious exemption. Congress, acting within the confines of its Fourteenth Amendment enforcement power, *see* City of Boerne v. Flores, 521 U.S. 507, 516-20 (1997) (defining Congress's power to accommodate religious exercise under Section 5 of the Fourteenth Amendment as an enforcement power that is limited to Congressional action reflecting a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"), may accommodate religion and religious exercise so long as such accommodation does not result in an unconstitutional establishment of religion, *see, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."). The limits on such permissive accommodation are the Fourteenth Amendment, which requires that legislative accommodation of religious exercise does not exceed the extent of the injury to churches' exercise of religion, and the Establishment Clause, which requires that legislative and judicial accommodation do not result in an establishment of religion. *See, e.g., Boerne*, 521 U.S. at 519-20 (confining Congress's power to accommodate religious exercise under Section 5 of the Fourteenth Amendment to enacting remedial legislation that is in proportion to the injury to be remedied—in this case, the burden on religious institutions' exer-

Such accommodation differs from pre-*Smith* Free Exercise exemptions because, unlike a finding that the Free Exercise Clause *requires* protection, permissive accommodation is a discretionary act, limited only by the Establishment Clause's negative mandate that government refrain from establishing religion.[27]

The Establishment Clause prohibits government from establishing religion, which includes "not only the institution of an official church, but any government act favoring religion, a particular religion, or for that matter irreligion."[28] The purposes of the Establishment Clause include "guarantee[ing] the right of individual conscience against compulsion . . . protect[ing] the integrity of religion against the corrosion of secular support, and . . . preserv[ing] the unity of political society against the antagonism of controversy over public support for religious causes."[29] For several years, the Supreme Court consistently applied a three-prong test drawn from *Lemon v. Kurtzman* to Establishment Clause claims. This test requires that governmental action have a secular purpose, that its primary effect neither advance nor inhibit religion, and that the action not result in the excessive entanglement of church and state.[30]

Unlike the Free Exercise Clause, where the Supreme Court's jurisprudence has focused on a test that is unitary, even if not entirely consistent, the Court's most recent Establishment Clause cases indicate the Court's refusal to cabin itself to one particular test for all Establishment Clause cases.[31] Rather, the Supreme Court has applied different tests depending on the factual context and the issues involved in the case at hand. The Establishment Clause test applied by the Supreme Court has differed depending on factors such as whether the case involved aid to religion[32] or the

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cise of religion); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 8-17 (1989) (holding that although religious institutions are allowed to receive some benefits from governmental programs, such programs must not violate the Establishment Clause).

27. Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334-35 (1987); *Hobbie*, 480 U.S. at 144-45.

28. Mitchell v. Helms, 530 U.S. 793, 120 S. Ct. 2530, 2572 (2000) (Souter, J., dissenting).

29. *Id.*

30. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

31. *See, e.g.*, *Mitchell*, 120 S. Ct. at 2573 (Souter, J., dissenting) (noting that "[i]n all the years of its effort [in designing an Establishment Clause test], the Court has isolated no single test of constitutional sufficiency").

32. *See, e.g.*, *id.* at 2540-41 (applying the plurality's modified *Lemon* test, which considered the entanglement inquiry to be part of the effect prong and distilled the ultimate inquiry down to whether any religious indoctrination that might occur from the aid could reasonably be attributed to governmental action); *Lemon*, 403 U.S. at 612-13 (holding that the appropriate test to evaluate the constitutionality of government aid to religion required that the aid have a secular

appearance of aid to religion,[33] or whether the case involved students in a school setting.[34] The *Lemon* test continues to provide an important point of reference in assessing the Establishment Clause issues raised by exempting religious institutions from Title VII, however, given that (1) the Supreme Court has never overruled *Lemon*, and (2) the cases discussing the constitutionality of both the statutory Title VII exemption and the constitutionally based ministerial exception apply the *Lemon* test. Thus, while it is unclear whether the Supreme Court would *only* apply the *Lemon* test to assess the constitutionality of exempting religious institutions from Title VII if it were presented with the issue today, the Court's application of the test under similar circumstances in the past indicates that the test remains an important piece of the Establishment Clause analysis.

2. Assessing the Constitutionality of the Statutory Religious Institution Exemption: *King's Garden, Inc. v. FCC* and *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*

Shortly after Congress enacted Section 702 of Title VII, the U.S. Court of Appeals for the D.C. Circuit in *King's Garden, Inc. v. FCC* addressed the primary Establishment Clause arguments against the constitutionality of the statute's new exemption of a religious institution's non-religious activities.[35] In *King's Garden*, a religious organization sought review of a Federal Communications Commission ("FCC") order finding that the organization's radio stations discriminated on the basis of religion in their employment practices.[36] In its defense, the religious organization argued that

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purpose, that it did not primarily advance or inhibit religion, and that it not excessively entangle church and state).

33. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989) (applying the "endorsement test," which prohibits the appearance of governmental advancement or support of religion).

34. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 2279-81 (2000) (holding that a showing that a governmental practice resulting in the coercion of students to participate in a religious activity was sufficient to prove an Establishment Clause violation); Lee v. Weisman, 505 U.S. 577, 586-99 (1992) (applying a coercion analysis to find that school prayer by a rabbi at a high school graduation violated the Establishment Clause).

35. King's Garden, Inc. v. FCC, 498 F.2d 51, 53-57 (D.C. Cir. 1974). The plaintiff's claim of religious discrimination was based on the King's Garden radio station employment application, which asked questions such as "Are you a Christian?" and "Is your spouse a Christian?" *Id.* at 52 n.1 (quoting the radio station's employment application).

36. *Id.* at 52. The FCC order also required the station to submit a statement regarding its future hiring practices and policies. *Id.*

Section 702 precluded application of Title VII to the radio station's religious discrimination in its employment practices.[37] In response, the FCC claimed that the Title VII exemption applied only to applicants for positions "connected with the espousal of the licensee's religious views."[38] Ultimately, the court accepted the FCC's position and held the FCC's qualified exemption for religious organizations involved in broadcasting complied with the text of Title VII and did not violate the organizations' rights under the Free Exercise Clause.[39]

In assessing the FCC regulation's validity, the *King's Garden* court first expressed doubt that Congress truly intended to exempt both secular and non-secular activities of religious organizations when it substituted "activities" for "religious activities."[40] By focusing on comments made by the amendment's sponsors during debate, the court constructed an argument that Congress primarily intended the amendment to extend Title VII's exception to the hiring of educators by religiously affiliated schools, despite the absence of such a limitation within the text of the amendment.[41] Absent a nexus with religious doctrine, the court asserted, the religiously-affiliated broadcaster's Free Exercise rights were not implicated.[42] Rather, Congress's failure to delineate specifically excepted activi-

37. *See* 42 U.S.C. § 2000e-1(a) (1994); *King's Garden*, 498 F.2d at 52-53.

38. *King's Garden*, 498 F.2d at 53. The court declined to address the applicability of the FCC standard to any particular job position; rather, it assessed the facial conformity of the FCC regulation to Title VII and the U.S. Constitution. *Id.* at 53-54, 59.

39. *Id.*

40. *Id.* at 53-55. In determining that Congress's purpose in enacting the amendment was not to exempt every church-sponsored activity, the court looked to the legislative history of the amendment and ascertained that Congress's primary goal in enacting the amendment was to allow religious educational institutions to hire only individuals of a particular faith as educators. *Id.* at 54 & n.6. Although the language of the amendment connotes application to any activity, the court emphasized that Senators Allen and Ervin, the amendment's sponsors, always referred to religiously affiliated schools in illustrating the effect of the proposed amendment. *Id.* at 54 n.6.

41. *Id.* at 54 & n.6. Additionally, the court noted that Congress indicated no intent for the FCC to be bound by the exemption. *Id.* at 53. The court added that in the absence of a clear intent for Title VII's religious organization exemption to apply to the FCC, the Commission's "public interest" mandate should not be subsumed by the exemption. *Id.* at 53-54.

42. *Id.* at 60-61. The court, however, did not specifically state how the FCC could constitutionally or logistically ascertain whether an employment position or broadcast is sufficiently religious in character to fall within the exception. Rather, the court indicated its confidence that the FCC, like other public bodies dealing with religious organizations, had the capacity to determine First Amendment issues arising in communications licensing. *Id.* at 61. Although it would be difficult to argue the FCC is not institutionally capable of assessing First Amendment free speech issues, the court seemed to assume too much in determining that the FCC similarly would be equipped to assess whether a program or employment position is sufficiently religious as to implicate Free Exercise concerns and invoke the FCC qualified exemption.

ties caused the amendment to be "of very doubtful constitutionality" because of the Establishment Clause's requirement of governmental neutrality toward religion.[43] In essence, the *King's Garden* court reasoned that by opening up a religious organization's exempted activities without limit, Congress crossed a fine line between accommodating religion and impermissibly creating a preference for religious organizations in violation of the Establishment Clause.[44] Given this apparent tension between the plain statutory language applying the exemption to all activities of religious organizations and lower courts' doubts regarding the amendment's constitutionality,[45] this issue ultimately came up for review by the Supreme Court.[46]

After various lower federal courts held that the statutory religious exemption's application to *all* activities of religious organi-

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43. *Id.* at 53; *see also* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."). Applying the first prong of the test, the *King's Garden* court concluded that there was no conceivable secular purpose in exempting *all* activities of religious institutions. *King's Garden*, 498 F.2d at 55. Moreover, such an exemption would necessarily give religious organizations an unfair advantage over similarly situated non-religious employers in hiring employees for non-religious activities, thereby violating the second prong of the *Lemon* test. *Id.*

44. *Id.* at 55 ("In creating this gross distinction between the rules facing religious and non-religious entrepreneurs, Congress placed itself on collision course with the Establishment Clause."); *see also* Wallace v. Jaffree, 472 U.S. 38, 52 (1985) (characterizing the juxtaposition of the First Amendment's Religion Clauses as dual means provided by the Framers for freedom of conscience with respect to religious rights in which, "[j]ust as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority").

45. *King's Garden*, 498 F.2d at 53; *see also* Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 978 (D. Mass. 1983). In *Feldstein*, the United States District Court for the District of Massachusetts held that the Christian Science Monitor was statutorily exempt from compliance with Title VII's prohibition of religious discrimination. *Feldstein*, 555 F. Supp. at 979. Instead of applying the applicable amended version of the Title VII exemption, however, the court reasoned that the Christian Science Monitor's hiring practices were exempt because the operation of the Monitor was a religious activity of a religious organization. *Id.* Thus, the court found that the Monitor met the stricter requirements of the statutory religious organization exemption as originally enacted. *Id.* In framing the issue and determining the standard for exemption under Title VII, the *Feldstein* court similarly avoided applying the amended version of the religious organization exemption by holding the exemption of all activities of religious organizations to constitute a "preference" for religion under the Establishment Clause. *Id.* ("It is well established that the expression of a preference for all religions is as constitutionally infirm as a preference for, or a discrimination against, a particular religion." (citing Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973))). Thus, similar to the *King's Garden* court, the *Feldstein* court refused to apply the 1972 amendment to the Title VII religious organization exception as written. *Id.*

46. *See infra* Part II.C. Instead of addressing the issue in *King's Garden*, the Supreme Court resolved it by granting certiorari in the *Amos* case.

zations violated the Establishment Clause,[47] the Supreme Court addressed the issue of the amended exception's constitutionality in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*.[48] In *Amos*, an assistant building engineer filed suit on behalf of a purported class of plaintiffs who lost their jobs with the Church of Jesus Christ of Latter-Day Saints (the Church) for their failure to obtain certificates showing they were members of the Church and eligible to attend its temples.[49] The plaintiffs subsequently filed suit, alleging that the church discriminated against them in violation of Title VII's prohibition against religious discrimination and that if Section 702 applied, it would violate the Establishment Clause.[50]

To determine whether Title VII's amended exemption of religious organizations' religious and non-religious activities unconstitutionally aided religion in violation of the Establishment Clause, the *Amos* Court analyzed the exemption using the Supreme Court's Establishment Clause test from *Lemon v. Kurtzman*.[51] Applying *Lemon*'s first prong,[52] the Court concluded that the amended exception had a legitimate secular purpose in "alleviat[ing] significant governmental interference with the ability of religious organi-

47. *See, e.g., King's Garden*, 498 F.2d at 53-55; *Feldstein*, 555 F. Supp. at 978 (expressing "grave doubts as to [the exemption's] ability to pass constitutional muster under the Establishment Clause").

48. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 334-40 (1987).

49. *Id.* at 330. The certificate at issue in *Amos* was a "temple recommend" and was only granted to individuals who follow the church's standards in matters including "regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco." *Id.* at 330 n.4.

50. *Id.* at 331. At the trial level, the United States District Court for the District of Utah held that the amended Title VII exception was unconstitutional for its failure to meet *Lemon*'s requirement that the exception have a primary purpose that neither inhibits nor advances religion. *Id.* at 332-33 (citing Amos v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 594 F. Supp. 791, 814-20 (D. Utah 1984)). The trial court held that the exemption's application to secular activity violated the Establishment Clause by granting religious organizations "an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices." *Id.* at 333 (quoting *Amos*, 594 F. Supp. at 825). Refusing to apply the exemption as amended, the trial court instead applied the 1964 version of the Title VII religious organization exception. *Id.* (citing *Amos*, 594 F. Supp. at 799). Because the operation of the gymnasium for which the plaintiff worked was not a religious activity and his job did not involve religious beliefs or rituals, the court held that the Church's religious discrimination against the plaintiffs was not included within the original Title VII religious institution exemption. *Id.* at 331-32 (citing *Amos*, 594 F. Supp. at 802).

51. *Amos*, 483 U.S. at 335 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

52. *Id.* (citing *Lemon*, 403 U.S. at 612-13) (stating that the first prong of the Establishment Clause test is whether the law has a secular purpose).

zations to carry out their religious missions."[53] The amendment actually decreased Establishment Clause concerns under the second prong, the *Amos* Court asserted, because it relieved religious institutions of the burden of questioning whether particular activities would be sufficiently "religious" to qualify under the exemption.[54] In holding that the amended exemption satisfied *Lemon*'s second prong, the Court distinguished between the impermissible effect of *government* advancing (or inhibiting) religion and the permissible effect of allowing for *religious organizations* to advance religion.[55] Because the amended Title VII exemption merely enabled *religious organizations* to advance religion, in a manner similar to granting tax exemptions to churches,[56] the *Amos* Court held that Section 702's primary effect was not to foster governmental advancement of

53. *Id.* The *Amos* Court emphasized that the first prong of the *Lemon* test is intended to prevent the relevant governmental decision maker from acting with the intent to promote a certain point of view in religious matters. *Id.*

54. *Id.* Even when federal courts attempted to ascertain whether a religious organization's activity was religious for purposes of the Title VII exception, the courts recognized the difficulty of accurately determining the distinction. In *Feldstein v. Christian Science Monitor*, the court noted comments by Senator Ervin, a sponsor of the amendment, indicating his concerns with the government's incapacity to distinguish non-religious from religious activities. Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 976 (D. Mass. 1983). Senator Ervin argued, "[i]t is impossible to separate the religious and non-religious activities of a religious . . . educational institution or religious society from its other activities." *Id.* (citing SENATE SUBCOMM. ON LABOR, COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1212, 1223 (1972)). Despite these comments from the amendment's sponsors, courts continued to determine eligibility for the Title VII exemption based on whether the activity was sufficiently religious. This analysis tended to turn on whether a religious organization pursued the activity in order to promote religion and whether the religious organization exerted sufficient control over the daily operations of the activity at issue. *Id.* at 977-78.

55. *Amos*, 327 U.S. at 336-37. The Court emphasized, "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon* . . . *government itself* [must have] advanced religion through its own activities and influence." *Id.* at 337. As the Supreme Court has indicated through its application of the endorsement test in cases such as *County of Allegheny v. ACLU*, the Court is not simply concerned with *actual* advancement of religion, but also the *appearance* that government is in some way advancing religion. County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989). In order for an Establishment Clause violation to arise, however, the government must have created the impermissible inference of governmental advancement of religion. *Amos*, 483 U.S. at 336-37. As an example of the distinction between governmental and private advancement of religion, the *Amos* Court cited *Walz v. Tax Commission*, in which the Supreme Court held that property tax exemptions for religious organizations had a principal effect that did not advance religion, though clearly such exemptions enabled religious organizations themselves to more effectively advance religion by freeing them of a burden carried by non-religious organizations. *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)). The *Walz* Court drew from the Framers' intent that "establishment" of religion "connoted sponsorship, financial support, and *active* involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668, *quoted in Amos*, 483 U.S. at 337 (emphasis added).

56. *See, e.g., Walz*, 397 U.S. at 668.

religion.[57] Finally, the Court determined that the amended statutory exemption easily satisfied *Lemon*'s third prong, which prohibits excessive entanglement of church and state.[58] The Court found that the amended exemption prevented government from engaging in an "intrusive inquiry" into whether a religious organization's activity was sufficiently "religious" to qualify under the exemption.[59] Because the *Amos* Court found the amended exemption for religious institutions satisfied all three prongs of the *Lemon* test,[60] it held that the exemption's application did not violate the Establishment Clause and was therefore constitutional.[61] Thus, *Amos* clearly established a religious organization's right to discriminate on the basis of religion in hiring employees for any type of activity sponsored by the organization.

C. Limits on Applying Section 702 to Employment Discrimination by Religious Organizations: The Bright Line Between Religious and Non-Religious Discrimination

Although the Supreme Court upheld the constitutionality of Title VII's statutory exemption for all activities of religious institutions in *Amos*, clear limits on the extent to which churches could assert immunity from federal employment discrimination claims subsequently emerged in federal case law. These cases established that, although the statutory exemption applies to the religious and non-religious activities of religious organizations, as well as the organization's choice to discriminate on the basis of religion, it does not protect discrimination based upon non-religious factors like race, sex, or national origin.

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57. *Amos*, 483 U.S. at 337-38. The *Amos* Court emphasized that government does not unconstitutionally establish a religion by removing a burden for religious organizations that non-religious entities must still bear. *Id.* Rebutting the argument that government must reciprocally lift such a burden for non-religious entities to comply with the Establishment Clause, the Court stated, "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id.* at 338.

58. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

59. *Amos*, 483 U.S. at 339.

60. *Id.*; *Lemon*, 403 U.S. at 612-13.

61. *Amos*, 483 U.S. at 327. Specifically, the Court held that the rational basis test is the proper inquiry for Section 702 as applied to religious entities, because the statutory exception was neutral on its face and motivated by the permissible purpose of limiting governmental interference with the exercise of religion. *Id.*

1. *McClure v. Salvation Army*

In *McClure v. Salvation Army*, the Fifth Circuit considered, for the first time, whether Title VII's statutory religious institution exemption applied to non-religious as well as religiously-based employment discrimination.[62] Both McClure and the EEOC argued that the religious exemption only applied to discrimination on the basis of *religion*; because the Salvation Army allegedly discriminated against Ms. McClure on the basis of sex, the exemption should not apply.[63] The *McClure* court accepted this argument and defined the proper scope of the statutory religious organization exception as encompassing religious discrimination only.[64] In support of this position, the court looked to the exemption's language and legislative history.[65] The court emphasized that the House and the Senate compromised in enacting section 702; Congress adopted the pared-down version offered by the Senate that, instead of granting a blanket exception as the House version did, would exempt only religious activities.[66] Drawing from the amendment's language and legislative history, the *McClure* court then held that the religious organization exception applied only to religious discrimination.[67] Consequently, because Ms. McClure's claim was for sex discrimination, rather than religious discrimination, the Salvation Army could not claim exemption from Title VII liability under section 702.[68]

2. *EEOC v. Mississippi College*

Although *McClure* clearly established that the Title VII statutory exemption only applied to religious discrimination, Congress's amendment of section 702 shortly after *McClure* raised the question of whether Congress intended to exempt non-religious *discrimination* by extending the statutory exemption to religious organizations' non-religious *activities*. In *EEOC v. Mississippi College*, the Fifth Circuit addressed this very question, ultimately re-

62. McClure v. Salvation Army, 460 F.2d 553, 588 (5th Cir. 1972).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* (quoting 110 CONG. REC. 12818 (1964)). Because the court heard the case early in 1972, it dealt solely with the exception as enacted, because Congress had not yet extended the amendment to *all* activities of religious organizations.
67. *Id.* The arguments against extending the exception to non-religious discrimination were especially strong, because the *McClure* court heard the case before Congress amended Section 702 to encompass non-religious as well as religious activities.
68. *Id.*

jecting the expansion of religious immunity.[69] In *Mississippi College*, Dr. Patricia Summers, a white female assistant professor, brought suit against the religiously owned and operated college for sex and race discrimination.[70] Specifically, she alleged that Mississippi College unlawfully denied her a full-time teaching position on the basis of sex, and that, although she was not a minority, the institution's alleged racial discrimination in hiring created a "working environment heavily charged with discrimination."[71] In its defense, Mississippi College argued that section 702 precluded adjudication of Summers' sex and race discrimination claims.[72]

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69. EEOC v. Miss. College, 626 F.2d 477, 485-86 (5th Cir. 1980). In holding that Title VII's statutory exception was limited to religious discrimination, the *Mississippi College* court construed the exception to be consistent with Congress's proscription of racial discrimination in Title VII and in other sections of the Civil Rights Act of 1964. *Id.* at 488-89. Furthermore, the court "conclude[d] that the government's compelling interest in eradicating discrimination is sufficient to justify the minimal burden imposed upon the College's free exercise of religious beliefs that results from the application of Title VII." *Id.* at 489. At least one commentator has taken issue with the *Mississippi College* court's balancing of Title VII's supposed interest in eradicating discrimination with churches' free exercise rights. *See* David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 162 (asserting that the *Mississippi College* court's reasoning with respect to the significance of balancing state interests in eradicating discrimination with churches' free exercise rights was flawed because Title VII is a civil rather than criminal statute, which "quite clearly did not manifest [Congress's] interest in eradicating discrimination," and because Congress does not have the power to limit the scope of a constitutional right by manifesting an intent to do so). Bernstein argues that the *Mississippi College* court overstated the extent to which Congress could and did seek to infringe upon religious institutions' Free Exercise rights in the course of pursuing its interest in ending discrimination. *Id.* First, Bernstein asserts, the Constitution does not allow Congress to determine the extent to which one group's constitutional rights may be slighted in order to promote the constitutional rights of another group. *Id.* at 162-63. Second, Bernstein infers that, because Congress passed a civil rather than a criminal statute to fight discrimination, the interest it was pursuing was not as compelling as the *Mississippi College* court made it out to be. *Id.* Although Bernstein is undoubtedly correct about Congress's ability to define the scope of religious institutions' constitutional rights, his inference from Congress's choice of a civil statute to address discrimination is not well-supported or well-reasoned. Congress pursues many compelling interests through civil rather than criminal statutes.

70. *Miss. College*, 626 F.2d at 479-80.

71. *Id.* at 479-80, 482. The Fifth Circuit reversed the district court's determination that Summers lacked standing, concluding that Summers did have standing to assert racial discrimination, because she was entitled under Title VII to charge "a violation of her own personal right to work in an environment unaffected by racial discrimination." *Id.* at 483.

72. *Id.* at 484. The court considered Mississippi College a religious institution within the meaning of Section 702 because it was owned and operated by the Mississippi Baptist Convention and sought to hire faculty committed to the principle that "the best preparation for life is a program of cultural and human studies permeated by the Christian ideal, as evidenced by the tenets, practices and customs of the Mississippi Baptist Convention and in keeping with the principles and scriptures of the Bible." *Id.* at 479. Thus, in accordance with its right to discriminate based on religious criteria in hiring, the College favored active members of Baptist churches for faculty positions. *Id.*

According to the *Mississippi College* court, application of the statutory exemption to Summers' sex discrimination claim ultimately turned on whether the college denied her the position because she was female or because she was not Baptist.[73] The court asserted that if Mississippi College refused to grant Summers a full-time teaching position because she was not Baptist, this decision would be a proper exercise of the College's section 702 rights.[74] If, however, Mississippi College could not present convincing evidence that it based its challenged employment decision on religious grounds, the exception would not apply, and the EEOC would have jurisdiction to investigate and proceed with the case because non-religious discrimination is not exempted under section 702 of Title VII.[75]

III. CONSTITUTIONAL PROTECTION OF NON-RELIGIOUS DISCRIMINATION BY RELIGIOUS INSTITUTIONS: THE MINISTERIAL EXCEPTION AS DEFINED IN *MCCLURE V. SALVATION ARMY*

The statutory religious organization exemption under Title VII is limited to discrimination on the basis of religion, and does not exempt cases in which a religious organization discriminates against employees based on non-religious criteria, regardless of whether the organization acts for religious reasons.[76] Given courts' concurrence in this narrow interpretation, the primary issues raised by ministerial claims were constitutional.[77] The Fifth Circuit and subsequent courts faced with Title VII claims by ministers against church employers found intrinsic constitutional problems in applying ostensibly neutral employment laws to church hiring decisions.[78] It was because of these reservations about applying intru-

73. *Id.* at 484-85.

74. *Id.* at 484.

75. *Id.* at 485. The court noted that "[t]his interpretation of section 702 is required to avoid the conflicts that would result between the rights guaranteed by the Religion Clauses of the First Amendment and the EEOC's exercise of jurisdiction over religious educational institutions." *Id.*

76. *See supra* Part II.C.

77. *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) (asking and analyzing the question, "[d]oes the application of the provisions of Title VII to the relationship between [defendant] and [plaintiff] (a church and its minister) violate either of the Religion Clauses of the First Amendment?").

78. Such constitutional issues stemmed from considering the Free Exercise and Establishment Clauses of the First Amendment in the context of Title VII's application to ministerial employment issues. U.S. CONST. amend. I. Although these constitutional issues also arise in a variety of other contexts, this Note will discuss only the constitutional issues arising in the employment context.

sive hiring standards to religious organizations, as well as the clear statutory limitations of the religious exemption under section 702,[79] that courts formulated the constitutional ministerial exception.[80] The ministerial exception is based on the Free Exercise and Establishment Clauses and exempts church employment decisions affecting ministerial employees; this exception fills in the gap left open by section 702 and results in both religious and non-religious employment discrimination against ministerial employees being exempted from Title VII's application.

The Fifth Circuit was the first court to articulate a constitutional ministerial exception in *McClure v. Salvation Army,* holding that the First Amendment precludes courts from intruding into the employment relationship between a church and its ministerial employees.[81] McClure, a female officer and minister of the Salvation Army, brought suit for the Army's allegedly discriminatory practices toward women ministers with regard to their assignments, salaries, and duties.[82] The Salvation Army had terminated McClure, allegedly because she complained to her superiors and the EEOC about the discrepancy between the monetary and non-monetary benefits provided to similarly situated male and female officers.[83] Because McClure's claim did not involve discrimination on the basis of religion, the court held that section 702 did not exempt the Salvation Army's hiring practices in this case.[84] Instead of ending its analysis, however, the statutory exception's inapplicability brought the court to the question of whether applying Title VII to the ministerial employment relationship in this case was constitutional.[85] In essence, the court's constitutional inquiry was whether the First Amendment prohibits the adjudication of employment disputes stemming from the church/minister relationship.

The *McClure* court began its analysis by noting that, at numerous times, the Supreme Court has recognized a "wall of separation" that is to be maintained between church and State with re-

79. *See supra* Part II.C (explaining that the statutory religious institution exemption protects only discrimination based on religious factors, not discrimination based on race, sex, or national origin).

80. For the definition and scope of the ministerial exception, see *infra* Part IV.

81. *McClure,* 460 F.2d at 559.

82. *See supra* Part II.C.1.

83. *McClure,* 460 F.2d at 555.

84. *Id.* at 558.

85. *Id.* McClure's position was as an officer and minister of the Salvation Army, an organization determined in prior case law to constitute a "religious organization." *Id.* at 553-54.

gard to religious matters.[86] Specifically, with respect to the church/minister relationship, the court emphasized that "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[87] When dealing with such matters, the court asserted that "the decisions of the proper church tribunals . . . although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."[88] Thus, courts have been hesitant to resolve secular controversies that implicate ecclesiastical questions in their resolution.[89] In deciding such cases, the *McClure* court emphasized, "the hazards are ever present of inhibiting the free development of religious doctrine."[90]

Guided by this constitutional principle, the *McClure* court expressed concern that litigating employment disputes involving a church/minister relationship could result in governmental intrusion on doctrinally significant matters such as church administration and governance.[91] In the case at bar, the court concluded that the application of Title VII to an employment dispute between the Salvation Army and one of its ministers would necessitate investigation and judicial review of the organization's employment practices and decisions, "caus[ing] the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern."[92] Under such circumstances, courts would be substituting their judgment with respect to ecclesiastical questions for that of the church.[93]

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86. *Id.* at 558. The court explained that this wall, though it may blur and vary, must remain "high and impregnable." *Id.*

87. *Id.* at 558-59.

88. *Id.* at 559 (quoting Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929)).

89. *Id.*

90. *Id.* at 560 (citing United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969)).

91. *Id.* at 559-60.

92. *Id.* at 560.

93. *Id.* The *McClure* court and others courts feared that state regulation of the ministerial relationship through application of federal employment discrimination laws would result in government shaping religious doctrine. *Id.* They appeared most concerned that, instead of focusing on religious criteria in making clergy employment decisions, church leadership would be forced to look primarily at secular requirements imposed by the state in employment discrimination laws. *Id.* (asserting that imposing employment discrimination laws may result in "inhibit-

The *McClure* court was also concerned that investigating and reviewing church employment decisions about ministers, in addition to "injecting the State into substantive ecclesiastical matters," could "produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment."[94] Applying Title VII to an employment relationship between a church and a minister would result in a constitutional violation, according to the court, because of the resultant "encroachment by the State into an area of religious freedom [that] it is forbidden to enter by the principles of the Free Exercise Clause of the First Amendment."[95] Thus, due to Free Exercise and Establishment

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ing the free development of religious doctrine and [in] implicating secular interests in matters of purely ecclesiastical concern").

94. *Id.* Here, the *McClure* court suggested that *Lemon*'s excessive entanglement prohibition may be violated by adjudicating church/minister employment disputes. *Id.* (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)); *see also infra* note 114 and accompanying text (describing the "procedural entanglement" issue that may arise from various forms of government regulation of religious institutions). Although the Supreme Court has refused to confine its Establishment Clause jurisprudence to the application of a solitary test since its decision in *Lemon*, *see, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting that the Court has "repeatedly emphasized . . . [an] unwillingness to be confined to any single test or criterion"), courts evaluating the Establishment Clause implications of the ministerial exception have employed the *Lemon* analysis in a fairly uniform fashion, focusing primarily on the entanglement prong, *see, e.g.*, *McClure*, 460 F.2d at 559 (justifying the court's formulation of the constitutional ministerial exception on the basis that it does not violate the Establishment Clause under *Lemon*). For a brief synopsis of the *Lemon* test and its subsequent history, see *supra* text accompanying notes 30-34. Considering that *Lemon* involved financial aid to religious institutions, the *Lemon* test provides the most appropriate Establishment Clause analysis for the ministerial exception because, similar to government aid, the ministerial exception potentially provides a financial benefit to religious institutions in the form of immunity from monetary damages for certain statutory claims for which they would otherwise be subject to financial liability.

95. *McClure*, 460 F.2d at 560. In its Free Exercise analysis, the *McClure* court discussed the requirement under *Sherbert v. Verner* for a compelling state interest when a law imposes even an incidental burden on Free Exercise of religion. *Id.* at 558 (citing Sherbert v. Verner, 374 U.S. 398, 403 (1963)). Although strict scrutiny is no longer appropriate for a Free Exercise challenge to a neutral, generally applicable law such as Title VII in light of the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the *Smith* case does not necessarily undermine the doctrinal underpinnings of the ministerial exception, because it is unclear that the ministerial exception is solely rooted in the principle of strict scrutiny for Free Exercise claims. *See infra* note 139. Clearly, the *McClure* court did not specifically apply strict scrutiny, because the court's opinion includes no language requiring federal regulation of church employment disputes to be narrowly drawn to serve a compelling state interest. Rather, instead of citing cases establishing strict scrutiny for Free Exercise claims, the *McClure* court explained the constitutional necessity for the ministerial exception by relying primarily on cases establishing a general First Amendment right for churches to be free from intrusions into church governance. *Id.* at 558-60 (citing Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)). An additional post-*Smith* argument for the ministerial exception's continuing validity is the accommodation doctrine, which permits the exemption of religious

Clause concerns, the *McClure* court established the constitutionally-based ministerial exception, which provides religious organizations with immunity from Title VII claims by ministerial employees.[96] The constitutional ministerial exception has been widely adopted in numerous jurisdictions, yet never specifically acknowledged or defined by the Supreme Court.

IV. THE SCOPE OF THE MINISTERIAL EXCEPTION: HOW "MINISTERS" ARE DEFINED

Following *McClure*, religious institutions enjoyed two forms of Title VII protection. In addition to Section 702's statutory exemption from claims of religious discrimination, the *McClure* court granted churches a constitutionally-based ministerial exception, providing them with immunity from suits brought by ministers for sex, race, and national origin discrimination. Courts next confronted the issue of what constituted a "minister" for purposes of the constitutional exception. Clear definition was necessary in order to prevent churches' sphere of protection from becoming too inclusive of their non-religious acts.[97] The predominant test for application of the ministerial exception emerged as a bright line test used to determine the extent to which a church's employment decisions could be considered sufficiently rooted in religious belief or practice to implicate the First Amendment's Religion Clauses.[98] The "primary duties of the plaintiff" test, developed in large part by the Fourth Circuit in *Rayburn v. General Conference of Seventh-Day Adventists*, has been widely accepted and applied by courts presented with ministerial exception defenses.[99]

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institutions from neutral laws of general applicability so long as the exemption does not amount to an impermissible establishment of religion. *See supra* note 26.

96. See *infra* Part IV for a discussion of which types of employees can be considered "ministerial" for purposes of the ministerial exception.

97. Considering that the constitutional ministerial exception is based in part on Free Exercise principles, courts presented with ministerial exception defenses were mindful that, at a minimum, such claims "must be rooted in religious belief." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

98. For an explanation of the constitutional considerations underlying courts' adoption of the ministerial exception, see *supra* Part III.

99. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (asserting that application of the ministerial exception depends on the "function of the position" of the plaintiff).

A. The Primary Duties of the Plaintiff Analysis

Although *McClure v. Salvation Army*, the case originally establishing the ministerial exception, involved sex discrimination,[100] other cases soon followed in which religious organizations asserted a constitutional ministerial exception as a defense to other types of discrimination, including race and age discrimination.[101] As the ministerial exception jurisprudence evolved, however, courts began to focus more heavily on the nature of the employment position at issue as a method to restrict the scope of the constitutional ministerial exception, and less on the character of the substantive claim.

In *Rayburn v. Seventh-Day Adventists*, the Fourth Circuit articulated a test for the application of the ministerial exception, focusing on the plaintiff's primary employment duties.[102] In *Rayburn*, a white female member of the Seventh-Day Adventist Church brought race and sex discrimination claims against the church after it hired a different candidate for an associate pastor position.[103]

Recognizing that Title VII did not exempt all allegations of employment discrimination by religious organizations, the *Rayburn* court sought to find a balance between the purpose of Title VII and the mandate of the Religion Clauses.[104] To do so, the court looked to the function of the plaintiff's current or desired employment position and held that a constitutional ministerial exception should apply "if the employee's primary duties consist of teaching, spreading

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100. *McClure*, 460 F.2d at 553.

101. *See, e.g.*, Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 185-87 (7th Cir. 1994) (rejecting the application of Title VII to a female African-American minister's sex and race discrimination claims because of First Amendment concerns); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362-63 (8th Cir. 1991) (holding that the application of Title VII and the ADEA to a hospital chaplain's sex and age discrimination claims was constitutionally barred because adjudicating such claims would violate the Free Exercise and Establishment Clauses of the First Amendment); *Rayburn*, 772 F.2d at 1171 (holding that the First Amendment barred consideration of sex and race discrimination claims by a white female applicant for a pastoral position).

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

103. *Id.* at 1164-65. The associate in pastoral care position for which the plaintiff applied was designated for individuals who had completed seminary training but were not ordained. *Id.* Such positions could be held by women who obtained seminary training but could not be ordained according to the Seventh-Day Adventist requirements. *Id.* at 1165.

104. *Id.* at 1168-71. As a threshold inquiry, the *Rayburn* court first examined whether the Title VII statutory exemption protected race or sex discrimination by a religious organization. *Id.* It concluded that, although section 702 of Title VII exempted employment practices in which a church could prove by "convincing evidence" that religion was the discriminating factor, "Title VII [did] not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin." *Id.* at 1166. Thirteen years prior to *Rayburn*, the Fifth Circuit in *McClure* made a similar determination, holding that section 702 did not allow for the exemption of discrimination based on race, sex, or national origin. *McClure*, 460 F.2d at 558.

the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[105] If the court found the plaintiff's current or desired position within the church was sufficiently spiritual, then judicial involvement in the dispute would cease because of the "constitutional concern for the unfettered right of the church to resolve certain questions."[106] In reaching this conclusion, the *Rayburn* court drew from two Supreme Court decisions: *Kedroff v. St. Nicholas Cathedral* and *Serbian Orthodox Diocese v. Milivojevich*, which established the principle that ecclesiastical issues, including the choice of a religious group's spiritual leaders, are "generally inviolate."[107] When presented with a claim involving such a decision, courts should defer to the church in these matters and refrain from adjudicating related disputes.[108]

In its adoption of the primary duties of the plaintiff test, the *Rayburn* court also relied on First Amendment Establishment and Free Exercise principles.[109] With respect to the Seventh-Day Adventists' Free Exercise rights, the *Rayburn* court balanced church and state interests to determine how exempting the relevant church practice from state regulation would impede the state's broad regulatory goals.[110] The employment decision at issue in *Rayburn* involved the selection of an employee who would be a liaison between the church and "those whom it would touch with its message."[111] The court therefore concluded that the church's interest in selecting the candidate of its choice outweighed the state's interest

105. *Rayburn*, 772 F.2d at 1169 (citing Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)). Professor Bagni advocates a ministerial exception test based on a concentric circles model in which religious organizations would be exempt from federal employment laws for their core spiritual activities with amenability to suit increasing with the secular nature of the organization's pursuits. Bagni, *supra*, at 1539-41. Activities within the "epicenter" would include the relationship between a church and its clergy, modes of worship and ritual, religious education, and possibly church-operated schools with a religious orientation. *Id.* The first "emanation" would include the relationship between churches and support employees with some religious functions as well as church-sponsored community activities like hospitals and primarily secular church-operated schools. *Id.* Finally, the second circle would contain a religious organization's "purely secular" business activities and its relationships with employees performing nonspiritual functions. *Id.*

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

107. *Id.* at 1167-68 (citing Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976)).

108. *Id.*

109. *Id.* at 1168-71.

110. *Id.* at 1168 (quoting Wisconsin v. Yoder, 406 U.S. 205, 205 (1972)).

111. *Id.*

in eradicating discrimination, even if the church was effectively discriminating on the basis of a factor other than religion.[112]

Additionally, the court determined that adjudicating Rayburn's claim would cause excessive entanglement of church and state in violation of the Establishment Clause.[113] Such entanglement, the court stated, would occur at the substantive level, because selection for the position involved evaluating subjective religious factors such as "spirituality," and at the procedural level by "pitting church and state as adversaries" in a protracted legal process.[114] Thus, the court concluded that the church's selection of its pastoral associate was an area constitutionally designated to be off-limits for governmental involvement.[115] In making this determination, the *Rayburn* court primarily examined the function of the employment position at issue rather than the type of claim.[116] This "primary duties of the plaintiff" analysis, focusing on the function of the plaintiff's current or desired employment position to determine application of the ministerial exception, became the standard inquiry in employment discrimination claims against church defendants.

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112. *Id.* at 1169-70. The position of associate in pastoral care involved leading Bible studies, occasional preaching, counseling a singles group, and leading the congregation in certain rites of worship. *Id.* at 1168.

113. *Id.* at 1170-71. Applying the Supreme Court's entanglement analysis from *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971), the court examined the "character and purposes" of the institution affected, the nature of the benefit or burden imposed, and the "resulting relationship between the government and the religious authority." *Rayburn*, 772 F.2d at 1170.

114. *Id.* at 1170-71. The concept of "procedural entanglement" originated from the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), in which the Court held that applying the National Labor Relations Act to church-operated schools and requiring them to bargain collectively could result in extensive and ongoing monitoring by the state in violation of the Establishment Clause. *Compare* NLRB v. Catholic Bishop, 440 U.S. 490, 505 (1979) (declining to construe the National Labor Relations Act as applying to church-operated schools because of Establishment Clause violations), *with* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305 (1985) (subjecting religious organizations to "routine and factual inquiries" of the Fair Labor Standards Act does not constitute sufficient government surveillance to raise an Establishment Clause concern), *and* Lukaszewski v. Nazareth Hosp., 764 F. Supp. 57, 60 (E.D. Pa. 1991) (distinguishing between the continuous involvement of the NLRB in enforcing collective bargaining agreements and the EEOC's isolated involvement on a case-by-case basis in investigating allegations of age discrimination).

115. *Rayburn*, 772 F.2d at 1172.

116. Although the court grounded its decision in both Free Exercise and Establishment Clause jurisprudence, it arguably stretched the limits of the procedural entanglement issue in stating that mere inquiry into the alleged discrimination would impermissibly entangle church and state. In cases defining procedural entanglement subsequent to *NLRB v. Catholic Bishop of Chicago*, courts have generally refused to accept such an argument when the statute at issue does not require ongoing monitoring to the extent that the National Labor Relations Act does. *See supra* note 114.

B. Stretching the Limits of the Definition of a Ministerial Employee

In the original case setting forth the constitutional ministerial exception, *McClure v. Salvation Army*, the court only needed to explain *why* the employment relationship between a church and its minister was essential to the church's religious mission and therefore deserved protection from state regulation.[117] There was no question that the plaintiff was a minister; adjudicating the plaintiff's case would necessarily intrude into the church/minister relationship.[118] After *McClure's* establishment of a constitutional ministerial exception, however, religious organizations saw an opportunity to further shield themselves from federal employment discrimination laws. They argued that certain employees, such as teachers,[119] administrative employees,[120] and music directors,[121] should be included within the ministerial exception's purview, because these employees' duties were sufficiently religious to make them essential to the church's religious mission. The success of such claims ultimately turned upon the extent to which the employees' duties involved the church's essential religious functions.[122]

1. The Extent of the Ministerial Exception's Application to Religious Schools: *EEOC v. Mississippi College* and *EEOC v. Southwestern Baptist Seminary*

Nearly a decade after the Fifth Circuit articulated and applied the constitutional ministerial exception, it confronted the issue of which types of employment positions were sufficiently religious to come within the scope of the exception, and which positions were subject to Title VII claim adjudication in the context of church-operated schools.[123] *EEOC v. Mississippi College* and *EEOC*

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117. McClure v. Salvation Army, 460 F.2d 553, 558-60 (5th Cir. 1972).

118. *Id.*

119. *See infra* Part IV.B.1.

120. *See infra* Part IV.B.2.

121. *See infra* Part IV.B.3.

122. *See, e.g.*, Rayburn v. Gen. Conference of Seventh Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (holding that the application of the ministerial exception was contingent upon whether "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" (quoting Bagni, *supra* note 105, at 1545)); *see also* Starkman v. Evans, 198 F.3d 173, 176-77 (5th Cir. 1999) (examining whether the plaintiff was "engaged in activities traditionally considered ecclesiastical or religious" (quoting EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. Unit A July 1981)), *cert. denied*, 121 S. Ct. 49 (2000).

123. *See* EEOC v. Miss. College, 626 F.2d 477 (5th Cir. 1980); *Southwestern Baptist*, 651 F.2d at 277. Prior to *Mississippi College* and *Southwestern Baptist*, the major cases in which religious associations advanced a ministerial exception defense did not present the issue of whether the

v. Southwestern Baptist Theological Seminary reflect the Fifth Circuit's attempt to resolve this issue.[124]

Both *Mississippi College* and *Southwestern Baptist Theological Seminary* arose in the context of EEOC efforts to require church-operated schools' compliance with Title VII's reporting and investigative requirements.[125] Yet although the types of claims in these two cases were similar, the court's holdings in each diverged significantly depending on the extent to which the defendants pursued a religious mission. In response to arguments that the ministerial exception should apply in *Mississippi College*, the court distinguished the case at bar from its holding in *McClure v. Salvation Army* by emphasizing that the *McClure* court's decision was restricted to the context of the church-minister relationship.[126] In the case at bar, the facts were distinguishable because the College was not a church.[127] Since the Mississippi College faculty did not include anyone whose role was to function as an "intermediar[y] between a church and its congregation," the ministerial exception did not protect Mississippi College's faculty appointment decisions.[128] In de-

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employment position at hand could be adequately classified as a ministerial position, because the plaintiff clearly performed ministerial functions. *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972). Thus, the court hearing the dispute could simply state that the ministerial relationship it was asked to examine constituted the "lifeblood" of the church and therefore was not subject to state intervention. *See Southwestern Baptist*, 651 F.2d at 284 (referring to the Fifth Circuit's application of the ministerial exception to the plaintiff in *McClure* and stating, "[t]he failure of any party to challenge [plaintiff's] 'status as a minister engaged in the religious or ecclesiastical activities of the church' relieved this court from clearly explicating the test for such a determination in that case").

124. *Southwestern Baptist*, 651 F.2d at 277; *Miss. College*, 626 F.2d at 477.

125. The dispute in *Mississippi College* stemmed from Mississippi College's refusal to voluntarily comply with the EEOC's request for information necessary for the EEOC to investigate a part-time faculty member's charge of sexual discrimination. *Miss. College*, 626 F.2d at 479-80. As a consequence of the college's refusal to cooperate, the EEOC sought enforcement of a subpoena to compel production of the necessary information. *Id.* at 480-81. In *Southwestern Baptist*, the EEOC brought suit to compel the seminary to file biennial EEO-6 forms, which would reveal each employee's general job description, length of employment contract, salary bracket, gender, and race or national origin. *Southwestern Baptist*, 651 F.2d at 280.

126. *Miss. College*, 626 F.2d at 485.

127. *Id.*

128. *Id.* Before addressing the issue of whether the constitutional ministerial exception applied, the court first noted that the statutory language and legislative history of Title VII did not indicate any intent for religious organizations to be exempt from charges of discrimination based on any factor other than religion. *Id.* at 484 (citing 42 U.S.C. § 2000e-1). Consequently, if the EEOC found that the only discriminatory policy Mississippi College followed was its preference for Baptists, the College was excepted from a Title VII claim. *Id.* Implicit in this holding was a rejection of the procedural entanglement argument from *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 505 (1979), in which the Supreme Court held application of the NLRA to church institutions would necessarily create excessive entanglement of church and state because of the extensive monitoring by the NLRB that would result. *Id.* Investigating the type of alleged dis-

fining which types of employment selections should be protected from governmental scrutiny under the ministerial exception, the *Mississippi College* court emphasized two important ministerial functions absent from the faculty's job duties at Mississippi College: "attending to the religious needs of the faithful" and "instructing students in the whole of religious doctrine."[129] Without satisfying these requirements, Mississippi College could not claim their faculty members were tantamount to ministers and thereby protect itself from claims of both religious and non-religious discrimination.[130]

In *EEOC v. Southwestern Baptist Theological Seminary*, the Fifth Circuit confronted the issue of whether seminary faculty, staff, and administrators necessarily qualified as ministers if they were so designated by the school.[131] The court once again focused on the actual duties of the "ministers."[132] Because they provided religious instruction to future ministers and served as intermediaries between the future ministers and the Baptist Convention, the court concluded that seminary faculty members did indeed qualify as "ministers" for purposes of the exception.[133] The court refused to grant the same status to the seminary support staff, despite the seminary's contention that the title should apply since several staff positions were held by actual ordained ministers.[134] Finding that

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crimination in *Mississippi College*, religious or non-religious, was not only constitutionally permitted by the lack of ongoing authority that would be asserted by the EEOC, but it was also required in order to determine whether the College had preferred Baptists over non-Baptists or men over women. *Miss. College*, 626 F.2d at 485. Thus, the EEOC investigation would be determinative of whether Mississippi College could successfully protect the integrity of its hiring policies under the statutory exemption. *Id.* at 484-85.

129. *Id.* at 485. The court stated that expectations for the faculty members "to serve as exemplars of practicing Christians [did] not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern." *Id.*

130. Although the *Mississippi College* court held that the constitutional ministerial exception did not apply to the plaintiffs, the College would nevertheless be protected from claims of religious discrimination under the statutory exception to Title VII for religious employers. 42 U.S.C. § 2000e-1 (1994); *supra* Part II.C.

131. EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283-84 (5th Cir. Unit A July 1981). The *Southwestern Baptist* court specifically distinguished the facts of the case at bar from the facts of *Mississippi College* by highlighting the difference in religious intensity of the two schools as well as the future occupational divergence of the schools' student populations. *Id.* Thus, regardless of whether or not unequal treatment on the basis of sex or race was a tenet held by the Baptist Convention, the Baptist Convention was authorized to discriminate on that basis in hiring faculty for its *seminaries* but not for its other colleges. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* *Accord* Shirkey v. Eastwind Cmty. Dev. Corp., 941 F. Supp. 567, 577-78 (D. Md. 1996) (holding that although the employment of a minister was at issue, the secular nature of the position precluded application of the ministerial exception), *modified*, 993 F. Supp. 370 (D.

ordination was not a requirement for these positions, and that the functions performed were not ecclesiastical or religious in nature, the court concluded that support staff were not covered by the ministerial exception.[135]

After determining that the ministerial exception did not apply to employment decisions regarding non-religious staff members of the Seminary, the court then examined whether applying Title VII's reporting requirements would nevertheless violate the First Amendment's Establishment and Free Exercise Clauses.[136] These independent constitutional inquiries were necessary to determine whether, despite the inapplicability of the ministerial exception, either of the Religion Clauses would require or prohibit government from treating the defendant like similarly situated non-religious defendants. The implication of the court's separate treatment of the defendant's ministerial exception and constitutional defenses is that the ministerial exception need not provide the exclusive means by which religious institutions assert a constitutional argument against the application of Title VII. Rather, accommodation of religious exercise may also be accomplished independent of the ministerial exception.

Applying *Lemon*'s anti-entanglement principle,[137] the *Southwestern Baptist* court concluded that application of Title VII reporting requirements would not violate the Establishment Clause because the requirement did not result in ongoing interference with the seminary's *religious* practices, so the resultant relationship be-

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Md. 1998), *aff'd*, No. 99-1841, 1999 U.S. App. LEXIS 32387 (4th Cir. Dec. 13, 1999); Welter v. Seton Hall Univ., 608 A.2d 206, 215-16 (N.J. 1992) (declining to exempt nuns' breach of contract claim on First Amendment grounds because their teaching positions in the university did not involve "imbuing with Roman Catholic values" any of the students they encountered). *But see* Carter v. Baltimore Annual Conference, No. 86-2543 SSH, 1987 WL 18470, at *1 (D.D.C. Oct. 5, 1987) (holding that an ordained minister's race discrimination suit failed to state a cause of action because, although the minister served in a non-religious administrative capacity, ministerial relationships are constitutionally exempted from adjudication regardless of the capacity in which the minister serves).

135. *Southwestern Baptist*, 651 F.2d at 282. For a discussion criticizing the proposition that courts rather than churches should be able to define "which positions [are] ministerial and contral to the religion," see Treaver Hodson, Comment, *The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities?*, 1994 BYU L. REV. 571, 585-87 (asserting that the Ninth Circuit risked influencing religious doctrine by immediately dismissing the possibility of a constitutional exception to a religious organization's employment decision regarding its allegedly secular employees without examining whether the decision was religiously based).

136. *See Southwestern Baptist*, 651 F.2d at 284-86.

137. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (holding that the Establishment Clause requires a law regulating religious institutions to have a secular purpose, a primary effect that neither inhibits nor advances religion, and must not result in excessive entanglement of church and state).

tween church and state was "minimal."[138] The court also rejected the seminary's Free Exercise Clause objection to applying Title VII because the seminary did not hold any religious tenet requiring discrimination on the basis of sex, race, color, or national origin, such that enforcing the relevant Title VII prohibitions would burden the exercise of any sincerely held religious belief.[139] Thus, in *EEOC v.*

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138. *Southwestern Baptist*, 651 F.2d at 286. Although neither party made a procedural entanglement argument, the court implicitly distinguished this case from *NLRB v. Catholic Bishop of Chicago* by emphasizing that the extent of the church-state relationship resulting from enforcing a biennial reporting requirement would be slight. *Id.* at 285 (citing NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979)).

139. In evaluating whether application of Title VII to the non-ministerial employees would violate the Free Exercise Clause, the *Southwestern Baptist* court applied the level of scrutiny set forth by the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), and refined in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Southwestern Baptist*, 651 F.2d at 286. In these Free Exercise cases, the Court examined: (1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) whether the state had a compelling state interest justifying the burden imposed upon the exercise of the belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state. *Id.* (citing *Yoder* and *Sherbert*). The Free Exercise analysis in the context of the ministerial exception was complicated after the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 879 (1990). In *Smith*, the Court held that laws of general applicability do not violate the Free Exercise Clause when enforced against religious organizations. *Id.* at 879. The D.C. Circuit specifically addressed the question of whether the ministerial exception survived the holding of *Smith* in *EEOC v. Catholic University of America*, 83 F.3d 455, 460-63 (D.C. Cir. 1996). The D.C. Circuit held that *Smith* did not affect the ministerial exception for two reasons. *Catholic Univ.* 83 F.3d at 462. First, the *Catholic University* court distinguished the institutional Free Exercise right addressed by the ministerial exception from the individual Free Exercise right involved in *Smith*. *Id.* Because the ministerial exception protects the right of a *congregation* to select its ministers, the danger in *Smith* that an individual may "by virtue of his beliefs . . . become a law unto himself" is not an issue in applying the ministerial exception. *Id.* Second, the *Catholic University* court asserted that although the Fifth Circuit mentioned the compelling interest test in *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972), the doctrinal foundations of the ministerial exception did not necessarily require application of the compelling interest test. *Catholic Univ.*, 83 F.3d at 462. Rather, courts applying the ministerial exception have relied on Supreme Court precedent establishing the fundamental right of churches to decide questions of church doctrine and governance free from government intervention. *Id.* (quoting Watson v. Jones, 80 U.S. 679, 727 (1871) (stating that "questions of discipline, or of faith, or ecclesiastical rule, custom, or law [that] have been decided by the highest of . . . church judicatories . . . must [be] accept[ed] as final"); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952) (emphasizing the fundamental right of churches to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine")). Therefore, because the legitimacy of the ministerial exception does not directly depend on the continued viability of *Sherbert* or the applicability of the compelling interest test, the court in *Catholic University* held that the ministerial exception survived the *Smith* decision. *Catholic Univ.*, 83 F.3d at 462. Following the D.C. Circuit's lead, the Fifth and Eleventh Circuits have similarly held that the ministerial exception remains a valid defense to the application of Title VII after *Smith*. In so holding, both circuits focused on the difference between the state's interference with an individual's right to observe the practices of his religion, as in *Smith*, and the state's interference with a church's right to self-governance, as in the ministerial exception cases. *See* Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000) (asserting that the ministerial exception does not

Southwestern Baptist Theological Seminary and *EEOC v. Mississippi College*, the Fifth Circuit established two important principles for religious organizations seeking to insulate their employment decision-making process from judicial review. First, a church's classification of employees as "ministers" will not be conclusive; rather, a court will independently examine the duties of the position to determine if the position is so central to the organization's religious mission as to require non-intervention.[140] Second, even if a religious organization does not succeed in convincing a court that a particular employment position is sufficiently religious to apply the ministerial exception, the church may still argue that application of the statute would impermissibly entangle church and state if the ensuing church/state relationship would be substantial or adjudication would impermissibly burden the exercise of religious beliefs.[141]

2. Administrative Employees in Church-Operated Secular Activities: *EEOC v. Pacific Press Publishing Association*

Despite the ministerial exception's facial limitation to "ministers,"[142] church defendants faced with employment discrimination claims by non-ministerial employees have asserted that *all* employment decisions by churches should be protected by the exception. In *EEOC v. Pacific Press Publishing Ass'n*, the Ninth Circuit rejected a religiously-affiliated publisher's argument that its employment of administrative staff should be protected by the ministerial exception or by the First Amendment's Religion Clauses.[143]

"subvert [*Smith*'s] concern" that an individual might become a law unto himself because the exception "was not developed to provide protection to individuals who wish to observe a religious practice that contravenes a generally applicable law," but rather "only continues a long-standing tradition that churches are to be free from government interference in matters of church governance and administration"); Combs v. Cent. Tex. Annual Conference of United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999) (asserting that because the concerns raised in *Smith* with an individual avoiding neutral, generally applicable laws are different from the concerns in the ministerial exception cases, *Smith* does not require that the ministerial exception be abandoned by courts).

140. *Southwestern Baptist*, 651 F.2d at 282. *But see* Hodson, *supra* note 135, at 584-85 (arguing that the church, rather than a court, is the proper institution to define which employment positions are essential to the church's spiritual mission).

141. *See Southwestern Baptist*, 651 F.2d at 284-86.

142. See *supra* Part IV.A for an explanation of how courts have defined "ministers" for purposes of the ministerial exception.

143. EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1278-82 (9th Cir. 1982). The religious organization also made a statutory interpretation argument that Title VII should not apply to any employment decisions by a religious organization, but the court concluded otherwise, drawing upon congressional intent indicated in the legislative history. *Id.* at 1276-77 ("The legislative history shows that Congress consistently rejected proposals to allow religious employers to dis-

The plaintiff in this case, an editorial secretary, filed a sex discrimination suit alleging Pacific Press maintained a gender-differentiated pay scale and reassigned plaintiff's administrative and discretionary duties because of her participation in a co-worker's sex discrimination proceedings.[144] In response, Pacific Press argued that Title VII could not constitutionally be applied to its employment relationship with the plaintiff because the plaintiff's job involved religious activities, thereby invoking application of the ministerial exception.[145]

The court rejected Pacific Press' ministerial exception argument and adopted a narrow interpretation of the exception, drawing from the Fifth Circuit's decisions in *Mississippi College* and *Southwestern Baptist Theological Seminary*.[146] Because the plaintiff was not an "intermediar[y] between a church and its congregation" and her administrative and discretionary duties did not involve "attend[ing] to the religious needs of the faithful" or "instruct[ing] students in the whole of religious doctrine," she could not be considered a minister for purposes of the ministerial exception.[147] Pacific Press argued, however, that even if the plaintiff were not covered by the ministerial exception, applying Title VII to *any* employment relationship involving a religious organization would violate the First Amendment's Religion Clauses.[148]

The court analyzed the constitutionality of applying Title VII to church employment decisions affecting non-ministerial employees to demonstrate why the ministerial exception's application should be limited to *ministerial* employees. In response to Pacific Press's contention that applying Title VII to its employment decisions would necessarily violate the Free Exercise Clause, the court concluded that the argument lacked merit because the publisher's affiliated church, the Seventh-Day Adventists, held no belief requiring discrimination on the basis of sex that would be burdened by state regulation.[149] Moreover, the state's interest in eradicating

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criminate on grounds other than religion: '(church-affiliated) organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin.' ") (quoting 118 CONG. REC. 7167 (1972))).

144. *Id.* at 1274.

145. *Id.* at 1277-78. The court characterized plaintiff's administrative and secretarial duties as "discretionary and administrative" without further description. *Id.*

146. *Id.* (citing EEOC v. Miss. College, 626 F.2d 477, 484 (5th Cir. 1980); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283-85 (5th Cir. Unit A July 1981)).

147. *Id.* (citing *Miss. College*, 626 F.2d at 484).

148. *Id.* at 1279.

149. *Id.*; *see also supra* note 139 (setting forth the Free Exercise analysis from *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as well as the change

discrimination clearly exceeded any interest Pacific Press had in discriminating on the basis of sex.[150]

This trilogy of cases, *EEOC v. Mississippi College*, *EEOC v. Southwestern Baptist Theological Seminary*, and *EEOC v. Pacific Press Publishing Ass'n*, thus illustrates the methodology courts have traditionally applied when evaluating ministerial exception claims by religious organizations for cases in which the existence of a true ministerial relationship is questionable. First, courts have established that a church's characterization of the position at issue will not be determinative.[151] Rather, the church must demonstrate that the employee acts in an intermediary capacity between the church and its congregation.[152] In evaluating the church's argument, a court will inquire whether the individual "attended to the religious needs of the faithful" or "instructed students in the whole of religious doctrine."[153] Absent these factors, the church's employment decisions with respect to this employee will not be covered by the ministerial exception. This does not end the analysis, however, as the church can still argue that applying the regulation at issue to the particular employment decision would burden the church's Free Exercise of religion or would result in an impermissible entanglement of church and state from the resultant relationship.[154]

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in Free Exercise jurisprudence effectuated by *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 879 (1990)).

150. *Pac. Press*, 676 F.2d at 1279. Pacific Press also failed in its argument that applying Title VII's proscription against sex discrimination would result in impermissible procedural entanglement because, unlike the application of the National Labor Relations Act collective bargaining provisions to churches in *NLRB v. Catholic Bishop of Chicago*, "neither the judgment in this suit nor Title VII's enforcement mechanisms [would] result in any ongoing scrutiny of Pacific Press' operations." *Id.* at 1282; *see also* NLRB v. Catholic Bishop, 440 U.S. 490, 502-03 (1979) (holding that applying the National Labor Relations Act to a church-operated school would violate the Establishment Clause because it would result in an ongoing, and thus impermissible, relationship between church and state). Thus, enforcing Title VII's mandate against sex discrimination would not give rise to a violation of either Religion Clause, leaving no constitutional impediment to applying Title VII to administrative employees of church-operated organizations. *Pac. Press*, 676 F.2d at 1279.

151. *Southwestern Baptist*, 651 F.2d at 282.

152. *Id.* at 283 ("In this case, the faculty are intermediaries between the Convention and the future ministers of many local Baptist churches."); *Miss. College*, 626 F.2d at 485 ("The faculty members are not intermediaries between a church and its congregation.").

153. *Southwestern Baptist*, 651 F.2d at 283-85 (emphasizing that the college faculty at issue instructed seminarians "in the whole of religious doctrine"); *Miss. College*, 626 F.2d at 485 (holding that the Mississippi College faculty members were not ministers because they "neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine").

154. *Pac. Press*, 676 F.2d at 1279 (continuing Free Exercise and Establishment Clause analyses after rejecting application of ministerial exception).

3. Ministerial Employees? The Case of the Church Musicians

Although courts generally abide by the proposition from *EEOC v. Southwestern Baptist Theological Seminary* that religious organizations' classification of employees as "ministers" does not control their legal status,[155] deference to religious organizations' designation of ministerial employees within the church has increased such that churches have been able to bring increasing numbers of their employees within the definition of "ministers."[156] While religious organizations have had trouble convincing courts that teachers in religiously-operated schools should be considered ministerial employees,[157] churches have successfully argued that certain church actors besides ministers should be covered by the ministerial exception.[158]

One employment position courts have increasingly accepted as "ministerial" for the purpose of applying the ministerial exception is that of the church musician or church organist.[159] Although this may not intuitively seem to fall within the ministerial classification, various churches have successfully made this argument by showing that the musician's duties are sufficiently religious to be comparable to a minister's duties.[160] In *Starkman v. Evans,* for example, the Fifth Circuit held a church music director's Americans with Disabilities Act ("ADA") claim could not be litigated because the plaintiff was a "minister" whose employment relationship with the church was subject to the ministerial exception.[161] Despite the

155. *See, e.g.,* Starkman v. Evans, 18 F. Supp. 2d 630, 633 (E.D. La. 1998), *aff'd,* 198 F.3d 173 (5th Cir. 1999) ("An individual's designation by an organization is neither necessary nor sufficient to control the designee's 'extra-religious legal status.' " (quoting *Southwestern Baptist,* 651 F.2d at 283)), *cert. denied,* 121 S. Ct. 49 (2000).

156. *See, e.g., Starkman,* 198 F.3d at 177 (classifying a church music director as a "minister" whose employment was covered by the ministerial exception); Assemany v. Archdiocese of Detroit, 434 N.W.2d 233, 238 (Mich. Ct. App. 1988) (holding that a church organist was a minister for purposes of applying the ministerial exception).

157. *See, e.g.,* DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172 (2d Cir. 1993) (refusing to exclude the relationship between a teacher and a private religious school from application of the ADEA); *Miss. College,* 626 F.2d at 477 (holding that Congress intended, and the First Amendment did not preclude, the employment relationship between a religious university and its faculty to be regulated by Title VII). *But see, e.g., Southwestern Baptist,* 651 F.2d at 283-84 (classifying seminary faculty as ministers covered by the ministerial exception); Maguire v. Marquette Univ., 627 F. Supp. 1499, 1504-05 (E.D. Wis. 1986) (holding that the First Amendment barred adjudication of a theology professor's employment discrimination claim), *aff'd on other grounds,* 814 F.2d 1213 (7th Cir. 1987).

158. *See, e.g., Starkman,* 198 F.3d at 177; *Assemany,* 434 N.W.2d at 238.

159. *See, e.g., Starkman,* 198 F.3d at 177; *Assemany,* 434 N.W.2d at 238.

160. *See, e.g., Starkman,* 198 F.3d at 177; *Assemany,* 434 N.W.2d at 238.

161. *Starkman,* 198 F.3d at 177. The plaintiff had sued the church for failing to modify her work schedule to allow her to recuperate from knee surgery and refusing to accommodate certain

ministerial clause's origin in Title VII jurisprudence, the *Starkman* court applied the exception to the plaintiff's ADA claim because of the similar anti-discrimination purpose underlying both statutes.[162]

The Fifth Circuit held the Free Exercise Clause precluded adjudication of the plaintiff's claim, because she was not only a music director but also a "minister" for purposes of applying the ministerial exception.[163] In concluding a music director could be considered a minister, the *Starkman* court appeared to depart from the test it previously used to determine ministerial status. Whereas the Fifth Circuit traditionally examined the nature of the plaintiff's job to determine if it involved "attending to the religious needs of the faithful" or "instructing students in the whole of religious doctrine," the *Starkman* court applied a multi-factor analysis of the plaintiff's

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chemical sensitivities she had acquired. *Id.* at 174. The plaintiff also sued one of the church ministers individually. *Id.* The court dismissed this claim, however, because the minister did not qualify as an "employer" under the ADA. *Id.*

162. *Starkman*, 198 F.3d at 175. Although the church argued that both the Establishment Clause and the Free Exercise Clause precluded adjudication of the plaintiff's claim, the Fifth Circuit addressed only the Free Exercise issue. *Id.* at 174-77. By refusing to find an Establishment Clause issue in the adjudication of a religious employee's employment discrimination claim, the *Starkman* court followed the Fifth and Ninth Circuits' approach, which distinguishes cases such as Starkman's from *NLRB v. Catholic Bishop of Chicago. See, e.g.*, EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1282 (9th Cir. 1981) ("The present case is distinguishable from *NLRB v. Catholic Bishop* because neither the judgment nor Title VII's enforcement mechanisms result in any ongoing scrutiny of [defendant's]operations."); EEOC v. Miss. College, 626 F.2d 477, 488 (5th Cir. 1980) ("No ongoing interference with the College's religious practices will result from an EEOC investigation of the charge filed by [plaintiff]."). In evaluating Establishment Clause defenses of churches in employment discrimination cases, the Fifth and Ninth Circuits have not examined the particular facts of each case; rather, they reject the argument if enforcement of the *statute* at issue requires no ongoing interference with a church employment relationship. On the other hand, the D.C. Circuit has evaluated churches' Establishment Clause defenses on a case-by-case basis to determine whether an agency investigation would be excessively intrusive or whether adjudication would require a court to "evaluate competing opinions on religious subjects." EEOC v. Catholic Univ. of Am., 83 F.3d 455, 465-67 (D.C. Cir. 1996) (holding that a Catholic nun's sex discrimination case against Catholic University should be dismissed on Establishment Clause grounds because the EEOC's investigation, pre-trial inquiries, and the trial itself resulted in "an impermissible entanglement with judgments that fell within the exclusive province of the Department of Canon Law as a pontifical institution"). Because the *Catholic University* court concluded that adjudication of this case would result in both Free Exercise and Establishment Clause problems, the *Catholic University* court held it fell within the "hybrid" exception to the *Smith* rule, which allows for heightened scrutiny when the plaintiff can assert a Free Exercise claim in conjunction with another viable constitutional claim. *Id.* (citing Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 881 (1990) (articulating the basic rule that neutral laws of general applicability, such as Title VII, pose no Free Exercise problems when they burden religious exercise)). Implicitly finding that a protracted relationship between church and state would not result from the adjudication of an isolated ADA claim, the *Starkman* court did not engage in an Establishment Clause analysis of the plaintiff's ADA claim, in accordance with Fifth Circuit precedent.

163. *Starkman*, 198 F.3d at 175.

job duties.[164] The first factor the court considered was whether the church's decision to employ the plaintiff was based "largely on religious criteria."[165] Although the plaintiff argued that she was hired because of her abilities as a choral director, the court held the church satisfied the first factor by showing the position required coursework in the Bible and theology, as well as the organization of religious music which "play[ed] a highly important role in the spiritual mission of the church."[166] Second, the *Starkman* court considered whether the plaintiff was "qualified and authorized to perform the [church's] ceremonies."[167] In evaluating this factor, the court focused on the plaintiff's Answers to Interrogatories, which classified nineteen of her job duties as religious and only three as secular.[168] Finally, the court examined whether the plaintiff was "engaged in activities traditionally considered ecclesiastical or religious."[169] The court found that this element was satisfied because the plaintiff was designated to be a " 'ministerial presence' to ailing parishioners on occasion," and because she organized "music [which] constitute[d] a form of prayer" for the congregation.[170] Although the *Starkman* court claimed to derive its test from its holding in *EEOC v. Mississippi College*, the court changed the test in subtle ways by broadening the range of considered factors and treating elements that were previously determinative as optional factors.[171] Thus, it is

164. *Compare id.* (requiring that the plaintiff's job duties satisfy only one of a multitude of factors for the ministerial exception to apply), *with Miss. College*, 626 F.2d at 485, *and* EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1278 (9th Cir. 1982) (holding that the plaintiffs did not fall within the ministerial exception, because they "[were] not intermediaries between a church and its congregation" and did not "attend to the religious needs of the faithful" or "instruct students in the whole of religious doctrine").

165. *Starkman*, 198 F.3d at 176.

166. *Id.* Arguably, this factor could be applied, with the same result, to teachers at religious schools who incorporate Bible lessons into their curriculum, even though courts consistently exclude teachers in religious schools from application of the ministerial exception. *See, e.g., Miss. College*, 626 F.2d at 485 (denying application of the ministerial exception to the faculty of a religiously-operated university); Guinan v. Roman Catholic Archdiocese, 42 F. Supp. 2d 849, 853 (S.D. Ind. 1998) (holding that the ministerial exception did not apply to preclude an ADA claim by a teacher in a church-operated elementary school).

167. *Starkman*, 198 F.3d at 176. *But cf.* Shirkey v. Eastwind Cmty. Dev. Corp., 941 F. Supp. 567, 577 (D. Md. 1996) (denying application of the ministerial exception to a minister's race discrimination claim because, although the minister was clearly authorized to perform ecclesiastical functions, the position for which he applied was a lay position), *modified*, 993 F. Supp. 370 (D. Md. 1998), *aff'd*, No. 99-1841, 1999 U.S. App. LEXIS 32387 (4th Cir. Dec. 13, 1999).

168. *Starkman*, 198 F.3d at 176. The church produced documentation of this belief by citing a copy of its "1994 Ministry of Excellence in Music." *Id.*

169. *Id.* (quoting EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. Unit A July 1981)).

170. *Id.* at 176-77.

clear that the "primary duties of the plaintiff" test, which conditions application solely on the nature of the plaintiff's employment relationship with the church, can be manipulated in subtle ways to broaden the scope of church actors covered by the exception.

Adopting a rationale similar to that of the *Starkman* court, a Michigan appellate court also concluded a church organist could be considered "clergy" for purposes of the ministerial exception in *Assemany v. Archdiocese of Detroit*.[172] In *Assemany*, the church defendant argued that the ministerial exception should apply to its decision not to renew the plaintiff's job contract because his job involved more than simply playing the organ in church; rather, his position required pastoral-liturgical leadership.[173] The *Assemany* court accepted the church's ministerial clause argument, finding that the "[p]laintiff was intimately involved in the propagation of Catholic doctrine and the observance and conduct of Catholic liturgy."[174] Because the plaintiff's job required a working knowledge of Catholic doctrine and liturgy and involved the selection and teaching of liturgical music as well as leading the congregation in song, the court held that the plaintiff's duties were sufficiently religious for him to be considered "important to the spiritual and pastoral mission of the church."[175] Citing the Fourth Circuit's holding in *Rayburn v. General Conference of Seventh-Day Adventists*, the *Assemany* court characterized the test for classification as a minister to be whether "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious

171. Whereas the Fifth Circuit in *Mississippi College* examined whether the plaintiff tended to the religious needs of the faithful or instructed in the whole of religious doctrine, the *Starkman* court considered whether the plaintiff engaged in traditionally religious activities, *including but not limited to* whether the plaintiff attended to the religious needs of the faithful. *Compare Miss. College*, 626 F.2d at 485 (remarking that "[plaintiffs] neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine"), *with Starkman*, 198 F.3d at 176 (noting that the third and "probably most important" factor is whether plaintiff "engaged in activities traditionally considered ecclesiastical or religious," *including* whether plaintiff "attends to the religious needs of the faithful") (emphasis added and internal citations omitted)). *See also* EEOC v. Roman Catholic Diocese, 213 F.3d 795, 802 (4th Cir. 2000) (holding that a female music minister's sex discrimination claim against her church employer was barred by the constitutional ministerial exception because applying the "function of the position" test to the plaintiff placed her within the ambit of ministerial exception because of her role in "the selection, presentation, and teaching of music, which is an integral part of Catholic worship and belief").

172. Assemany v. Archdiocese of Detroit, 434 N.W.2d 233, 238 (Mich. Ct. App. 1988) (holding that a church organist's employment discrimination claim against a church was barred from adjudication by the constitutional ministerial exception).

173. *Id.*

174. *Id.*

175. *Id.* at 237-38 (citing Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)).

order, or supervision of participation in religious ritual and worship."[176] By satisfying *one* of these factors, a religious group could have the employment position at issue classified as "ministerial" and avoid the application of federal employment discrimination laws to the church's relationship with the employee.

As the church musician cases illustrate, application of the "primary duties of the plaintiff" test has created an increasingly broad area of protection for church employment decisions regardless of the reason for the church's employment decision or the nature of the alleged discrimination. Given the underlying rationale of the ministerial exception, as well as long-standing deference to churches in selecting its religious leaders, such broad application of the ministerial exception may not be problematic as applied to hiring decisions involving only the church and potential or former employees. Deference to the church becomes less comfortable, however, when an unlawful church employment decision lacks any rational grounding in religious doctrine, or when a church employment decision results in harm to a third party. Indeed, when a religious organization asserts the ministerial exception in a Title VII hostile environment sexual harassment case, the inherent shortcomings of applying only the "primary duties of the plaintiff" test to determine application of the ministerial exception are evident.

V. A RELIGIOUS RIGHT TO PROTECTION FROM HOSTILE ENVIRONMENT SEXUAL HARASSMENT AND NEGLIGENT HIRING AND SUPERVISION CLAIMS UNDER THE MINISTERIAL EXCEPTION?

Once courts determined which types of employees would be included within the scope of the constitutional ministerial exception,[177] the question of which types of claims would be exempted from adjudication remained. The statutory religious institution exemption in Section 702 of Title VII indicates only that Congress intended to exempt churches from claims of religious discrimination.[178] Thus, only lower court opinions have provided for guidance as to which claims should be covered by the judicially cre-

176. *Id.*

177. *See supra* Part IV.A.

178. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1 (1994)).

ated constitutional ministerial exception.[179] One especially controversial claim for application of the ministerial exception has been hostile to environment sexual harassment under Title VII.

As indicated in the first case articulating a constitutional ministerial exception, *McClure v. Salvation Army*, the ministerial exception may apply to sex discrimination claims.[180] Under Title VII, hostile environment sexual harassment is an actionable form of sex discrimination.[181] By implication, it seems that the constitutional ministerial exception would apply to such claims. Hostile environment sexual harassment claims differ from other Title VII claims, however, in two ways: (1) hostile environment sexual harassment claims by non-ministerial plaintiffs may still implicate a ministerial relationship if the allegation is that a church defendant failed to take appropriate employment action in response to complaints of harassment by a minister, and (2) hostile environment sexual harassment claims involve harm to an innocent third party outside the ambit of the church/minister relationship. Applying the traditional primary duties of the plaintiff analysis to determine application of the ministerial exception to such claims would be both overinclusive and underinclusive. It would be overinclusive because, unlike other forms of discrimination where the church's ability to hire clergy of its choice is directly assailed, a hostile environment sexual harassment claim only indirectly involves church hiring practices. It would be underinclusive because limiting the exception's application to claims by ministerial employees would overlook the fact that claims by non-ministerial employees may nonetheless implicate a church/minister relationship to some extent. Thus, the issue of whether the ministerial exception should apply to hostile environment sexual harassment claims is especially complicated. Moreover, if the ministerial exception does apply to hostile environment sexual harassment claims, perhaps by the same token it should also apply to state law-based negligent hiring and supervision claims, in which plaintiffs similarly attack churches' failure to take employment action against ministers who engaged in sexual abuse or other misconduct. The following two

179. The Supreme Court has never determined whether the constitutional ministerial exception is required or prohibited by the Constitution; the exception was wholly created by lower federal courts.

180. McClure v. Salvation Army, 460 F.2d 553, 558-61 (5th Cir. 1972) (applying the constitutional ministerial exception to a sex discrimination claim brought by an ordained minister for the Salvation Army).

181. The prohibition on hostile environment sexual harassment is drawn from Title VII's proscription of sex discrimination in Section 703(a)(1). 42 U.S.C. § 2000e-2.

Sections address these issues and the differing approaches adopted by courts that have considered them.

A. The Non-Ministerial Employee as Plaintiff

Although the traditional ministerial exception test articulated by various circuit courts focuses primarily on the duties of the plaintiff in determining whether the exception applies, sexual harassment cases brought by non-ministerial employees against the church pose unique issues when the claim calls into question the church's employment of a minister who allegedly harassed or abused parishioners or employees. Such issues may not be readily apparent if workplace sexual harassment cases are analyzed in the same way that other types of sex discrimination cases are analyzed.[182] As stated by one federal district court, "[s]imply assessing the role of the plaintiffs vis-à-vis the defendants and the Church in this case would lead the court to conclude that the church-minister exception does not apply because plaintiffs are not ministers, and they do not primarily serve the spiritual or pastoral mission of the Church."[183]

In addition, merely applying the "primary duties of the plaintiff" test to a non-religious employee's hostile environment sexual harassment claim against a church to determine the ministerial exception's applicability would overlook the underlying rationale of the exception: protecting the church from state involvement in decisions regarding the hiring, retention, and termination of clergy. If, according to the courts that created the ministerial exception, "[t[he relationship between an organized church and its ministers is its lifeblood" and "[m]atters touching this relationship must necessarily be recognized as of prime ecclesiastical

182. In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court, in accord with EEOC guidelines, held that sexual harassment was a form of sex discrimination prohibited by Title VII. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). Although there are two types of sexual harassment prohibited by Title VII, hostile environment sexual harassment is the only type that is pertinent to the ministerial exception cases because only this type of harassment claim potentially implicates the church/minister employment relationship. The typical fact pattern for such a claim involves a plaintiff who has allegedly been harassed by a priest and seeks to recover damages from the church for its failure to take action to avoid or eliminate the hostile or abusive work environment created by the priest's sexual harassment. *See, e.g.*, Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 696-99 (E.D.N.C. 1999) (describing such allegations as underlying plaintiff's Title VII claim against the church conference).

183. *United Methodist*, 63 F. Supp. 2d at 696.

concern,"[184] it follows that *any* employment decision regarding clergy must be treated differently than other employment decisions. This is because the Supreme Court has recognized that "the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive."[185] According to this principle, church decisions regarding the employment of clergy members should not be adjudicated in secular courts, regardless of whether the dispute involves their hiring, retention, or termination.

Thus, if the overarching rationale for the ministerial exception is to provide special protection from state intervention for all "matters touching [the church/minister] relationship,"[186] allowing lay employees to pursue claims against churches for hostile environment sexual harassment seems antithetical. By alleging that the church is liable for such a claim, the plaintiff asserts that the church as employer harmed the plaintiff by failing to take adequate action to prevent a hostile and abusive work environment from developing.[187] If a plaintiff alleges that a church failed to take adequate action to prevent or stop a minister from creating a sexually abusive or hostile environment, the plaintiff is, in fact, accusing the church of failing to discipline or terminate a particular clergy member. Resolving such a dispute goes against the principle of freedom from state interference in matters concerning the church/minister relationship, which inheres in the ministerial exception as originally defined.[188] Thus, although the "primary duties of the plaintiff" test would not require application of the ministerial exception

184. *McClure*, 460 F.2d at 558-59.

185. Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 7 (1929) (holding that courts could not adjudicate an attempted challenge to an archbishop's decision regarding a chaplaincy appointment).

186. *McClure*, 460 F.2d at 559.

187. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998) ("An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct [by the plaintiff's co-worker] but failed to stop it."); *see also United Methodist*, 63 F. Supp. 2d at 710 ("Plaintiffs claim that [the employers] violated Title VII because they knew or should have known about the sexually harassing environment to which plaintiffs were subjected . . . and that defendants failed to take action to protect plaintiffs."). If the harassing employee is the plaintiff's supervisor, the employer may be vicariously liable for the harassment unless (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Burlington Indus.*, 524 U.S. at 745-46 (explaining that agency principles are applied to establish supervisory authority in sexual harassment claims, as well as the affirmative defenses an employer can assert in response); Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998) (setting forth the test for employer liability for a supervisor's acts of sexual harassment).

188. *McClure*, 460 F.2d at 559.

when the plaintiff is not a ministerial employee, adjudication of a hostile environment sexual harassment claim against a religious organization may nevertheless contradict the underlying rationale of the ministerial exception when the dispute implicates the supervisory relationship between a church and its minister.

Both federal and state courts have grappled with the question of whether negligence-based actions against a church can properly be adjudicated under the First Amendment when the plaintiff challenges the hiring, supervision, or retention of a clergy member who allegedly sexually harassed or abused the plaintiff. This problem arises in two contexts, depending on the type of claim alleged by the plaintiff. The first instance is in the case of Title VII hostile environment sexual harassment claims against a religious organization, which are generally addressed in federal court under federal subject matter jurisdiction.[189] First Amendment issues also arise in state law negligent hiring, supervision, and/or retention claims against churches, generally heard by state courts.[190] The latter type of cases involve application of state law rather than Title VII; the analysis is based on the First Amendment's Religion Clauses rather than the ministerial exception, because the ministerial exception has been applied only to Title VII and other federal employment discrimination claims.[191] Because, as applied to church defendants, both hostile environment sexual harassment and negligent hiring and supervision claims may result in church liability for failing to make certain employment decisions in response to allegations of clergy misconduct,[192] these cases can be analyzed together to de-

189. See *supra* note 187 for theories of employer liability in hostile environment sexual harassment claims.

190. *See* Joseph B. Conder, Annotation, *Liability of Church or Religious Society for Sexual Misconduct of Clergy*, 5 A.L.R. 5th 530, 535 (1993) (noting that liability has been asserted against churches and religious societies for the sexual misconduct of their clergy under theories of imputed negligence, including respondeat superior and agency, as well as under direct negligence for negligent supervision and hiring). Because most courts have rejected imputed negligence claims based on a narrow definition of the scope of ministerial employment, *see, e.g.*, Destefano v. Grabrian, 763 P.2d 275, 286-87 (Col. 1988) (concluding that an imputed negligence action could not stand because given that "sexual intercourse with a parishioner . . . is not part of the priest's duties nor customary within the business of the church), this Note focuses on the direct negligence claims for negligent supervision and hiring that have been more widely disputed in the state courts.

191. Drawing directly from the Religion Clauses instead of the ministerial exception only changes the analysis slightly because the ministerial exception is itself founded on the Religion Clauses. The primary difference between analyzing First Amendment defenses in state law and federal law claims is that the ministerial exception "shorthand" for a First Amendment violation is not available in state law claims because the ministerial exception is a federal law doctrine.

192. *Compare Burlington Indus.*, 524 U.S. at 742 ("An employer is negligent with respect to sexual harassment if it knew or should have known about the [co-worker's] conduct and failed to

termine whether the underlying reasoning of the ministerial exception should apply to such claims.[193] The issue that arises in both sexual harassment and state law-based negligence claims is whether First Amendment principles, including the church's right to employ religious leaders free of governmental interference and the state's interest in avoiding excessive entanglement of church and state, should override a plaintiff's interest in redressing a church's failure to protect the plaintiff from harm, recognized yet ignored, by the church.

1. The Nature of the Controversy Analysis: No First Amendment Protection for Religious Organizations from Sexual Harassment Claims by Non-Ministerial Employees

Although there are few cases involving sexual harassment claims by non-ministerial employees against religious organizations,[194] courts hearing such cases have, for the most part, held that the First Amendment does not prohibit adjudication when the dispute implicates the church/minister relationship.[195] In rejecting

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stop it."), *with* Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997) ("Negligent supervision implicates the duty of a master to control conduct of a servant: A master is under the duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them if . . . the master . . . knows or should know of the necessity and opportunity for exercising such control.") (citing RESTATEMENT (SECOND) OF TORTS § 317 (1965)), *and* Destefano v. Grabrian, 763 P.2d 275, 287 (Colo. 1988) (holding that the plaintiff stated a viable claim against a church diocese for negligent supervision since "[t]he principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him" (citing RESTATEMENT (SECOND) OF TORTS § 317 (1965)).

193. Because both hostile environment sexual harassment claims under Title VII and negligent hiring, supervision, and retention claims under state law are based on an employer's failure to take action to prevent harm caused by its agent or employee despite evidence of the agent's proclivity to harm the plaintiff, both types of claims challenge a church employment decision to retain the minister/employee on a negligence-based theory. *See supra* note 192. Thus, the issue of whether a court may adjudicate such a challenge to a church employment decision involving clergy is similar in both types of claims.

194. Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist, 63 F. Supp. 2d 694, 711 (E.D.N.C. 1999) ("The number of published and on-line decisions in which courts have addressed sexual harassment claims against religious institutions is extremely limited, and most of those that are available involve claims made by ministers.").

195. *See, e.g., id.* at 715 (concluding that "this court cannot agree that courts are required to defer to religious authority in resolving sexual harassment claims where no issue of doctrinal controversy is involved and where the dispute between the parties is not ecclesiastical"); Nigrelli v. Catholic Bishop, 1991 WL 36712, at *3 (N.D. Ill. Mar. 15, 1991) (rejecting the defendant's First Amendment defense to a Title VII claim by a Catholic school principal and noting that "[t]here is . . . no doubt that in order to determine if the plaintiff was sexually harassed, the court need not inquire into the doctrines and religious goals of the Catholic Church nor of the school").

Free Exercise and Establishment Clause defenses to the application of Title VII harassment provisions, courts have relied on two basic principles: (1) the defendant religious organization has no argument based in religious doctrine for condoning sexual harassment, and (2) reviewing a church's response to complaints of sexual harassment would involve application of neutral principles of law without intruding upon church autonomy.[196]

In *Smith v. Raleigh District of the North Carolina Conference of the United Methodist*, a North Carolina federal district court addressed the issue of whether the ministerial exception should be applied to two church administrative employees' Title VII hostile environment sexual harassment claims against the Methodist Conference. The court ultimately concluded that adjudicating the claims would not violate the First Amendment's Religion Clauses.[197] In making this determination, however, the court acknowledged that the hybrid nature of this case required that the court engage in a more detailed analysis than mere application of the "primary duties of the plaintiff" test would provide; although the plaintiffs were not ministers, their claims arose from a minister's misconduct.[198] Because the plaintiff's hostile environment sexual harassment claim would necessarily touch on the church/minister relationship[199] and require inquiry into the church's supervision

196. *United Methodist*, 63 F. Supp. 2d at 712.

> The court need not dwell on the issues of faith and doctrine because defendants have not alleged a particular religious belief or doctrine that would be compromised by this court's exercise of jurisdiction over plaintiffs' hostile environment [sexual harassment] claims. Defendants certainly have not suggested that the Methodist Church condones sexual harassment in any way . . . .

Id.; *see also id.* at 713 ("Even assuming this court must review the actions taken by defendants . . . in response to plaintiffs' formal grievances . . . such a review would not require an intrusion upon church autonomy and governance of the type or magnitude at issue in [the cases underlying the ministerial exception]."). Similar to other courts, the *United Methodist* court narrowly interpreted the question of whether the church had a doctrinal basis for its employment decision by classifying the doctrinal issue as whether the church defendant condoned sexual harassment. *Id.* The outcome of the court's inquiry would have changed if the issue were defined more broadly to include reasons the church might have had for retaining a minister accused of sexual harassment. By requiring a religious organization to have professed a belief in condoning sexual harassment, the court failed to give the church a realistic chance to articulate a doctrinal reason for retaining the minister, such as forgiveness and rehabilitation rather than mandatory termination. See *infra* note 215 for further discussion of how the definition of "church doctrine" may be significant to the ministerial exception analysis.

197. *Id.* at 714, 719.

198. *Id.* at 706. Such heightened analysis was appropriate, according to the court, because the case not only implicated the plaintiff's non-religious employment relationship with the church, but also "the court's ability to subject to judicial scrutiny at least some small aspect of the church-minister relationship." *Id.*

199. McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972).

and discipline of its clergy, the church argued that the ministerial exception should be applied in this hybrid situation.[200]

Without detailed analysis of the defendant's claim that the ministerial exception should apply to cases indirectly implicating the church/minister relationship, the *United Methodist* court simply stated that the defendant's argument was more properly analyzed based upon general Free Exercise and Establishment Clause principles rather than by per se application of the ministerial exception.[201] The court did not give a specific reason for its rejection of the ministerial exception.[202] Rather, it merely concluded that "the [church's] defense is more properly based upon the church autonomy principle articulated in the Supreme Court decisions upon which the church-minister exception was based."[203] The *United Methodist* court first examined Free Exercise/church autonomy arguments for excluding churches from sexual harassment and sexual misconduct cases.[204] Drawing from church autonomy principles,[205] the *United Methodist* court asserted that whether a church's employment decision should be subjected to court scrutiny depends on the degree to which "resolving the issues raised by a plaintiff's claims would require intrusion into the spiritual functions of the religious institution at issue."[206] The court concluded that in a case involving hostile environment sexual harassment, it would not have to intrude upon the spiritual functions of the church because the court's inquiry would be limited to whether the church's actions were based in religious doctrine and whether the church knew about the harassment and failed to take action.[207] Without a religion-based reason for failing to respond to the alleged harassment, the court could resolve the claims "in secular terms—the terms of negligence law and sexual harassment."[208] Therefore, adjudication

200. *United Methodist*, 63 F. Supp. 2d at 706-07.

201. *Id.* at 707.

202. *Id.*

203. *Id.*

204. This Note uses the term "sexual misconduct" to refer to illegal and involuntary sexual acts committed against other individuals, including sexual abuse and assault against adults and children, as well as the initiation or coercion of improper sexual relations.

205. *Id.* at 709 (stating that churches should be able to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine") (citing Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).

206. *Id.* (citing Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985)).

207. *Id.*

208. *Id.* at 715.

of the claim would not implicate Free Exercise and church autonomy principles.

For reasons analogous to its rejection of the defendant's Free Exercise Clause argument, the *United Methodist* court also rejected the defendant's Establishment Clause argument.[209] Because Title VII's proscription of hostile environment sexual harassment clearly had a secular purpose and did not primarily advance religion, the only contentious factor of the *Lemon* test was whether the statutory requirements excessively entangled church and state. [210] Because the court would not have to "choose between competing religious visions," and because the resultant church/state relationship would be procedurally and substantively limited, the *United Methodist* court held that applying Title VII sexual harassment provisions to the United Methodist Conference would not violate the Establishment Clause.[211] Thus, the court's Establishment Clause holding was similar to its Free Exercise Clause holding: both emphasized that neither the church's reason for its employment determination nor the investigative and adjudicative process would implicate religious doctrine.[212]

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209. *Id.* at 719.

210. *Id.* at 716-17 (applying Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)). In analyzing the entanglement prong, the *United Methodist* court adopted the case-sensitive approach taken by the D.C. Circuit in *Catholic University* rather than the statute-centered approach of the Fifth and Ninth Circuits, and held that an Establishment Clause issue only arises when the court must address a question of religious doctrine or practice. *United Methodist*, 63 F. Supp. 2d at 717 (citing EEOC v. Catholic Univ. of Am., 83 F.3d 455, 465 (D.C. Cir. 1996)).

211. *Id.* at 719. In holding that the Establishment Clause would not be violated by adjudicating the plaintiff's claim, the court emphasized that spiritual beliefs were not at issue in this case. *Id.* at 717 ("While a court's intrusion upon a church's selection of a minister may be viewed as an establishment clause violation when a court effectively mandates the selection or forbids the discharge of a certain minister, the same cannot be said of the government's enforcement of its sexual harassment laws, a process in which core religious beliefs are not at issue."). The court overstates the absence of an Establishment Clause issue in applying sexual harassment laws to churches, however, by implying that such claims *never* result in such a problem. *See id.* One could imagine, however, a situation in which a church defends retaining a minister accused of sexual harassment on the grounds that the minister should be rehabilitated and forgiven, rather than terminated. *See* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 789 (Wis. 1995) ("Beliefs in penance, admonition, and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church's mercy toward the offender . . . ."); *infra* note 215. Hostile environment sexual harassment liability may be interpreted as an ex post facto statement to the church that it should have discharged or removed the offending minister from his position. Although such a statement may not rise to the level of a hiring mandate, *see United Methodist*, 63 F. Supp. 2d at 717, such a scenario casts doubt on the *United Methodist* court's assertion that adjudicating sexual harassment cases can never result in Establishment Clause violations.

212. The similarity between the Free Exercise and Establishment Clause analyses in sexual harassment cases is further illustrated by courts' discussions of church defendants' First Amendment defenses in state law negligent hiring and supervision cases, which generally ad-

Similarly, when third party plaintiffs have asserted state law negligent hiring, supervision, or retention claims, many courts have held the First Amendment poses no problem because, absent a doctrinal reason for the church's employment decision, the court is not required to weigh or interpret religious beliefs.[213] Rather, the dispute may be resolved by applying a secular standard to secular conduct.[214] Indeed, absent a religious tenet that would be undermined by the application of sexual harassment or misconduct laws,[215] religious organizations do not have a logical argument for

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dress the two arguments together and base both holdings on the absence of a doctrinal dispute. *See, e.g.*, Smith v. O'Connell, 986 F. Supp. 73, 80-81 (D.R.I. 1997) (holding that the adjudication of a plaintiff's negligent supervision claim did not violate the Free Exercise Clause because the claim could be resolved by applying neutral and generally applicable principles of law, and there was no Establishment Clause problem because the claim did not require interpretation of religious doctrine); Jones v. Trane, 591 N.Y.S.2d 927, 930-31 (N.Y. Sup. Ct. 1992) (addressing a church's First Amendment defenses as one issue and concluding that no constitutional violation existed because the defendants did not assert a religious tenet that would be violated by adjudicating the plaintiff's negligent hiring claim); Smith v. Privette, 495 S.E.2d 395, 397 (N.C. Ct. App. 1998) (resolving the First Amendment defenses asserted by the defendant by concluding that without religious tenets at issue, the court is not required to weigh or interpret church doctrine). Courts' holdings in negligent hiring and supervision claims against church defendants suggest that both Free Exercise and Establishment Clause issues can be resolved by determining whether the church has a religious reason for its employment or disciplinary decisions regarding its clergy or whether adjudicating the claim would otherwise require the court to examine religious tenets.

213. *See, e.g.*, Moses v. Diocese of Colorado, 863 P.2d 310, 321 (Colo. 1993) (concluding that because the specific facts presented by the plaintiff's case did not require interpreting or weighing church doctrine, the First Amendment was not a defense to adjudication of the claim); Doe v. Malicki, No. 3D99-549, 2000 WL 1022042, at *2 (Fla. Dist. Ct. App. Dec. 7, 2000) (holding that, because determining whether the church defendant knew one of its priests sexually assaulted the plaintiffs but failed to take action was an issue governed by tort law which would not require inquiry into religious doctrines and practices, the First Amendment did not bar adjudication of the claim); *Smith*, 495 S.E.2d at 398 (reversing the trial court's grant of summary judgment to the defendant, because the plaintiff's negligent retention and supervision claims arising out of a minister's sexual misconduct involved "conduct that the Church Defendants do not claim is part of the tenets or practices of the Methodist Church," and consequently the court did not need to "interpret or weigh church doctrine in its adjudication of the Plaintiff's claim").

214. *See, e.g.*, Bear Valley Church of Christ v. DeBose, 928 P.2d 1315, 1323-24 (Colo. 1997) (holding that a negligent hiring and supervision claim against a church, arising from alleged sexual abuse of a child by a minister, "is actionable because it does not require such interpretation or weighing of religious belief but instead is merely application of a secular standard to secular conduct"); Konkle v. Henson, 672 N.E.2d 450, 455 (Ind. Ct. App. 1996) (noting that "several courts have determined that when purely secular conduct is at issue, courts can apply secular standards and hold churches responsible for the effects of their conduct on third parties" and holding that the First Amendment would not be violated by adjudicating the plaintiff's negligent supervision claim because, given that the offending minister's actions were not religiously motivated, review of the plaintiff's claim did not require inquiry into religious doctrine or practice).

215. Although it is difficult to imagine a religious doctrine that would support a church's decision not to act after having received complaints of sexual harassment by one of its ministers, churches might defend a decision not to terminate a minister accused of sexual harassment by

Free Exercise protection.[216] Courts have also distinguished between disputes of an internal and an external nature to determine whether church autonomy principles should preclude application of negligent hiring or supervision laws. [217] Thus, another reason for rejecting a Free Exercise or church autonomy defense is that, unlike disputes between religious factions or between a church and its ministers, negligent hiring cases involve harm to a third party. Such a dispute, courts have argued, "can hardly be characterized as a dispute involving an internal church matter."[218] Similar to federal courts hearing hostile environment sexual harassment claims, many state courts have found no Free Exercise problem in applying negligent hiring and supervision laws to religious organizations.

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references to church beliefs in forgiveness and rehabilitation of ministers, rather than immediately terminating ministers for alleged wrongdoings. One problem religious organizations might face in articulating such a defense, however, is reluctance on behalf of courts to accept the validity of supposed religious tenets that are not reflected in official church doctrine. Professor Douglas Laycock illustrates this Free Exercise problem for religious organizations, noting that when religious organizations assert Free Exercise protection from state regulation, "courts have tried to decide whether activities of organized churches were required *by church doctrine* which at best represents the dominant or most commonly held view" and "cannot safely be imputed to every believer or every affiliated congregation." 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, 1390-91 (1981) (emphasis added). Professor Laycock argues that "[t]his gap between official doctrine and rank-and-file belief means that courts are prone to err in deciding whether activities of a local church or small group of believers are compelled by conscience." *Id.* at 1391. Because of this "gap" between officially promulgated church doctrine of organized religious organizations and the beliefs of the local congregation leadership, church defendants in hostile environment sexual harassment cases may have trouble convincing a court that their failure to remove a minister accused of harassment was because of their religious beliefs. *Id.* at 1390-91.

216. *See, e.g.*, Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66, 73 (D. Conn. 1995) (asserting that "to have protection of the Religion Clauses, the claims must be rooted in religious belief"); *Jones*, 591 N.Y.S.2d at 931 ("[I]nasmuch as it is conduct, and not creed, that underlies plaintiffs' actions, and that the potential for civil consequences exists equally as to religious and non-religious persons, and as to clergy and lay persons of all religions alike, the Free Exercise aspect of the First Amendment does not come into play to preclude plaintiffs' [negligent hiring claim].") (citing Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990)).

217. *See, e.g.*, Smith v. O'Connell, 986 F. Supp. 73, 77 (D.R.I. 1997) (distinguishing the plaintiff's negligent supervision claim arising from a priest's alleged sexual abuse of minors from internal church disputes requiring non-intervention, because the plaintiff's claim involved church officials and third persons rather than factions within the church or the church/minister relationship); *Bear Valley Church of Christ*, 928 P.2d at 1323 (noting that although the court previously held that "[t]he decision to hire or discharge a minister is itself inextricable from religious doctrine . . . we took care to distinguish internal hiring disputes within religious organizations from general negligence claims filed by injured third parties"); Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806, 811 (Minn. Ct. App. 1992) (distinguishing the plaintiff's action against a diocese arising from the alleged sexual abuse of a child by a pastor from church autonomy cases involving internal church property disputes on the basis that "this case concerns conduct by the Church that resulted in external and secular harm").

218. *Smith*, 986 F. Supp. at 77.

Although the state's intrusion on the church/minister relationship may be more tenuous in the sexual harassment and negligent hiring and supervision cases than in the traditional sex discrimination cases, the more attenuated connection does not adequately explain why the ministerial exception is applied in the latter but not the former group.[219] Such a cavalier rejection of the ministerial exception in sexual harassment and misconduct cases yields three propositions: (1) courts are well-equipped to evaluate and respond to a church's Free Exercise and Establishment Clause defense to state intervention without blindly invoking the ministerial exception; (2) there are certain church employment decisions that courts will scrutinize for a religious motive, without which the plaintiff's claim will not be barred; and (3) although courts may be willing to sacrifice the rights of religious employees to be free from unlawful discrimination, they will not defer to churches when sexual misconduct or third-party harm is at issue.

2. The Nature of the Church/Minister Relationship Analysis: All Church Employment Decisions Implicating Clergy Should Be Protected

Employing the same factors as courts rejecting First Amendment protection for churches in hostile environment sexual harassment and negligent hiring and supervision claims, other courts have reached opposite results.[220] These courts reason that all hiring, firing, and disciplinary decisions regarding clergy must receive First Amendment protection because of the nature of the

219. The *United Methodist* court distinguished the case at bar from other cases in which non-religious employees brought Title VII claims against religious organizations, noting that unlike sexual discrimination cases brought by non-religious employees, "the issues in this [hostile environment sexual harassment] case may involve not only the relationship between defendants and these secular employees of the church (the plaintiffs), but also, *to a lesser extent*, the defendants' relationship with the minister that they assigned to that Church." Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 706 (E.D.N.C. 1999) (emphasis added). Thus, the court acknowledged that adjudication of plaintiffs' sexual harassment case against the church *would* implicate the church/minister relationship to some extent. *Id.* The court did not, however, explain why this implication should not result in application of the ministerial exception or, more importantly, to what extent adjudication would have to implicate a church/minister relationship in order for the ministerial exception to apply.

220. For lists of cases illustrating the split of authority among courts regarding the First Amendment implications of adjudicating negligent hiring and supervision claims against churches, see Doe v. Malicki, No. 3D99-549, 2000 WL 1022042, at *2 (Fla. Dist. Ct. App. July 26, 2000); N.H. v. Presbyterian Church (U.S.A.), 998 P.2d 592, 602 n.47 (Okla. 1999).

church/minister relationship.[221] They assert that regardless of the employer's action or motivation, adjudicating claims implicating clergy hiring decisions requires courts to compare what a "reasonable employer" would do with what the church defendant did—a "proscribed comparison," according to one court.[222]

Courts holding that the adjudication of negligent hiring and supervision claims against church employers necessarily violates the First Amendment emphasize that in all decisions regarding hiring, firing, or discipline, the church's determination is necessarily guided by religious doctrine and practice.[223] These courts reason that, regardless of whether or not a religious institution has a doctrinal reason for the challenged employment decision, examining church employment policies regarding ministerial employment to determine what is "reasonable" conduct necessitates "inappropriate governmental involvement" in violation of the Free Exercise and Establishment Clauses.[224] Based on this rationale, a Florida appellate court held in *Doe v. Evans* that a parishioner's negligent hiring, supervision, and retention claim against her former church for failing to respond to her allegations of sexual misconduct by one of the church's ministers was barred from adjudication by the First

221. *See, e.g.*, Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) (asserting that "[a]ny award of damages [for a negligent supervision claim against a church] would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination"); Van Osdol v. Vogt, 908 P.2d 1122, 1131 (Colo. 1996) (asserting in the context of a Title VII sexual harassment case that "[a]pplying Title VII or any anti-discrimination law to a church's choice of a minister would require a judge to question the belief system of the church, to validate certain interpretations of the religious doctrine over others, or to compel the church to accept certain ideas into their belief system"); Doe v. Evans, 718 So. 2d 286, 291 (Fla. Dist. Ct. App. 1998) ("[A] court's determination regarding whether the church defendant was 'reasonable' would necessarily entangle the court in issues of the church's religious law, practices and policies."), *review granted*, 735 So. 2d 1284 (Fla. 1999); H.R.B. v. J.L.G., 913 S.W.2d 92, 98-99 (Mo. Ct. App. 1995) (refusing to recognize a breach of fiduciary duty action against a church and one of its priests for the priest's alleged sexual abuse of the plaintiff as a child because the plaintiff could recover under other legal theories, such as intentional infliction of emotional distress, and because adjudicating the plaintiff's claim would inevitably require inquiry into the religious aspects of the church's relationship with its priests and parishioners).

222. *Evans*, 718 So. 2d at 291.

223. *See, e.g., id.*

224. *See, e.g.*, Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250-51 (D. Colo. 1998), *aff'd*, 185 F.3d 873 (10th Cir. 1999) (holding that adjudicating the plaintiff's negligent supervision claim stemming from alleged sexual abuse by a priest was barred by the First Amendment because courts are not equipped or constitutionally permitted to define reasonable conduct for a church employer); Swanson v. Roman Catholic Bishop, 692 A.2d 441, 445 (Me. 1997) (expressing concern that "[t]he imposition of secular duties and liability on the church as a 'principal' will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest"); Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997) (asserting that "judicial inquiry into hiring, ordaining, and retaining clergy would result in an endorsement of religion, by approving one model for church hiring, ordination, and retention of clergy").

Amendment.[225] In so holding, the court presumed that a church's hiring, supervision, and termination decisions with respect to a minister are necessarily guided by religious doctrine and practice.[226] Drawing from the Establishment Clause's anti-entanglement principle, the court determined that evaluating the church defendant's decision not to terminate the offending minister would be unconstitutional.[227] Courts adopting the position articulated in *Evans*, unlike courts that determine the constitutionality of adjudicating claims implicating a ministerial relationship on a case by case basis, focus on the nature of the church/minister relationship and assume that all church employment decisions regarding clergy necessarily involve questions of religious doctrine or practice and are therefore per se excluded from adjudication.

Courts that find a per se violation of the First Amendment when a claim involves examining a ministerial relationship *and* courts that determine that a non-ministerial plaintiff's claim can never result in a First Amendment problem both rely excessively on presumptions about church doctrine and practice. Whereas the position rejecting all First Amendment defenses assumes that a church will *never* have a religious reason for continuing to employ a minister accused of sexual harassment or misconduct, the position universally accepting the First Amendment as a defense assumes that *all* employment decisions regarding clergy are necessarily based in religious doctrine. These analyses are both overly simplistic and fail to take into account the specific facts of each individual case.

Cases involving non-ministerial employees as plaintiffs illustrate, however, that claims implicating the church/minister relationship need not be resolved through blind application of the ministerial exception in order to address potential First Amendment issues. Rather, it is possible to address these issues by applying Free Exercise and Establishment Clause analyses to each individual case. Such a case-specific analysis allows a court to determine whether the First Amendment is logically implicated by examining whether a religious belief or practice would have to be addressed or

225. *Evans*, 718 So. 2d at 290-91. The court acknowledged that other courts have held that the First Amendment bars adjudication of claims like the plaintiff's. *Id.*

226. *Id.* at 291.

227. *Id.* at 290-91. The court espoused the proposition, taken from *Lemon*, that government may not excessively entangle itself with religion and asserted that excessive entanglement occurs when "courts begin to review and interpret a church's constitution, laws, and regulations." *Id.* at 288; *see also* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

decided by the court. This determination should be the deciding factor, and courts should not assume that churches would have no religious reason for their employment decisions in cases involving sexual harassment or misconduct by priests; nor should courts assume every employment decision involving clergy necessarily implicates religious doctrine.

Rather, the method of analysis that achieves the optimum balance between churches' rights to self-governance and plaintiffs' rights to redress for unlawful discrimination having no relation to a church's spiritual mission would first require religious employers to articulate a doctrinal basis for taking the particular employment action at issue. If the church could articulate a religious reason for its employment decision, this would be an affirmative defense to adjudication of the claim. Such a requirement forces religious organizations to articulate a specific religious belief necessitating First Amendment protection without requiring courts to examine religious doctrine once the belief or practice is articulated. This analysis, however, becomes more complicated in cases in which the plaintiff is not a secular employee but is a member of the clergy who would clearly qualify as a "minister" under the "primary duties of the plaintiff" test.[228] The issue then becomes whether per se exclusion of the claim should still be the appropriate analysis, rather than requiring churches to articulate a religious doctrine implicated by adjudication of the particular dispute.

B. Sexual Harassment Claims by Ministerial Employees Against Religious Organizations

In *Bollard v. California Province of the Society of Jesus,* the Ninth Circuit addressed the issue of whether the ministerial exception requires per se exclusion of *all* Title VII claims by clergy against the church.[229] Because the underlying constitutional concerns addressed by the ministerial exception were not present in this hostile environment sexual harassment case, the *Bollard* court determined the ministerial exception was neither constitutionally

228. *See supra* Part IV.A.

229. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999), *reh'g denied,* 211 F.3d 1331 (9th Cir. 2000). Specifically, the issue of first impression before the court was whether the ministerial exception should be applied to Title VII hostile environment sexual harassment actions in addition to hiring-based Title VII employment discrimination claims. For further discussion on employer liability in hostile environment sexual harassment cases, see *supra* note 187.

required nor logically applicable.[230] Absent a religious reason for the church's employment decision, applying Title VII would not affect the church's free exercise of religion, require the court to interpret religious doctrine, or result in an ongoing church/state relationship.[231]

In order to determine whether the First Amendment's Religion Clauses would be implicated by adjudicating the plaintiff's claim against the church, the court analyzed the application of Title VII to the facts of this case under both the Free Exercise and the Establishment Clauses.[232] The plaintiff was studying to become an ordained priest with the Society of Jesus (the Jesuits).[233] During the time that the plaintiff was in seminary school, his superiors allegedly subjected him to unsolicited sexual advances, sent him pornographic material, and engaged him in inappropriate and unwelcome sexual discussions.[234] The plaintiff, in a hostile environment sexual harassment suit, alleged that he was forced to leave the seminary before becoming a priest as a result of this conduct.[235] In their defense, the Jesuits did not assert a religious justification for the conduct of plaintiff's superiors and, indeed, specifically disavowed one.[236]

Although the district court concluded its analysis with a determination that the plaintiff was indeed a minister and thus covered by the ministerial exception,[237] the Ninth Circuit performed a more searching analysis, examining whether the First Amendment required exception from Title VII *under the facts of this particular case*.[238] Beginning with the Free Exercise Clause, the *Bollard* court

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230. *Bollard*, 196 F.3d at 947-50 (holding that application of Title VII to the Society of Jesus would not violate either the Free Exercise Clause or the Establishment Clause of the First Amendment).

231. *See Id.*

232. *See Id.*

233. *See Id.* at 944. This order of Roman Catholic priests is more commonly known as the Jesuits order. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 947.

237. *Id.* at 944.

238. *Id.* at 945-50. Before launching into a constitutional analysis, the court first pointed out that the ministerial exception is based on the Constitution rather than Title VII. Indicating its sentiment towards per se application of the ministerial exception, the court stated, "[d]espite the lack of a statutory basis for the ministerial exception, and despite Congress's apparent intent to apply Title VII to religious organizations as to any other employer, courts have uniformly concluded that the Free Exercise and Establishment Clauses of the First Amendment require a narrowing construction of Title VII in order to insulate the relationship between a religious organization and its ministers from constitutionally impermissible interference by the government." *Id.* at 945.

first noted that certain religious interests are "so strong that no compelling state interest justifies government intrusion into the ecclesiastical sphere."[239] Such strong religious interests may arise in cases involving competing interpretations of church doctrine or competing claims of chaplaincy, for example.[240] Free Exercise concerns do not require application of the ministerial exception, however, when resolving the dispute would not require consulting religious doctrine.[241] Applying this dichotomy, the court reasoned that the Free Exercise rationale for excepting the Jesuits from Title VII was absent because the Jesuits asserted no religious justification for the alleged harassment.[242] Essentially, the only religious defense the Jesuits could offer was that, as a future minister, the plaintiff fit within the ministerial definition; the Jesuits could not explain how the underlying principles of the ministerial exception would be furthered in this case.[243]

In previous cases in which church defendants asserted a ministerial exception defense, courts did not engage in such an inquiry; rather they only examined whether the primary duties of the plaintiff qualified him as a minister.[244] The *Bollard* court, however, went beyond the traditional ministerial exception analysis and adopted a test balancing church and state interests.[245] Under this test, a religious organization would not receive First Amendment protection from Title VII's application "[w]here the church provides no doctrinal nor protected-choice based rationale for its alleged actions, and indeed expressly disapproves of the alleged actions."[246] Thus, when there is no logical reason to invoke the Free Exercise Clause, or when the church asserts no religious belief or doctrine that would be impeded by adjudication, the *Bollard* court would reject strict application of the ministerial exception in favor of a more flexible balancing test.[247]

The *Bollard* court next examined whether the Establishment Clause nonetheless required application of the ministerial exception, concluding that the Jesuits' failure to articulate a religious

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239. *Id.* at 946.

240. *Id.* (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976); Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 (1929)).

241. *Bollard*, 196 F.3d at 947 (citing EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982)).

242. *Id.* at 947.

243. *Id.* at 947-51.

244. *See supra* Part IV.A.

245. *Bollard*, 196 F.3d at 948.

246. *Id.*

247. *Id*

doctrine implicated by the employment dispute also precluded an Establishment Clause defense.[248] The court determined that the appropriate Establishment Clause test was *Lemon*'s three-prong test, and that the only contentious issue was the anti-entanglement prong.[249] The court first noted that "[e]ntanglement has both substantive and procedural dimensions."[250] In addition to the substantive entanglement problem caused when a church's right to select its clergy or choose among competing opinions on religious subjects is at stake, procedural entanglement may occur when a protracted legal process results in an ongoing church/state relationship.[251] Absent a substantive entanglement problem,[252] however, "procedural entanglement considerations are reduced to the constitutional propriety of subjecting a church to the expense and indignity of the civil legal process"—considerations present whenever a church is involved in litigation.[253] Similar to its Free Exercise analysis, the court balanced church and state interests in its Establishment Clause analysis, concluding that, absent a claim directly implicating religious practice or doctrine or ministerial hiring, any procedural entanglement concerns raised by the adjudication process were too insignificant to preclude application of Title VII.[254] Because neither the Free Exercise Clause nor the Establishment Clause required the court to abstain from adjudicating Bollard's sexual harassment case, the court held that Bollard, although clearly a ministerial employee, could proceed on his Title VII claim.[255]

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248. *Id.* at 948-50.

249. *Id.* at 948 (asserting that Title VII has an obvious secular purpose and does not principally advance or inhibit religion).

250. *Id.*

251. *Id.* at 949; *see also supra* note 114.

252. A substantive Establishment Clause issue could arise if the court had determined that one of the Supreme Court's Establishment Clause tests applied and resulted in a Constitutional violation. See *supra* Part II.B.1 for an overview of the various Establishment Clause tests.

253. *Bollard*, 196 F.3d at 949. The *Bollard* court also noted that, similar to the ministerial sexual harassment case of *Black v. Snyder*, the plaintiff only sought monetary damages rather than reinstatement. *Id.* at 947 (citing Black v. Snyder, 471 N.W.2d 715, 721 (Minn. Ct. App. 1991)). This distinction minimized the risk of entanglement, according to both courts. *Id.* at 950.

254. *Id.*

255. *Id.* at 948-50.

VI. AN ALTERNATIVE ANALYSIS FOR THE MINISTERIAL EXCEPTION DEFENSE DRAWING FROM *BOLLARD*

A. Bollard's *Departure from the Standard Ministerial Exception Analysis*

Although the *Bollard* court cited the same cases as previous courts applying the ministerial exception,[256] it adopted an entirely different approach. Rather than merely noting the underlying Free Exercise and Establishment Clause principles of the ministerial exception, the court actually applied these principles to the case at bar.[257] Instead of requiring the church defendant to simply construct an argument that the plaintiff's position was sufficiently religious to be classified as "ministerial" under the primary duties of the plaintiff test, the court required the church to assert a religious reason for the church's employment decision.[258] This requirement departed from the traditional ministerial exception analysis, which posited that "it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions."[259] Rather than acknowledging its rejection of the traditional ministerial exception analysis, though, the *Bollard* court sought to distinguish the plaintiff's claim from other Title VII claims asserted by ministers by arguing that this case did not in-

256. The *Bollard* court referred to two major lines of cases. The first was the church autonomy line of cases, in which the Supreme Court held that courts should not intervene in certain types of disputes involving feuding church factions or that would require choosing among competing religious viewpoints. *Id.* at 946 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (prohibiting judicial resolution of various matters of internal church governance because "religious controversies are not the proper subject of civil court inquiry"); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 115 (1952) (holding that courts may not constitutionally adjudicate a dispute between church patriarchs regarding which patriarch would use St. Nicholas Cathedral because the issue was "strictly a matter of ecclesiastical government")). The second line of cases to which the *Bollard* court referred was the group of cases from various circuit courts formulating and applying the ministerial exception. *Bollard*, 196 F.3d at 946 (citing McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) (holding that a female minister's sex discrimination claim against the Salvation Army was barred by the ministerial exception)); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (holding that the ministerial exception barred adjudication of a minister's sex and race discrimination claims because the Free Exercise Clause "protects the act of a decision rather than a motivation behind it"). The court distinguished these cases from the case at bar by asserting that previous cases applying the ministerial exception involved the *selection* of clergy, whereas Bollard's sexual harassment case did not. *Bollard*, 196 F.3d at 947.

257. *Id.* at 947-48.

258. *Id.*

259. *Id.* at 946 (citing *Rayburn*, 772 F.2d at 1169).

volve clergy *selection*.[260] The court's distinction departed from traditional ministerial exception jurisprudence, because the original understanding of the ministerial exception was that it provided a safe haven from state regulation for *all* matters involving the relationship between a church and its ministers, not just ministerial *hiring*.[261] Thus, the *Bollard* court's distinction between clergy hiring decisions and other clergy employment decisions[262] seems to be the court's way of disguising the fact that it has really set forth a new methodology for analyzing Title VII claims by ministers against churches.[263]

The *Bollard* court's analysis resulted in the correct outcome: The Jesuits were prevented from hiding behind the ministerial exception's shield without a religious basis for the contested employment decision.[264] To ensure an equitable result in each Title VII case, the *Bollard* court's analysis not only applies constitutional defenses to Title VII claims without blind application of the ministerial exception, but also reaches a constitutionally and logically sound result without invading the protected sphere envisioned by the ministerial exception rationale. Although some courts justify applying the ministerial exception to all Title VII suits by ministers on the grounds that the employment decision in and of itself is protected, the real concern courts voice is that they refrain from evaluating the legitimacy of a religious institution's underlying reason for the decision.[265]

This Note argues that it is possible to construct a model for evaluating ministerial exception defenses that would prevent re-

260. *Id.* at 946.

261. *McClure*, 460 F.2d at 558-59 ("The relationship between an organized church and its ministers is its lifeblood . . . . Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."). Certainly, whether to retain or terminate a minister accused of sexual harassment would be considered a matter "touching [the relationship between an organized church and its ministers]" that is "of prime ecclesiastical concern." *Id.*

262. *Bollard*, 196 F.3d at 946.

263. The significance of the *Bollard* court's holding was emphasized by a four-judge dissent to the Ninth Circuit's order denying rehearing of the case, in which the dissent argued that "the panel opinion undermine[d] over a century of Supreme Court jurisprudence" and ran "contrary to every other United States Court of Appeals that has had occasion to visit the issue." Bollard v. Cal. Province of the Soc'y of Jesus, 211 F.3d 1331, 1331 (2000) (Wardlaw, J., dissenting).

264. For examples of courts employing similar reasoning in allowing adjudication of negligent hiring and supervision claims against religious employers, see *supra* note 213.

265. *See, e.g.*, Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999) ("[W]e cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church.").

ligious institutions from invoking the protection of the First Amendment's Religion Clauses absent an affected religious doctrine or practice, without inserting the court into an evaluation of the legitimacy or propriety of religion-based decisions.[266]

B. Incorporating a Religious Doctrine Requirement into the Ministerial Exception

Drawing from *Bollard*, this Note's proposed ministerial exception analysis would require religious organizations to articulate how a religious belief or practice would be implicated by judicial resolution of the particular employment dispute at hand for the ministerial exception to preclude adjudication of the plaintiff's traditional employment discrimination or harassment claim. Mitigating this additional requirement of an underlying issue of religious doctrine or practice, however, this Note's proposed analysis would expand the ministerial exception's application to more than just ministerial plaintiffs by allowing the defense to be raised whenever the plaintiff's claim directly implicates a ministerial relationship.[267]

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266. *See infra* Part VI.B. Other commentators have also criticized the primary duties of the plaintiff ministerial analysis, because it fails to constitute an adequate proxy for measuring the extent to which religious doctrine or practice would be implicated by adjudication of the plaintiff's claim. *See, e.g.*, Kerri A. Gildow, Combs v. Central Texas Annual Conference of the United Methodist Church: *Making It Difficult to Keep the Faith When the "Ministerial Exception" to Title VII Still Prevails*, 74 TUL. L. REV. 1567, 1577 (2000) ("Just as it is not an absolute that an investigation dealing with a secular employee would never involve church doctrine, it is likewise not an absolute that investigation of a minister-type employee's claim would necessarily put ecclesiastical law at issue."). This Note departs from scholarship advocating wholesale abandonment of the ministerial exception, however, in favor of a requirement that the organization invoking the ministerial exception articulate a doctrinal basis for its allegedly discriminatory employment action. *Contra, e.g., id.* at 1577 (arguing that the statutory religious institution exemption under Title VII should be the sole source of protection for church employment decisions because it "affords the maximum amount of protection for the individual, while still allowing churches to choose those individuals who will undertake the church activities based on the religion of the individual").

267. This expansion of the class of plaintiffs to which the ministerial exception may apply directly addresses the concern that the primary duties of the plaintiff analysis does not function as an adequate proxy for whether a religious issue is implicated by the plaintiff's claim. *See, e.g.*, Gildow, *supra* note 266, at 1577 (noting that the secular nature of an employee's job duties does not necessarily preclude a question of religious doctrine or practice from arising during adjudication of the employee's discrimination claim). The extent to which mere application of the primary duties of the plaintiff test fails to account for all cases in which the Free Exercise dimensions of church/minister relationships are implicated is illustrated in hostile environment sexual harassment claims and in negligent hiring and supervision claims by secular church employees and parishioners. *See, e.g.*, Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist, 63 F. Supp. 2d 694, 706 (E.D.N.C. 1999) (noting that, although the plaintiff was a secular employee, her hostile environment sexual harassment claim against the church defendant presented an "atypical, hybrid situation" in that it involved not only the church's relationship with

The test proposed by this Note has two prongs. First, the "primary duties of the plaintiff" test, as articulated by the numerous circuit courts, would be applied to determine if the plaintiff is a minister.[268] If the religious organization failed to prove that the plaintiff's position within the church was sufficiently based in religious practice or teaching, the church could alternatively establish that its relationship with a ministerial employee, as defined by the primary duties test, would be directly implicated by adjudication of the dispute.[269] If the religious organization proved that either the plaintiff's current or desired employment position could be classified as "ministerial," or that the employment dispute directly implicated a ministerial relationship, the second part of the analysis would apply; otherwise, the ministerial exception analysis would end, and the claim would be adjudicated unless either Religion Clause otherwise required judicial abstention.[270]

Under the second prong of the test, the church defendant would carry the burden of asserting a religious reason for its employment decision or a religious doctrine that would otherwise be implicated if the court were to adjudicate the claim. For example, if a female plaintiff alleged sex discrimination against a church, the church would have to respond that it did not believe in hiring women for the position at issue for religious reasons. Meeting this burden would essentially constitute an affirmative defense for the defendant, and the ministerial exception would be applied to preclude the plaintiff's case. Religious reasons for employment decisions would be construed broadly, so the court would not substan-

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secular employees but also the church's relationship with the minister accused of the harassment, thereby "present[ing] issues reminiscent of those in the *McClure* line of cases"); Doe v. Evans, 718 So. 2d 286, 291 (Fla. Dist. Ct. App. 1998) (holding that the First Amendment precluded adjudication of the plaintiff's negligent hiring and supervision claim because any determination of whether the church's actions with respect to a minister's employment was "reasonable" could "entangle the court in issues of the church's religious law, practices, and policies"), *review granted*, 735 So. 2d 1284 (Fla. 1999).

268. See *supra* Part IV.A for an explanation of the primary duties of the plaintiff analysis.

269. This analysis would involve application of the primary duties of the plaintiff test to any other employee whose employment relationship with the church was implicated by the plaintiff's claim. If the plaintiff's claim directly involved the employment relationship between the church defendant and an employee established to be a minister under the primary duties test, the church would proceed to the second prong for application of the ministerial exception. *See supra* Part IV.A (describing the primary duties of the plaintiff test). The clearest example of a case in which a ministerial relationship could be directly implicated is a hostile environment sexual harassment case involving church liability for unlawful harassment by a minister, or a negligent hiring and supervision case involving sexual misconduct by a minister.

270. In practice, many cases would reach the second prong of the analysis because of courts' increasingly broad definitions of ministers. *See supra* Part IV.

tially assert itself into a determination of which types of beliefs or practices could constitute a doctrinal motivation for the employment action at issue.[271] If the employer had no doctrinal reason for exclusion from regulation, however, the court would then engage in Free Exercise and Establishment Clause analyses to determine whether, absent a defense based on religious doctrine or practice, the First Amendment nonetheless requires non-intervention.[272] With this modified analysis, it would be more difficult for the religious organization to successfully invoke the ministerial exception; rightfully so, however, because the First Amendment is not logically implicated where a religious organization has no doctrinal reason that it should be excluded from neutral, generally applicable laws. Rather the court need only apply secular standards to secular conduct: an analysis giving rise to no First Amendment issues.[273]

This model finds support in both Free Exercise and Establishment Clause jurisprudence. The model comports with the Supreme Court's Free Exercise jurisprudence, because it accounts for whether the integrity of a church's religious belief is actually at issue. Without a religious belief that impacts application of the statute, the religious institution's interest in exclusion from the statute is low given that there is no religious belief or practice to accommodate.[274] Considering the state's important interest in eradicating

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271. By construing the definition of a religious reason broadly, the religious institution would not be limited to official doctrinal proclamations or even to direct advocation of the challenged conduct. For example, if the plaintiff alleged hostile environment sexual harassment, the church could assert that the offending minister was not removed from his position because of the church's belief in forgiveness and redemption rather than immediate termination. This broad construction resolves the problem of the "gap" between officially promulgated church doctrine and local congregational beliefs. Laycock, *supra* note 215, at 1390-91. Although such a broad definition of an implicated religious doctrine or policy could encourage churches to try to fabricate a religious motivation for its conduct where none actually existed, such creative theology would not likely be employed when a minister's conduct is sufficiently reprehensible to discourage church association with the conduct. When a church is unwilling to support or otherwise take responsibility for a minister's conduct, the vindication of the plaintiff's statutory rights would be of greater importance than preserving the integrity of church's employment relationship with the offending minister.

272. See *supra* Part II.B.1 for an overview of the Supreme Court's Free Exercise and Establishment Clause jurisprudence. Applying Free Exercise and Establishment Clause analyses, in addition to evaluating whether the ministerial exception should apply, comports with the *Bollard* court's continued First Amendment analysis after rejecting per se application of the ministerial exception. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947-50 (9th Cir. 1999), *reh'g denied*, 211 F.3d 1331 (9th Cir. 2000).

273. *See supra* note 6.

274. *See, e.g.*, EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 286 (5th Cir. Unit A July 1981) ("Since the Seminary does not hold any religious tenet that requires discrimination on the basis of sex, race, color, or national origin, the application of Title VII report-

employment discrimination, the balance of church and state interests clearly weighs in favor of applying the statute where a religious institution advances no affected religious belief.[275] Courts have already rejected Free Exercise defenses asserted by religious organizations outside of the context of Title VII claims when these defendants were unable to articulate a religious issue implicated by adjudication.[276] Courts should not treat Title VII cases any differently.

Even if the ministerial exception survived the Supreme Court's elimination of a compelling interest test for claims to exemption from neutral laws of general applicability in *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court's holding that the Free Exercise Clause does not require exemption from a neutral law of general applicability indicates that the situations under which religious accommodation is necessary are severely circumscribed.[277] After *Smith*, religious exemption is more frequently a matter of permissive accommodation rather than a Free Exercise right.[278] Now, in evaluating church requests for accommodation from neutral laws of general applicability, courts appear to focus on whether the law burdens a core religious belief or practice that would likely have been protected under pre-*Smith* jurisprudence.[279] By requiring the existence of an impacted religious

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ing requirements to it does not directly burden the exercise of any sincerely held religious belief.").

275. *Bollard*, 196 F.3d at 948 ("Where the church provides no doctrinal nor protected-choice based rationale for its alleged actions and indeed expressly disapproves of the alleged actions, a balancing of interests strongly favors application of the statute.").

276. *See, e.g.*, Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431 (2d Cir. 1999) (rejecting the church defendant's Free Exercise defense in the context of a breach of fiduciary duties claim against a church for the priest's alleged sexual abuse of a child where "[t]he Diocese points to no disputed religious issue which the jury of the district judge in this case was asked to resolve").

277. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990). For a brief explanation of how the Supreme Court's decision in *Smith* changed the Court's Free Exercise jurisprudence, see *supra* Part II.B.1.

278. The *Smith* Court noted that although courts were not *required* to exempt religious institutions from neutral laws of general applicability, legislatures or courts *could* exempt religious institutions from burdens on their exercise of religion, provided that such accommodation did not result in an impermissible establishment of religion. Part II.B.1 of this Note describes in more detail how *Smith* transformed claims that were formerly required under the Free Exercise Clause into arguments for permissive accommodation of religious exercise.

279. *Compare* Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334-40 (1987) (holding that the amended statutory exemption of religious institutions from liability for religious discrimination under Title VII was not only permissible under the Establishment Clause, but also appropriate given the religious discrimination proscription's significant interference with churches' ability to carry out their religious missions by selecting leaders based on religious criteria), *with* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15

belief or practice for application of the ministerial exception, this model would help bring the exception in line with contemporary Free Exercise jurisprudence.

When this model is considered in conjunction with the Supreme Court's Establishment Clause jurisprudence, it is clear that it not only passes muster, but it also decreases the likelihood of a substantive Establishment Clause issue in Title VII claims against religious organizations. Clearly, Title VII has a secular purpose and has a primary effect that neither advances nor inhibits religion when applied to religious and non-religious employers alike.[280] Considering case law evaluating the constitutionality of the ministerial exception, the excessive entanglement provision is generally the only contentious element in the application of the *Lemon* test.[281] Courts making entanglement determinations have focused on two factors: first, whether a protracted relationship between church and state would inevitably result from adjudication, and second, whether the court must evaluate religious doctrine in adjudicating the claim.[282] Because courts adjudicate numerous potentially lengthy civil claims involving the church without implicating First Amendment concerns, the procedural entanglement argument that involving a religious organization in a protracted employment discrimination case constitutes an Establishment Clause violation is

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(1989) (holding that Texas' exemption of religious publications from the state sales tax was not a permissible accommodation of religion because "when government directs a subsidy to exclusively religious organizations that is not required by the Free Exercise Clause and . . . *cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion*," it conveys "a message of endorsement" in violation of the Establishment Clause (emphasis added)).

280. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (holding that an Establishment Clause violation may exist if a statute fails to satisfy the following criteria: (1) the statute must have a secular legislative purpose, (2) its primary effect should neither advance nor inhibit religion, and (3) the statute must not foster an excessive entanglement of church and state).

281. This Note evaluates the Establishment Clause issues raised by the author's proposed ministerial exception analysis by applying *Lemon* because, despite the fact that the Supreme Court has recently declined to commit to any one particular Establishment Clause test, the Establishment issues raised by the ministerial exception are most closely associated with the anti-entanglement prong of *Lemon*. *See, e.g.*, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948-50 (9th Cir. 1999) (evaluating the Establishment Clause issue raised by adjudication of Bollard's claim under the anti-entanglement prong of *Lemon*), *reh'g denied*, 211 F.3d 1331 (9th Cir. 2000). See *supra* Part II.B.1 for further discussion of the Supreme Court's contemporary Establishment Clause jurisprudence.

282. *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 465 (D.C. Cir. 1996) (asserting that courts "have found an unconstitutional entanglement with religion in situations where a 'protracted legal process pit[s] church and state as adversaries,' and where the Government is placed in a position of choosing among 'competing religious visions' ").

not especially strong.[283] The second factor in an entanglement analysis, whether a question of religious doctrine or practice would be implicated, is specifically addressed by the model this Note proposes.[284] Once the church defendant asserts a religious doctrine or belief that would be implicated in resolving the dispute, the ministerial exception would exempt the church's conduct from Title VII. If the religious organization cannot satisfy this burden, the court is not placed in the position of choosing among "competing religious visions," and no Establishment Clause violation results.[285] Courts have already applied this argument to sexual harassment cases to conclude that applying Title VII yields no Establishment Clause violation because "core religious beliefs are not at issue."[286] This same principle should be applied to all employment discrimination claims in which religious organizations cannot articulate a religious belief or practice that would be implicated by adjudication.[287]

Indeed, by requiring church defendants to come forth with a religious belief underlying their conduct, this model precludes the strong possibility of another Establishment Clause problem: favoring religious institutions over non-religious institutions involved in similar secular conduct.[288] By allowing religious institutions to violate Title VII without a doctrinal reason, courts elevate religious conduct over comparable non-religious conduct.[289] Applying the ministerial exception *without* requiring church conduct to be based

283. *See, e.g.*, Smith v. Privette, 495 S.E.2d 395, 397 (N.C. Ct. App. 1998) ("[C]laims against religious organizations have long been recognized for premises liability, breach of a fiduciary duty, and negligent use of motor vehicles." (citing Esbeck, *supra* note 6, at 76)).

284. Without ongoing interference with a religious organization's *religious* practices, no Establishment Clause issue arises. EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 286 (5th Cir. Unit A July 1981). Therefore, requiring religious organizations to articulate an affected religious practice comports with Establishment Clause jurisprudence. *Id.*

285. *Catholic Univ.*, 83 F.3d at 465 (holding that Establishment Clause violations depend on whether a court must choose between "competing religious visions").

286. Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 717 (E.D.N.C. 1999) ("While a court's intrusion upon a church's selection of a minister may be viewed as an Establishment Clause violation when a court effectively mandates the selection or forbids the discharge of a certain minister, the same cannot be said of the government's enforcement of its sexual harassment laws, a process in which core religious beliefs are not at issue.").

287. *See* Gildow, *supra* note 266, at 1577 (arguing that because the ministerial exception as currently formulated does not adequately distinguish between claims that implicate religious doctrine and those that require an entirely secular inquiry, a "case-by-case analysis" would more accurately delineate the constitutionally significant distinction between the two types of cases).

288. *See, e.g.*, Marshall & Blomgren, *supra* note 17, at 324 (noting that "[f]reeing religious organizations from regulation provides a relative benefit for religion over nonreligion, which may raise Establishment Clause concerns").

289. *Id.*

on religious belief clearly has a primary effect of advancing religion, contrary to *Lemon*.[290] For these reasons, a ministerial exception model focusing on whether religious institutions actually have a religious motivation for challenged employment decisions fits more appropriately with contemporary First Amendment jurisprudence than mere application of the primary duties of the plaintiff analysis.

VII. CONCLUSION

Since the inception of the ministerial exception, its application has broadened—from colloquially defined ministers to any religious employees who perform some type of religious function within the church.[291] Given the widespread acceptance of the "primary duties of the plaintiff" test,[292] the ministerial exception has the potential to expand to nearly all church employment disputes. Clearly, this was not the intent expressed by Congress in its balance between religious freedom and anti-discrimination interests in Title VII, [293] and is not required by the Constitution if religious doctrine is not implicated. Because religious institutions play an important role in shaping public attitudes and social mores, it is not in the public interest to condone non-religious discrimination by religious organizations if neither the First Amendment nor Title VII requires religious exemption.[294] The model suggested by this Note also furthers public policy by discouraging inconsistency from religious institutions that claim they do not condone or support discrimination against protected classes and subsequently attempt to hide behind the ministerial exception without contradicting their public proclamations.

The model advocated by this Note does not ask religious institutions to conform their policies to majoritarian views as ex-

290. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); *see also* Marshall & Blomgren, *supra* note 17, at 324-26.

291. *See supra* Part IV.B

292. *See supra* Part IV.A.

293. *See supra* Part II.C.; Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999) ("Insofar as race, sex, and national origin are concerned, the text of Title VII treats an employment dispute between a minister and his or her church like any other employment dispute."), *reh'g denied*, 211 F.3d 1331 (9th Cir. 2000).

294. *See* Whitney Ellenby, *Divinity vs. Discrimination: Curtailing the Divine Reach of Church Authority*, 26 GOLDEN GATE U. L. REV. 369, 407 (1996) (asserting that "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").

pressed in federal employment discrimination laws. Rather, it merely requires them to abide by their own moral dogma and policy statements and to admit when their employment decisions are not based in religious doctrine or practice and hence are undeserving of constitutional protection. As shown by the sexual harassment cases, blind application of the ministerial exception is not required in order to further the exception's underlying rationale or to give churches the opportunity to voice Free Exercise and Establishment Clause concerns. Rather, a two-step approach requiring religious institutions to show the plaintiff's claim would directly implicate a ministerial relationship *and* religious doctrine or practice will ensure the ministerial exception serves the constitutional interests it was intended to address, without condoning employment discrimination lacking religious justification.

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