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The Ministerial Exception and Disability Discrimination Claims

Renee M. Williams

INTRODUCTION

Disabled veteran Melanie Starkman once served as a church music director.1 During the course of her employment, she suffered from a range of medical conditions, including asthma, migraines, osteoarthritis in her knees, and endometriosis.2 However, instead of agreeing to modify Starkman’s work schedule so that she could recover from knee surgery, the church fired her.3 When she filed a lawsuit alleging discrimination on the basis of her disability, the district court denied her legal recourse.4 The Fifth Circuit rejected her claim on appeal.5 Neither court examined the merits of Starkman’s discrimination claim; instead, both courts invoked the so-called “ministerial exception.” The Fifth Circuit held that, because Starkman performed a ministerial role, judicial interference would infringe upon the free exercise of religion.6

Starkman’s case raises important questions concerning government power with respect to churches: to what extent can the courts intervene in church affairs to enforce our nation’s civil rights laws? Can the government penalize a church for conduct that would clearly run afoul of antidiscrimination laws in a secular workplace? Or would such a penalty violate the First Amendment? At first glance, there appears to be an irresolvable tension between the freedom of religion and the societal goal of ending discrimination in employment. Here, the ministerial ex-

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1 Starkman v Evans, 18 F Supp 2d 630, 631 (ED La 1998), affd 198 F3d 173 (5th Cir 1999).
2 Starkman, 18 F Supp 2d at 631.
3 Id.
4 Id at 635.
5 Id at 177.
6 Starkman, 198 F3d at 176–77.
ception—which essentially allows religious entities to discriminate against employees on the basis of religious affiliation and other characteristics—achieves an uneasy compromise. As a compromise, the ministerial exception has divided commentators, leading many of them to argue for a limited or substantially narrowed ministerial exception,⁷ or, on the other hand, to argue that the doctrine be more broadly applied to safeguard the freedom of religious employers.⁸ This Comment argues for a narrowed ministerial exception in the context of disability discrimination claims. While much has been written about the ministerial exception broadly applied,⁹ there appears to be a dearth of literature regarding the application of the ministerial exception to block disability claims in the context of employment discrimination. However, courts reviewing claims brought under the Americans with Disabilities Act (ADA)¹⁰ have adopted the same approach as they have to employment discrimination claims brought under Title VII of the Civil Rights Act of 1964 (Title VII).¹¹

Application of the ministerial exception to disability discrimination claims has essentially provided religious organizations carte blanche to discriminate against their employees, whose only recourse for such claims is found within courts that are overly deferential to the ministerial exception. This Comment

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⁷ See, for example, Jessica R. Vartanian, Note, Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception, 40 U. Toledo L. Rev. 1049, 1064–69 (2009). See also Caroline Mala Corbin, Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law, 75 Fordham L. Rev. 1965, 1972 (2007) ("[T]o the extent the ministerial exception has any constitutional basis, it would be a much more limited exemption than the one currently applied.").

⁸ See Todd Cole, The Ministerial Exception: Resolving the Conflict Between Title VII and the First Amendment, 4 Charleston L. Rev. 703, 737 (2010) (arguing that the definition of what constitutes a “minister” for the purposes of determining who should be subject to the ministerial exception should be expanded beyond only “members of the clergy” to include “all employees of a religious organization” whose primary role is religious teaching, participation in worship, or church administration).

⁹ See, for example, Corbin, 75 Fordham L. Rev at 1965 (cited in note 7).

¹⁰ Pub L No 101-336, 104 Stat 327 (1990), codified at 42 USC § 12101 et seq.


¹² See, for example, Starkman, 198 F3d at 175 (noting that “the ‘ministerial exception’ outlined in McClure [a case brought under Title VII] should be extended to the case now before us because, like the ADA . . . , Title VII is an anti-discrimination and anti-retaliation statute”). See also Laura L. Coon, Note, Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions, 54 Vand L Rev 481, 515–16 (2001) (observing that, “[d]espite the 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”).
will utilize the courts' analysis of the ministerial exception generally to propose a solution to one area of the ministerial exception that is more likely to attract wider consensus: disability status. Unlike other characteristics covered by antidiscrimination statutes, such as gender, disability does not play an integral role in church teachings or doctrine.

The caselaw and literature suggest that there is precedent for such an approach. As other commentators have noted, courts—despite the vitality of the ministerial exception among the circuits—have hesitated to apply the exception to sexual harassment claims. This has been interpreted as a signal that courts are at least willing to entertain a more narrow application of the ministerial exception. As one commentator has observed, "clergy sexual harassment claims are the one instance where lower courts have declined to apply the ministerial exemption" because "[i]mmunity from suits seems particularly inappropriate on entanglement grounds in any case where no religious reason is proffered" since an organization will likely not argue that its religion necessitates sexual harassment. In this Comment, I argue that discrimination against the disabled is equally unlikely to stem from religious beliefs.

This Comment proposes that a narrowing of the ministerial exception can be contemplated with respect to disability discrimination claims. In the alternative, this Comment will argue that disability claims brought under the ADA should be analyzed under a different framework than other discrimination claims brought under Title VII. Both proposed solutions attempt to reconcile the competing interests of antidiscrimination and religious freedom.

13 See Vartanian, Note, 40 U Toledo L Rev at 1064 (cited in note 7) ("[C]ourts' willingness to hear sexual-harassment suits may indicate a positive trend toward narrowing the ministerial exception's application."). See also Corbin, 75 Fordham L Rev at 1977 (cited in note 7) (observing that "[a] handful of lower courts have permitted sexual harassment claims by clergy notwithstanding the ministerial exception," and that "[t]o date, this remains the only exception to the broad sweep of the ministerial exemption").

14 See Vartanian, Note, 40 U Toledo L Rev at 1064 (cited in note 7).

15 Corbin, 75 Fordham L Rev at 2015 (cited in note 7).
I. THE EVOLUTION OF THE MINISTERIAL EXCEPTION DOCTRINE AND ITS APPLICATION IN THE COURTS

A. The “Ministerial Exception” and Employment Discrimination Generally: The Doctrinal Underpinnings of Title VII

When drafting Title VII, Congress was cognizant of the potential First Amendment problems in preventing religious organizations from discriminating on the basis of religious affiliation, and therefore made Title VII inapplicable to religious organizations “with respect to the employment of individuals of a particular religion.”

However, while allowing religious organizations to discriminate on the basis of an employee’s religious affiliation, Title VII “did not relieve religious employers from liability for employment discrimination in other protected categories.” Instead, courts provided an additional liability shield by crafting a “ministerial exception” doctrine. This doctrine stems from the courts’ concern that enforcement of antidiscrimination statutes within churches could threaten religious freedom. The Ninth Circuit observed that “[t]he Free Exercise and Establishment Clauses of the First Amendment compel [the ministerial] exception to the otherwise fully applicable commands of Title VII when the disputed employment practices involve a church’s freedom to choose its ministers or practice its beliefs.”

Some commentators have also suggested that, aside from the Free Exercise and Establishment Clause concerns, courts have also found it necessary to protect the so-called right to “freedom of expressive association.” Suppression of expressive association rights under the First Amendment can occur when the “state meddles with the internal structure of an association, such as by foisting an unwanted member upon the association.” At least one commentator argues that the relatively recent Supreme Court decision of Boy Scouts of America v Dale further strengthens this “associative expression” rationale, as the Dale...
analysis can be used to justify exclusion of certain individuals by religious organizations. However, no court has upheld the ministerial exception explicitly on these grounds.

Given these First Amendment concerns, the courts have found it necessary to widen the scope of Congress's ministerial exception. Courts have permitted religious organizations to discriminate on the basis of characteristics such as age and disability status in addition to discriminating on the basis of religion, as provided for by statute. In fact, courts have accepted the ministerial exception as a defense to a whole range of antidiscrimination statutes.


   a) The First Amendment. The ministerial exception has its basis in the First Amendment's guarantee of religious freedom. The First Amendment states, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Courts have offered both the Establishment Clause and the Free Exercise Clause as justifications for the ministerial exception. The Second Circuit has observed that the Constitution requires the application of this exception to Title VII, since "the presumptively appropriate remedy in a Title VII action is reinstatement, but it would surely be unconstitutional under the First Amendment to order the Catholic Church to reinstate . . . a priest whose employment the Church had terminated on account of his excommunication based on a violation of core Catholic doctrine."
b) Judicial expansion of the ministerial exception. Generally, courts cite *McClure v Salvation Army*\(^{28}\) as the case precipitating the judicial expansion beyond the statutory allowance of discrimination on the basis of religion.\(^{29}\) McClure, an employee of the Salvation Army, alleged that the Salvation Army had violated Title VII by compensating her with lower pay and fewer benefits than her male colleagues.\(^{30}\) Additionally, McClure claimed that the Salvation Army fired her in retaliation for complaining about this disparity.\(^{31}\) The Fifth Circuit held that the Salvation Army, while a church,\(^{32}\) still fell within the definition of an “employer” engaged in an ‘industry affecting commerce’ for the purposes of Title VII analysis.\(^{33}\) McClure noted that such “[o]rganizations affecting commerce may not escape the coverage of social legislation by showing that they were created for fraternal or religious purposes.”\(^{34}\) The Fifth Circuit even conceded that the “language and legislative history of [Title VII] compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with

\(^{28}\) 460 F2d 553 (5th Cir 1972).

\(^{29}\) See, for example, *Cote*, 520 F3d at 206 (stating that the Fifth Circuit in *McClure* was the first circuit court to adopt formally the ministerial exception). See also *Starkman*, 198 F3d at 175 (noting that *McClure* first utilized the ministerial exception regarding employment discrimination claims); *Gellington v Christian Methodist Episcopal Church*, 203 F3d 1299, 1301 (11th Cir 2000); *Elvig v Calvin Presbyterian Church*, 375 F3d 951, 975 (9th Cir 2004).

\(^{30}\) *McClure*, 460 F2d at 555.

\(^{31}\) Id.

\(^{32}\) The question of whether the Salvation Army constituted a “church” for the purposes of Title VII analysis posed an interesting question for the district court in *McClure*. As the lower court noted, “[t]he Salvation Army has always been known as a charitable body, but the question of its being a religion has rarely arisen.” *McClure v Salvation Army*, 323 F Supp 1100, 1104 (ND Ga 1971). While acknowledging that “the question of what is a religion as interpreted by the law has remained hazy throughout this country’s existence,” the lower court held that the Salvation Army is a “religion” despite its lack of “traditional houses of worship.” Id. To justify its position, the court quoted language from the Supreme Court of Georgia:

> The term ‘church’ is one of very comprehensive signification, and imports an organization for religious purposes, for the public worship of God. . . . The Salvation Army is a benevolent and religious institution. It is likewise a church on wheels. . . . So it preaches the gospel. It disseminates Christian truth. It is a church, a sect, and a religious institution.

Id at 1004–05, quoting *Bennett v City of LaGrange*, 112 SE 482, 485 (Ga 1922).

\(^{33}\) *McClure*, 460 F2d at 557.

\(^{34}\) Id.
respect to their compensation, terms, conditions or privileges of employment."\textsuperscript{35}

But despite broadly construing Title VII to include churches, the \textit{McClure} court also recognized the central role that so-called "ministers" play within a church:

The 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. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.\textsuperscript{36}

Given this view of the minister-church relationship, \textit{McClure} found that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister."\textsuperscript{37} Therefore, the Fifth Circuit found that subjecting the Salvation Army to Title VII restrictions in these circumstances "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."\textsuperscript{38}

To justify its holding, the \textit{McClure} court cited an earlier reluctance by the courts to interfere with church administration, even when it had secular consequences. For example, \textit{McClure} noted that the Supreme Court had previously expressed the view that

\begin{quote}
whenever the questions of discipline, or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such de-
\end{quote}

\textsuperscript{35} Id at 558.
\textsuperscript{36} Id at 558–59.
\textsuperscript{37} \textit{McClure}, 460 F2d at 560–61.
\textsuperscript{38} Id at 560.
cisions as final, and as binding on them, in their application to the case before them.\textsuperscript{39}

\textit{McClure} also cited the Supreme Court’s reasoning in \textit{Gonzalez v Roman Catholic Archbishop of Manila.}\textsuperscript{40} The Gonzalez case, which involved a controversy over an appointment to a church position, resulted in the Court taking a decidedly hands-off approach with respect to involvement in ecclesiastical matters, even when a plaintiff’s civil rights were affected:

Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, \textit{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.\textsuperscript{41}

The \textit{McClure} court noted that these cases, along with other precedents, all contain “a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”\textsuperscript{42} It is on this doctrinal foundation that other circuits have built the current framework regarding the ministerial exception. The difficult question for courts has been whether “a particular employee is functionally a ‘minister.’”\textsuperscript{43}

B. Post-\textit{McClure} Application of the Ministerial Exception

1. The Second Circuit: \textit{Ticali, Cote,} and \textit{Redhead.}

Before the formal adoption of the ministerial exception, lower courts within the Second Circuit acknowledged that there were instances in which Title VII does not apply to the ministerial-religious organization relationship, even when the discrimination

\textsuperscript{39} Id at 559, quoting \textit{Watson v Jones}, 80 US 679, 727 (1871).
\textsuperscript{40} See \textit{McClure}, 460 F2d at 559, citing \textit{Gonzalez}, 280 US 1 (1929).
\textsuperscript{41} Id at 16 (emphasis added).
\textsuperscript{42} \textit{McClure}, 460 F2d at 560, quoting \textit{Kedroff v St Nicholas Cathedral}, 344 US 94, 116 (1952).
\textsuperscript{43} \textit{Cote}, 520 F3d at 208.
is not based on religion. However, the district court in Ticali v Roman Catholic Diocese also acknowledged that Title VII bars “discrimination on non-religious grounds by religious organizations toward their non-minister employees.” The Ticali opinion demonstrates the competing interests at play here—religious freedom, on the one hand, and a respect for antidiscrimination laws in the other. In a sense, the Ticali court split the difference. The district court reasoned that “[t]he key inquiry for a court seeking to apply Title VII to such an employment relationship is whether the position involved has any religious significance.” Therefore, if the position contains “religious significance,” then the extension of Title VII into this employment relationship is “constitutionally suspect, if not forbidden.” The court held that a teacher of religious education at a parochial school was a position with religious significance and therefore Title VII could not be used to assert a claim of discrimination on religious grounds. In adopting this stance, the court here arguably went beyond the requirements of McClure, by stating that, “[d]espite the fact that Ticali is a non-minister, her role as a teacher in the school may be said to have religious significance, which deprives this Court of jurisdiction over her Title VII claim to the extent that it alleges religious discrimination.” Despite expanding the class of employees against which the church could discriminate on the basis of religion, the Ticali court reviewed her Title VII claims regarding discrimination based on race and national origin. This occurred before the formal adoption of the ministerial exception in the Second Circuit.

The Second Circuit itself confirmed the existence of the ministerial exception only recently in Rweyemamu v Cote, in which the Circuit barred the examination of a priest’s racial discrimination claim under Title VII. In Cote, the court went as far as to affirm its “vitality” within the Circuit, as the exception is “constitutionally required by various doctrinal underpinnings of the

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44 Ticali v Roman Catholic Diocese, 41 F Supp 2d 249, 259 (EDNY 1999), affd, 201 F3d 432 (2d Cir 1999).
45 41 F Supp 2d 249.
46 Ticali, 41 F Supp at 259.
47 Id (emphasis added).
48 Id.
49 Id at 260.
50 Ticali, 41 F Supp at 260 (emphasis added).
51 Id at 260.
52 520 F3d 98 (2d Cir 2008).
53 Id at 209.
First Amendment.”54 Cote took the position that “[t]he more ‘pervasively religious’ the relationship between an employee and his employer, the more salient the free exercise concern becomes.”55 However, “[a]t the same time, however high in the church hierarchy [an employee] may be, a plaintiff alleging particular wrongs by the church that are wholly non-religious in character is surely not forbidden his [or her] day in court.”56 In essence, the Second Circuit appears to adopt a sliding scale that examines both the specific job description of the employee and the “nature of the dispute.”57 Despite this arguably more exhaustive inquiry, the Circuit clearly stated that it would “not subject to examination the genuineness of a proffered religious reason for an employment action,” even if the suit were brought by a lay employee.58 But the Second Circuit previously held that while the asserted religious values or beliefs would not be assessed for validity, courts could still inquire as to the reasons offered by churches for instances of alleged discrimination.59

Building upon the Cote framework, a lower court found in Redhead v Conference of Seventh-day Adventists60 that the ministerial exception will not apply if a plaintiff can demonstrate that his or her duties were “primarily secular,” and that the nature of the dispute is not such that “its resolution inevitably will run afoul of the Establishment Clause by impermissibly entangling the court in matters of religious doctrine.”61 Redhead concluded that excessive government entanglement occurs when “a secular court is asked to second-guess a religious organization’s decision to terminate a member of its clergy.”62 However, disputes in which a court can make a decision “without having to question the validity or plausibility of a religious belief, or having to favor a certain interpretation of religious doctrine, do not pose

54 Id at 207.
56 Cote, 520 F3d at 208.
57 Id.
58 Id at 207.
59 See Demarco v Holy Cross High School, 4 F3d 166, 171 (2d Cir 1993) (‘[A] plaintiff will usually be able to challenge as pretextual the employer’s justification without calling into question the value or truthfulness of the religious doctrine.”).
60 566 F Supp 2d 125 (EDNY 2008).
61 Id at 132.
62 Id at 133.
a similar risk." While consistent with the sliding scale approach adopted in *Cote*, this approach demonstrates that the Second Circuit is willing to apply Title VII to a church when doing so would not require a court to question the church's beliefs or values.

Applying the above test, the *Redhead* court allowed a former teacher at a Seventh-day Adventist school to sue for wrongful termination based upon her out-of-wedlock pregnancy, as the court found that the teacher had a primarily secular function and that allowing the claim would not entangle the government in religious affairs. However, as the teacher's function was found to be secular and not ministerial, *Redhead* 's outcome does little damage to the ministerial exception itself. Such a case does, however, illustrate that the examination of personnel decisions within religious organizations does not require an excessive intrusion into the ecclesiastical sphere.

2. The Ninth Circuit: *Bollard, Elvig*, and the application of the doctrine to sexual harassment claims.

Like the Second Circuit, the Ninth Circuit applies a similar—though not identical—line of analysis to determine if allowing a Title VII claim would impermissibly interfere with religious freedom. In *Bollard v California Province of the Society of Jesus*, the Ninth Circuit first addressed the contours of the ministerial exception doctrine in a sexual harassment claim brought by a man training to be a priest against his Jesuit order. The Ninth Circuit noted that "courts have uniformly concluded that [the religion 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." The *Bollard* court examined the claim by pursuing two lines of analysis: a Free Exercise Clause rationale and an Establishment Clause rationale. With regard to the Free Exercise Clause, the court noted that certain religious interests are so strong that "no compelling state interest justifies government intrusion into

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63 Id.
64 See id at 132.
65 196 F3d 940 (9th Cir 1999).
66 Id at 944.
67 Id at 945.
the ecclesiastical sphere.\textsuperscript{68} The court recognized that "the ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions."\textsuperscript{69} Despite this recognition by the court, the Ninth Circuit found that, because the priest alleged sexual harassment in \textit{Bollard}, any Free Exercise rationale for assertion of the ministerial exception was missing.\textsuperscript{70} The court observed that the defendant Jesuit order did not "offer a religious justification for the harassment Bollard allege[d]" and instead "condemn[ed] it as inconsistent with their values and beliefs."\textsuperscript{71} Since the sexual harassment at issue lacked a religious doctrinal basis, the court concluded that there was "no danger that, by allowing this suit to proceed, [the court would] thrust the secular courts into the constitutionally untenable position of passing judgment on questions of religious faith or doctrine."\textsuperscript{72}

The condemnation of sexual harassment by the Jesuits allayed the court's fears that applying Title VII would have a "significant impact on their religious beliefs or doctrines."\textsuperscript{73} In short, because the Jesuits averred that sexual harassment had no legitimate doctrinal basis in church teaching or doctrine, allowing the sexual harassment inquiry to proceed would not detrimentally impact the Jesuits' ability to exercise their faith freely. The court emphasized that, aside from determining whether to intervene and stop the harassment, there was no employment decision here such that allowing an employment discrimination claim to proceed would interfere with a church's ability to select its own clergy.\textsuperscript{74} \textit{Bollard} explained that a "generalized and diffuse concern for church autonomy, without more, does not exempt [churches] from the operation of secular laws."\textsuperscript{75} Ultimately, the court found that allowing the sexual harassment claim to go forward would not violate the Free Exercise Clause protections afforded to religious organizations.\textsuperscript{76}

\textsuperscript{68} Id at 946.
\textsuperscript{69} \textit{Bollard}, 196 F3d at 946.
\textsuperscript{70} Id at 947.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} \textit{Bollard}, 196 F3d at 947.
\textsuperscript{74} Id.
\textsuperscript{75} Id at 948.
\textsuperscript{76} Id. See also Belcove-Shalin, 2 Nev L J at 104 (cited in note 17) (noting that, "[a]fter carefully navigating through this constitutional minefield, the \textit{Bollard} court felt satisfied that granting jurisdiction to the plaintiff would not deprive the church of the protection
Additionally, Bollard examined the claim by conducting an Establishment Clause inquiry to determine if allowing a Title VII claim to proceed “would foster an impermissible government entanglement with religion.” The court was most concerned with a scenario in which the application of Title VII would result in prolonged monitoring of church activities by the government. The Circuit concluded that, again, due to the nature of the lawsuit, any inquiry into the merits of the Title VII claim would not necessarily result in “a wide-ranging intrusion into sensitive religious matters.” Ultimately, Bollard concluded that allowing the sexual harassment claim to proceed against the Jesuit order would not result in an Establishment Clause violation, citing both the “limited nature of the inquiry” as well as the “ability of the district court to control discovery.”

Distinguishing Bollard, the Ninth Circuit more recently appeared to take a different approach with respect to Title VII sexual harassment claims by an ordained minister. In the 2004 case Elvig v Calvin Presbyterian Church, the Ninth Circuit used the fact that Elvig was fired from his parish to distinguish this scenario from Bollard, in which the plaintiff was not terminated. Elvig’s firing, the court reasoned, gave rise to claims that “in certain respects very much involve the Church’s decision-making about who shall be a minister of the Church—a decision clearly within the scope of the ministerial exception.” While conceding that the sexual harassment claim itself would have been a secular inquiry as in Bollard, Elvig held that “the Church may nonetheless invoke First Amendment protection from Title VII liability if it claims that her subjection to or the Church’s toleration of sexual harassment was doctrinal.”

The Ninth Circuit added that it will not “scrutinize doctrinal justifications” since it is not the court’s role to find whether the plaintiff’s mistreatment was for secular or religious reasons.

afforded by the § 702 religious employer exemption”).
77 Bollard, 196 F3d at 948.
78 Id.
79 Id at 950.
80 Id.
81 See Elvig v Calvin Presbyterian Church, 375 F3d 951, 958 (9th Cir 2004).
82 375 F3d 951.
83 Elvig, 375 F3d at 958.
84 Id.
85 Id at 959.
86 Id, quoting Alicea-Hernandez v Catholic Bishop of Chicago, 320 F3d 698, 703 (7th Cir 2003).
Unlike the Second Circuit’s willingness to at least inquire into the reasons offered for a church employee’s termination, the Elvig court felt “proving that a church’s asserted justification for a protected employment decision was pretextual would come to nothing” because of a church’s sweeping discretion in its employment decisions.\(^87\) Interestingly, the court left the door open for some of Elvig’s sexual harassment claims for essentially two reasons: (1) demonstrating that she was harassed in itself was a secular inquiry; and (2) the church did not claim that sexual harassment had a religious justification.\(^88\)

3. The Tenth and Seventh Circuits.

The Tenth Circuit has held that the ministerial exception preserves a church’s “essential’ right to choose the people who will ‘preach its values, teach its message, and interpret its doctrines[,] both to its own membership and to the world at large,’ free from the interference of civil employment laws.”\(^89\) Whether employees are governed by the ministerial exception depends upon whether a given position is “‘important to the spiritual and pastoral mission of the church.’”\(^90\)

The Tenth Circuit adopted the Fourth Circuit’s view that Title VII may apply to church employment decisions if they do not implicate the church’s “spiritual functions.”\(^91\) This largely reflects the Second and Ninth Circuit view that the inquiry into a claim of employment discrimination cannot entangle the government in the evaluation of an ecclesiastical doctrine’s validity. However, the Tenth Circuit has refused to adopt the Ninth Circuit’s view that “a hostile work environment claim brought by a minister does not implicate a church’s spiritual functions.”\(^92\) The Tenth Circuit believes that allowing such claims to go forward would infringe upon church autonomy by “influencing it to employ ministers that lower its exposure to liability” rather than the best

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\(^{87}\) Elvig, 375 F3d at 961.

\(^{88}\) Id at 958–64.

\(^{89}\) Skrzypczak v Roman Catholic Diocese of Tulsa, 611 F3d 1238, 1243 (10th Cir 2010) (addition in original), quoting Bryce v Episcopal Church in the Diocese of Colorado, 289 F3d 648, 656 (10th Cir 2002).

\(^{90}\) Skrzypczak, 611 F3d at 1243, quoting Rayburn v General Conference of Seventh-Day Adventists, 772 F2d 1164, 1169 (4th Cir 1985).

\(^{91}\) Skrzypczak, 611 F3d at 1245, citing Bryce, 289 F3d at 657.

\(^{92}\) Skrzypczak, 611 F3d at 1245 (distinguishing the Tenth Circuit’s position from that of Werth v Desert Southwest Annual Conference, 377 F3d 1099 (9th Cir 2004)).
spiritually-suited people to fill the role. In this sense, the Tenth Circuit advocates a more broadly-applied ministerial exception.

Instead of employing the Ninth Circuit’s test regarding the application of the ministerial exception, the Tenth Circuit decided to follow the Seventh Circuit’s approach. In Skrzypczak v Roman Catholic Diocese of Tulsa, the Tenth Circuit endorsed the position that “the ministerial exception applies without regard to the type of claims being brought.” The Seventh Circuit (and subsequently the Tenth in its adoption of the Alicea-Hernandez v Catholic Bishop of Chicago reasoning) felt that the inquiry pursued by the Second and Ninth Circuits was too analytically messy, as it would subject the courts to “endless inquiries as to whether each discriminatory act was based in Church doctrine or simply secular animus.” Instead, the inquiry asks whether the plaintiff is acting as a minister for Title VII purposes; if so, the ministerial exception applies.

The Tenth Circuit applies the exception whether or not the alleged discrimination was related to any sort of ecclesiastical decision. While this approach has the attractiveness of not entangling the court in parsing out religious motivations or doctrine, it also leaves ministers, however defined, subject to conduct such as severe sexual harassment akin to what was seen in Elvig.

One lower court in the Tenth Circuit adopted the Ninth Circuit’s analysis. In Dolquist v Heartland Presbytery, the court cited Bollard and Elvig in holding that the First Amendment does not bar lawsuits for sexual harassment. In addition to citing these cases, Dolquist noted that at least two state courts have adopted similar logic regarding sexual harassment claims. In one of those cases, the New Jersey Supreme Court allowed a sexual harassment claim to proceed because such a claim would not offend the First Amendment, since “[o]bviously,

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93 Skrzypczak, 611 F3d at 1245, quoting Elvig v Calvin Presbyterian Church, 397 F3d 790, 803–04 (9th Cir 2005) (order denying petition for rehearing) (Kleinfeld dissenting).
94 611 F3d at 1238.
95 Id at 1245, quoting Alicea-Hernandez v Catholic Bishop of Chicago, 320 F3d 698 (7th Cir 2003).
97 Skrzypczak, 611 F3d at 1245, quoting Alicea-Hernandez, 320 F3d at 703.
98 See Skrzypczak, 611 F3d at 1245–46.
99 Id.
100 342 F Supp 2d 996 (D Kan 2004).
101 Id at 1007.
102 Id at 1006.
sexual harassment is not doctrinally based, a protected choice, or inherent in church administration.”

Dolquist reasoned that issues involved within a sexual harassment case do not implicate a religious organization’s decision to “select clergy or decide matters of church government, faith and doctrine.”

C. Disability Discrimination and the Ministerial Exception

1. The ADA’s Ministerial Exception.

With this sense of how the general ministerial exception has evolved in the courts, it is now appropriate to discuss how the law has treated disability discrimination claims brought by ministerial employees. The ADA forbids any “covered entity” from discriminating “against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” It prohibits employers from, among other things: refusing to make reasonable accommodations for disabled employees, denying employment to otherwise qualified employees because of a disability, utilizing “qualification standards, employment tests or other selection criteria that screen out or tend to screen out” the disabled unless such standards are both job-related and “consistent with business necessity.”

While there is no explicit ministerial exception within the statute itself, the Code of Federal Regulations (CFR) attempts to describe the application of the ADA to religious organizations. Acknowledging the ministerial exception generally, the CFR states that religious organizations are not only permitted to prefer members of a given religion, but may also require employees to abide by the organization’s religious tenets. Despite this, the CFR clearly prohibits discrimination “against a qualified individual, who satisfies the permitted religious criteria, because of his or her disa-

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103 McKelvey v Pierce, 800 A2d 840, 858 (NJ 2002) (discussing a claim under state law, but noting the Bollard rationale).
104 Dolquist, 342 F Supp 2d at 1006, quoting Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church in North America, 344 US 94, 116 (1952).
105 42 USCA § 12112(a) et seq.
106 42 USCA § 12112(b)(5)(A) (noting an exception for “undue hardship” to the employer).
107 Id at § 12112(b)(5)(B).
108 Id at § 12112(b)(6).
109 See 29 CFR § 1630.16(a).
110 Id.
bility."\textsuperscript{111} However, what constitutes the "permitted religious criteria" is the real question, and, by extension, whether religious organizations can discriminate on the basis of disabilities unrelated to job performance.

2. Application of Title VII doctrine to bar ADA claims.

A good place to begin examining how the courts have handled disability claims is \textit{Starkman v Evans},\textsuperscript{112} the case described in the Introduction. While the district court observed that allowing for litigation on the merits would not violate the Establishment Clause, it found that the Free Exercise Clause nevertheless barred Starkman's claim.\textsuperscript{113} As noted earlier, the analysis here mirrors that found within Title VII ministerial exception cases, as the court relied heavily upon cases such as \textit{McClure, EEOC v Southwestern Baptist},\textsuperscript{114} and \textit{EEOC v Mississippi College}.\textsuperscript{115} The court found that Starkman, as a choir director: (1) held a position in which employment decisions were based substantially on religious criteria, (2) engaged in religious and spiritual ritual as part of her job, and (3) participated in activities that are traditionally religious in nature.\textsuperscript{116} Therefore, the court held, her employment fell squarely within the Fifth Circuit's ministerial exception first articulated in \textit{McClure}, even though she brought her employment claim under the ADA, not Title VII.\textsuperscript{117} On appeal, the Fifth Circuit affirmed, noting that, "[w]hile religious institutions are generally bound by the ADA and other employment discrimination laws, (e.g. a church secretary or janitor may advance an ADA claim if he or she is discharged because of a disability), the facts of this case trigger the Free Exercise Clause's bar against such claims" because of Starkman's "minister" status.\textsuperscript{118}

\begin{table}
\begin{tabular}{ll}
\textsuperscript{111} Id. \\
\textsuperscript{112} \textit{Starkman}, 18 F Supp 2d at 631. \\
\textsuperscript{113} Id at 632. \\
\textsuperscript{114} 651 F2d 277, 286–87 (5th Cir 1981) (holding that "an exemption for the Seminary's support staff and other non-ministers is not constitutionally compelled" partially because the Seminary "does not hold any religious tenet that requires discrimination on the basis of sex, race, color, or national origin"). \\
\textsuperscript{115} 626 F2d 477, 488 (5th Cir 1980) (holding that ministerial exception to Title VII did not prevent a psychology professor from bringing a sex discrimination claim against a religiously-affiliated college because the college's employment practices did not "embody religious beliefs or practices"). \\
\textsuperscript{116} \textit{Starkman}, 18 F Supp 2d at 633–35. \\
\textsuperscript{117} Id at 335. \\
\textsuperscript{118} \textit{Starkman v Evans}, 198 F3d 173, 177 (5th Cir 1999).
\end{tabular}
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Other courts have also used the Free Exercise Clause to bar claims under the ADA. The Sixth Circuit affirmed that a resident in a Methodist-affiliated clinical pastoral education program (essentially, a program training residents to minister to the sick) could not bring a claim under the ADA for dismissal based upon the results of a psychiatric evaluation administered to the resident.\textsuperscript{119}

Additionally, and perhaps most importantly for the purposes of this Comment, the Ninth Circuit held in \textit{Werft v Desert Southwest Annual Conference}\textsuperscript{120} that the ministerial exception does not apply solely to hiring or firing decisions, but also to any matters related to a minister's relationship with the church such as whether the church is willing to provide a reasonable accommodation.\textsuperscript{121} \textit{Werft} involved a pastor who suffered from attention deficit disorder, dyslexia, and "certain heart problems" who sought "minor accommodations" in order to perform his duties.\textsuperscript{122} Instead, the church refused his requests and demanded the pastor's resignation.\textsuperscript{123} The \textit{Werft} court distinguished that case from \textit{Bollard} by stating that the sexual harassment seen in \textit{Bollard} was not part of the minister's relationship with the church, whereas the failure to accommodate a disability was a decision regarding the minister's employment relationship with the church.\textsuperscript{124} The disability claim in \textit{Werft}, the Ninth Circuit reasoned, was "more similar to the pre-\textit{Bollard} Title VII cases, where claims were disallowed because they would require a civil court to inquire into religious justifications for personnel decisions, than the Title VII sexual harassment claim at issue in \textit{Bollard}."\textsuperscript{125} Therefore, the court concluded that, if this lawsuit were allowed to move forward, the Church "would necessarily be required to provide a religious justification for its failure to accommodate," which is impermissible under the First Amendment.\textsuperscript{126}

\textsuperscript{120} 377 F3d 1099 (9th Cir 2004).
\textsuperscript{121} Id at 1103.
\textsuperscript{122} Id at 1100.
\textsuperscript{123} Id.
\textsuperscript{124} \textit{Werft}, 377 F3d at 1103.
\textsuperscript{125} Id at 1101–02.
\textsuperscript{126} Id at 1103.
3. Examples of the ministerial exception failing to bar ADA claims.

Despite the seemingly broad expanse of the ministerial exception with respect to disability claims—particularly given the approach adopted by the Werft court—there are cases in which courts have refused to recognize the exception as a bar to ADA litigation. However, these cases have been decided on the grounds that the role undertaken by the employee does not fall within the definition of "minister." For example, one federal district court has found that a theology teacher at a Jesuit high school could pursue an ADA claim against his employer after he was dismissed for reasons relating to his performance as a teacher generally, which is distinct from the theological material he taught.\(^\text{127}\) In Longo v Regis Jesuit High,\(^\text{128}\) John Longo, therefore, did not meet the definition of a "minister" under those circumstances.\(^\text{129}\) The Sixth Circuit, in EEOC v Hosanna-Tabor Evangelical Lutheran Church and School,\(^\text{130}\) citing Redhead, also held that parochial school teachers who teach primarily secular subjects are not "ministers" for the purposes of the exception.\(^\text{131}\) Given the uncertainty surrounding the definition of what constitutes a "minister" for purposes of Title VII analysis, these holdings offer insufficient protection for disabled church employees.

II. TWO METHODS FOR ANALYZING DISABILITY DISCRIMINATION CLAIMS WITHIN A MINISTERIAL EXCEPTION CONTEXT

This Comment argues that the courts' current application of the ministerial exception with respect to claims made under the ADA exceed what is necessary to protect religious liberty concerns. The following subsections propose two solutions that would narrow the scope of the ministerial exception with respect to ADA claims. These solutions generally fall within two broader approaches. The first solution utilizes analysis that has already been proffered by certain courts in an attempt to narrow the ministerial exception as applied to Title VII. In the alternative, a second solution argues that the ADA is sufficiently distinct from


\(^{128}\) 2006 WL 197336.

\(^{129}\) Id at *6.

\(^{130}\) 597 F3d 769 (6th Cir 2010), cert granted 131 S Ct 1783 (2011).

\(^{131}\) Id.
Title VII such that courts should narrow the ministerial exception to a much greater extent than it has under Title VII.

A. Courts Should Adopt the Ninth’s Circuit’s Logic in Bollard and Apply it to ADA Claims by Taking a Categorical Approach to Disability Discrimination Cases

1. The categorical approach: building on an existing framework.

*Bollard* refused to find a Free Exercise rationale for applying the ministerial exception to Title VII for the instant sexual harassment claim.\(^\text{132}\) In *Bollard*, the Jesuits condemned the sexual harassment at issue under a Title VII claim as not being representative of their values or beliefs.\(^\text{133}\) Therefore, the *Bollard* court concluded there would be no danger of “thrust[ing]” the secular courts into the constitutionally untenable position of passing judgment on questions of religious faith or doctrine.\(^\text{134}\) *Bollard* also made it clear that extending the ministerial exception to bar a Title VII claim in this context would “stray[ ] too far from the rationale of the Free Exercise Clause.”\(^\text{135}\) Additionally, *Bollard*, again seizing on the fact that the Jesuits disavowed sexual harassment as part of their doctrine, found that there was a very low chance of excessive government entanglement in church affairs or decision-making.\(^\text{136}\) Instead, allowing the matter to be heard by a jury would involve a secular inquiry into whether the employer took steps to prevent the harassment, as well as the extent of the harassment itself.\(^\text{137}\) As noted in the previous section, lower courts outside of the Ninth Circuit—such as the district court in *Dolquist*—have also adopted this approach to sexual harassment claims on the grounds that sexual harassment cannot be justified by church doctrine.\(^\text{138}\)

This Comment argues that courts, when entertaining disability discrimination claims under the ADA, should adopt a category-based or so-called “categorical approach.” This approach would work to substantially narrow the ministerial exception. To accomplish this, courts should apply the same logic to the catego-

\(^{132}\) *Bollard*, 196 F3d at 948.

\(^{133}\) Id.

\(^{134}\) Id at 947.

\(^{135}\) Id.

\(^{136}\) *Bollard*, 196 F3d at 950.

\(^{137}\) See id.

\(^{138}\) See *Dolquist*, 342 F Supp 2d at 1004.
ry of disability discrimination claims that courts—most notably in Bollard—have seemingly applied to sexual harassment claims. Bollard indicates that not all categories of claims would be treated with the same degree of deference to the ministerial exception.\textsuperscript{139} Therefore, the courts should harness the Bollard reasoning—a lack of doctrinal basis for the discrimination—and apply it to ADA claims. Disability discrimination claims, like sexual harassment claims, are far enough outside the scope of the church-minister relationship that these claims should be considered to be a second carved-out exception to the broader application of the ministerial exception. As discussed in more detail below, this framework builds upon an approach already taken in the literature\textsuperscript{140} but stops short of applying this framework to all employment discrimination claims.

As decisions such as Bollard, Dolquist, and McKelvey v Pierce\textsuperscript{141} point out, allowing such claims to proceed does not intrude upon religious autonomy or a court's evaluation of the merits of a given religious doctrine. Instead, the court's inquiry would not involve a greater intrusion on religious autonomy than another other type of civil lawsuit (tort claims, etc) against a church.\textsuperscript{142}

In Elvig, even while upholding the ministerial exception with respect to a church's dismissal of the employee,\textsuperscript{143} the Ninth Circuit explained that, if the church had argued that sexual harassment was part of its doctrinal structure, the ministerial exception would be permitted.\textsuperscript{144} Therefore, courts should require the organization seeking dismissal of a disability discrimination claim on ministerial exception grounds to argue that the alleged discrimination is in fact part of church teaching; this approach

\textsuperscript{139} See Vartanian, Note, 40 U Toledo L Rev at 1064 (cited in note 7).
\textsuperscript{141} 800 A2d 840 (NJ 2002).
\textsuperscript{142} Bollard, 196 F3d at 950. The question of general church civil liability in a broader context of First Amendment protections has long troubled the courts. See, for example, Cassandra Butler, Comment, Church Tort Liability in Spite of First Amendment Protection, 12 S U L Rev 37 (1986). However, churches are not immune from imposition of tort liability, for example, on First Amendment grounds. See, for example, Malicki v Doe, 814 S2d 347 (Fla 2002) (noting that, even though the lawsuit may impact religious practice incidentally, "the parishioners' cause of action for negligent hiring and supervision is not barred because it is based on neutral applications of tort law"), citing Church of the Lukumi Babalu Aye v City of Hialeah, 508 US 520, 531 (1993). Bollard also seems to imply that any lawsuit will have some sort of incidental impact on church functioning. However, such incidental impact need not bar the progress of the lawsuit. Bollard, 196 F3d at 950.
\textsuperscript{143} Elvig, 375 F3d at 969.
\textsuperscript{144} Id at 969.
has been already advocated by one commentator, who argues in favor of requiring that the sued religious employer assert a doctrinal basis in order to invoke the ministerial exception. However, the commentator advocating this approach wishes to apply it to “all employment discrimination claims in which religious organizations cannot articulate a religious belief or practice that would be implicated by the adjudication.”

Instead, this Comment argues that such a framework should not be applied to all claims of employment discrimination involving ministers. Additionally, this Comment proposes that courts should examine employment discrimination claims in different categories and that courts should not use the ministerial exception when considering the disability discrimination claim category. Blanket application to all employment discrimination claims would expose churches to unconstitutional government intrusion and restrict the free exercise of religion. Instead, carving out categories that rarely implicate religious beliefs is not only more attuned to religious freedom concerns, but also presents a more realistic option for courts to implement. The ministerial exception enjoys at least some degree of vitality within the majority of circuits. Courts would likely mount considerable resistance to the application of this approach to all types of employment discrimination claims. Therefore, it is important to reiterate that this solution only applies to disability discrimination claims. Simply put, courts are more likely to narrow the ministerial exception case by case or category by category than to rethink the entire doctrine. However, the proposed approach would increase the likelihood that courts would carve out another category in which the ministerial exception is not applied as vigorously. The

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145 Coon, Note, 54 Vand L Rev at 540-41 (cited in note 12). The Note outlined a test in which "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." The commentator illustrated,

"[I]f 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 substantially assert itself into a determination of which types of beliefs or practices could constitute a doctrinal motivation for the employment action at issue."

146 Id at 544.

147 See Cole, 4 Charleston L Rev at 707 (noting that, "[i]n the last three decades, every circuit except the Federal Circuit has adopted the ministerial exception in some form") (cited in note 8).
proffered approach narrows the overall scope of the ministerial exception slightly and more gradually.

The proposed test advocated in this Comment requires that, when an ADA claim comes before the court, the presumption is that disability discrimination is not included within the organization's religious doctrine. To invoke the ministerial exception, the organization must then simply assert that the discrimination has a religious basis. This framework does not require that courts delve into any sort of religious inquiry; it simply asks the church to assert whether this form of discrimination is in fact part of the accepted religious tenets of the religious organization if the organization wishes to assert the ministerial exception. As pleadings are public, many religious organizations would be deterred from making such an argument if for no other reason than public embarrassment, assuming that the discrimination is not known by the public to constitute a part of church doctrine. Such a solution would have the practical effect of reducing the expansion of the ministerial exception into the realm of disability discrimination claims, allowing such claims to be addressed on the merits. It would also have the added benefit of saving courts the administrative costs (at least with respect to disability discrimination claims) of determining whether a given job is "ministerial" in nature, which can be a factually-intensive, difficult inquiry. This solution strikes the balance of protecting the interests of the employees of religious organizations while at the same time respecting the free exercise rights of any religious organization that wishes to discriminate against the disabled.

Critics of this solution will most assuredly point to the Ninth Circuit's failure to extend Bollard to accommodate the ADA claim made in Werft. This Comment argues that the Ninth Circuit incorrectly applied the Bollard standard within the disability context and should view ADA claims within the context of the categorical approach. Werft refused to extend Bollard because allowing a disability discrimination claim to proceed would force a religious organization to present a religious justification for its employment decisions, and the Ninth Circuit worried that this would offend the First Amendment. However, the solution proposed here does not do this. Instead, this solution simply re-

148 See id at 540.
149 Id.
151 See id at 541.
152 See Werft, 377 F3d at 1103–04.
quires that the religious organization affirmatively assert that the alleged disability discrimination is in fact a part of church teaching. It does not require a "religious justification," per se, but a mere acknowledgement by the defendant that disability discrimination is in fact a part of church doctrine. Such a solution would not require that a religious organization defend its decision by referencing specific tenets or doctrine, which appears to be at the heart of the First Amendment justification for the ministerial exception.

It is also worth noting that the failure to extend Bollard appears internally inconsistent. Werft distinguishes Bollard by stating that sexual harassment goes far beyond the church-minister relationship, while the decision whether or not to accommodate a disability lies within that relationship. To demonstrate this, Werft quotes language arguing that the "broader relationship" between a church and its ministers to which the ministerial exception applies includes "[m]atters touching this relationship." It is difficult to understand why a religious order regarding sexual harassment within its ranks also "touches" that relationship, particularly given Werft's broad reading of that relationship. Therefore, it seems that the Ninth Circuit is unsure of what the appropriate boundaries are with respect to what is within and what is beyond the scope of the church-minister relationship. The proposed solution in this Comment approaches this question from a different angle—not by attempting to define the exact contours of the church-minister relationship, but by instead ensuring that judicial review of alleged employment discrimination by a church does not devolve into courts assessing the validity of church doctrine.

2. This solution extends the reasoning existing within current Second Circuit case law.

The proffered approach goes beyond the "nature of the claim" prong adopted by the Second Circuit initially in Cote. Some commentators advocate the adoption of the "nature of the claim" test by all circuits. In Cote, the Second Circuit analyzed the case by looking at the specific facts of the case, but refused to examine the genuineness of the church's reasons for dismissing a

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154 Werft, 377 F3d at 1103, quoting McClure, 460 F2d at 559.
155 See, for example, Vartanian, Note, 40 U Toledo L Rev at 1069–74 (cited in note 7).
priest. In *Redhead*, this approach was interpreted by a lower court to require a determination of "whether the nature of the dispute in this case is such that its resolution inevitably will run afoul of the Establishment Clause." While such an approach does demand a closer examination of the facts of a given case and has been viewed by subsequent courts as providing more judicial leeway to examine the asserted reasons for dismissal, ultimately the result does not adequately protect church employees from the ministerial exception. The solution, therefore, is to approach claims made under the ADA with a categorical approach. However, courts taking this approach must be cognizant of both Free Exercise and Establishment Clause concerns.

3. This solution narrows the ministerial exception for one group of employees while still maintaining respect for church autonomy.

Such concerns about the integrity of church autonomy in internal decision-making are valid. To proponents of the ministerial exception, it is the plaintiff's role within the spiritual life of the church that determines whether he or she is subject to the ministerial exception. Ruling otherwise or changing the manner in which courts approach this issue will unconstitutionally interfere with the hiring and firing decisions of churches. A categorical approach would involve an impermissible examination of church doctrine—precisely the kind of judicial interference that the ministerial exception was created to prevent. Ultimately, however, this solution provides churches with the opportunity to maintain their autonomy.

First, churches wishing to assert the ministerial exception would be free to assert that a particular form of disability discrimination—such as the failure to provide reasonable accommodation—is in fact a part of religious doctrine or practice. For example, if the Catholic Church avers that a priest must be able to stand in order to conduct Mass effectively, the church may assert the ministerial exception to defend against a disability discrimination suit. It is important to reiterate that this approach does not require a court to assess the validity of the doctrine or prac-

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156 *Cote*, 520 F3d at 209–10.
158 See, for example, *Rojas v Roman Catholic Diocese of Rochester*, 557 F Supp 2d 387, 398–99 (WDNY 2008) (noting that *Cote* appears to reject the argument that "a court may never inquire into a church's stated reasons for terminating a minister").
tice presented as the justification for discriminating against a
disabled employee. That type of judicial inquiry would be consti-
tutionally impermissible, as the Supreme Court has expressly
condemned courts "put[ting] to the proof" any sect's "religious
doctrines or beliefs." Therefore, if the church argues that the
discriminatory conduct with respect to a disabled employee was
doctrinally based, the exception can be asserted. This doctrine
functions on the assumption that churches would not wish to
embrace as part of doctrine things that would reflect poorly upon
the religious organization and its tenets as a whole. Arguably,
this would make discrimination against the disabled based on
pure animus toward the disabled less likely to occur. This refusal
to embrace nefarious conduct is what occurred in *Bollard,* as the
Jesuit Order refused to acknowledge that the ongoing sexual
harassment at issue had a doctrinal basis.

Certainly, concern over any potential chilling effect on
church personnel decisions that such an approach would create
within churches is valid. The aim of this solution is to lessen the
occurrence of unwarranted discrimination, not to provide the
government with veto authority over church administration. In
this spirit, the proposed solution has been structured to minimize
any resulting chilling effect in two respects. First, while not le-
gally required to provide an explanation of the doctrinal reasons
for a disabled employee's dismissal, the religious entity is cer-
tainly free to do so. The church can avail itself of court filings or
any other public forums (including the church itself) to defend or
justify its position. Whether the church is embarrassed by its
position regarding a given discrimination claim is a separate in-
quiry from whether it is legally permitted to assert the ministe-
rial exception. While churches enjoy the constitutional right to
exercise their faiths free of government intrusion, the Constitu-
tion does not afford the same protection from the scrutiny and
accompanying praise or opprobrium of the public. Second, the
proposed solution's gradualist approach is sensitive to concerns
of chilling church behavior regarding hiring practices. By nar-
rowing the ministerial exception with respect to a single category
that—much like sexual harassment—appears to be largely un-
connected to religious doctrine, the solution puts churches on
notice with respect to antidiscrimination laws while leaving most
of the existing ministerial exception framework intact.

159 *United States v Ballard,* 322 US 78, 86 (1944).
160 *Bollard,* 196 F3d at 947.
Second, courts have already adopted this categorical approach with respect to sexual harassment claims, and the general ministerial exception remains intact. Cases such as Bollard and Dolquist provide support for this approach to discrimination claims. This solution simply targets another category of discrimination claims—namely, those based on disability status—that is less likely to be a part of church doctrine.

Third, while this approach narrows the ministerial exception, its overall impact will be limited to claims of disability discrimination. The solution is actually quite moderate, as the approach is simply a scaling-down of a broader doctrine that has gone far beyond its original statutory origins. Additionally, churches would still be free to assert the ministerial exception. However, by compelling churches to proffer a reason for the alleged discrimination on the basis of disability status, the goal of this solution is to move beyond a jurisprudence in which courts simply rely on the procedural bar without hearing these claims on the merits. With all of this said, even if courts adopt this framework, the ministerial exception would be largely unchanged, as other categories of discrimination claims would still be subject to the current ministerial exception as applied. This proposal simply seeks to narrow the ministerial exception, not abolish it entirely. By leaving the exception largely intact, the fears of excessive government interference with church operation or a hindrance of religious exercise would arguably be overestimated.

B. In the Alternative, Claims Brought under the ADA Should be Analyzed Distinctly from Title VII Claims

As an alternative to the first approach, this Comment also argues that ADA claims should be analyzed distinctly from Title VII claims, a departure from the current practice. The following Section outlines the rationale as to why claims brought under the ADA should not be bound by previous Title VII analysis with respect to the ministerial exception.
1. The ADA possesses a reasonable-accommodations mechanism that is sufficient to address First Amendment concerns.

The ADA forbids employment discrimination on the basis of disability. The statute defines discrimination, in part, as "not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." It is a defense under the statute that a reasonable accommodation could not be made for the disabled employee. A reasonable accommodation does not need to be made under the ADA if the accommodation would impose an undue hardship, which the statute defines as "an action requiring significant difficulty or expense." The ADA lists a series of factors that can be considered so as to determine whether an accommodation constitutes an "undue hardship," including nature and cost, financial ability of the employer to provide such accommodations, and, most importantly, the "type of operation or operations of the covered entity, including the composition, structure, and functions of the workplace of such entity."

By considering the "type of operation" of the religious organization, the inherent religious nature of the organization will be a factor in the analysis. Courts therefore would be able to focus the inquiry on whether the accommodation itself is a reasonable one. In this context, an accommodation that would interfere with the spiritual mission of the church would inherently be unreasonable. The ADA even provides further protections for churches

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161 42 USC § 12122(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").
162 42 USC § 12122(b).
163 42 USC § 12113(a) ("It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.") (emphasis added).
164 42 USC § 12111(10)(A).
165 42 USC § 12111(10)(B)(i).
166 42 USC § 12111(10)(B)(iii).
in that it also includes an exception for financial burdens. Therefore, this mechanism lessens the likelihood that the government would be able to require churches to make accommodations to the point at which they are diverting excessive financial resources away from their central spiritual function.

2. Using the ADA analysis simplifies the process for courts by avoiding the intrusive and factually messy determination of what positions qualify as “ministerial positions.”

By analyzing disability discrimination claims against churches using an ADA reasonable accommodations standard—as opposed to mirroring a traditional Title VII analysis—courts can narrow the ministerial exception and spare the court a rather exhaustive inquiry. In using the ADA, courts need not spend time asking whether a church’s decision to provide reasonable accommodations impermissively delves into the church-minister relationship. The *Elvig* court noted that determining whether sexual harassment had in fact occurred would be a secular inquiry.\(^{168}\) Therefore, it seems as though the decision of whether to provide an employee with reasonable accommodations also has very little, if anything, to do with the practice of religious doctrine itself. The requirement of a “reasonable” accommodation can be analyzed as a secular inquiry without getting into the merits of a given religious tenet. Doing so would allow the courts to examine disability claims in churches in a manner similar to those of other civil rights claims. In determining the reasonableness of the requested accommodation, the ADA provides for a totality-of-the-circumstances inquiry—such that the reviewing court would determine whether the imposition of the accommodation would either constitute an excessive government entanglement in church decisions or would interfere with the exercise of religion. However, this inquiry is not as rigid as the ministerial exception framework analyzed within the Title VII context. In a sense, the ADA provides courts seeking to narrow the ministerial exception with an “out” with respect to disability discrimination claims. Despite constituting a distinct line of analysis, utilizing the ADA instead of Title VII arguably harnesses the spirit of the *Cote/Redhead* cases by moving toward a more “nature of the

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\(^{168}\) *Elvig*, 375 F3d at 958–64.
claim” analysis, as opposed to making a determination about the ministerial role of the plaintiff.

3. This approach provides courts a way to narrow the ministerial exception for this area of law without impacting the Title VII doctrine.

Opponents of this approach will argue that it has no grounding in precedent, since ADA claims have been incorporated into the Title VII analysis. However, this solution allows courts to remove an entire class of discrimination claims from the ministerial exception’s Title VII analysis without disturbing the Title VII framework. Instead, disability discrimination claims against churches will be analyzed under the ADA “reasonable accommodation” doctrine. By creating a parallel framework, the existing Title VII doctrine will not be further narrowed beyond what it has been by decisions such as Bollard, Elvig, Cote, and Redhead. While finding a way to narrow or weaken the ministerial exception within the established Title VII jurisprudence has occupied commentators for decades, this solution provides a new path for the courts with respect to an entire class of discrimination claims. Therefore, if the courts seek to narrow the ministerial exception outside of the Title VII context, this is a means to do so.

III. CONCLUSION

The ministerial exception has, through judicial intervention, expanded far beyond the intended parameters of ensuring that the government was not curtailing religious freedom through enforcement of secular employment discrimination laws. One way to narrow the exception is to attack the ministerial exception as applied to disability discrimination claims. Disability discrimination, much like sexual harassment, lacks a serious religious doctrinal basis. Seizing upon this, courts can choose to analyze disability claims in the same manner in which sexual harassment claims have been addressed by some courts. By utilizing the framework established by Title VII, the courts narrow the ministerial exception, while still respecting the free exercise of religion and acknowledging the wider societal interest in workplaces that do not discriminate on the basis of disability status. However, if such an approach does not appear workable to the courts, in the alternative, the courts should analyze disability discrimination claims solely within the context of the ADA, as opposed to simply adopting the Title VII framework for disability claims. Either of
these solutions attempts to strike a balance between preserving the autonomy and free exercise of religious organizations while addressing the problem of workplace discrimination against the disabled. As noted above, this is just not simply a problem among pastors. The ministerial exception has been applied widely throughout our society, from the Salvation Army to parochial schools and other employees of religious organizations. Such religious organizations, while serving a higher purpose, must also be subject to secular antidiscrimination laws. This Comment has attempted to provide solutions that achieve balance two important societal interests: religious autonomy and a rejection of unwarranted discriminatory employment practices.
ERRATA

In Richard H. McAdams, Economic Costs of Inequality, 2010 U Chi Legal F 23, 23 n †, it should have said “Bernard D. Meltzer Professor of Law” instead of “Walter J. Blum Professor and Kearney Director of the Program in Law and Economics.”