WHO IS A MINISTER? BROADENING THE SCOPE OF THE MINISTERIAL EXCEPTION AFTER *HOSANNA-TABOR*

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I. INTRODUCTION

How is it that churches can freely and openly terminate a minister in complete disregard of all existing and established employment law? The ministerial exception is a highly controversial doctrine. It bars, at the very least, employment lawsuits between ministerial employees and their religious institutions based on the First Amendment's Establishment and Free Exercise Clauses.[1] While every federal circuit has adopted some form of the exception,[2] the Supreme Court stood firm in not addressing the doctrine until its decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*.[3] Historically, each circuit applied the exception differently, some applying it broadly, while others very narrowly.

This Note argues that after the Supreme Court's decision in *Hosanna-Tabor*, the term "minister" must be construed broadly. The purpose of the exception is not to safeguard churches from employment decisions made for religious reasons; rather, it is to ensure that the *power* to control and select ministers, who are in a position to influence a congregation's beliefs, stays with religious institutions.[4] A court cannot

1. U.S. CONST. amend. I. It is relevant to note that the term "minister" is to be applied broadly, in that it covers all religious leaders among all faiths. While the term "minister" is generally used in Protestant Christianity, the "ministerial exception" has been applied in Judaism, Islam, and other religious contexts. *See* El-Farra v. Sayyed, 226 S.W.3d 792 (Ark. 2006) (applying the ministerial exception in an Islamic context); *see also* Friedlander v. Port Jewish Ctr., 347 F. App'x 654 (2d Cir. 2009) (applying the ministerial exception in the case of a Jewish rabbi). Justice Alito in his concurrence in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp. Opportunity. Comm'n*, wrote that though the term "minister" is relevant, it alone is "neither necessary nor sufficient." Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp. Opportunity Comm'n, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring).

2. *See, e.g.*, Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168-69 (4th Cir. 1985).

3. *Hosanna-Tabor*, 132 S. Ct. at 709.

4. *Id.* The Court held that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision." *Id.* at 706.

take this power from the church, as the First Amendment protects these decisions.[5]

First, this Note will review the origin of the exception, starting with the religion clauses of the First Amendment. Some of the differences in application of the "primary duties" test will be examined since courts have not used any uniform analysis in applying the test. This Note will then closely inspect the Supreme Court's decision in *Hosanna-Tabor*, after which it will become apparent that some circuits and states will need to construe their "primary duties" test more broadly. Finally, this Note concludes that when applying the ministerial exception, courts should not only look at the primary duties of the employee, but should also look to the ability of the religious official to influence the religious experience of members within a religious institution, through the exercise of their own independent decisions. Looking at the ability of employees to influence church members, rather than looking solely to their primary duties, will better effectuate the purpose of the ministerial exception and cohere with the Supreme Court's reasoning in *Hosanna-Tabor*.

While it is clear that courts will need to broaden their definition of "minister" post-*Hosanna-Tabor*, this Note's thesis proposes a workable solution that courts should apply going forward. These changes will not come without cost, however, as broadening the term will leave less individuals, who may otherwise have valid claims under state and federal law, without remedy against otherwise illegal employment decisions.

II. BACKGROUND

A. The Religion Clauses

The ministerial exception is a constitutional affirmative defense.[6] Its justification arises out of the religion clauses of the First Amendment.[7]

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5. For a discussion defending the ministerial exception, see Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011). This article explains the various components to the exception—relational, conscience, and autonomy—each providing its own unique protection for churches. The relational component exists so churches can show preference to individuals who share their same beliefs. The Catholic Church will want to hire a Catholic priest. The conscience component allows discrimination based on religious doctrine. A good example of this is the number of religions that, based on religious doctrine, only hire all-male clergy. The final component, the autonomy component, prevents religious leaders from bringing employment-based claims against the church. There is overlap between all of these components, but they all exist to create the ministerial exception.

These clauses require that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[8] Courts have ruled that the Establishment and Free Exercise Clauses each provide an independent basis for preventing the government from interfering with a decision of a religious group to terminate one of their ministers.[9] Courts have used both clauses to justify the ministerial exception.[10]

1. Bollard Using The Free Exercise Clause

The Ninth Circuit used the Free Exercise Clause to examine the ministerial exception in *Bollard v. California Province of the Society of Jesus*.[11] This case involved a Title VII sexual harassment claim against a church—brought by a novice priest.[12] To determine whether the claim unlawfully restricted the free exercise of religion, the court looked at various factors including: how great of an impact the statute had on the exercise of religious belief; whether the state had a compelling interest that justified the burden imposed on religious belief; and how the recognition of the ministerial exception for "the statute would impede the objectives sought to be advanced by the state."[13] The court recognized

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6. *Hosanna-Tabor*, 132 S. Ct. at 709 n.4. The Supreme Court clarified that the ministerial exception is *not* a jurisdictional bar, as some courts have ruled, but rather is an affirmative defense. *Id.*

7. U.S. CONST. amend. I.; *see* Alcazar v. Corp. of Catholic Archbishop of Seattle, 598 F.3d 668, 671-72 (9th Cir. 2010), *vacated in part, adopted in part en banc*, 627 F.3d 1288 (9th Cir. 2010).

8. U.S. CONST. amend. I.

9. *See, e.g.*, Dayner v. Archdiocese of Hartford, 23 A.3d 1192, 1203 (Conn. 2011) (stating "[a]lthough the United States Supreme Court has not addressed the ministerial exception to date . . . every federal circuit has adopted the doctrine pursuant to either or both the free exercise and establishment clauses of the first amendment").

10. *See, e.g.*, Rhoades v. Sch. Dist. of Abington Twp., 226 A.2d 53, 73 (Pa. 1967).

11. 196 F.3d 940, 946 (9th Cir. 1999).

12. *Id.* at 944. The relevant facts of *Bollard* are as follows: John Bollard became a novice of the Jesuits. Men in his position are trained and study to be ordained. Bollard claimed that between 1990 and 1996, he was sexually harassed by his superiors through unwelcome sexual advances, delivery of pornographic material, and inappropriate sexual discussions. *Id.* Bollard reported the incidents to the proper authorities within the church, but nothing was done. The harassing conduct got to be so severe that he left the Jesuit order in December 1996. *Id.*

13. *Id.* at 946. *Bollard* is an interesting case, as the harassment alleged was admitted by the church to be inconsistent with church doctrine and their beliefs and values. The court concluded that there would be no danger in allowing the suit to go forward by saying that "[t]he Jesuits' disavowal of the harassment also reassures us that application of Title VII in this context will have no significant impact on their religious beliefs or doctrines." *Id.* at 947. Additionally, the court recognized that the case itself did not

that some religious interests are so strong that there would be no compelling interest that would justify a governmental intrusion into ecclesiastical doctrine.[14]

Generally, if courts enforced judgments against the church for making certain employment decisions, courts would essentially be choosing a religious organization's officials, where the judiciary would be interfering with decisions that influence church policy and the right to "shape its own faith and mission through its appointments."[15] The ministerial exception is not limited to only statutes; the same analysis has been applied to common law tort and contract claims.[16]

2. Bollard Using the Establishment Clause

The Establishment Clause is similarly implicated when courts adjudicate matters between ministers and their institutions. Courts treat the Establishment Clause as a constitutional basis separate from that of the Free Exercise Clause.[17] In *Lemon v. Kurtzman*, the Supreme Court ruled that a statute must have a secular purpose, must not advance or inhibit religion, and "must not foster 'an excessive government entanglement with religion.'"[18]

Courts have found that the ministerial exception analysis primarily involves this last factor.[19] The Ninth Circuit, again in *Bollard*, recognized that there are two types of entanglements in which courts are primarily

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revolve around the church's choice of representation, as the plaintiff did not allege that the church refused to ordain him or fire him, as he in fact quit as a result of the harassment. *Id.* at 947.

14. *Id.* at 946.

15. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp. Opportunity Comm'n, 132 S. Ct. 694, 706 (2012).

16. *See, e.g.*, Archdiocese of Miami v. Minagorri, 954 So. 2d 640 (Fla. Dist. Ct. App. 2007) (applying the ministerial exception to an assault and battery claim); Pardue v. Ctr. City Consortium Sch. of Archdiocese of Washington, 875 A.2d 669 (D.C. 2005) (applying the ministerial exception to a principal of a parochial school on a wrongful termination of contract claim). The Supreme Court, in its *Hosanna-Tabor* decision, recognized the potential of the defense for contract and tort claims and stated that they "express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." *Hosanna-Tabor*, 132 S. Ct. at 710.

17. *See* Dayner v. Archdiocese of Hartford, 23 A.3d 1192, 1203 (Conn. 2011) (stating "[a]lthough the United States Supreme Court has not addressed the ministerial exception to date . . . every federal circuit has adopted the doctrine pursuant to either or both the free exercise and establishment clauses of the first amendment").

18. 403 U.S. 602, 612-13 (1971) (citing Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 674 (1970)).

19. *See* Rweyemamu v. Cote, 520 F.3d 198, 208 (2d Cir. 2008).

concerned: substantive and procedural.[20] Substantively, enforcing a judgment against a minister in the church employment relationship interferes with a church's ability to choose who may best carry out its message and spread its doctrine.[21] The government does not have a place in determining or evaluating church policy.[22] The procedural component is of the concern that a court judgment would require continued involvement into a religious organization's employment policies.[23] The Establishment Clause procedural safeguard is designed to protect against protracted government surveillance and the resulting impact on the religious organization.[24]

In short, the Free Exercise Clause protects a religious institution's fundamental right to shape its own ecclesiastical policy and faith through its hiring decisions, free from court interference, while the Establishment Clause prevents the government from entangling itself by evaluating ecclesiastical decisions.[25] The differences between the two are subtle, but both clauses provide an independent constitutional basis for the exception.[26]

Having established the origin of the doctrine, this Note will now turn to the lower courts' many diverse interpretations of how an employee qualifies as a ministerial official, prior to the Supreme Court's decision in *Hosanna-Tabor.*

B. Interpretation of the Ministerial Exception Prior to Hosanna-Tabor

Courts varied in their application of the ministerial exception.[27] Some courts barred all suits between religious officials and their

20. *Bollard*, 196 F.3d at 948.
21. *Id.* at 948-49.
22. *Id.* at 949.
23. *Id.*
24. *Id.*
25. Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006), *abrogated by* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 132 S. Ct. 694 (2012).
26. *See* Dayner v. Archdiocese of Hartford, 23 A.3d 1192, 1203 (Conn. 2011) (stating "[a]lthough the United States Supreme Court has not addressed the ministerial exception to date . . . every federal circuit has adopted the doctrine pursuant to either or both the free exercise and establishment clauses of the first amendment").
27. The court in *Dayner v. Archdiocese of Hartford*, does an excellent job of explaining the split in the circuits. *Dayner*, 23 A.3d at 1206. The Court explains that the Supreme Court had not ruled on the ministerial exception to date and that every federal circuit had adopted some form of it. *Id.* at 1203. The court also discussed that the Second, Third, Ninth, and District of Columbia Circuit Courts of Appeal have all taken similar approaches by looking at the nature of the claim to determine whether it has to do with the "religious institution's choice as to who will perform spiritual functions." *Id.* at 1206.

institutions, and held that any involvement is a violation of the First Amendment because any adjudication itself intertwines with ecclesiastical doctrine.[28] Others created a balancing test to determine whether the level of involvement by the government arises from a secular purpose that necessarily involves church policy.[29]

Courts also greatly differed in their analysis of who qualifies as a "minister" for purposes of the exception. Some courts read the term very broadly, while others read it very narrowly.[30] A court's interpretation of "minister" will have a large impact on who will have enforceable rights in court and who will be denied access, because those deemed to be ministers will be barred from receiving any judgment in court. Courts at all levels were inconsistent with fringe professions within a church, such as parochial teachers and music directors, where there is a mixture of both secular and religious duties.[31]

To resolve this issue, federal and state courts historically used different tests to examine the relationship between an employee and their church. A common approach cited by courts was the "primary duties test," where courts look at the primary duties assigned to an employee by

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The competing circuits, namely the Seventh and Fourth Circuits, have adopted the approach that the "'ministerial exception' applies without regard to the type of claims being brought." *Id.*

28. *See* Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698, 703 (7th Cir. 2003).

29. *See Bollard*, 196 F.3d at 950 (applying a balancing test); Prince of Peace Lutheran Church v. Linklater, 28 A.3d 1171, 1184 (Md. 2011) (stating that "[t]he First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships").

30. As will be discussed later, there has been inconsistent treatment of parochial school teachers. Some courts, such as in *Redhead v. Conference of Seventh-Day Adventists*, *Guinan v. Roman Catholic Archdiocese of Indianapolis*, and *DeMarco v. Holy Cross High Sch.*, all held that the religious school teachers were not to be treated as ministers, while the Wisconsin Supreme Court ruled that a similar teacher was a minister in *Coulee Catholic School v. Labor & Industry Review Commission*. Redhead v. Conference of Seventh-Day Adventists, 440 F. Supp. 2d 211 (E.D.N.Y. 2006); Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849 (S.D. Ind. 1998); DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993); Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, 768 N.W.2d 868 (Wis. 2009).

31. *See supra* note 30. As for music directors and musicians, in *Archdiocese of Washington v. Moersen*, the court found that an organist did not fall within the purview of the ministerial exception; however, in *Starkman v. Evans*, the court found that there was "no dispute that religious music plays a highly important role in the spiritual mission of the church," and found that a music director was minister for purposes of the exception (her American with Disabilities Act claim was dismissed). Archdiocese of Washington v. Moersen, 925 A.2d 659 (Md. 2007); Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999).

the church to determine whether or not he or she is a minister for purposes of the exception.[32] Courts rarely applied this approach consistently.[33] For example, a Texas appellate court found in *Patton v. Jones* that a youth director who "did not participate in worship services or ceremonies, had no responsibility for the music or liturgy, did not assist with the confirmation of youth, and was not required to teach religious classes or have religious training" was still a minister for purposes of the ministerial exception.[34]

Other courts, however, found that parochial teachers, who have religious training and some religious duties, are not ministers given that their "primary duties" are secular.[35] *Hosanna-Tabor* was one such case, where the Sixth Circuit determined that such a teacher was not a minister.[36] The Sixth Circuit was not alone, as the courts in *Redhead v. Conference of Seventh-Day Adventists*,[37] *Guinan v. Roman Catholic Archdiocese of Indianapolis*,[38] and *DeMarco v. Holy Cross High School*,[39] all similarly held that parochial teachers were not ministers for purposes of the exception, even though they may have taught some religion classes. The court in *Guinan* distinguished teachers from ordinary ministers, as they did not have a position that was "important to the spiritual and pastoral mission of the church."[40] In *Coulee Catholic School v. Labor & Industry Review Commission*, however, the Wisconsin

32. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243 (10th Cir. 2010) ("Although the doctrine usually comes into play in employment suits between an ordained minister and her church, it extends to any employee who serves in a position that 'is important to the spiritual and pastoral mission of the church.'" (quoting Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)). The court continued on to weigh the plaintiff's administrative duties and the religious ones. *Skrzypczak*, 611 F.3d at 1243.

33. *Compare Coulee*, 768 N.W.2d at 883 (rejecting the primary duties test that measures the amount of time an employee spends on each task, and adopting a test that measures how "closely linked the employee's work is to the fundamental mission of that organization"), *with Redhead*, 440 F. Supp. 2d at 221 (explaining that while a teacher taught one hour of Bible class, "plaintiff's teaching duties were primarily secular" and teaching secular subjects "took up the bulk of her day").

34. 212 S.W.3d 541, 550 (Tex. App. 2006). The court found that by merely organizing the events for the youth, Patton acted as a minister. By bringing church members together in fellowship for the purpose of religious worship, the court conceptualized the term "minister" broadly. *Id.*

35. *See supra* note 30.

36. Equal Emp. Opportunity Comm'n v. Hosanna-Tabor, Evangelical Lutheran Church & Sch., 597 F.3d 769, 779 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012).

37. *Redhead*, 440 F. Supp. 2d at 221-22.

38. Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849, 854 (S.D. Ind. 1998).

39. DeMarco, v. Holy Cross High Sch., 4 F.3d 166, 172 (2d Cir. 1993).

40. *Guinan*, 42 F. Supp. 2d at 852.

Supreme Court determined, after applying the primary duties test, that a parochial teacher was a ministerial official, not because of the time spent on religious tasks, but because the employee worked at a Catholic church where her job was to promote the fundamental mission of the church.[41]

As seen in these examples, courts throughout the United States apply the primary duties test differently.[42] The U.S. Supreme Court had provided very little guidance on this divergence between the circuits and states until the *Hosanna-Tabor* decision, where it made clear that the ministerial exception is to be applied broadly.[43]

C. The Supreme Court on Ministerial Officials: An Examination of Hosanna-Tabor

Having discussed the origin of the ministerial exception and the lower court's interpretations of "minister" prior to the U.S. Supreme Court's landmark decision in *Hosanna-Tabor*, this Note will now discuss *Hosanna-Tabor* and the distinction that it establishes between ministers and non-ministers. Prior to this case, the Supreme Court had not acknowledged the ministerial exception nor introduced a test that courts could use to determine when the exception should apply, even though every federal circuit and many state courts had recognized the exception.[44]

1. Hosanna-Tabor: The Facts

The facts of *Hosanna-Tabor* are relatively straightforward. Cheryl Perich was a fourth grade teacher at a parochial school run by Hosanna-Tabor Lutheran Church in Redford, Michigan.[45] Perich taught a range of secular subjects such as: "math, language arts, social studies, science,

41. Coulee Catholic Sch. v. Labor Indus. Review Comm'n, 768 N.W.2d 868, 883 (Wis. 2009).

42. As a further example, the Fourth Circuit applies the primary duties test looking at the primary functions of the position, not whether or not the individual is ordained, and adds a requirement that a position be "important to the spiritual and pastoral mission of the church." Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 363 F.3d 299, 306 (4th Cir. 2004). This Court also added, "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" *Id.*

43. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 132 S. Ct. 694, 708 (2012).

44. *Id.* at 705.

45. *Id.* at 699.

gym, art, and music."[46] Perich, however, was instructed to integrate faith into all of the subjects she taught, and also taught a religion class four days every week for thirty minutes.[47] She also prayed with her students three times a day, attended a chapel service with her students once a week, and led the chapel service twice per year.[48] In total, she engaged in approximately forty-five minutes of religious activity in a seven-hour day.[49] In addition, Perich was a "called" teacher, meaning she had to go through intensive training through a seminary and pass an examination.[50] While Perich originally started as a contract/lay teacher, which did not require this training, she eventually became a commissioned minister and received a call from the congregation just one year after she began her employment with the church.[51] Lutheran and non-Lutheran teachers, however, had the same responsibilities, including the religious components.[52]

The conflict giving rise to the case arose when Perich developed an illness and passed out suddenly and without warning.[53] She agreed to go on disability leave and the school hired a replacement teacher for her class.[54] After the replacement was hired, Perich was diagnosed with narcolepsy and started receiving treatment, after which she told the school she was ready to return.[55] The school, however, refused to hire her back, as they had already hired her replacement and asked her to resign her call.[56] The school indicated that her contract would be renewed the following year.[57] Perich found this unacceptable, preferring to return right away.[58] She insisted that she be hired back by going to the school

46. Equal Emp. Opportunity Comm'n v. Hosanna-Tabor, Evangelical Lutheran Church & Sch., 597 F.3d 769, 772 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* To become a called teacher, at Hosanna-Tabor, the teachers are hired by only voting members of the church congregation upon a recommendation by the Board of Education, Board of Elders, and Board of Directors. When "called" teachers are hired, they cannot be dismissed without cause. To become a called teacher, the teacher must complete classes required by the Lutheran Church that focus on faith. After completing the classes, the teacher receives a certificate and her name is placed on a list that can be accessed by schools that need qualified teachers. A called teacher's title is also "commissioned minister." *Id.*

51. *Hosanna-Tabor*, 597 F.3d at 772.

52. *Id.* at 772-73.

53. *Id.* at 773.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Hosanna-Tabor*, 597 F.3d at 774.

58. *Id.*

and refusing to leave until the school acknowledged that she had showed up for work.[59] The school gave her a letter indicating as such, however, based on Perich's "insubordination and disruptive behavior," the school's board voted to terminate her.[60] Instead of going through internal church procedure, she filed suit based on the Americans with Disabilities Act (ADA) and Michigan law.[61] The Eastern District of Michigan dismissed the action based on the ministerial exception, finding that she was a minister.[62]

2. The Sixth Circuit's Decision

The Sixth Circuit reversed, finding that Perich was not a ministerial official for purposes of the ministerial exception.[63] The court acknowledged that Perich had some religious duties, but reasoning that because her duties were no different than those of a lay teacher with no special training and that her duties primarily consisted of secular teaching, the court ruled that the district court erred in classifying Perich as a ministerial official.[64] The court opined that "[t]he fact that Perich participated in and led some religious activities throughout the day does not make her primary function religious" and that her religious training did not transform her primary duties.[65] They also expressly rejected the approach that teachers were Christian role models, making all of their duties religious.[66]

The Sixth Circuit determined that an examination of Perich's ADA claim would not require a court to analyze church doctrine, but would rather focus on Perich's disability within the ADA and whether Hosanna-Tabor violated the Act through Perich's termination.[67]

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59. *Id.*

60. *Id.* at 774-75.

61. *Id.* at 775. *See generally* Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West 2013). Perich and the EEOC alleged "one count of retaliation in violation of the ADA" and Perich added a cause of action under the Michigan's Persons with Disabilities Civil Rights Act, M.C.L. § 37.1201(b). *Id.* (citing Mich. Comp. Laws § 37.1201(b) (2010)).

62. *Hosanna-Tabor*, 597 F.3d at 775.

63. *Id.* at 781.

64. *Id.* at 780. Six hours and fifteen minutes per day primarily consisted of secular activities. *Id.*

65. *Id.*

66. *Id.* The court opined that even though "Hosanna-Tabor has a generally religious character—as do all religious schools by definition—and characterizes its staff members as 'fine Christian role models'" this "does not transform Perich's primary responsibilities in the classroom to religious activities." *Id.*

67. *Id.* at 781-82.

3. The Supreme Court's Reversal

The Supreme Court, however, reversed the Sixth Circuit.[68] The Court found that time spent on religious duties, in itself, is not determinative of a ministerial official.[69] The decision noted that it was relevant that she received religious training, but stated that this would not be necessary to determine her status as a ministerial employee.[70] The Court also reasoned that her title as a "called" teacher was important, as "the formal title given . . . by the church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the church" were all considerations that substantiated their conclusion that she was a ministerial employee.[71] The Court noted that Perich held herself out as a minister for purposes of a special housing allowance on her taxes that was only available for employees "in the exercise of the ministry."[72] They also found her religious duties that included teaching, praying, and preaching all relevant to her role as a ministerial employee.[73]

The Court gave three specific errors made by the Sixth Circuit in reasoning that Perich was not a ministerial employee: (1) the Sixth Circuit did not see relevance in her being a commissioned minister; (2) the Sixth Circuit gave too much weight to the fact lay teachers performed the same religious duties; and (3) the Sixth Circuit put too much weight on Perich's secular duties.[74] The Supreme Court also rejected Perich's argument that, because her termination was pretextual and not for a religious reason, the exception should not apply.[75] Instead, it found that because the decision to control ministerial employees was the church's alone, the reason for the termination, religious or not, did not matter.[76]

The Supreme Court ultimately found that because Perich met the requirements for a minister within the meaning of the ministerial exception, "the First Amendment requires dismissal of this employment discrimination suit against her religious employer."[77] The decision,

68. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 132 S. Ct. 710 (2012).

69. *Id.* at 709.

70. *Id.* at 708.

71. *Id.*

72. *Id.* at 708.

73. *Id.* at 708.

74. *Hosanna-Tabor*, 132 S. Ct. at 708-09.

75. *Id.* at 709.

76. *Id.*

77. *Id.*

however, did not elaborate further to provide guidance on how courts should determine a "minister" going forward.

In his concurrence, Justice Thomas agreed with the judgment, but warned that "[j]udicial attempts to fashion a civil definition of "minister" through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs . . . are outside of the 'mainstream' . . . ."[78] Justice Thomas would find that because Hosanna-Tabor considered Perich a minister, that would be enough evidence to show that she was, in fact, a minister.[79]

It is evident that the Supreme Court, through its decision in *Hosanna-Tabor*, has concluded that religious autonomy in decisions of internal governance is the central purpose for the exception.[80] This Note will now explore how lower courts should apply a more expansive definition of "minister," and will examine various contexts in which broadening the standard will better effectuate the purpose of the exception, but lead to significant negative consequences for some.

III. ANALYSIS

A. Going Forward from Hosanna-Tabor

It is clear that as a result of *Hosanna-Tabor*, looking only at the primary duties of a ministerial official is inadequate. If this were the case, the Sixth Circuit's analysis of looking at the amount of time Cheryl Perich spent on religious duties versus the amount of time she spent on secular ones would have held up under the Supreme Court's scrutiny. Again, the Sixth Circuit's interpretation of the "primary duties" test was consistent with how many Circuits and states applied the ministerial exception prior to *Hosanna-Tabor*, so many courts will need to drastically refashion their approach in addressing these problems.[81]

It is also important not to lose perspective when delving into these decisions. Allowing a broader interpretation of "minister" necessarily follows that more employees will lose their right to recourse against their

78. *Id.* at 711 (Thomas, J., concurring).

79. *Id.*

80. *Hosanna-Tabor*, 132 S. Ct. at 715.

81. *See* Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243 (10th Cir. 2010) ("Although the doctrine usually comes into play in employment suits between an ordained minister and her church, it extends to any employee who serves in a position that 'is important to the spiritual and pastoral mission of the church.'") (quoting Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)). The court continued on to weigh the plaintiff's administrative duties and the religious ones. *Skrzypczak*, 611 F.3d at 1243.

employer for unfair hiring practices. As the Equal Employment Opportunity Commission (EEOC) argued in *Hosanna-Tabor*, "the logic of the exception would confer on religious employers 'unfettered discretion' to violate employment laws . . . ."[82]

There has been significant commentary on this issue, arguing for equality in employment law.[83] One such article, written by Professor Caroline Mala Corbin, argues that employment discrimination lawsuits against churches, when not a result of spiritual failing, do not violate First Amendment principles.[84] She argues that in many cases, a court is justified in providing relief for those that are discriminated against, since the court merely "restores to the church someone who would have been chosen but for discrimination and aligns church practices with beliefs."[85] She contends that, with respect to "neutral doctrine" cases, the court only fixes mistakes made by the church without ever interfering with First Amendment issues.[86] Professor Corbin admits that where religious doctrine requires discrimination, such as many religions' practices of hiring an all-male clergy, the exception may apply, but in most other circumstances, churches should not be granted special treatment.[87]

This Note's proposal will not alleviate these concerns, since more individuals will be covered by the exception. Nonetheless these arguments miss the point of the doctrine. The ministerial exception exists

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82. *Hosanna-Tabor*, 132 S. Ct. at 710. While it is true that churches will not have the ultimate right to decide who is and who is not a minister, that is for the courts to decide, a more expansive definition of "minister" taken by courts will apply the exception to more people.

83. *See, e.g.*, Jane Rutherford, *Equality As the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996); Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 WM. & MARY J. WOMEN & L. 459, 479 (2004); Jessica R. Vartanian, Note, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049 (2009).

84. Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2023 (2007). Professor Corbin, though writing before *Hosanna-Tabor*, argues that contemporary First Amendment doctrine emphasized equalizing religion and its secular counterparts. She argues that looking at recent law, religion is no longer treated as "privileged" and modern jurisprudence no longer treats religion as more important than state interests. Further, she explains that many discrimination suits are resolved on neutral principles, thereby not implicating any Establishment Clause issues. She asserts that applying the ministerial exception "raises substantive entanglement concerns that are equally, if not more, problematic than those raised by a full-blown Title VII lawsuit." *Id.* at 1972.

85. *Id.* at 2023.

86. *Id.*

87. *Id.* at 1972.

to protect a church's decision on who is best able to spread the church's beliefs. These are decisions that churches alone are able to make.[88] There is no "neutral law" that courts can use to force a church to retain an unwanted ministerial employee.

Again, the ministerial exception is derived from the U.S. Constitution and protects church autonomy.[89] Without it, courts, a state entity, would have the power to *require* churches to retain or accept ministers outside of their beliefs or would be able to penalize a church for not hiring ministers that comply with state standards.[90] Such unencumbered state action against a church is not compatible with the First Amendment and traditional Free Exercise and Establishment Clause principles.[91] These types of actions offend traditional notions of church autonomy and breed state domination over churches, violating the Free Exercise Clause, and excessive entanglement in resolving church

88. *See* Lund, *supra* note 5, at 38-57. There are four primary problems that anti-discrimination suits can create for religious organizations: reinstatement, restructuring, control, and inquiry problems. The reinstatement problem exists when a plaintiff claims that he or she has a legal right to return to his or her old position. A court that reinstates a minister, or awards monetary damages, either penalizes or denies a religious organization the freedom to freely choose their own ministers. The restructuring problem occurs when the threat of class actions and large-scale actions could change the way churches operate. Churches would have to change how they operate to protect themselves against suits, infringing on traditional notions of religious liberty. The control problem occurs when the state imposes its own set of values on the church and different standards between religious denominations results. The last problem, the inquiry problem, appears when juries or courts make mistakes in fact finding. There are inherent risks when juries are asked to evaluate religious doctrine and motivation that can be avoided by having the ministerial exception.

89. Hosanna-Tabor, Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 132 S. Ct. 694, 704 (2012).

90. *Id.* at 706. Additionally, courts before *Hosanna-Tabor* were not consistent in how they applied damages versus specific performance. In *McKelvey v. Pierce*, 800 A.2d 840, 859 (N.J. 2002), the court determined that they had to evaluate every element to every claim to determine if there was an entanglement of ecclesiastical doctrine. If there was not, then monetary damages would be the *only* appropriate remedy if the plaintiff could prove his claim. *Id.* at 859. The court said "McKelvey might, without offending First Amendment principles, seek money damages . . . ." *Id.* Other courts have found, however, that money damages awarded by a court constitutes a penalty for an unwanted minister, something that the First Amendment prohibits. *See* DeBruin v. St. Patrick Congregation, 816 N.W.2d 878 (Wis. 2012). The Supreme Court also addressed this issue in *Hosanna-Tabor*, stating "An award of [monetary] relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination." *Hosanna-Tabor*, 132 S. Ct. at 709.

91. *Hosanna-Tabor*, 132 S. Ct. at 710.

doctrine, violating the Establishment Clause.[92] The next question this Note considers is how courts should apply the Supreme Court's standard in a manner that is consistent with the exception's purpose.

1. Courts Need to Look at the Ability of the Employee to Influence the Religious Experience of the Congregation

The Supreme Court in *Hosanna-Tabor* abolished the Sixth Circuit's interpretation of the "primary duties" test, so it is clear that "minister" is to be applied broadly. This Note proposes that, in order to comply with the Supreme Court's ruling in *Hosanna-Tabor*, lower courts should consider not *just* the duties of religious officials, but put a greater weight on the *ability* of the employee, through the exercise of religious judgments, to influence the religious experience of individual members of their church.

This recommendation covers the flaws of the Sixth Circuit recognized by the Supreme Court in *Hosanna-Tabor*. Cheryl Perich's religious training and her status as a "commissioned minister" necessarily made her better equipped to influence her students. Even the title, in itself of being "called," put her in a position where she could influence her students' religious experience, since her students knew that they should look to her for spiritual advice.[93] Moreover, the fact that Perich conducted prayers in her classroom, led a chapel service twice a year, and taught a religious class, clearly reflects her ability to influence her students religiously. Because the Free Exercise Clause protects a church's right "to shape its own faith and mission through its appointments," it is a logical step to consider how ministerial employees can influence the faith of others in deciding if the First Amendment protects churches against state interference.[94]

This Note's proposal shifts the focus from the secular duties of an employee to the religious ones that actually affect church congregants. It should not be important whether or not Perich teaches history and other secular subjects for six hours out of the day, for if she at least plays a

92. Not only is a broad interpretation of "minister" founded in constitutional principles, it will also aid in judicial efficiency, as it will end inquiries into whether something conflicts with ecclesiastical doctrine very early in the process. Courts will not have to entertain long and elaborate theories on how something is or is not church policy if courts adopt a robust definition of "minister" and the ministerial exception generally.

93. As the Supreme Court noted, the "Sixth Circuit failed to see any relevance in the fact that Perich was a commissioned minister. . . . [T]he fact that an employee has been ordained or commissioned as a minister is surely relevant . . . ." *Hosanna-Tabor*, 132 S. Ct. at 708.

94. *Id.* at 706.

significant and meaningful role in delivering the church's message, within the capacity of her employment, the church must have complete control over her employment status. Religious institutions must remain in control over how their services are carried out by representatives of the church.[95] Again, as stated in *Hosanna-Tabor*, the purpose of the exception is to ensure that the selection and control of religious employees, who propagate the church's religious ideas, remain with churches.[96] The exception protects religious autonomy and ensures that the state does not infringe on what actually matters—a church's message to their followers. Whether the minister is fired for a religious reason, or not, does not matter.[97]

2. Case Example: Taking a Closer Look at Patton v. Jones

Looking again at *Patton*, the Texas case where the court found a youth director was a minister for purposes of the ministerial exception, the court found, at least in part, that the plaintiff, in accordance with his duties, influenced members' religious experience.[98] This is analogous to this Note's thesis and the spirit of the Supreme Court's decision in *Hosanna-Tabor*.

The *Patton* court acknowledged that Patton had secular administrative duties, such as "transportation, logistics, and other travel arrangements for youth outings and gatherings."[99] He was not ordained, did not perform any religious ceremonies or functions, had no musical responsibility, did not confirm youth, and did not teach any religious classes.[100] Patton, as director of the youth program, however, was in a position to decide what youth activities the group would participate in and acted "as the 'voice' of the youth ministry and serv[ed] as a 'primary agent' of the church."[101]

The court focused not on his secular tasks, but his ability to influence the church's youth. Because Patton was in a position to organize events in any way he saw fit, he was able to alter the religious experience of the church's youth members and act as a direct representative of the church.[102] Acting with this authority, Patton performed his duties in a

95. *Id.*
96. *Id.*
97. *Id.*
98. Patton v. Jones, 212 S.W.3d 541, 550-51 (Tex. App. 2006).
99. *Id.* at 550.
100. *Id.*
101. *Id.* at 551.
102. *Id.*

ministerial capacity, similar to a parochial teacher recognized in *Hosanna-Tabor*.

B. Another Example: Organists and Music Directors

Another example will be useful. First, this Note will examine a pre-*Hosanna-Tabor* case that used a narrow definition of the term "minister" to hold that an organist was not a minister. This Note will then apply its thesis to show how this definition should be changed, and then will analyze a post-*Hosanna-Tabor* case involving a church employee in a similar position, to examine the shift that courts are already starting to implement. As will be demonstrated, the Fifth Circuit and other courts have recognized that they must broaden their "primary duties" test when classifying ministers from other church employees.

1. Ministerial Exception Analysis of Music Officials Pre-Hosanna-Tabor

In *Archdiocese of Washington v. Moersen*,[103] the plaintiff, an organist for a Catholic church, alleged wrongful discharge, breach of contract, and intentional infliction of emotional distress against the archdiocese, the pastor, and the parish.[104] The trial court granted summary judgment in favor of the church on First Amendment, ministerial exception grounds, but the Maryland Court of Appeals reversed, holding that the organist was *not* a ministerial employee.[105] The organist was responsible for sustaining music at all services, assisting in planning and selecting songs for the services, and participating in various aspects of the worship.[106]

The court used the "primary duties" test as its method to decide whether or not Moerson fell under the purview of the exception.[107] The court concluded that because his duties did not spread the Catholic faith, he did not teach, he was not a part of church governance, and he did not supervise religious worship, he was not considered a minister.[108] The

103. Archdiocese of Washington v. Moersen, 925 A.2d 659 (Md. 2007).

104. *Id.* at 664-65.

105. *Id.* at 665.

106. *Id.*

107. *Id.* at 663.

108. *Id.* at 668. The court also at this point contrasted *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. Ct. App. 1988), a pre-*Hosanna-Tabor* case that held that a music director with similar duties fell under the ministerial exception. In so doing, the Michigan Court of Appeals ruled that an organist who selected music for each service was a minister for purposes of the ministerial exception because "[h]is primary

court distinguished this case from similar ones, opining that occasionally selecting songs for worship and encouraging the congregation and choirs to sing was not enough to constitute a minister.[109]

The Maryland court's reasoning is rendered obsolete after *Hosanna-Tabor*. While other courts had contemporaneously ruled that musicians in similar situations were ministers for purposes of the exception, Maryland did not follow suit.[110] The court, like the Sixth Circuit in *Hosanna-Tabor*, focused on the secular aspects of Moerson's job, rather than the religious.[111] To prop up its argument, the court reasoned that because he "could have been replaced easily by another qualified organ player" and that replacement did not need any "specific religious-based qualification," it followed that his duties were not religious.[112]

This reasoning is flawed after *Hosanna-Tabor*. Perich's position, too, could have been replaced by completely secular, or "lay," teachers and in fact there were teachers who had no religious qualifications at the school.[113] While relevant, the fact the employee's duties could have been performed by a secular employee is not at all dispositive.[114]

Courts should instead look at the influence the employee has on the congregation and the church members. Because organists and music directors have the power to influence the religious experience of members, through their own decisions of music selection and encouragement, they should fall under the ministerial exception. The individual who plays the organ directly encourages members to sing the hymns that she selects, directly influencing the service. If an organist only chose secular songs, or no music at all, that would likely influence the religious experience of the church's members in a negative way, and

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responsibility was to enable and encourage the . . . congregation to participate in the Catholic liturgy through song." *Assemany*, 238 N.W.2d at 238.

109. *Moersen*, 925 A.2d at 663, 668.

110. *Id.* at 663.

111. The court opined that "[i]t is not enough to say that Moersen's music is central to the church's method of worship; it would be just as easy to say that the manufacturer of the organ contributes to the church's worship . . . ." *Id.* at 668-69. This argument would fail under my proposed test and really has little relevance to a ministerial exception debate. An organist manufacturer has very little ability to directly influence a church member's religious experience, unlike the person who helps choose the songs and plays the organ. Music selection and encouraging members to express their religious feelings through song directly affects those who participate, so they should fall under the exception. Organ manufacturing in no way affects or supports how people worship, nor does it play a central role in the religious ceremony itself.

112. *Id.* at 670.

113. Hosanna-Tabor, Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 132 S. Ct. 694, 699-700 (2012).

114. *Id.* at 708-09.

a church should be protected in its employment decisions regarding that employee. The Fifth Circuit recognized this expansion in *Cannata v. Catholic Diocese of Austin*.[115]

2. A Post-Hosanna-Tabor Case—Looking Beyond the Secular Duties

In *Cannata*, a former music director alleged that his church terminated him in violation of the Age Discrimination in Employment Act (ADEA) and the ADA.[116] This was the first chance for the Fifth Circuit to address the Supreme Court's decision in *Hosanna-Tabor*.[117] Cannata was a pianist who argued that since "he merely played the piano at Mass and that his only responsibilities were keeping the books, running the sound system, and doing custodial work," the ministerial exception should not apply.[118] The Fifth Circuit found his arguments unpersuasive and followed the logic of *Hosanna-Tabor* in ruling that the ministerial exception applied.[119]

The court held that all musicians, including those who are volunteer and part-time, contribute to liturgical ministry.[120] The court abandoned all previous rigid formulas, reasoning that "there is no genuine dispute that Cannata played an integral role in the celebration of Mass and that by playing the piano during services, Cannata furthered the mission of the church and helped convey its message to the congregants."[121]

The Fifth Circuit, after looking extensively at the logic of *Hosanna-Tabor*, abandoned its prior rigid test and instead looked only to Cannata's religious role within the church.[122] The court did not care that

115. 700 F.3d 169 (5th Cir. 2012).

116. *Id.* at 170. *See generally* Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West 2013); Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-634 (2013).

117. *Id.*

118. *Id.* at 177.

119. *Id.* The court noted "the *Hosanna-Tabor* Court eschewed a 'rigid formula' and the application of a bright-line test in ministerial exception cases." *Id.* It also cited Justice Alito's concurrence that reasoned those "who perform important functions in worship services and in performance of religious ceremonies and rituals" are included within the exception. *Id.* at 175 (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 132 S. Ct. 694, 712 (2012) (Alito, J., concurring)).

120. *Cannata*, 700 F.3d at 177.

121. *Id.*

122. *Id.* The court expressly abandoned the *Starkman* test it once used to apply to ministerial exception cases. *Id.* at 176. The three-factor test included: (1) an inquiry into whether the decisions regarding the position were made on religious criteria; (2) whether the employee was qualified to perform religious ceremonies; and (3) if the plaintiff participated in activities that are usually considered to be ecclesiastical. Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999). The court recognized that *Hosanna-Tabor*

Cannata was not ordained, did not have any religious training, and had largely secular duties.[123] Instead, the court looked at how Cannata was able to convey the message of the church to its congregants.[124] This is precisely the type of analysis courts in all jurisdictions will have to conduct after *Hosanna-Tabor*.

3. Synthesizing Cannata and This Note's Thesis

This Note's proposal and the Fifth Circuit's solution to who qualifies as ministerial employees after *Hosanna-Tabor* are compatible. The *Cannata* court looked at how Cannata *conveyed* the message to the congregants.[125] By looking at how church members perceive a message by church employees, courts better serve the intent behind the ministerial exception. This is very similar to this Note's proposal, since it also changes the focus of the analysis from only the religious duties of the employee to the ability of the employee to influence an individual's religious experience through the performance of their duties. Adopting this form of analysis, courts can get past the secular duties of an employee and focus on what is important—whether an employee conveys a religious message as an employee of the church.

Moersen and *Cannata* are irreconcilable. While the two are in different jurisdictions, *Cannata* shows that the reasoning in *Moerson* can no longer stand. The exception's purpose requires broadening the definition of "minister." Churches must be allowed to make internal employment decisions regarding who is *able* to influence the religious experience of its congregants. The *Cannata* court recognized this and focused on the musician's ability and role in Mass, while the *Moersen* court shows exactly the rigid analysis that should be abandoned.

IV. CONCLUSION

In the absence of rigid and bright-line tests, the definition of "minister" for purposes of the ministerial exception is no closer to being defined, however it does not have to be. Whether or not an employee is a "minister" depends on the specific employee's involvement and his or her ability to affect other congregants' religious experience. The term

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rejected bright-line tests and that there was no one-size-fits-all approach that could be taken. *Cannata*, 700 F.3d at 176. Instead, the court looks at the religious duties of the employee and their importance to how the church conveys their message through them. *Id.* at 177.

123. *Cannata*, 700 F.3d at 178.

124. *Id.*

125. *Id.* at 177.

only must be broad enough to encompass the protections afforded by the First Amendment. As made clear by *Hosanna-Tabor*, churches have the power to select who embodies and conveys their teachings. It is not for a court to decide who is in control of churches' religious leaders; rather, it is for the church itself to make those selections. These decisions need to be applied to a broad set of employees.

The Supreme Court elected to not give any rigid test in deciding who a minister is for purposes of the exception.[126] While this undoubtedly will lead, again, to divergences between courts on this question, it is clear from the facts of *Hosanna-Tabor* that the term is not to be restricted narrowly. It is better for courts to be over-inclusive in defining "minister," and look to the actual ability of the employee to spread the church's beliefs, so as not to infringe on a church's right to choose who spreads their faith, a freedom protected by the First Amendment.[127]

126. Hosanna-Tabor, Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 132 S. Ct. 694, 697 (2012).

127. As Justice Alito wrote in his concurrence in *Hosanna-Tabor*, "[w]hen it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters . . . . A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses." *Hosanna-Tabor*, 132 S. Ct. at 713 (Alito, J., concurring). Justice Alito further concluded that "[a] religious body's control over such 'employees' is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world." *Id.*