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RELIGIOUS FREEDOM IN A BRAVE NEW WORLD:* HOW LEADERS IN FAITH-BASED SCHOOLS CAN FOLLOW THEIR BELIEFS IN HIRING

*Charles J. Russo***

INTRODUCTION

A confluence of litigation at the Supreme Court raises important, yet potentially conflicting, questions about the freedom of employers in religious schools¹ to hire teachers and staff members. On the one hand, in *Hosanna-Tabor v. Equal Employment Opportunities Commission*,² a unanimous Court reasoned that the ministerial exception granted religious leaders alone the authority to choose who is qualified to teach in their schools. On the other hand, the Court's rulings on same sex-unions seem to be ushering in a brave new

* Consistent with the title of Aldous Huxely's novel, which is based on Miranda's speech in William Shakespeare *The Tempest*, Act V, scene I, available at <http://shakespeare.mit.edu/tempest/full.html> ("How beauteous mankind is! O brave new world,"), Justice Scalia expressed a similar legal sentiment in *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting) (affirming that the First Amendment protects independent contractors from the termination of or prevention of automatic renewals of at-will government contracts in retaliation for exercising their right to freedom of speech) ("The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.").

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To view my video presentation for the University of Toledo Law Review's Symposium entitled "From Kindergarten to College: Brainstorming Solutions to Modern Issues in Education Law," see <https://www.youtube.com/watch?v=I2tMkeiEEH>.

1. This article uses the terms religious schools, religiously affiliated non-public schools, and faith-based schools interchangeably. Further, in recognizing that a variety of faith-based schools exist, the article refers to Christian schools because all of the reported education-related litigation to date involving institutions operated by Christian denominations.

2. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v EEOC*, 132 S. Ct. 694, 698 (2012).

world. For example, in *United States v. Windsor*,³ the Court struck down the Defense of Marriage Act thereby requiring the federal government to recognize unions that are legal in the States where they were entered. Similarly, in *Hollingsworth v. Perry*,⁴ albeit a dispute about standing rather than the merits of the issue, the Justices refused to allow supporters of a voter-initiative from California which defined marriage as a relationship between one man and one woman, to defend it in judicial proceedings. In this brave new world, there is possible conflict over whether leaders in faith-based schools can continue to exercise their professional judgments grounded in their deeply held religious beliefs when hiring personnel or whether proponents of change are unwilling to allow people of faith to live in a country where there is “space for other Americans who believe something different.”⁵

Aware of the nascent tension that these and other cases may present for leaders in faith-based schools when it comes to hiring and personnel actions, especially at the K-12 level which is the focus of this article, this article is divided into three sections. The first part reviews the key features of Title VII of the Civil Rights Act of 1964,⁶ which affords leaders in faith-based schools latitude in making personnel decisions.

The second section briefly reflects on the potential conflict between *Hosanna Tabor*, *Hollingsworth*, and *Windsor*, particularly if states refuse to grant exceptions to religious employers under their anti-discrimination statutes when dealing with the marital status and lifestyle choices of potential employees. This discussion is framed against the explicit language in *Hosanna Tabor*, and the long history of religious freedom in the United States as reflected in the First Amendment’s Establishment and Free Exercise Clause,⁷ coupled with the Court’s rationale in *Agency for International Development v. Alliance for Open Society International (Alliance)*.⁸ In *Alliance*, the Court observed that the constitutionality of a condition on receiving a subsidy, or in terms more applicable to religious institutions such as schools, tax exemptions for themselves and tax deductions for donors depends on whether the condition imposed by the government defines or reaches outside of programs. As such, employers in faith-

3. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

4. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2678 (2013), *appeal dismissed sub nom. Perry v. Brown*, 725 F.3d 1140, 1140 (9th Cir. 2013).

5. Ironically, in penning this phrase, a member of the Supreme Court of New Mexico agreed that a Christian photographer could be fined for refusing to offer her services at a same-sex commitment ceremony. *Elane Photography v. Willock*, 309 P.3d 53, 78-79 (N.M. 2013) (Bosson, J., concurring). Chillingly, in terms of religious freedom, a page earlier the concurrence suggested that the plaintiffs “are compelled by law to compromise the very religious beliefs that inspire their lives.... A multicultural, pluralistic society, one of our nation’s strengths, demands no less.” *Id.* If the United States is to truly be pluralistic, why cannot people agree to have different value systems, respecting those with whom they differ? Why is it that believers are expected to compromise their values?

6. 42 U.S.C. §§ 2000e to 2000e-4 (2012).

7. U.S. CONST. amend. I. According to the sixteen words of these clauses, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” *Id.*

8. *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013).

based schools should be able to preserve their right to hire as they deem appropriate.

Based on analysis from the first two parts of this article, the final section offers recommendations for leaders in faith-based schools, and their lawyers, as they walk a tightrope by seeking to protect their religious autonomy while taking steps to avoid running afoul of anti-discrimination statutes in the brave new world that may be ushered in by such cases as *Hollingsworth* and *Windsor*. The article rounds out with a brief conclusion.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII was enacted as part of the Civil Rights Act of 1964 in response to the Civil Rights movement that followed the Supreme Court's monumental judgment in *Brown v. Board of Education*.⁹ Accordingly, the Civil Rights Act of 1964 codified many of the equal opportunities advances that emerged as a result of the Civil Rights Movement.¹⁰

At the heart of the Civil Rights Act is Title VII, the most significant federal anti-discrimination statute dealing with employment.¹¹ In its most relevant part, Title VII reads:

It shall be an unlawful employment practice for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, *religion*, sex, or national origin.¹²

Title VII acknowledges the tension that may arise between the authority of ecclesiastical employers to retain control in their schools and the rights of employees to be free from workplace discrimination. In this way, Title VII provides far-reaching protection to religious employers since it permits them to

9. *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Ky.*, 347 U.S. 483, 495 (1954) (invalidating racial segregation in public schools).

10. Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86, 90 (2002) (noting the crucial role played by ecclesiastical leaders in helping to counter a filibuster by southern (Democrat) Senators but describing the exception given to religious employers as an irony given Title VII's anti-discrimination provisions, perhaps failing to take into account the quid pro quo nature of politics).

11. For histories of the ministerial exception, see Blair A. Crunk, Comment, *New Wine in an Old Chalice: The Ministerial Exception's Humble Roots*, 73 LA. L. REV. 1081, 1082, 1088, 1090-92, 1097-98, 1100-01 (2013); Joshua D. Dunlap, Comment, *When Big Brother Plays God: The Religion Clauses, Title VII, and The Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2012 (2007). See also Belcove-Shalin, *supra* note 10, at 92, 95, 99, 100, 102, 103.

12. 42 U.S.C. § 2000e-2(a) (2012) (emphasis added).

establish bona fide occupational qualifications (BFOQs) while crafting policies designed to focus on hiring and retaining members of their faiths.

As discussed below, judicial interpretation of Title VII recognizes that a distinction, one which may be applied very narrowly at times, can be made between the duties of ecclesiastical educational leaders who make hiring decisions based on religion and judgments where secular jobs and duties come into play. Courts are, thus, generally unwilling to intervene in disputes over whether teachers witness to the faith in their public-professional lives such as when they are pregnant out of wedlock¹³ or adopt lifestyles that are antithetical to the teachings of their church employers.¹⁴ Still, courts are more willing to assert their jurisdiction over secular matters, including whether teachers in religious schools can engage in bargaining over the terms and conditions of their employment under state,¹⁵ but not federal,¹⁶ laws as well as whether they can file age discrimination claims.¹⁷

Title VII has special rules for religious employers, such as faith-based schools. In fact, Title VII provides significant protection to religious employers

13. For a commentary on point, see Jessica L. Waters, *Testing Hosanna-Tabor: The Implications for Pregnancy Discrimination Claims and Employees' Reproductive Rights*, 9 STAN. J. C.R. & C.L. 47, 59-66 (2013).

14. For case upholding the dismissal of a teacher in a faith-based school who violated the precepts of her religious employer by openly living with her boyfriend and raising their child without being married on the ground that she was a "spiritual leader" for purposes of the ministerial exception, see *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041, 1054-55 (Ct. App. 2011).

15. For cases mandating bargaining under state law, see *Catholic High Sch. Ass'n of Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1171 (2d Cir. 1985); *Hill-Murray Fed'n of Teachers, St. Paul, Minn. v. Hill-Murray High Sch., Maplewood, Minn.*, 487 N.W.2d 857, 867 (Minn. 1992); *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709, 724 (N.J. 1997). *But see* *Cent. Catholic Educ. Ass'n v. Archdiocese of Portland*, 916 P.2d 303, 310 (Or. 1996) (refusing to apply a state, rather than federal, law over whether the State Educational Labor Relations Board could resolve a dispute about certifying a bargaining representative for teachers in a high school owned and operated by a Catholic archdiocese).

16. For cases in K-12 settings where the judiciary refused to permit federal law to compel bargaining in Catholic schools, see *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 506 (1979). For a commentary on this case, see Charles J. Russo, *NLRB v. Catholic Bishop of Chicago: Collective Bargaining in Roman Catholic Secondary Schools Ten Years Later*, 57 EDUC. L. REP.1113, 1117-18 (1990). *See also* *N.L.R.B. v. Bishop Ford Cent. Catholic High Sch.*, 623 F.2d 818, 822 (2d Cir. 1980), *cert denied*, 450 U.S. 996 (1981). For a case in higher education, see *Carroll College, Inc. v. N.L.R.B.*, 558 F.3d 568, 574 (D.C. Cir. 2009).

17. For cases on point, see *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 168 (2d Cir. 1993); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 851 (S.D. Ind. 1998); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1041 (7th Cir. 2006), *cert. denied*, 549 U.S. 881 (2006). *But see* *Coulee Catholic Schs. v. Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 892 (Wis. 2009) (holding that age's discrimination claim impinges upon the employer's right to religious freedom and reversing the court of appeals decision). *See also* *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987) (upholding the constitutionality of the ministerial exception). For a commentary on this case, see generally Brigid C. O'Neill, *Freedom of Religion—Extending the Ministerial Exception Too Far Allows Religious Organizations to Discriminate Against Their Employees: Coulee Catholic Schs. v. Labor & Indus. Review Comm'n*, 768 N.W.2d 868 (Wis. 2009), 41 RUTGERS L.J. 1121 (2010).

since it permits their officials to set BFOQs relating to religion while allowing them to limit hiring to members of their faiths.

The four exemptions under Title VII have a major impact on personnel matters in faith-based schools since they shield institutional officials from charges of religious discrimination. These exemptions apply to institutions with fifteen or more employees, BFOQs, individuals who serve in ministerial capacities, and institutions that are in whole or in substantial part, owned, supported, controlled, or managed by religious bodies.

First, the threshold exemption under Title VII applies to institutions with fifteen or more employees.¹⁸ Accordingly, Title VII has a limited impact in small schools since these institutions are typically considered part of the larger religious organizations, such as the parishes, with which they are affiliated.

The second, and arguably most important, exemption applies “where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”¹⁹ In such a case, the Sixth Circuit addressed the nonrenewal of the contract of a teacher in a Roman Catholic elementary school who gave birth six months after getting married.²⁰ While pointing to language in the teacher’s contract “that by word and example you will reflect the values of the Catholic Church[,]”²¹ the court refused to uphold a grant of summary judgment in favor of the diocese. The panel returned the dispute to a trial court for further consideration since it was uncertain whether the teacher’s contract was not renewed solely due to her pregnancy.²² Conversely, the same Sixth Circuit upheld the dismissal of a suit filed by a former preschool teacher who alleged that she was fired for being pregnant.²³ The court affirmed that officials in a Christian school did not violate Title VII since the former teacher was unable to show that they applied the policy against premarital sex in a discriminatory manner.²⁴

18. 42 U.S.C. § 2000e(b) (2012).

19. 42 U.S.C. § 2000e-2(e)(1) (2012).

20. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 656 (6th Cir. 2000).

21. *Id.*

22. *Id.* For other cases denying motions for summary judgment entered on behalf of officials in faith-based schools in dispute over whether the contracts of unmarried teachers were terminated due to their pregnancies, see *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 359 (E.D.N.Y. 1998); *Redhead v. Conference of Seventh-Day Adventists*, 566 F. Supp. 2d 125, 139 (E.D.N.Y. 2008). For an unreported case involving a similar issue where the court rejected a motion to dismiss by school officials in the face of the claim of an unmarried teacher who was impregnated via artificial insemination, a practice forbidden by the Catholic Church, see *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165, at *1 (S.D. Ohio Mar. 29, 2012). *See also* *Herx v. Diocese of Fort Wayne-South Bend*, No. 1:12-CV-122RM, 2012 WL 3870528, at *1 (N.D. Ind. Sept. 05, 2012) (affirming an order staying discovery where the contract of a teacher was not renewed because she was undergoing in vitro fertilization treatments, another practice forbidden by Catholic teachings). For the facts, see the pleadings at *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, No.1:12CV122RLM, 2012 WL 1416923, at *1 (N.D. Ind. Sept. 05, 2012).

23. *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 410 (6th Cir. 1996).

24. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1316 (11th Cir. 2012) (reversing an earlier grant of summary judgment in favor of officials in religious school in Florida

A closely related third exemption, which is derived from the Religion Clauses of the First Amendment, applies “to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”²⁵ Typically referred to as the ministerial²⁶ or *McClure* exception,²⁷ this forbids secular authorities from interfering in employment disputes between ministers and their churches. This provision placed the burden of proof of the necessity of BFOQs on employers, even if individuals are not ordained clerics.²⁸ In order to apply this exception, authorities in religious institutions must prove that the nexus between teaching and/or other duties of staff members are so integrally related to furthering their spiritual and pastoral missions that they can be treated as ministerial employees.²⁹

In *Corporation of the Presiding Bishop v. Amos*,³⁰ the Supreme Court upheld the constitutionality of the ministerial exception. *Amos* involved a building engineer who filed a class action suit when he was dismissed after sixteen years of employment at a gymnasium operated by the Church of Jesus Christ of the Latter Day Saints.³¹ The plaintiff was fired because he was unable to qualify for a certificate that enabled him to attend one of the Church’s Temples.³² The Court found that the plaintiff was fired even though he did not perform religious duties. However, Title VII did not violate the Establishment Clause because earlier language, referring to an institution’s “religious activities,” was no longer in the law.³³ The upshot of *Amos* is that the Court extended the reach of the ministerial exception to non-religious employment-related activities.

where issues of fact issues existed as to whether a teacher was fired for being pregnant or for engaging in premarital sexual relations).

25. 42 U.S.C. § 2000e-1 (2012).

26. The ministerial exception was first enunciated in *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972) (affirming that Title VII precluded judicial intervention in a dispute over gender-based discrimination between a “church and its minister” where a female officer completed years of professional training).

27. See *EEOC v. Pacific Press Pub’g Ass’n*, 676 F.2d 1272, 1279 (9th Cir. 1982).

28. The exception has generated an extensive body of literature. For representative recent commentary, see, e.g., Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL’Y 839, 848-52 (2012); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 6-9 (2011); Todd Cole, Comment, *The Ministerial Exception: Resolving the Conflict Between Title VII and the First Amendment*, 4 CHARLESTON L. REV. 703, 704-06 (2010); Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86, 99-105 (2002).

29. For a pre-*Hosanna-Tabor* analysis of this issue, see generally Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776 (2008).

30. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 327 (1987).

31. *Id.* at 330-31.

32. *Id.* at 330.

33. *Id.* at 335-36.

When a first-grade teacher in a Roman Catholic school was dismissed as a result of consolidations, she filed suit and claimed that she was subjected to age discrimination.³⁴ Reversing an earlier order, the Supreme Court of Wisconsin noted that the teacher was hired to help advance the school's religious mission in a faith-centered environment that incorporated Catholic values, doctrine, and practice. She was also tasked with encouraging spiritual growth in children throughout the school day, not just in religion class, and was obligated to obtain certifications in religious instruction.³⁵ Convinced that the teacher was covered by the ministerial exception, the court concluded that she could not adjudicate her age discrimination claim.³⁶

In its most important case for hiring in faith-based schools, the Supreme Court, in a rare unanimous judgment in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunities Commission (Hosanna-Tabor)*,³⁷ upheld the constitutionality of the ministerial exception, albeit as it was extended under the Americans with Disabilities Act (ADA)³⁸ rather than Title VII. In so ruling, the Court rejected an order of the EEOC directing officials at a Lutheran elementary school to re-employ a female teacher who was dismissed due to an illness and for disruptively influencing the staff.³⁹

At issue in *Hosanna-Tabor* was whether school officials could dismiss a contract teacher who they regarded as "called," meaning she had a vocation from God.⁴⁰ Since the Justices viewed the teacher as essentially a ministerial employee, the Supreme Court agreed that educational officials had freedom in the interplay between the Establishment and Free Exercise Clauses to safeguard the school's religious liberty in selecting teachers *qua* ministers.⁴¹

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

35. *Id.* at 890.

36. O'Neill, *supra* note 17, at 1122.

37. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 694 (2012).

38. 42 U.S.C. § 12101 (2012). Specifically, § 12113(d)(1) states:

(d) Religious entities.

(1) In general. This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement. Under this title, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

42 U.S.C. § 12113(d)(1) (2012).

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

40. *Id.* at 699.

41. For a commentary on point, see generally Lauren N. Woelsgle, Comment, *The United States Supreme Court Sanctifies the Ministerial Exception in Hosanna-Tabor v. EEOC Without Addressing Who Is a Minister: A Blessing for Religious Freedom or is the Line Between Church and State Still Blurred?*, 50 DUQ. L. REV. 895 (2012).

Reversing the Sixth Circuit,⁴² the Supreme Court decided that the teacher's allegation, that her primary duties were secular notwithstanding the ministerial exception, precluded her ADA claim.⁴³ The Court rejected the teacher's claim that she was dismissed in retaliation for threatening to take legal action when she refused to resign in a dispute over whether she could return to work due to her health problems.⁴⁴

Emphasizing the First Amendment prohibition against government contravention of the judgment of church leaders as to who can serve as ministers, the Supreme Court explained that the ministerial exception applied to bar the teacher's claim. The Court reached this outcome even though the teacher spent more than six hours of her seven-hour day teaching secular subjects,⁴⁵ used secular textbooks that did not mention religion,⁴⁶ teachers were not required to be "called" or members of the Lutheran faith to conduct religious activities,⁴⁷ and the duties of contract teachers were identical to non-ministers.⁴⁸ In other words, the Court protected the school's religious freedom by agreeing that ecclesiastical leaders and officials of faith-based institutions, rather than civil authorities such as the EEOC, retain the freedom to apply their religious values in making hiring decisions as to who can serve or be ministers.

On the same day that it handed down *Hosanna-Tabor*, the Supreme Court rejected two other challenges involving the ministerial exception. In the first, the Director of the Department of Religious Formation unsuccessfully sued the Catholic Diocese of Tulsa, Oklahoma, for gender and age discrimination after being dismissed from her job.⁴⁹ In the second, the Justices declined to hear the appeal where a Director of Religious Education, who also taught mathematics, sued the Catholic Diocese of Lansing, Michigan, for alleged violations of the state's Whistleblowers' Protection Act and Civil Rights Act for retaliatory dismissal over charges unrelated to her duties as a religious educator.⁵⁰ The Court posited that the plaintiffs could not proceed with their suits because they were subject to the ministerial exception.⁵¹

42. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 782 (6th Cir. 2010).

43. *Hosana-Tabor*, 132 S. Ct. at 710.

44. *Id.* at 707.

45. *Id.* at 708.

46. *EEOC*, 597 F.3d at 772.

47. *Id.*

48. *Id.*

49. *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1240 (10th Cir. 2010).

50. *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483, 486 (Mich. Ct. App. 2008).

51. For a story about a state trial court judge in New York's refusal to apply the ministerial exception, see Howard Friedman, *Ministerial Exception Defense Rejected in Suit by Transgender Catholic School Teacher*, RELIGION CLAUSE, Sept. 10, 2013, 2013 WLNR 22520726 (reporting on the rejection of the ministerial exception defense raised by officials in a Catholic high school in a suit by a former teacher with 32 years of experience who claimed to have been fired for announcing that she is transgendered; administrators countered that the teacher was dismissed for insubordination).

The final exemption, which applies to institutions that are “in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution . . . is directed toward the propagation of a particular religion,”⁵² permits hiring preferences for members of their faiths. In such a case, albeit from higher education, the Eleventh Circuit permitted officials at a Baptist university to limit a faculty member’s teaching assignments to undergraduate classes while preventing him from teaching in its divinity school due to religious differences between him and the dean.⁵³ The court added that even though the university was no longer under the direct control of a religious governing body, it was entitled to the exemption because the church was still a substantial supporter.⁵⁴

In a related type of dispute not involving Title VII, the Third Circuit upheld the authority of educational officials to supervise faculty behavior at a Catholic school. The court affirmed that officials did not violate the rights of a faculty member who taught English and religion to seventh and eighth grade students when they terminated her employment because she signed an advertisement in a newspaper in support of the Supreme Court’s legalization of abortion despite her knowledge that this position contradicted Church teachings.⁵⁵ In deferring to the authority of school officials to ensure doctrinal compliance, the court pointed out that insofar as the teacher was not engaged in protected free speech activity when she signed the newspaper advertisement, she failed to present a viable claim for retribution.⁵⁶ The court maintained that officials proffered a valid justification for dismissing the teacher since she knowingly violated Church teaching.⁵⁷

II. REFLECTIONS

As important as granting deference to ecclesiastical officials who apply the teachings of their faiths has been in the United States, a trend in litigation may increase the rate at which challenges are filed to religious freedom, Title VII, and the Free Exercise Clause. For instance, in *United States v. Windsor*,⁵⁸ some of Justice Kennedy’s musings as author of the Supreme Court’s majority’s opinion

52. 42 U.S.C. § 2000-(e)(2)(e) (2012).

53. *Killinger v. Samford Univ.*, 113 F.3d 196, 200-01 (11th Cir. 1997). *See also* *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 627 (6th Cir. 2000) (affirming the dismissal of a student services specialist, an ordained lay minister, in a church with a large gay and lesbian membership); *Petruska v. Gannon Univ.*, 462 F. 3d 294, 311 (3d Cir. 2006) (affirming that the ministerial exception precluded the Title VII gender discrimination claim of a former chaplain at a Catholic college but did not prevent her from pursuing other allegations including fraudulent misrepresentation and breach of contract).

54. *Killinger*, 113 F.3d at 201.

55. *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 138-40 (3d Cir. 2006).

56. *Id.* at 142.

57. *Id.* at 140.

58. *See generally* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

in a five-to-four order invalidating the Defense of Marriage Act⁵⁹ should warn religious leaders about the status of the Free Exercise Clause.

According to Justice Kennedy's inflammatory rhetoric, "[i]n determining whether a law is motivated by an improper animus or purpose, '[d]iscriminations of an unusual character' ... require careful consideration."⁶⁰ Justice Scalia took strong exception to part of Justice Kennedy's unnecessarily provocative and condescending perspective in which the latter wrote "that the supporters of this Act acted with *malice*—with the '*purpose*' 'to disparage and to injure' same-sex couples."⁶¹ It is unclear how or why Kennedy could make such a sweeping and ultimately mean-spirited statement absent evidence. On the same day, in *Hollingsworth v. Perry*,⁶² the Court invalidated the voter-enacted Proposition 8, a state constitutional amendment that defined marriage as one between a man and a woman, because proponents lacked standing to sue.

Readily conceding that an analysis of same-sex unions is beyond the scope of this article, proponents on both sides of the issue should demonstrate mutual respect. Moreover, supporters of same-sex unions, such as Justice Kennedy, should not impute a discriminatory animus to those who disagree with his point of view, especially when differences emerge in light of individuals' sincerely held religious beliefs. If anything, insofar as Kennedy's position can lead to dire consequences for religious freedom, particularly faith-based schools as officials seek to hire teachers who will preserve institutional values.

In light of *Windsor*, it is worth considering its potential impact on mainstream religious bodies and their schools that do not support same-sex unions. Further questions from critics of the ministerial exception⁶³ arise about the treatment of religious bodies that refuse to ordain non-celibate gays (or women, an admittedly different topic) as members of their clergy.⁶⁴ Put another way, subject to the discussion in the next paragraph, it remains to be seen

59. 28 U.S.C. § 1738C (1948).

60. *Windsor*, 133 S. Ct. at 2693 (internal citations omitted).

61. Justice Scalia's response added that the Court "says that the motivation for DOMA was to demean;" to "impose inequality;" to "impose ... a stigma;" to deny people "equal dignity;" to brand gay people as "unworthy;" and to "*humiliat[e]*." *Id.* at 2708 (Scalia, J., dissenting) (internal citations and emphasis omitted). Of course, he disagreed. *Id.*

61. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2652 (2013), *appeal dismissed sub nom.*, *Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013).

62. *Hollingsworth*, 133 S. Ct. at 2652.

63. For an article arguing that the ministerial exception has no place in the Supreme Court's contemporary First Amendment jurisprudence, see Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exception from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1966, 1966-67 (2007). See also Ashlie C. Warnick, *Accommodating Discrimination*, 77 *U. CIN. L. REV.* 119, 128 (2008); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 *BYU L. REV.* 1099, 1114; Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 *VAND. L. REV.* 481, 484-86 (2001).

64. For a note examining this question, see generally Jessica R. Vartanian, Comment, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 *U. TOL. L. REV.* 1049 (2009).

whether religious institutions will be required to modify their hiring practices based on sexuality and lifestyle preferences.

*Agency for International Development v. Alliance for Open Society International*⁶⁵ may offer an answer to the *Windsor* conundrum. In *Alliance*, the Supreme Court held that the constitutionality of a condition for receiving a subsidy, or in terms more applicable to religious institutions such as schools and houses of worship, tax exemptions for themselves and tax deductions for donors, depends on whether the condition imposed by the government define or reaches outside of programs.⁶⁶ In other words, it appears that pursuant to *Alliance*, public officials cannot impose requirements on religious organizations that would change their very nature. For example, expecting them to alter their doctrines or moral teachings about marriage since these go to the heart of their sincerely held religious beliefs.⁶⁷ Of course, it is unclear whether *Alliance* can be applied to protect religious organizations such as schools in the attacked by opponents of religious freedom who seek to use the police power of the State to punish those who disagree with their positions on such controversial topics as same-sex unions, abortion,⁶⁸ or the health care mandate.⁶⁹

III. RECOMMENDATIONS

Hosanna Tabor appears to preclude governmental officials from using their authority to force religious employers to hire individuals whose lifestyles and/ or beliefs are openly inconsistent with, or hostile to, the teachings of their churches. Further, *Alliance* seems to resolve the question of whether states can withhold tax exempt status from religious bodies such as schools that refuse to accept same-sex unions.

In enacting statutory protections against employment discrimination in Title VII, Congress weighed two potentially conflicting sets of interests. On the one hand, Congress balanced the needs of religious leaders to retain control over hiring personnel consistent with their duty to comply with the precepts of their faiths against the rights of individuals to be free from discrimination as they seek gainful employment. Consequently, Title VII is designed to ensure that administrators in faith-based schools should not have to compromise their beliefs when hiring staff.⁷⁰

Leaders in religiously affiliated non-public schools and their attorneys may wish to consider the following suggestions designed to preserve their right to hire

65. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2321 (2013).

66. *Id.* at 2332.

67. For a much more detailed analysis of *Alliance*, see generally William E. Thro, *Undermining Christian Legal Society v. Martinez*, 295 EDUC. L. REP. 867 (2013).

68. See *In re United States Catholic Conference*, 885 F.2d 1020, 1023-31 (2d Cir. 1989) (holding that a pro-abortion group lacked standing to challenge the tax exempt status of the Roman Catholic Church based on its pro-life teachings).

69. For a discussion of some of these issues, see Charles J. Russo, *Religious Freedom in the United States: "When You Come to the Fork in the Road Take It,"* 38 U. DAYTON. L. REV. 363 (2013).

70. See *supra* note 5 for a discussion about compromising values.

individuals whose lifestyles and values are consistent with their faiths. Of course, in developing and implementing hiring and personnel policies, leaders in faith-based schools should give witness to the spirit of Christian justice and Gospel values in making hiring decisions.⁷¹

In the first of two related initial items, educational leaders, whether at the diocesan level in Catholic institutions, the most highly bureaucratic and centralized systems of faith-based schools, or in independent Christian or other types of religious schools, should provide regular professional development opportunities for both administrators and teachers.⁷² Doing so can help to familiarize educators with the dimensions of the relationship between their faith traditions and civil law. Offering professional development opportunities on the interplay between religious teachings and secular laws in faith-based schools can provide a solid background to enhance policy development that meets the requirements of both legal systems.

Second, in an overlapping concern, religious leaders should work with teacher and administrator preparation programs at institutions of higher learning so that the latter can include units or courses on relationship between church teachings and civil law. Encouraging educators in preparation programs to offer such classes should allow administrators and teachers to understand the relationship between these two overlapping sets of legal obligations. As highlighted in the ensuing suggestions, adopting a proactive approach should help in developing hiring and personnel policies since administrators and teachers ought to have acquired better understandings of applicable legal requirements under both church and civil law.

Third, when leaders in faith-based schools, working with their attorneys, prepare job descriptions and hiring policies, they should follow judicial guidance in distinguishing between ministerial and secular duties. For example, it is a good idea to differentiate between teaching religion and issues that are purely secular as opposed to salary and benefits that can be subject to collective bargaining.⁷³ In delineating between religious and lay aspects of work, policies should enunciate BFOQs clearly and unequivocally differentiating hiring criteria and job qualifications plus rationales as to why they are put in place. In creating BFOQs for jobs in which religion is an essential work requirement such as teaching theology or serving as a music minister⁷⁴ or serving in a faith formation⁷⁵ capacity, officials should make it clear in posting vacancies and

71. For a case where the shoe was on the proverbial other foot insofar as it involved an administrator, see *Dayner v. Archdioceses of Hartford*, 23 A.3d 1192, 1210 (Conn. 2011) (holding that the ministerial exception barred a former principal's breach of contract and other claims).

72. For Roman Catholic schools, it is important to review the extensive directives in the CODE OF CANON LAW 796-805 (1983), http://www.vatican.va/archive/ENG1104/___P2N.HTM.

73. See *supra* notes 13-17 and accompanying text.

74. See, e.g., *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171, 1174, 1181 (Md. 2011) (holding that the ministerial exception precluded most, but not all, of a former music minister's sex discrimination claims).

75. See *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 882 (Wis. 2012) (holding that federal and state law barred the breach of contract claim of a Director of a Faith Formation Program in a Catholic parish since she was a ministerial employee).

hiring policies that one's faith is to be taken into consideration. Officials should also specify that they apply these policies consistently.

Fourth, to build on the previous point, religious employers should remember that if they wish to include church teachings on matters such as pre-marital sexual relations and pregnancy,⁷⁶ marriage to individuals who are divorced,⁷⁷ or sexual orientation⁷⁸ in personnel policies and job postings, they should do so explicitly, making it clear exactly what behavior is proscribed. One way to help avoid confusion is to use incorporation by reference, citing the appropriate Church documents, and giving prospective teachers and staff members copies of these materials with their contracts. Illustrative policy language, at least for a Catholic school, might read that "all employees are expected to familiarize themselves with the Church's teachings on sexuality as contained in *The Catechism of the Catholic Church*, a copy of which they acknowledged being given when they signed their employment contracts" rather than using such broad language as "employees must abide by Gospel values." Moreover, contract language should encourage teachers to check with educational leaders, who should respond if writing to document conversations, if they have questions about Church teachings.

Personal matters involving personnel can become thorny because, as the litigation discussed earlier suggests, courts tend to defer to religious employers over the extent to which employees must adhere to church teachings in both their public and, to the extent that it is observable, private lives. A case from California offers a good application of this principle. In declaring that "[a] teacher's employment in the public schools is a privilege, not a right,"⁷⁹ the court reiterated the principle that being an educator is not just another job. The position of the Roman Catholic Church, for example, is explicit in this regard with canon law dictating that "teachers are to be outstanding in correct doctrine and integrity of life."⁸⁰ As such, the legal standard for educators in public schools is all the more applicable to teachers in religious schools since they must be exemplars or witnesses of the faith to their students (and others). Specifying expectations clearly can avoid unnecessary and potentially expensive, not just

76. For a news report about the dismissal of Catholic school teacher due to her unwed pregnancy, see Josh Sweigert, *Church: Unwed, Pregnant Teacher Fired for Violating 'Morality Clause,'* DAYTON DAILY NEWS (Feb. 25, 2013), <http://www.daytondailynews.com/news/news/church-unwed-pregnant-teacher-fired-for-violating-nWZKj/>.

77. For a case rejecting the Title VII claim of a divorced non-Catholic teacher from a Catholic school whose contract was non-renewed after she remarried because even though her husband was a non-practicing Catholic because she failed to pursue "the 'proper canonical process available from the Roman Catholic Church to obtain validation of her second marriage,'" see *Little v. Wuerl*, 929 F.2d 944, 945-46 (3d Cir. 1991) (internal citations and quotations omitted).

78. See JoAnne Viviano, *Hot-Button Issue Ex-Teacher Won't Get Job Back in Deal*, COLUMBUS DISPATCH, Aug. 16, 2013, at 1A, 2013 WLNR 20393260 (reporting that a nineteen-year teacher whose being gay came to light as a result of a statement in her mother's obituary revealing that she had a same-sex partner would not be reinstated as part of a settlement with the diocese).

79. *Bd. of Educ. of the City of Los Angeles v. Wilkinson*, 270 P.2d 82, 85 (Cal. Dist. Ct. App. 1954).

80. CODE OF CANON LAW Canon 803, § 2 (1983).

financial cost but also to the emotional or working climate in schools, conflict that can tear educational communities apart.

Fifth, an unstated assumption in the development of hiring policies is that educational leaders need to act on the advice of attorneys. To this end, school officials should work closely with lawyers who are knowledgeable about civil law and the teachings of their faiths. While retaining the services of attorneys with expertise in both of these areas may be expensive, the additional expenditure is likely to be dwarfed by the costs saved if employment disagreements result in litigation.

Sixth, educational leaders should create hiring policies consistent with Biblical norms and Church teachings with regard to labor and employment issues.⁸¹ By doing so, officials should do more than simply follow the letter of the law, whether religious or civil, in developing policies. In this way, school leaders should witness to church praxis while further legitimizing their authority in decision making over personnel.

The final recommendation suggests that educational leaders regularly update personnel policies, typically on an annual basis. These annual reviews should take place during summer breaks, at meetings separate from the regular school year. That way, time will have passed between controversies that may have led to calls for changes and actually reworking the language and content of personnel policies. Adopting a proactive approach should help in making changes in a thoughtful, reflective manner rather than in the “heat of the moment” that can lead to hasty and often less than well thought out changes. While keeping policies up-to-date by ensuring compliance with emerging legal developments cannot guarantee that either conflicts or litigation will not occur, they can help to demonstrate good faith to the courts that may grant officials the benefit of the doubt when disagreements arise.

CONCLUSION

To the extent that leaders in faith-based schools understand the different, yet complementary, roles between church teachings and Title VII, they are likely to retain the freedom to hire as they deem appropriate. It is important, then, for educational leaders in faith-based schools to distinguish between religious and secular aspects of job duties to ensure enduring workplace peace and compliance with church teachings. At the same time, educational leaders will be satisfying the needs of both the civil and religious juridical systems under which they operate their schools.

81. For a discussion of labor law and Catholic education, see David L. Gregory & Charles J. Russo, *The First Amendment and Labor Relations of Religiously-Affiliated Employers*, 8 B.U. PUB. INT. L.J. 449, 465-67 (1999).

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